IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., SEHEL, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 38 OF 2020

REGINA ISHEMWABURA..... APPELLANT

VERSUS

NASSOR HAMIS NASOR.....1st RESPONDENT

JOHN MARTIN MWANGA.....2nd RESPONDENT

FISHA MASHOO.....3rd RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mohamed, J.)

dated the 16th day of September, 2019
in
Land Case No. 47 of 2014

JUDGMENT OF THE COURT

22nd September & 23rd November, 2022.

SEHEL, J.A.:

The appellant, Regina Ishemwabura, the then plaintiff in Land Case No. 47 of 2014 was aggrieved by the decision of the High Court of Tanzania (Mohamed, J.), Land Division at Dar es Salaam (the High Court), dated 16th September, 2019. In that case, the appellant sued the respondents claiming for ownership of a residential house on plot number 705 Block 'F' formerly known as plot number 94A Drive Inn Cinema,

Msasani area along Old Bagamoyo road (henceforth "the disputed property").

The appellant claimed in her plaint that she bought the disputed property from the National Housing Corporation under a tenant purchase scheme operated by the defunct Tanzania Housing Bank. That, in 2012 when she was making a follow for the issuance of a certificate of title, she found that there was a certificate of title number 55756 issued to the 1st respondent on 12th June, 2004. She therefore filed a suit against the respondents claiming for a declaratory order that she be declared a lawful owner of the disputed property; an order of eviction of the 1st respondent from the disputed property and the 1st respondent, be ordered to surrender certificate of title number 55756 to the Commissioner for Lands for cancellation. The appellant further prayed for *mense* profit of TZS. 500,000.00 per month; costs of the suit and interest at the court's rate of 12% per annum.

On the other hand, in his written statement of defence, the 1st respondent disputed the appellant's claims and averred that he was the lawful owner of the disputed property under certificate of title number 55756 since 6th November, 2001 having lawfully purchased the same from the 2nd respondent. On the part of the 2nd and 3rd respondents, they did

not enter appearance nor filed any document. Therefore, the suit, against them, was heard *ex parte*.

Upon conclusion of the pleadings and determination of the preliminary objection, the case went through the first pre-trial conference and scheduling conference pursuant to Order VIIIA of the Civil Procedure Act, Cap. 33 R.E. 2002 (now it is Order VIII of the Civil Procedure Act, Cap. 33 R.E. 2019) (henceforth the CPC). The conference was held on 21st October, 2014 before Hon. Wambura, J. who upon considering the nature of the case and in terms of Order VIIIA rule 3 (3) (now Order VIII rule 22 (3)) of the CPC, fixed the case at speed track IV as it was expected for the same to be tried and concluded within 24 months period, counted from 21st October, 2014. Thereafter, the suit passed through mediation but it was marked failed on 16th February, 2015.

Therefrom, the suit went to the final pre-trial and scheduling conference that was held on 23rd March, 2015 and issues were framed. The plaintiff's case begun on 1st October, 2015 whereby the evidence of the first witness, one **Palemon Martin** (PW1) was heard and received by Wambura, J. Gathered from the record of appeal, on 10th May, 2016, the case was placed on special session aiming at clearing backlog. Hence, it was re-assigned to Mallaba, J. However, by the time the special session

came to an end on 12th April, 2016, Mallaba, J. managed to hear and receive the evidence of only one witness for the plaintiff, **Regina Ishemwabura** (PW2).

The record of appeal further bears out that, on 5th October, 2016 the suit was placed before Kente, J. (as he then was) for continuation of the trial. However, on that date the trial could not proceed. After several adjournments, on 28th March, 2017 when it was called again for continuation of the trial before Kente, J. (as he then was), the learned counsel for the appellant sought extension of the speed track which was granted and extended for two more years. Again, several adjournments ensued until 7th November, 2018 when Mohamed, J. took over the proceedings and proceeded with the hearing of the plaintiff's case without stating the reason for taking over. He heard and received the evidence of **Mr. Innocent Tairo** (PW3); **ASP James Sebastian Mapunda** (PW4) and **Kajesa Minga** (PW5). On 12th November, 2018 the plaintiff closed her case.

Once more there were several adjournments for the defence case to start. In that respect, on 16th September, 2019 when the case was called for hearing, Ms. Vercah Gossy, learned advocate who held brief for Mr. Sylivester Shayo, learned advocate for the 1st respondent requested for

adjournment of the hearing of the defence case, the High Court declined the prayer, and instead, adjourned the hearing to 13:00 hours and ordered for the appearance of Mr. Shayo.

At the fixed time of hearing, Mr. Shayo appeared. The High Court then invited learned counsel for the parties to address it on the jurisdiction of the court upon expiry of the speed track on 28th March, 2019. Mr. Rutabingwa, learned counsel for the plaintiff requested for a short adjournment till next day in order to have time to go through the record and the law for him to make a proper submission. He further beseeched the trial court to take cognizant that the plaintiff had closed her case. On his part, first, Mr. Shayo replied that the prayer for adjournment was within the discretionary power of the court to grant or refuse. Secondly, he agreed that the speed track expired way back as pointed out by the court. Having heard the parties, the High Court refused the prayer for adjournment and immediately thereafter, it proceeded to compose and deliver a ruling to the parties by dismissing the suit with costs. Aggrieved, the appellant filed the present appeal.

In her memorandum of appeal, the appellant advanced the following five (5) grounds:

"1. High Court erred in law and on fact by not giving the appellant, then plaintiff, an opportunity to address the court on the issue of expired speed track, having rejected an adjournment to allow the parties prepare for the submission on the matter.

2. The High Court erred in law and fact by not proceeding to compose the judgment, plaintiff having closed her case on 12th November, 2018 paving the way for the defence case, as a result the obligation to revive the speed track was no longer entirely that of the plaintiff.

3. The trial judge showed bias on the part of the plaintiff by picking only dates showing incidences of the plaintiff counsel alone whereas adjournments were at the instances of both parties and at times by the court as revealed under the record on diverse dates and the facts that the issue of expiry of speed track was taken up after the trial judge was asked to recuse himself by the plaintiff, a request which was never addressed upon by the said trial judge.

4. High Court erred in law and on evidence by holding that the speed track lapsed on 27th March, 2019 and proceeded to dismiss the suit with cost whereas the circumstances of the case were such that it was in the interest of justice to extend the life span of the suit and even if that was not the open course, the only

alternative would have been to struck out the suit and not to dismiss it.

5. The trial judge erred in law by not recording the reasons of his taking over the proceedings and or conduct of the suit on 19th October, 2018 as to the requirement under Order XVII, Rule 10 (i) of the Civil Procedure Code, Cap 33 RE 2002."

At the hearing of the appeal, Mr. Joseph Rutabingwa assisted by Mr. Thomas Brash, both learned advocates appeared for the appellant, whereas Ms. Verycah Gossy and Mr. Henry Kitambwa, also learned advocates appeared for the 1st respondent. The 2nd and 3rd respondents did not enter appearance despite being duly served with the notice of hearing through publication in Uhuru newspaper of 14th September, 2022. In that respect, Mr. Rutabingwa sought and was granted leave in terms of Rule 112 (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) to proceed in absence of the 2nd and 3rd respondents who were duly served but failed to enter appearance. The appellant and the 1st respondent filed their respective written submissions pursuant to Rule 106 (1) and (8) of the Rules which they adopted in their oral submissions.

Highlighting on the written submissions, Mr. Rutabingwa submitted on the fifth ground of appeal that the provisions of Order XVIII rule 10 (1) of the CPC (now it is Order XVIII Rule 15 (1) of the CPC) was contravened

as there was no reason given for taking over the conduct of the case by Mohamed, J. Referring to page 273 of the record of appeal, he submitted that Mohamed, J. took over the proceedings for the first time on 19th October, 2018 and ordered that the case be heard on three consecutive days on 7th, 8th and 9th November, 2018.

He went on arguing that, on the fixed dates, the learned Judge proceeded to hear and receive the evidence of PW3 without there being any reason assigned as to why he took over the conduct of the case. He contended that the omission to state the reasons was fatal and rendered the subsequent proceedings irregular. To cement his argument, he referred us to the cases of **Charles Chama and 2 Others v. The Regional Manager, TRA and 3 Others**, Civil Appeal No. 224 of 2018 and **Leticia Mwombeki v. Faraja Safarali and 2 Others**, Civil Appeal No. 133 of 2019 (both unreported). He therefore prayed for the irregular proceedings to be quashed and the dismissal order be set aside.

In his response, Mr. Kitambwa began his submission by referring us to page 272 of the record of appeal where Mr. Rutabingwa said the following:

> *"...My Lord, we are not sure if the judge who was to come and hear the case is around or will come..."*

Mr. Kitambwa contended that the above extract of the proceedings suggests that parties were well informed by the predecessor judge that the case would be assigned to another judge thus the reasons for taking over were explained to the parties and that is why the learned counsel for the appellant made the above remark. He further added that the omission to record the reasons did not prejudice the appellant as she was well aware of the reasons for taking over. He then distinguished the facts in the case of **Charles Chama and 2 Others** (supra) but embraced the holding that each case must be decided on its own set of acts.

Mr. Rutabingwa briefly re-joined that the remark he made appearing at page 272 of the record of appeal was made on 18th June, 2018 in respect of the cleanup exercise whereby the case was placed before special session to be heard by a Judge who could not appear on that date and that is why the case proceeded to be called again before Kente, J (as he then was). Regarding prejudice, he contended that the compliance with the provisions of Order VIII rule 10 of the CPC is mandatory. He therefore reiterated his earlier submission and prayed for the appeal to be allowed with costs.

From the submissions by the learned counsel for the parties, we find that the issue that stands for our deliberation is whether the omission

to state the reasons for taking over of the proceedings vitiated the proceedings of the successor Judge.

It is noteworthy to point out that at the time the suit was being tried, the prevailing law was Order XVIII rule 10 (1) of the CPC. We are aware that the said Order was amended through Government Notice No. 760 of 2021 published and came into force on 22nd October, 2021. The said amendment added a proviso and re-numbered the Order to Order XVIII rule 15 (1) of the CPC. That apart, the then Order XVIII rule 10 (1) of the CPC read as follows:

> *"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."*

According to the above provision of the law, the evidence taken and recorded by a trial Judge or Magistrate may be taken over by a successor Judge or Magistrate upon the death of the predecessor Judge or Magistrate; or upon his/ her transfer; or due to any other cause that

prevented the predecessor Judge or Magistrate to conclude with the trial of the case. The rationale is to ensure that a trial which was commenced by the trial Judge or Magistrate is finalized by the same presiding judicial officer unless prevented by death, transfer or any other cause- see: the case of **Leticia Mwombeki** (supra).

In the present appeal, as stated earlier, the trial commenced with Wambura, J. who heard the evidence of PW1. The case was then transferred to Mallaba, J who was on a special session aimed at clearing backlog. Therefore, there was a reason for the transfer from Wambura, J. to Mallaba, J. being that the case was a special session. At the end of such session, the trial of the case was not completed. Therefore, the case was placed before Kente, J. for continuation of the trial. Later on, without assigning any reason, the case came up before Mohamed, J. who then heard the evidence of PW3, PW4 and PW5. The taking over of the proceedings without assigning reason is contrary to the dictates of the then Order XVIII rule 10 (1) of the CPC.

Nonetheless, given the circumstance of the case and being mindful that each case is determined according to its own peculiar facts, we are of the settled mind that with the overriding objective in place, the omission did not prejudice the appellant since throughout the trial he had been duly

represented by an advocate. We took the same stance in the case of **Charles Bode v. The Republic**, Criminal Appeal No. 46 of 2016 (unreported) when we said:

> *"...with the introduction of section 3A in the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA), which was brought about by the Written Laws (Miscellaneous Amendments) 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 by 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 his 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. We therefore find the first ground of appeal by the appellant to be without basis and we dismiss it."*

Accordingly, we find that the fifth ground of appeal lacks merit.

We now turn to the 1st, 3rd and 4th grounds of appeal which Mr. Rutabingwa submitted together as they all raise the issue of the expiry of the speed track. He argued that the dismissal order was made in total disregard of the legal position stated in the case of **Nazira Kamru v. MIC**

Tanzania Limited, Civil Appeal No. 111 of 2015 (unreported). He pointed out that the issue of the expiry of the speed track was raised by the trial court *suo moto* and the appellant was not given a chance to address the court on that issue. He then referred us to page 503 of the record of appeal where the suit was adjourned to continue in the afternoon hours and argued that had the parties been alerted on the expiry of the speed track that morning, there would be no need for him to request for an adjournment as he would have been prepared to properly address the trial court on the facts and law concerning speed track. He further pointed out that even after the trial court declined the prayer for adjournment, it went on to compose and deliver a ruling without affording the appellant a right to be heard.

Responding on the expired speed track, Mr. Kitambwa supported the ruling of the trial court dismissing the suit on account that the trial court lacked jurisdiction. He acknowledged that the plaintiff closed her case but argued that no extension was sought for the expired speed track thus the trial court had no power to proceed with the case. Further, the case had been pending before the High Court for more than five (5) years. On the right to be heard, referring to pages 504 – 506 of the record of appeal, he argued that the learned counsel for the appellant waived his right as he

was adamant in seeking for adjournment. In that regard, he prayed for the appeal to be dismissed with costs.

Mr. Rutabingwa reiterated his earlier submission that the High Court should not have dismissed the case least it could have done was to determine the suit upon the evidence available before it.

Having heard the submissions and gone through the grounds of appeal we find that the issue before us is what was the resultant effect of the suit whose speed track had expired. Both parties are in agreement that the speed track of the case expired on 28th March, 2019. They were also in agreement that the issue was raised by the trial court that led to the dismissal of the plaintiff's suit. For clarity, we find it prudent to reproduce part of the trial court's ruling that dismissed the suit as follows:

> *"...I find the speed track of the suit lapsed under the provisions of rule 23 of Order VIII of the CPC as amended by G.N. No. 381 of 2019. I consequently, dismiss the suit with costs."*

Order VIII Rule 23 of the CPC relied upon by the trial court to dismiss the suit provides:

> *"Where a scheduling conference order is made, no departure from or amendment of such order shall be allowed unless the court is satisfied that such departure or amendment is necessary in the*

interests of justice and the party in favour of whom such departure or amendment is made ***shall bear the costs of such departure or amendment,*** *unless the court directs otherwise."* (Emphasis added).

The import of the above provision of the law was adequately considered and explained in the case of **National Bureau of Statistics v. The National Bank of Commerce and Another**, Civil Appeal No.113 of 2018 CAT (unreported) that dealt with a similar scenario. In that appeal, the suit was struck out on account of expiry of the scheduled life span. On appeal, the Court considered and discussed the essence of assigning speed tracks in a suit and the import of Order VIIIA rule 4 (now Order VIII rule 23) of the CPC. It stated:

> "*...the spirit embraced in assigning a suit to a certain speed track is only to facilitate the expeditious disposal and management of the case.* ***It is thus not expected that failure to adhere to a scheduled speed track will have serious consequences of having a suit struck out. Instead, a judicial officer presiding over the suit is enjoined to ensure that substantive justice is done to the parties by affording them opportunity to be heard and the matter to be determined on merit.*** *Cognizant of that*

right, Order VIIIA did not directly impose any legal consequence in the event the scheduled speed track expires. Counsel for the parties are at one that the cited Rule does not provide for the legal consequences of lapse of a speed track without an application being made to extend the same. We entirely agree with them. That said, we need not overemphasize that the inescapable inference and conclusion is that striking out a suit is not a resultant effect envisaged by the law, for, had it been the intention, it would have been expressly stated so. Instead, the trial court, either upon being moved by either of the parties or suo motu has to amend the scheduling order and where the highest speed track is attained and yet the case is yet to be finalized to enlarge the time frame until the case is concluded. It is only by doing so, that we shall be according due regard to the dictates of the law." (Emphasis added).

The Court went on to hold that the remedy is to condemn the party causing the delay to pay costs. It stated:

"...a suit will not be let to suffer the wrath of being struck out or dismissed simply because the speed track has, for some reason, lapsed. Instead, they infer other order to be made that does not affect the parties' rights. It is for this reason that the

above Rule makes it plain that inordinate delays by the parties which contribute towards the expiry of the assigned speed track are to be punished by imposition of costs.... We have no hesitation to hold that the learned judge strayed into an error to strike out the suit because there is no provision in the CPC authorizing such a course of action. The action she took was contrary to the dictates of the law. Instead, ***she ought to have condemned the party who had contributed towards the delay which led to the lapse of the speed track to pay costs."*** *(Emphasis made).*

In the present appeal, we reiterate the above position of the law that Order VIII rule 23 of the CPC is silent on the legal consequences. It does not provide for the striking out or dismissal of the suit but rather, where the trial court is satisfied that departure from or amendment of the scheduled order is necessary in the interest of justice, it may depart from or amend it. We are therefore satisfied that the learned trial judge erred in law in dismissing the appellant's suit on the ground of expiry of speed track. Accordingly, we find that the grounds of appeal have merit.

Since the 1st, 3rd and 4th grounds of appeal dispose the entire appeal, we find no need to determine the remaining 2nd ground of appeal.

In the end, we quash and set aside the ruling of Mohamed, J. dated 16th September, 2019. We remit the file back to the High Court and direct it to expeditiously resume the hearing of the suit. Given the circumstances of the appeal, we make no order as to costs.

DATED at **DAR ES SALAAM** this 22nd day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of November, 2022 in the presence of Mr. Evodius Rutabingwa, learned counsel for the Appellant and Verycah Gossi, learned counsel for 1st Respondent and in the absence for 2nd and 3rd Respondents, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL