

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MMILLA, J. A., MZIRAY, J. A. And KWARIKO, J. A.)

CIVIL APPEAL NO. 224 OF 2018

1. CHARLES CHAMA 2. MUZOLA KAISHOLI 3. KADUGU KAHINDI	} APPELLANTS
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VERSUS

1. THE REGIONAL MANAGER, TRA 2. DISTRICT COMMISSIONER KARAGWE DISTRICT 3. DISTRICT IMMIGRATION OFFICER KARAGWE DISTRICT 4. THE ATTORNEY GENERAL	} RESPONDENTS
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**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Bukoba)**

(Khaday, J.)

dated the 2nd day of May, 2014

in

Civil Case No. 2 of 2006

JUDGMENT OF THE COURT

26th November & 2nd December, 2019

MMILLA, J.A.:

Charles Chama, Muzola Kaisholi and Kadugu Kahindi (herein to be referred to as the first, second and third appellants respectively), were

Ugandan Nationals who in 2005 instituted a joint suit in the High Court of Tanzania at Bukoba in an endeavour to recover a total sum of Tzs. 450,000,000/= being the value of their 1500 herd of cattle which were allegedly illegally seized and jointly sold by the respondents namely; the Regional Manager Tanzania Revenue Authority (TRA) Kagera Region, the District Commissioner Karagwe District, the District Immigration Officer Karagwe District and the Attorney General who is the necessary party to Government suits in terms of the Government Proceedings Act Cap. 5 of the Revised Edition, 2002 (herein to be referred to as the first, second, third and fourth respondents respectively). Apart from the costs of the suit, the appellants claimed likewise payment of Tzs. 100,000,000/= being general damages from expected off-springs of milk of the illegally sold female cattle.

Those claims were strongly contested by the respondents whose joint defence at the trial was that, apart from the fact that the appellants had no *locus standi* to press such claims because the cattle did not belong to them; they also asserted that the alleged herd of cattle were justifiably seized, deposited and subsequently sold under the country's Customs and Immigration laws.

The brief background facts of the case were that on 25.5.2005, one Fulgence Matarasha, an Assistant Superintendent of Immigration stationed in Karagwe District who was on that day in Bukoba town, was informed by one Dr. Kiputa, the then Karagwe District Livestock Officer, that he spotted large groups of cattle between Kihanga and Rugera villages which had crossed into the United Republic of Tanzania from the neighbouring country of Uganda. Upon that information, he reported the incident to the District Commissioner of Karagwe District. In the evening however, he left Bukoba for Karagwe. He chanced to go to Kayunga whereof he saw large groups of cattle at Kashojo village. He was informed by his colleague one Joseph Pembe that they had arrested ten (10) immigrants who had unlawfully crossed into the country with the said cattle. He was similarly informed that the herdsmen were detained at Kayunga Police Station. On 26.5.2005, they removed those people from Kayunga Police Station and took them to the Immigration Offices for questioning. They also contacted the TRA officers who conducted investigations and found out that the said herd of cattle were brought in the country contrary to Customs laws of Tanzania because the immigrant herdsmen had no legal documents to enter into the country with the said cattle. It was on that basis that the

TRA officers impounded those cattle, following which they were sold in a public auction on 27.5.2005. Meanwhile, the 10 herdsman were taken and handed over to the Ugandan Police at Mtukula. As already pointed out, the appellants, claiming to be the owners of the said herd of cattle, filed a suit in an attempt to get compensation.

After a full trial, the trial court found in favour of the respondents that the appellants failed to prove ownership of the alleged herd of cattle, also that they did not justify legality of the presence of the said animals in the United Republic of Tanzania. That judgment aggrieved them, hence the present appeal to the Court.

At the hearing of this appeal on 26.11.2019, the appellants enjoyed the services of Mr. Aaron Kabunga, learned advocate. Their memorandum of appeal raised eight grounds as follows:-

- 1. That, the Honourable Judge of the High Court grossly erred in law to write a judgment in which she had never participated in the proceedings to hear the case neither assigned by order to act on behalf of the Trial Judge while the Trial Judge (R. M. Kibella) who heard the case was present with full powers as a Judge to prepare*

and deliver his judgment in his case which he had heard to its finality.

- 2. That, the Honourable Judge of the High Court erred in law and on facts to hold that the seizure, impounding, forfeiture and sale of the plaintiffs cows was procedural and lawful while on **25th May, 2005** the East African Community Customs Management Act being not a domestic legislation was not in force to confer such powers to the respondents.*
- 3. That, the Honourable Judge of the High Court erred in law and on facts to hold that the impounded herd of cattle were not 1,500 but 895 by number contrary to documentary evidence and admission by the respondents' witnesses.*
- 4. That, the Honourable Judge of the High Court erred in law and on facts in that the defendants/respondents, having admitted to have seized and deposited **895 herds of cattle** in the **customs ware house** and a day later **sold 414 herds of cattle**, the appellants were entitled **for 481 herds of cattle** which were unsold at the auction.*

5. *That, the Honourable Judge of the High Court erred in law to hold that the law required no avail of opportunity to be heard or to pay fine or clear the goods which is contrary to Exhibit D3 the deposit Notice issued **under the Customs Management Act** which provides for that right of being heard to or clear the goods in 2 months before adverse decision of forfeiture and sale of goods deposited in customs ware house.*
6. *That, the Honourable Judge of the High Court erred in law and on facts to hold that the plaintiffs were not legal owners of the impounded animals.*
7. *That, the Honourable Trial Judge erred in law to admit in evidence the tendered respondents' documentary Exhibits D1 to D5 contrary to the mandatory provisions of Order XIII rule 4 (1) of the CPC [Cap. 33) R.E. 2002.*
8. *That, the Honourable Judge of the High Court erred in law and on facts to decide the case of the appellants contrary to the evidence on record which proved the case in their favour and on the standards required by law.*

On the other hand, the respondents were represented by Mr. Abubakar A. Mrisha, learned Senior State Attorney, assisted by Ms Grace Lupondo, learned State Attorney, and Mr. Switi Salvatory, the Principal Legal Officer of TRA.

At the commencement of hearing of the appeal on 26.11.2019, Mr. Kabunga proposed to address only the first ground of appeal on the ground that it is based on an irregularity which, if upheld, is capable of disposing of the entire appeal. Although Mr. Mrisha hesitated at first, he later on found sense on his learned friend's proposal and accepted it. We had no reservations, we granted that request.

As earlier on pointed out, the said ground queries that it was wrong for the trial judges who took over the trial of that case from where Lyimo, J. ended without assigning reasons for the takeover.

The learned advocate for the appellants began by detailing how the succession of the judges was made. He submitted that the case was tried by three judges. As reflected at page 97 of the Record of Appeal, the case commenced on 21.8.2008 before Lyimo, J. He heard the evidence of the plaintiffs (now appellants) until they closed their case. He similarly heard

the evidence of two witnesses for the defendants (DW1 and DW2). He then quietly ceased the conduct of that case.

Similarly, it is shown at page 116 of the Record of Appeal that as from 17.5.2011, the trial of the case was taken over by Kibella, J. Nonetheless, he did not assign reasons why he took over from Lyimo, J. He heard the evidence of three defence witnesses (DW3, DW4 and DW5) after which, like Lyimo, J., he quietly ceased the conduct of the case.

Likewise, as shown at page 140 of the Record of Appeal, the conduct of the case was taken over by Khaday, J. Like the second judge, she did not explain why she took over from Kibella, J. On 15.11.2013, the defendants' (now respondents) advocate asked to close their case. Although she did not hear any witnesses, Khaday, J. granted the prayer, marked the defendants' case closed, and set a date for delivery of judgment. The judgment in that regard was delivered on 2.5.2014.

The crux of Mr. Kabunga's submission is that since the successor judges did not assign reasons for the takeover, the omission to assign reasons was contrary to the dictates of Order XVIII rule 10 (1) of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (the CPC). That being the case, Mr. Kabunga asserted, the proceedings before the two successor

judges and the judgment which resulted therefrom were a nullity because the successor judges had no jurisdiction to continue with trial without giving explanation for the takeover. He fortified his argument by citing the cases of **David Kamugisha Mulibo v. BUKOP Ltd.** [1994] T.L.R. 217, **Tryphone Elias @ Ryphone Elias v. Majaliwa Daudi Mayaya**, Civil Appeal No. 186 of 2017 and **Kinondoni Municipal Council v. Q Consult Limited**, Civil Appeal No. 70 of 2016 (all unreported).

When probed by the Court to explain if non-compliance with the provisions of Order XVIII rule 10 (1) of the CPC in anyway prejudiced the appellants, Mr. Kabunga hastened to say that they were highly prejudiced because the judgment was written by a judge who had no opportunity to hear the witnesses and observe their demeanor, therefore that the omission occasioned injustice to the appellants. No doubt, he argued, that explains why the judge who composed the said judgment reached at a wrong conclusion. He also stated that aware though of the operation of the provisions of section 3A and 3B of the Appellate Jurisdiction Act as amended by Act No. 8 of 2016 (the AJA), he was strongly convinced that the principle of overriding objective created by those provisions was not meant to apply in every situation.

On the basis of the above arguments, Mr. Kabunga urged the Court to allow this ground of appeal, quash the proceedings and judgment before the second and third successor judges, and order the trial of the case to continue from where Lyimo J. ended upon the judge taking over may have complied with the demands of Order XVIII rule 10 (1) of the CPC. He did not press for costs.

Learned Senior State Attorney Mrisha marshaled the response to Mr. Kabunga's submission. In the first place, he admitted the fact that the present case was tried by three different judges; starting with Lyimo, J. who heard the evidence of the plaintiffs' witnesses as well as the first two defence witnesses; and then Kibella, J. who heard and recorded the evidence of the three other witnesses for the defence; and eventually Khaday, J. who, while she did not hear any of the witnesses, she closed the defendants' case and fixed a date for judgment. He also appreciated that Khaday, J. delivered the judgment on 2.5.2014. He similarly shared Mr. Kabunga's view that in terms of Order XVIII rule 10 (1) of the CPC, the second and successor judges ought to have assigned reasons during the take over from another judge, which they did not. He likewise agreed that the cases of **David Kamugisha Mulibo, Tryphone Elias @ Ryphone**

Elias and **Kinondoni Municipal Council** (supra) relied upon by his learned friend Mr. Kabunga, amplified the then position based on the interpretation of the said Order XVIII rule 10 (1) of the CPC.

On the other hand however, Mr. Mrisha challenged that with the promulgation of sections 3A and 3B of the AJA, whereupon the principle of overriding objectives was enunciated; the omission to assign reasons for the takeover is no longer a fatal irregularity. He argued that this is especially so because the appellants' advocate exercised the right to cross examine the witnesses who testified before the second successor judge, also that the third successor judge composed the judgment on the basis of the record in which both sides to the case actively participated. He referred the Court to its previous decision in **Chacha Jeremiah Murimi & 3 Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported) in which the principle of overriding objective was applied. He contended that in the light of that authority, the focus now should essentially be on substantive justice, and that it would be different where it was to be said that the omission occasioned injustice to the appellants, which he said was not the case. He urged the Court to dismiss this ground.

When probed by the Court on whether or not the circumstances in **Chacha Jeremiah Murimi's** case were similar to those in the present case, Mr. Mrisha responded that they were dissimilar, but added quickly that the principle is the same.

In a brief rejoinder, Mr. Kabunga was insistent that having conceded that the circumstances in **Chacha Jeremiah Murimi's** case were different to those in the present case, his learned friend Mr. Mrisha ought to have concluded that the principle of overriding objective cannot apply in the circumstances of the present case. Likewise, he emphasized that because the judgment in the present case was written by a judge who did not hear any of the witnesses, the appellants were vastly prejudiced by the decision which resulted because she was not in a good position to do justice in the case. He reiterated his prayer that the omission to comply with that law occasioned injustice to the appellants, and urged the Court to find merit on that ground and allow the appeal.

We have cautiously considered the rival arguments of counsel for the parties in this case. We conceive that the irregularity discussed by counsel for the parties concerning the irregular succession of judges during the trial

of this case orbits on Order XVIII rule 10 (1) of the CPC. Rule 10 of that Order provides that:-

*"(1) Where a judge or magistrate is **prevented by death, transfer or other cause from concluding the trial of a suit**, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."* [The emphasis is ours].

There are a range of cases in which the Court had the occasion to interpret this provision as requiring the giving of reasons for the takeover by another magistrate or judge. The justification has been two folds; **one** that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in the determination of any case before a court; and **two** that the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised – See the cases of **David Kamugisha Mulibo, Tryphone Elias @ Ryphone Elias** and **Kinondoni Municipal Council** (supra), **Ms Georges Centre Ltd v. The Attorney General & Another**, Civil Appeal

No. 29 of 2016 and **Kajoka Masanga v. The Attorney General and Another**, Civil Appeal No. 153 of 2016 (both unreported). It was stated in **Ms Georges Centre Ltd** (supra) that:-

*"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that judicial officer has to bring it to completion unless for some reason he/she is unable to do that. **The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another.** There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."* [The emphasis is ours].

In the just quoted case of **Ms Georges Centre Ltd** (supra), the Court found that the omission to give reasons for the takeover was a serious irregularity. The proceedings from the stage of takeover to its conclusion, including the resultant judgment, were declared a nullity, quashed, and the judgment set aside.

We profoundly considered the assertion of Mr. Mrisha that with the advent of the overriding objectives principle which was introduced by sections 3A and 3B of the AJA, the position expressed in cases of **Kinondoni Municipal Council, Kajoka Masanga** and **Ms Georges Centre Ltd** (supra) and several others of the like no longer applies. As earlier on pointed out, he depended on what was stated in **Chacha Jeremiah Murimi** (supra) in which the principle of overriding objective was applied, hence his view that the Court is required to gauge its decision on the issue of substantive justice. We further considered his argument that because the appellants in the present case were throughout the trial represented by an advocate, like it was said in the just quoted case, no injustice was occasioned to them. We have some reservations.

It is certain that the principle of overriding objectives was called into play or applied in the case of **Chacha Jeremiah Murimi**. The arguments

in that case centered on the demands of section 299 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). The appellants' counsel had asserted that the successor judge did not comply with the requirements under that provision, but the Court found that the second judge dutifully informed the appellants of their rights obtaining under that section, though of course, he did not give them chance to elect on whether or not they would have wished the witnesses who had earlier on testified before the first trial judge to be recalled. In finding resolve to the concern, the Court relied on the passage in its earlier decision in **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 (unreported) in which it was stated that:-

"Nonetheless with the introduction of section 3A in the Appellate Jurisdiction Act Cap. 141 R.E. Act No. 8 of 2018 whereby the Court is required to basically focus on substantive justice, the question which we had to ask ourselves here, is whether the failure on the successor judge to explain to the appellant about his rights occasioned him any injustice. Regard being had to the fact that, the appellant was throughout the trial of this case represented by a learned counsel, we entertain no doubt as it was

for the learned State Attorney that, no injustice at all was occasioned.”

It is this standpoint that Mr. Mrisha has urged the Court to follow.

On his part, and for reasons he assigned, Mr. Kabunga was forceful that the circumstances in the case of **Chacha Jeremiah Murimi** (supra) are distinguishable to those in the present case, therefore that the overriding objective principle cannot apply. We sincerely agree with him, we will explain.

To begin with, in **Chacha Jeremiah Murimi’s** case (supra), the arguments related to compliance with section 299 of the CPA, and there was partial compliance. In the present case however, not only did the successor judges omit to assign reasons for the takeover, but more serious is the fact that the judgment was composed by the third successor judge who did not hear even a single witness. Having she been a total stranger to the case, she was surely not in a good position to do justice in the case. In our view, that aspect makes a big difference.

Mr. Kabunga asserted similarly that it would be unrealistic to think that the principle of overriding objective may be applicable in all such situations as Mr. Mrisha impresses. Once again, we agree with him. Even,

the Court did not make a general rule in **Charles Bode's** case (supra) that in a situation such as the present, the principle of overriding objectives under sections 3A and 3B of the AJA must apply. To the contrary, it said that it would basically be required to focus on substantive justice, of course depending on whether or not the failure on the successor judge to explain to the appellant about his rights may have occasioned him any injustice. We think it is a sound expression made with a sense of justice. We need to also make a reminder that after all, as often expressed in cases without limit; every case must be decided on its own set of fact.

For reasons we have given, we find that in the circumstances of the present case, the first ground has merit and we allow it. Consequently, we quash the proceedings of the trial court from the stage the second judge took over to its conclusion, and set aside the judgment thereof. We order for the trial to be continued from where Lyimo, J. ended. In case for any reasons whatsoever, the first trial judge will not be able to resume trial, then it may be continued by any other judge after he/she will have complied with the demands of Order XVIII rule 10 of the CPC.

As can be grasped, this is an old case which has been lurking in the corridors of the courts since 2005. Given this position, we direct that it should be given special preference and enable it to be heard expeditiously.

Order accordingly.

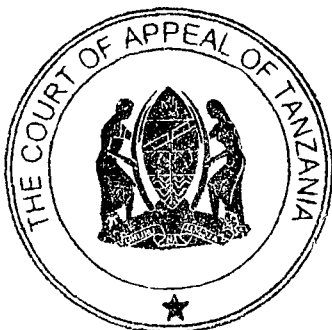
DATED at BUKOBA this 30th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2019 in the presence of Mr. Frank Kaloli, learned counsel for the Appellants and Mr. Gerald Njoka, State Attorney for the Respondents is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL