

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO 92 OF 2017**

(Arising from Civil Case No. 86 of 2015 at Temeke District Court Hon. Mganga RM)

**YONO AUCTION MART& COURT BROKER.....1<sup>ST</sup> APPELLANT**  
**DAR ES SALAAM CITY COUNCIL.....2<sup>ND</sup> APPELLANT**  
**VERSUS**  
**AUGUSTA JOHN NTIRUKA t/a SANGANIYE**  
**FOOD SUPPLIERS.....RESPONDENT**

**RULING**

**MASABO, J.:-**

The Respondent herein successfully sued the Appellants herein in Civil Case No 86 of 2015 in the District Court of Temeke for recovery of Tshs 86,457,000.00 incurred as a result of impounding of their meat supply vehicle by the Appellant's staff. Being aggrieved the Appellant lodged this appeal on 4 grounds, to wit that the trial court erred:by failing to evaluate the tendered evidence; in holding that the motor vehicle had mechanical fact; by holding that the officers from 1<sup>st</sup> Appellant knew that the Motor Vehicle had carried meat; by awarding general damages for damaged cooler.

Before the matter came for hearing, the Appellant prayed for leave to file a supplementary ground on regularity or otherwise of the proceedings regarding the change of magistrate. Upon being granted leave, the parties were subsequently ordered to address the court on this issue first. In his

submission to the Court, Mr. Samwel Shadrack, counsel for the Appellant submitted that the trial magistrate erred in law and fact for composing the judgment of which the succession procedure was not proper. He reasoned that trial was presided over by Hon Batulaine RM but surprisingly the judgment was composed by another Magistrate in the name M. Mfanga who did not preside the matter. He argued further that, Order 18 rule 10 of the Civil Procedure Code is to the effect that the successor magistrate or judge must record the reasons as to why he is taking over the suit. That since Hon Mfanga who composed the judgment did not take part in the hearing it was imperative that he gives reasons for such succession as required by law. In support Mr. Shadrack cited the case of **Mariam Samburo v Masoud Mohamed Joshi & Others** Civil Appeal No. 109 of 2016 where the Court of Appeal held that the successor judge must record the reasons for taking over. In this premise he concluded that failure by Hon. Mfanga to follow procedure rendered the whole proceedings a nullity. In reply Respondent Counsel, Grace Umoti opened her submission by reckoning the factors giving rise to the impugned change of magistrates. She submitted that, it is true that Hon Mfanga did not preside over the trial as the same was presided over by Hon, Batulaine. That, the change of magistrates was prompted by the Respondent herein in that, after the hearing was complete and after all the parties have made their final submissions and the date of judgment had been fixed, on 3/2/2017 which was the date of judgement, the Respondent spotted with the presiding magistrate together with another person purportedly to be the director of Yono (the appellant herein) whereby she speculated that there was a corruption incidence and prayed that the

magistrate disqualify herself from the suit. Pursuant to this prayer Hon. Batulaine recused herself and the case file was reassigned to Hon. Mfanga who composed the judgement. Having reckoned the facts above, Ms. Umoti argued that there are no any peculiar circumstances which would otherwise suggest that the transfer/re-assignment of the case file was made un-procedurally as all the procedures were complied with. In rejoinder Mr. Samwel submitted the procedure for transfer was not complied with.

Having gone through both submission the main issue to be determined is whether the transfer of the case file from Hon. Batulaine to Hon. Mfanga was procedurally done. A scrutiny of the records of the instant case would reveal that the matter was handled by different magistrates. At first, the case was before Mbona Masabo RM. Later it was reassigned to another magistrate. At the commencement of hearing the case was presided over by Tarimo SRM. On 28/10/2016 Hon Kihawa RM presided over the case but could not continue because she previously acted as a mediator for the case whereby on 1/11/2016 the case file was re assigned to Hon. Batulaine by then, three Plaintiff's witnesses had testified. There is no record as to what prevented Tarimo SRM from proceeding with the case. It is on record that Hon. Batulaine presided over the trial until 23/12/2016 when the defence closed its case and orders for final submission were made accordingly. On 29/12/2016 she fixed the matter for judgment on 3/2/2017. Pursuant to the order of the court on 3/2/2017 the matter came for judgment but before the judgment was delivered the plaintiff (Respondent herein) lamented that earlier that day she spotted the magistrate speaking to the 1<sup>st</sup> Defendant

and she subsequently requested the magistrate to recuse herself as she had lost confidence on her. Hon. Batulaine conceded to the prayer to disqualify herself from the case where by she recorded her reasons and on the same date she transmitted the file to the Hon. Kihawa RM i/c (Ag) who upon receipt of the file reassigned the case to Hon, Mfanga. The record of what transpired thereafter can be seen in page 62&63 of the proceedings. For convenience it is reproduced below:

3/2/2017

Coram: Hon Kihawa RM i/c (Ag)

Parties: Absent

CC Editha

Court: Following disqualification order made by Hon. Batulaine RM, the case file is forwarded to the RM I/C for re-assignment

Order. The file is reassigned to Hon. Mfanga to proceed with judgment

Sgd Hon. Batulaine – RM

3/2/2017

Coram: Hon Mfanga- RM

Plaintiff. Present

Defendant. Absent

Cc

Order

1. Judgment on 13/02/2017

2. Parties to appear

Sgd, Hon. Batulaine- RM

3/2/2017

24/2/2027

Coram. Hon. Mfanga -RM

Plaintiff. Mr. Matumla advocate for plaintiff

1st Defendant. Absent

2nd Defendant. Present represented by Umoti  
advocate

c.c Mtasiwa

Mr. Matumla Advocate for plaintiff

It's judgment ready to proceed

Ms. Umoti Advocate for the 2nd Defendant

We are ready to proceed

Signed Hon. Batulaine – RM

To start with, the procedure for transfer as provided for under Order 18 Rule 10 (1) provides 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.

This provision has been interpreted in numerous cases including in **M/S Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported); **Kajoka Masanga v. The**

**Attorney General and Another**, Civil Appeal No. 153 of 2016 and most recently in **Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas v Masoud Mohamed Josh & 2 Others**, Civil Appeal No. 109 of 2016. In **M/S Georges Limited v. The Honourable Attorney General and Another**, (*supra*) the Court stated 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 witnesses 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 maybe compromised."

Citing the above decision with approval, the Court of Appeal in **Mariam Samburo** (supra) stated that:

“The above quoted extract provides for a clear interpretation and the rationale behind existence of Order XVIII Rule 10(1) of the CPC in the effect that, recording of reasons for taking over the trial of a suit by a judge is a mandatory requirement as it promotes accountability on the part of successor judge. This means failure to do so amounts to procedural irregularity which in our respective views and as rightly stated by Mr. Shayo and Mr. Mtanga, cannot be cured by the overriding objective principle as suggested by Dr. Lamwai.

The rationale for this requirement is further espoused in the case of *Priscus Kimario v R*, Criminal Appeal No. 301 of 2013 (unreported) and in **Hatwib Salim v R** Criminal Appeal No. 372 of 2016, CAT at Bukoba (Unreported) where the Court of Appeal was called to determine the application of section 214(1) of the Criminal Procedure Act, Cap 20 RE 2002 which imposes a similar requirement in handling transfers in criminal cases. In **Hatwib Salim v R** (supra) the Court held that the rule is aimed at:

“controlling and avoiding the danger of some mischievous persons who might be able to access the file and do issues not in accordance with the procedure or requirement of the law”

Expounding further the ration for this rule, in **Priscus Kimario v R**, (supra) the Court held that:

“if that is not done it may lead to chaos in the administration of justice. Any one, for personal reasons could just pick up any file and deal with it to detriment of justice.”

When the above authorities are applied to the instant case, it goes without say that the failure by Hon. Mfanga to record the reasons for taking over the case constituted an irregularity. It should however be noted that, as it could vividly be seen from the records reproduced above, the record vividly show the reasons as to why the file changed hands from Hon. Batulaine to Hon. Mfanga, which in my settled view, demonstrates transparency and meets the rationale of the requirement of the rule. There are however several other irregularities that emerge from the records of the instant case. First, the name of Hon. Batulaine who recused herself from the case continued to appear on the records even after she had recused herself on 3/2/2017 (see the records for 2/3/2017 after the file had been assigned to Hon. Mfanga). Her name can be seen in the record for 24/2/2017 the date when the judgment was delivered. Although this could be deemed as clerical mistakes, there are yet two more irregularities. As alluded to earlier, no reasons were assigned to the transfer between Tarimo SRM and Batulaine RM which took place after 3 Plaintiff’s witness had testified.



Lastly, and even more serious, it is not clear from the records as to whether Hon. Mfanga composed a new judgment or delivered the judgment which had already been prepared by Hon. Batulaine. Order XX Rule 2 provides the following directives with regard to preparation and delivering of judgement in incidences where a case file changes hands between judges or magistrates. It states that "*A Judge or Magistrate may pronounce a judgment written but not pronounced by his predecessor*"

Interpreting this provision in **VIP Engineering and Marketing Limited (2) Tanzania Revenue Authority v. SGS Societe Generale de Serveillance & SGS Tanzania Superintendence Company Limited**, Civil Revision No. 5 of 2011, CAT (unreported)

"Though the word used in the rule is "may" it is mandatory upon the succeeding judge to pronounce the judgment prepared but not delivered by his predecessor, and it is not open to him to re-open the whole matter. That has always been the practice here in our Jurisdiction.....a duty is cast on the judge to pronounce judgment in the interests of litigant public and in the main to save judicial time, the word 'may' used in Order XX rule 2 of the Code has a compulsory force and the succeeding judge is under an obligation to pronounce the judgment that was written by his predecessor and it is not competent for him to re-hear the suit."

Underlining this position further in **SGS Societe Generale de Serveillance SA and Another v. VIP Engineering and Marketing Limited and**

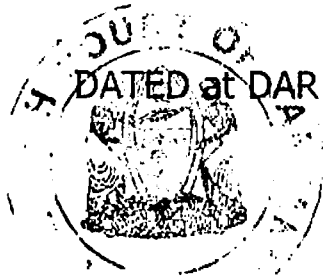
**Another**, Civil Application No.25 of 2015, CAT (unreported) the Court of Appeal emphasised that:-

“The word “may” in rule 2 of Order XX as read along with sections 2(2)(a) and (b) and 53 (1) of Cap 1 must be interpreted in such a way as imposing a mandatory obligation on the successor judge to pronounce the judgment of his predecessor. To interpret otherwise is to invest a successor judge with jurisdiction which he does not have.”

That in this case, Hon Mfanga could have pronounced the decision prepared by Hon. Batulaine which does not seem to be the case. Looking at the judgment appended to the memorandum of appeal, it is vivid that it was Mfanga RM who prepared the judgement. While I am alive to the fact that the application of the above rule might have obviously been incumbered by the circumstances that prompted the re-assignment, the fact that the judgment was prepared by a magistrate who did not hear the case leaves a lot to be desired. One would particularly wonder how did Mfanga RM assess the credibility of witness? As stated in **M/S Georges Limited v. The Honourable Attorney General and Another, (supra)** Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law and the one who sees and hears the witness is best positioned to assess their credibility.

In totality of what I have endeavored to demonstrate above, I am of the settled view the proceedings and the judgment constitute irregularities. Under the premises, I invoke my revisional powers under section 44(1) of

the Magistrate Courts CT to nullify the proceedings, judgment and decree and direct that the case file to be remitted to the trial court so that it can be placed before another magistrate with competent jurisdiction for an expedited fresh trial



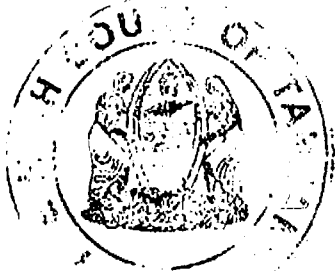
DATED at DAR ES SALAAM this 17<sup>th</sup> day of October 2019.

A handwritten signature in black ink, appearing to be 'J.L. MASABO'.

**J.L. MASABO**

**JUDGE**

Judgment delivered this 17<sup>th</sup> day of October 2019 in the Presence of Mr. Deogratus Lyimo and Mr. Mhina Michael, counsels for the Plaintiff and Mr. Stanley Mahenge, learned State Attorney for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> Defendants.



A handwritten signature in black ink, appearing to be 'J.L. MASABO'.

**J.L. MASABO**

**JUDGE**