

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUGASHA, J.A., GALEBA, J.A And MAIGE, J.A.)**

**CIVIL APPEAL NO. 133 OF 2019**

**LETICIA MWOMBEKI..... APPELLANT**

**VERSUS**

**FARAJA SAFARALI.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER FOR LAND, MINISTRY OF LAND**

**AND HUMAN SETTLEMENT DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**(Appeal from the Judgement and Decree of the High Court of Tanzania,  
(Land Division) at Dar-es-Salaam)**

**(Wambura, J.)**

**dated the 26<sup>th</sup> day of May, 2017**

**in**

**Land Case No. 276 of 2012**

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**JUDGMENT OF THE COURT**

*10<sup>th</sup> & 14<sup>th</sup> June, 2022*

**MUGASHA, J.A.:**

In this appeal, Leticia Mwombeki, the appellant is appealing against the decision of the High Court, Land Division which declared Faraja Safarali, the 1<sup>st</sup> respondent, as the lawful owner of Plot No. 350 Block 'F' (suit premises) situated at Tegeta area within the municipality of Kinondoni, Dar-es-Salaam Region.

The background underlying the present appeal as gathered from the record before us is to the effect that: Both the appellant and the first respondent were allocated one and the same plot No. 350 Block 'F' at Tegeta area and each was issued with a letter of offer. The appellant's letter of offer was dated 20/9/88 bearing reference No. LD/135781/1/CFK whereas that of the 1<sup>st</sup> respondent was dated 26/7/1988. Apparently, the two letters of offer were issued by the same authority, that is, the Director of Land Development Services in the Ministry of Lands. Subsequently, the 1<sup>st</sup> respondent developed the same suit premises and happened to be in the physical occupation of the suit premises. However, sometimes in 2010, the 1<sup>st</sup> respondent alleged to have been required to hand over his letter of offer for verification and having obliged the letter of offer was returned to him. Later, it is alleged that one Elmeder Mutafa (DW4) introduced herself to the respondent as a representative of the appellant and started to harass the 1<sup>st</sup> respondent asserting that the suit premises belonged to the appellant. This was followed by a notice dated 27/8/2010 whereby the 1<sup>st</sup> respondent was required to vacate from the suit premises within thirty days of the notice. Having made a follow up, the 1<sup>st</sup> respondent claimed to

have gathered that, the suit premises was unlawfully re-allocated to the appellant while his letter of offer was not yet revoked.

It is against the said backdrop, the 1<sup>st</sup> respondent sued the appellant together with the 2<sup>nd</sup> and 3<sup>rd</sup> respondents seeking for among others, to be declared as the lawful owner of the suit premises and in the alternative, be allocated another plot and paid compensation for unexhausted improvements.

On the other hand, the appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied the 1<sup>st</sup> respondent's claims. The appellant asserted to be the lawful owner of the suit premises upon being granted a certificate of occupancy which was re-issued on 4/8/2010 whereby her ownership was reconfirmed following the verification exercise conducted by the Land Ministry on plots situated at Tegeta area. On the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, they averred that the 1<sup>st</sup> respondent was a trespasser on the suit premises as the appellant was the lawful owner.

Since mediation was not successful, a full trial was conducted. The 1<sup>st</sup> respondent was the only witness of his case whereas the appellant had four witnesses including herself. Subsequently, judgement was entered in

favour of the 1<sup>st</sup> respondent who as earlier stated was declared the lawful owner of the suit premises.

Aggrieved the appellant has preferred an appeal to the Court. In the Memorandum of Appeal, eight points of grievance were fronted including the following:

- 1. That, the Honourable Trial Judge who composed the Judgment and her predecessor erred in law and practice by not recording the reasons and the manner of taking over the suit on 9<sup>th</sup> November, 2016 by Hon. Mkuye, J, (as she then was) and on 15<sup>th</sup> February, 2017 by Hon. S.A.N Wambura, J,*

On account of what will be apparent in due course, we shall not reproduce the rest of the grounds of appeal. At the hearing, the learned counsel for either side adopted the written submissions filed earlier containing arguments for and against the appeal. In appearance, was advocate Joseph Rutabingwa for the appellant, advocate Rajabu Mrindoko for the 1<sup>st</sup> respondent whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondents had the services of Mr. Lameck Merumba, learned Senior State Attorney and Ms. Getruda Songoi and Ms. Kause Kilonzo learned State Attorneys.

In the 1<sup>st</sup> ground, the appellant is faulting the conduct of trial by two Judges without complying with the law relating to succession of Judges for the continuation of trial in a partly heard case. On this, it was the appellant's counsel brief submission that, the record indicates that Mkuye, J, (the predecessor Judge) heard the evidence of witness for the plaintiff's side and three witnesses for the defence and on 5/12/2016 she adjourned the hearing of the case to 15/2/2017. However, the case came up before Wambura, J, (the successor Judge) who, without assigning any reasons for the takeover, continued with the trial, heard the evidence of Kasejo Minga (PW4) and proceeded to compose the impugned judgment. This was argued by the learned counsel to violate Order XVIII rule 10 (1) of the Civil Procedure Code [CAP 33 R.E. 2019] which require a successor Judge or Magistrate to record the reasons for the taking over the continuation of the trial in the absence of which, the successor Judge cannot assume jurisdiction to proceed with a partly heard case.

On account of the said omission, Mr. Rutabingwa urged us to nullify the proceedings before the predecessor Judge and the resulting judgement. To support his proposition, he cited to us the case of

## **NATIONAL INSURANCE CORPORATION (T) LIMITED VS JACKSON**

**MAHALI**, Civil Appeal No. 94 of 2011 (unreported).

Upon being probed by the Court if the appellant was prejudiced, Mr. Rutabingwa hastened to say that, the appellant was prejudiced because the judgment was authored by the successor judge who had no opportunity to see and assess the demeanour of other witnesses which explains why she reached at a wrong conclusion in the judgment she composed. Ms. Kilonzo, the learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents supported the course taken by the appellant's counsel and in addition, submitted that the failure by the successor Judge to assign reasons for the takeover is a fatal omission which cannot be glossed over and as such, she urged us to nullify the respective proceedings and the judgment composed by the successor Judge.

As for the 1<sup>st</sup> respondent's counsel, besides conceding that the succession was irregular, he took an opposite view on the way forward. He urged the Court to invoke the overriding objective principle and proceed to give judgment after having re-evaluated the evidence adduced at the trial instead of nullifying the impugned proceedings and judgment. On this, Mr.

Mrindoko was of the view that, none of the parties was prejudiced by the omission in any way.

Having cautiously considered the submissions of learned counsel for the parties and the record before us, the issue for determination is whether the omission on succession of Judges did vitiate the trial and the resulting judgment. The irregularity complained of hinges on the dictates of Order XVIII Rule 10 (1) of the CPC which stipulates as follows:

*"10 (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 essence of the cited order is to ensure that trial commenced by the trial Judge or Magistrate is completed by the same presiding judicial officer and in case he/she is unable, it is incumbent on the successor judicial officer to assign reasons for the continuation of the trial of a partly heard case. The rationale behind is that, the one who sees and hears the

witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be compromised. See: **MS. GEORGES CENTRE LIMITED VS ATTORNEY GENERAL AND ANOTHER**, Civil Appeal No. 29 of 2016, **KAJOKA MASANGA VS ATTORNEY GENERAL AND ANOTHER**, Civil Appeal No. 153 of 2016, **MARIAM SAMBURO (Legal representative of the late RAMADAHANI ABAS VS MASOUD MOHAMED AND TWO OTHERS**, Civil Appeal No. 109 of 2016 (all unreported). In all the cited cases, the proceedings before the successor Judges were nullified for being in violation of Order XVIII rule 10 (1) on account of failure by the successor Judge to assign reasons on the taking over of partly heard cases. In the cited cases, what is crucial is for the successor Judge/Magistrate to assign reasons as to the predecessor's inability to continue with the trial warranting the partly heard case to be placed before the successor Judge. The reasons for the taking over were considered in the case of **HAMZA BYUARUSHENGO VS FULGENCE MANYA AND 4 OTHERS**, Civil Appeal No. 33 of 2017 and the Court having considered the gist of Order XVIII Rule 10 (1) of the CPC had the occasion to observe as follows:

*"We are aware that the Court has in its numerous decisions stated that reasons for the taking over must be stated by the successors Judge. **However, the reasons which prevent the trial Judge to continue with the trial include death, transfer or other cause and this is what must be brought to the attention of the parties before the continuation of the hearing.**"*

[Emphasis supplied]

Thus, the Court held that, in the event the parties were informed that the trial Judge was on transfer and that the matter would be mentioned on 19/7/2016, they were fully aware that the predecessor Judge had been transferred and as such, the issue of lack of jurisdiction to continue with the partly heard case did not arise.

In the case at hand, it is glaring from pages 132 to 153 of the record of appeal that, the trial commenced before Mkuye, J., from 9/11/2016 up to 5/12/2016 and she heard the evidence of the plaintiff and three witnesses on the part of the defence. Then, she made an order to the effect that the hearing was adjourned to 15/2/2017. However, on that day the matter came before Wambura, J., and the record is silent on there being any explanation as to why was the matter before her instead of the

predecessor Judge. In the circumstances, none of the parties was aware as to why the predecessor Judge was unable to continue with the trial and what made the successor to preside over and continue with the trial of the partly heard case. Besides, the record is silent if at all the case file was assigned to the successor Judge and such circumstances put to test the integrity and transparency of the proceedings in question.

In view of the unknown circumstances in which the case file found its way before the successor Judge, she had no jurisdiction to proceed with the partly heard case. Thus, we decline Mr. Mrindoko's invitation to invoke the overriding objective principle to remedy a fatal omission which cannot be glossed over as it goes to the root of the matter and occasioned a failure of justice. See: **MONDOROSI VILLAGE COUNCIL AND TWO OTHERS VS TANZANIA BREWERIES LIMITED AND FOUR OTHERS**, Civil Appeal No. 66 of 2017 and **NJAKE ENTERPRISES LIMITED VS BLUE ROCK LIMITED AND ANOTHER**, Civil Appeal No. 69 of 2017 (both unreported).

As a result, we nullify the entire proceedings before the successor Judge from 15/2/2017 to 31/3/2017, the respective judgment and the subsequent orders. The case file is returned to the High Court for

continuation of the trial in accordance with the dictates of Order XVIII rule 10 (1) of the CPC. Therefore, first ground of appeal is merited and since the first ground sufficiently disposes the appeal, we shall not determine the remaining grounds of appeal. Thus, the appeal is allowed to the extent stated with no order as to costs bearing in mind the circumstances surrounding the trial subject of the appeal.

**DATED at DAR ES SALAAM this 13<sup>th</sup> day of June, 2022.**

S. E. MUGASHA  
**JUSTICE OF APPEAL**

Z. N. GALEBA  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

The Judgment delivered this 14<sup>th</sup> day of June, 2022 in the presence of Mr. Evodius Rutabingwa, learned counsel for the Appellant, Mr. Rajabu Mrindikio, learned counsel for the 1<sup>st</sup> Respondent and Mr. Ayoub Sanga, learned State Attorney for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, is hereby certified as a true copy of original.



  
A. L. KALEGEYA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**