**IN THE COURT OF APPEAL OF TANZANIA**

**AT ARUSHA**

**(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)**

**CIVIL APPEAL NO. 256 OF 2018**

**GURMIT SINGH ..... APPELLANT**

**VERSUS**

**MEET SINGH .....1ST RESPONDENT**

**ARJAN CONSTRUCTION LTD ..... 2ND RESPONDENT**

**(Appeal from the Order of the High Court of Tanzania, at Arusha)**

**(Moshi, J.)**

**dated the 17th day of September, 2014**

**in**

**Civil Case No. 17 of 1998**

.....

## JUDGMENT OF THE COURT

21st September & 5th October, 2022

**MWANDAMBO, J.A.:**

This appeal has had a chequered history. It is a protracted litigation which has been pending in the courts for no less than 24 years from the date of institution of the suit before the High Court to the time of determination of this appeal. Both old maxims; *justitia dilata justitia negavit* for justice delayed is justice denied and; justice hurried means justice buried complement each other in this appeal as shall become apparent later. Suffice to say for now that, this appeal does not arise

from a final determination of the dispute between the parties rather, against an order of the High Court at Arusha made on 17/09/2014 dismissing the appellant's suit *suo motu* for being prematurely instituted.

The facts from which this appeal has arisen present an unfortunate and pathetic tale involving a dispute between two blood brothers to a large extent over the management of the second respondent; a company in which both of them are shareholders. The dispute emerged after the demise of the Chairman and Managing Director of the second respondent; one Gurbux Singh Arjanram the father of both, the appellant and the first respondent.

By and large, the appellant claimed in the suit that the first respondent had hijacked the management and running of the Company to the exclusion of the appellant as a shareholder and director. The appellant had equally claimed that the first respondent misappropriated funds of the second respondent and dissipated her assets for which he sought several reliefs ranging from monetary award to restoration of some of the properties to him and declaration of specified landed properties in Arusha as assets of the second respondent. Up until the date of the impugned order, the suit before the High Court had reached the stage of final pre-trial conference (the FPTC) having been before no

less than 10 judges who handled a number of interlocutory applications including amendment of pleadings and preliminary objections. The record shows that, on 04/09/2014, mediation was marked to have failed paving a way for a FPTC before a trial Judge who, on the same date scheduled the FPTC on 17/09/2014. In terms of Order VII rule 3 (1) of the Civil Procedure Code (the CPC) before its amendment vide GN. No. 381 of 2019, the FPTC was meant to ascertain any pending matters in the suit, scheduling future events and framing issues for determination of the suit in accordance with its allocated speed track. For reasons which are not apparent on the record, Mrs. Aziza Shakale, learned advocate representing the appellant did not enter appearance on 17/09/2014. Nevertheless Mr. Ngeseyan, learned advocate, held her brief. The first respondent had Ms. Mariam Mrutu, learned advocate 'for' and holding brief for Mr. John Lundu, also learned advocate.

Before conducting the business for which the suit was scheduled on that day, the learned Judge drew the attention of the learned advocates present of the pending probate proceedings in Civil Case No. 9 of 2013 involving some of the properties in the suit for which no administrator had not yet been appointed in the deceased's estate which included properties and shares of the second respondent.

Finding himself in that situation, Mr. Ngeseyan prayed for a short adjournment to allow Mrs. Shakale appear personally and address the court on that aspect a prayer which was supported by Ms. Mrutu. However, the learned Judge found it unnecessary to adjourn the matter any further noting that it was an old case. Instead, satisfied that the issue the High Court raised to counsel present was a question of law which did not require any argument, supported by case law, the learned Judge found the suit prematurely instituted and dismissed it *suo motu* with costs, hence this appeal.

The appellant who enjoys the services of Mrs. Shakale and Mr. Emmanuel Sood, raised 6 grounds of appeal in support of the appeal. But we think the appeal can be disposed of on the basis of ground 3 and 4 which raise the issue framed in the written submissions filed by the learned advocates for the appellant that is to say; whether the dismissal of the suit deprived the appellant's right to be heard guaranteed under Article 13 (6) of the Constitution of the United Republic of Tanzania 1977 (the Constitution).

The essence of the submission by the advocates both written and oral was that, the High Court denied the appellant his right to be heard on the issue touching on the competence of the suit raised after 16

years. Mr. Sood who made oral submissions at the hearing of the appeal referred us to several decisions of the Court on the effect of violation of the right to be heard including; **Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council**, Civil Appeal No. 81 of 2017, **Director of Public Prosecutions v. Yassin Hassan @ Mrope**, Criminal Appeal No. 202 of 2019, **DPP v. Shabani Donansian & 10 Others**, Criminal Appeal No. 196 of 2017 (all unreported).

Not amused, Mr. Alute Mughwai, learned advocate representing the first respondent resisted the appeal through the written submissions in reply which he adopted during the hearing and oral arguments supported by several authorities. Mr. Mughwai was emphatic that as much as the advocate for the appellant defaulted appearance on a date fixed for FPTC without any apparent reason, the High Court rightly dismissed the suit having been satisfied that it was prematurely instituted.

The learned advocate was resolute that what the Judge did was justified in acting as she did to ensure full control of the proceedings by refusing adjournment. He argued that the adjournment was unwarranted as no cogent reason was advanced explaining away the absence of Mrs. Shakale on a date fixed for FPTC considering that the

case had been pending in court for many years. The learned advocate downplayed the relevance of the cases cited by the appellant's advocate as distinguishable because, those cases involved situations in which the judges determined issues raised *suo motu* in the course of composing judgments without affording parties opportunity to be heard. On the contrary, Mr. Mughwai contended that the issue was raised by the Judge in the presence of the parties but Mr. Ngeseyan who held brief for Mrs. Shakale was not prepared to address the court on that issue neither was there any evidence of any illness on the part of Mrs. Shakale justifying a prayer for adjournment of the suit scheduled for FPTC.

Under the circumstances, Mr. Mughwai argued, the appellant cannot be heard complaining of being unheard because he squandered the right to do so. To reinforce his argument, the learned advocate referred to our decision in **Abdallah Makongoro & 4 Others v. Hon. Attorney General**, Civil Appeal No. 8 of 1961 (unreported) on what constitutes opportunity to be heard under Article 13 (6) of the Constitution. He argued further that, the right to be heard is subject to exceptions such as, *ex parte* hearing for non-appearance citing **Lim Han Yung & Another v. Lucy Yreseas Kristensen**, Civil Appeal No.

219 of 2019 (unreported) and cases under summary procedure. He urged the Court to dismiss the appeal for lacking in merit.

In rejoinder, Mr. Sood argued that the need for parties to be heard on an issue raised **suo motu** during the FPTC was paramount and the fact that the appellant was absent during the FPTC is relevant because there was no order for his personal appearance during the FPTC. He distinguished **Makongoro's** case (supra) as irrelevant to the instant appeal in so far as the appellant was denied opportunity to be heard on an issue raised by the High Court *suo motu.*

We wish to preface our discussion with acknowledging the obvious but unpalatable fact that the suit remained undetermined in the High Court for as many as 16 years and four months to the date it was dismissed. We appreciate that anyone in the shoes of the High Court judge would have reason to be seriously concerned with the time the suit took in court. Nevertheless, as the Court expressed itself in **Nyanza Road Works Ltd v. Giovanni Guidon**, Civil Appeal No. 75 of 2020 citing **Independent Power Tanzania Limited & Another v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 10 of 2009 (unreported), there must be a balance between expeditiousness and justice to both parties to the case. This is where the

old maxims we made reference to earlier on would converge and boil down to; *"speed is good but justice is better"*. There is equally no dispute that behind Mrs. Shakale's absence during the FPTC was not explained although she asked a fellow advocate to hold her brief presumably with specific instructions for that purpose. We respectfully agree with Mr. Sood that as there was no order for the personal appearance of the appellant during the FPTC, the suit ought to have proceeded with the FPTC subject to Mr. Ngeseyan having full instructions to proceed for that purpose.

The record does not indicate that the learned judge asked the learned advocates who appeared before her on 17/09/2014 of their readiness for the purposes of the events required to be dealt with during such conference.

With the foregoing remarks we turn to our discussion on the issue for our consideration and determination; whether the order of the High Court dismissing the suit *suo motu* deprived the appellant's opportunity to be heard. Mr. Mughwai would have us answer that issue in the negative primarily because this is not a case in which the appellant was denied his opportunity to be heard rather, to use his word, the appellant frittered it away and thus he is to blame for the adverse consequences

of his own making. With respect, to agree with that proposition, it must be clear from the record that the appellant and/or his advocate was indeed unprepared for the FPTC resulting into the impugned order. On the contrary, the record is so conspicuous that, instead of conducting the FPTC pursuant to the previous order, the court abandoned that step and raised an issue *suo motu* on the competence of the suit. We shall have the record speak for itself at pages 434 and 435:-

> ***"Court**: After perusing through the file, I have noted that there's a pending probate and administration cause which involve the parties and it also involves some of the properties which are subject matter of this suit. I took trouble to follow up the matter I confirmed that the probate cause is still pending and it is civil case no. 9/2013. In civil case no. 9/2013, there are contentious issues between the parties in respect of the deceased's estate up to now, the Administrator of the deceased's estate is not yet appointed. The estate involves properties and shares of 2nd defendant.*
>
> ***Mr. Ngeseyan**: I pray for short adjournment so that Ms. Shakale can come and address the court.*
>
> ***Ms. Mariam**: I accept that Ms. Shakale be given a chance to be heard.*
>
> ***Court**: This is an old case which is pending in court since 1998. The issue is [a] question of law. I see no need of*

*adjourning the case further because the position is so obvious see the case of* ***Mr. Anjumvicar Saleem Abd vs. Mrs. Naseem Akhtar Saleem Zangie****, Civil Appeal no. 73 of 2003, Court of Appeal where the court held inter-alia that:-*

> *"As we have already alluded to above, the suit land or the matrimonial home or property as the High Court labeled it, form part of the estate of the deceased following his death. Whether the deceased died testate or intestate its distribution to its beneficiary or beneficiaries, provided it was not disposed of by the deceased vlva vivos, was governed by the law on probate and administration of the deceased's estate. It was therefore, wrong on the part of the learned trial judge to pick out only this property and give it to the respondent and then order that the residue of the estate be administered under Islamic Law."*

*Likewise in our case, some of the propertles indicated in the plaint are part of the Probate and Administration cause, see Annexure to the written statement of defence Annex "AR JAN 20".*

*I thus basing on what I have said above, find that the case was pre-maturely filed. I therefore,* ***suo motu*** *dismiss the suit with costs."*

There is hardly any doubt from the extracted part of the record, that the learned Judge had made sufficient preparations ahead of the FPTC before raising the issue. This is so because, to use her own words, she took trouble to follow up the matter which landed into her discovery of the existence of Civil Case No. 9 of 2013 raising contentious issues between the parties in respect of the estate of Gurbux Singh Arjanram involving some properties and shares of the second respondent but up to that point no administrator had been appointed.

There is no indication that any of the parties had raised that issue neither is it clear from the record what prompted the learned Judge taking trouble to follow up a matter which was not before her. That aside, it is equally evident that the learned Judge appears to have been determined to dispose of the suit on the issue she raised during the FPTC judged from the preparation of an authority from case law to back up her decision. Indeed, she dismissed the suit *suo motu* on the strength of the very authority in **Anjumicar Saleem Abd v Mrs. Naseem Akhtar Saleem Zangie**, Civil Appeal No. 73 of 2003 (unreported).

Apart from refusing the prayer for adjournment which was supported by the advocate appearing for and holding brief of Mr. Lundu,

that the learned advocates who appeared before her were availed with a copy of the decision he made reference to in the order for their reaction. All what is plain is that, the High Court refused adjournment for no other reason than its own understanding of the issue as a straight forward question of law which it considered to be so settled that it did not require argument from counsel whether on that day or any other date. With respect, we are unable to go along with Mr. Mughwai arguing, as he did, that the appellant squandered his opportunity to be heard because none was afforded and frittered it away as Mr. Mughwai put it.

As alluded to earlier on, what was before the High Court immediately before the impugned order was a consent prayer for adjournment with a view to allowing time to the appellant's advocate with full instructions to address the court on an issue raised before conducting the FPTC. Whilst we agree with Mr. Mughwai on the need for the courts to control proceedings, we hold the view that such control should be done in such a manner that promotes and facilitates orderly and smooth conduct of cases which entails affording parties opportunity to present their cases within the ambit of Article 13 (6) of the Constitution. Unlike Mr. Mughwai, we do not share his view that the appellant was given opportunity to be heard on the issue raised

impromptu and squandered it. On the contrary, it is plain that, immediately after the consent prayer for adjournment, the learned Judge never made any order in response thereto but proceeded to make an order dismissing the suit on the basis of the issue she raised without inviting counsel to address her.

Again, in all fairness, any unpreparedness alluded to by Mr. Mughwai must have relation to the FPTC and not on an issue in which the learned advocate was not aware of beforehand which takes us to the authorities cited.

From the submissions made by the learned advocates, there is no dispute on the effect of a decision made in violation of opportunity to be heard in the ambit of Article 13 (6) of the Constitution. We agree that most of the decisions cited by the appellant's learned advocate relate to situations in which the judges determined issues **suo motu** in the cause of composing their judgments, but we do not think that the circumstances in the impugned order permit any distinction as submitted by Mr. Mughwai to render them irrelevant. The extracted order is too clear to be misunderstood. The learned Judge's order clearly indicated having dismissed the suit *suo motu* for being prematurely filed on the basis of the issue raised as involving a question of law which, if we may

be tempted to speculate, did not require any argument on the authority she herself sourced.

In our view, **Abdallah Makongoro's** case (supra) is clearly distinguishable in so far as it involved a party who opted out of the case, regardless of the potential risk in the final outcome of the election petition. This is not the position in the instant appeal. Similarly, reference to **Lim Hang Yung** (supra) serves no useful purpose in this appeal because that case involved an appeal from an order dismissing an application to set aside *ex parte* judgment entered against the appellant on account of failure to file a written statement to the amended plaint. It only serves to illustrate the point raised by Mr. Mughwai; exception to the general rule on the right to be heard. The circumstances in this appeal do not fit into that exception.

In the light of the foregoing, we are constrained to answer the sole issue discussed in this judgment in the affirmative. We have come to such conclusion upon being satisfied that the appellant was wrongly denied his opportunity to be heard on an issue which resulted into the order dismissing the suit *suo motu*.

In fine, we allow the appeal and quash the order of the High Court dismissing the suit and direct that the record be remitted to the High

Court for expeditious determination of the suit at the stage it had reached immediately before the impugned order.

As Mr. Sood did not press for costs, we order that each party to bear own costs.

**DATED** at **ARUSHA** this 4th day of October, 2022.

S. A. LILA
**JUSTICE OF APPEAL**

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

P. S. FIKIRINI
**JUSTICE OF APPEAL**

The Judgment delivered this 5th day of October, 2022 in the presence of Mrs. Aziza Shakale and Mr. Emmanuel Sood both learned counsel for the Appellant and Mr. Alute Mugwai, learned counsel for the 1st Respondent, is hereby certified as a true copy of original.


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