

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CIVIL APPEAL NO 37 OF 2020

MAIRO MARWA WANSAKU _____ **APPELLANT**

VERSUS

SIMON KILES SAMWEL _____ **RESPONDENT**

*(Arising from the Decision and Orders of the resident magistrate's court of Musoma at Musoma,
Hon. Marwa in civil case no 16 of 2020 dated 16.10.2020)*

RULING

3rd & 4th December 2020

GALEBA, J.

Civil case no 16 of 2020 between the above parties was heard by two resident magistrates at the resident magistrate's court of Musoma. Hon. **R. S. Mushi SRM** recorded the testimony of **PW1, Mr. Simon Kiles Samwel** on 14.07.2020 and adjourned continuation of the hearing to 19.08.2020. On the latter date the case was not called; but it was called on 16.09.2020 and the presiding judicial officer was **Hon. Mushi SRM**, but on that day he recused himself from continuing with the hearing of the matter and assigned it to **Hon. J. T. Marwa RM** to succeed him in the trial of the matter. On the same day, that is on 16.09.2020 the matter was called

before **Hon. Marwa RM** but he adjourned it to the next day, 17.09.2020 from which day he took up the case from where **Hon. Mushi SRM** had left it and continued till judgment. When **Hon. Marwa RM** took over the proceedings, he did not record any reasons in the proceedings. The decision in this ruling is particularly on the consequences of **Hon. Marwa RM** failing to record such reasons as to why he had to take up proceedings commenced before his predecessor magistrate, **Hon. Mushi SRM**.

As it were, the matter was heard to finality but, the appellant was aggrieved by the decision that was pronounced by **Hon. Marwa RM** and he filed the present appeal. When the appeal was called for orders before this court on 03.12.2020, the appellant was represented by Mr. Motete Kihiri and Mr. Dominic Chacha both learned advocates and the respondent had able representation of Mr. Alhaji Majogoro and Mr. Paul Obwana also learned advocates. Before this court was to make any orders, I directed counsel to address the court on whether **Hon. Marwa RM's** taking over the proceedings as a successor magistrate without recording any reasons in the proceedings was lawful in view of the provisions of **Order XVIII Rule 10(1) of the Civil Procedure Code [Cap 33 RE 2019]** (the

CPC). Counsel prayed for a few hours adjournment to prepare and this court readily adjourned the matter from around 11.00 hours to 14:00 hours in order to avail parties adequate opportunity to prepare.

When the court resumed at 2.00 o'clock in the afternoon, Mr. Motete Kihiri was the first to submit in support of the position that the omission by **Hon. Marwa RM** to write the reasons for taking over the proceedings was fatal and that the same cannot be cured not even by reliance on the overriding objective principle because the matter is jurisdictional. To support his position Mr. Kihiri relied on two decisions of the Court of Appeal in **Mariam Samburo (Legal Personal Representative of the Late Ramadhani Abas) v Masoud Mohamed Joshi and 2 Others**, Civil Appeal No. 109 of 2016 and **Kinondoni Municipal Council v Q Consult Limited** Civil Appeal No. 70 of 2016 (both unreported).

In reply Mr. Alhaji Majogoro assisted by Mr. Paul Obwana learned advocates submitted that the decisions relied upon by learned counsel for the appellants are distinguishable because in the case before us the reasons were given at pages 2 to 3 of the challenged judgment and also the reasons were stated in civil revision no 8 of 2020 which was

pronounced by this court on 10.09.2020. He added that because the law requires assigning reasons for a higher court to know the reasons of the takeover by a successor magistrate then, this court ought to take judicial notice of the reasons for the takeover as contained in the ruling of this very court under the provisions of **section 59(1) of the Evidence Act [Cap 6 RE 2019] (the Evidence Act)**. Mr. Obwana added that the reasons for the takeover were stated by the predecessor magistrate, **Hon. Mushi SRM** at page 19 of the typed proceedings. He submitted further that the requirement to record reasons is a technicality which was contrary to the spirit of **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania 1977** which is promoting dispensation of substantive justice.

In rejoinder, Mr. Kihiri submitted that the fact that reasons are in the judgment is no ground because the judgment is a result of the proceedings, which are not compliant to the law, adding that jurisdiction must be asserted on the day that a successor magistrates assumes a takeover and not anytime subsequent.

With the submissions by parties, this court is now in a position to make up its mind and decided the issue and firmly show the way forward and to do so we will start with **Order XVIII Rule 10(1) of CPC** itself. It provides;

'(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.'

Looking at that provision superficially, it seems to be only permissive but there is more to that. The Court of Appeal has interpreted it to mean that a successor magistrate or judge must state the reasons as to why he has to take up proceedings started by another magistrate or judge. In the case of **Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) at pages 5-6; the Court of Appeal held that;

'The general premise 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.'

Therefore two reasons were cited in the above decision for the successor magistrate or judge to state reasons for his takeover which are ***first***, to discourage free take overs amongst judicial officers for that could affect proper assessment of the credibility of witnesses and ***secondly*** to command and maintain integrity of judicial proceedings. With the above decision, Mr. Majogoro is not right in submitting that the rationale of giving

reasons by a successor magistrate or judge is for the higher court to know the reasons rather it is because of the reasons stated in the above decision of the Court of Appeal. Mr. Obwana submitted that there cannot be a takeover without a handover when arguing that if it is the issue of giving reasons, then **Hon. Mushi SRM** gave the reasons at page 19 of the typed proceedings. With due respect that argument is logically correct but legally incorrect because a careful study of the above quoted paragraph from the case of **Georges Limited and the Attorney General**, the obligation to give reasons is placed upon the shoulders of the successor magistrate or judge, and not the predecessor magistrate or judge. In this case the judicial officer to give reasons was **Hon. Marwa RM** and not **Hon. Mushi SRM**.

The other argument was that, the requirement to record reasons by the successor magistrate before taking the proceedings was met by having the reasons in the judgment of **Hon. Marwa RM** at pages 2 to 3. That point is neither attractive nor convincing. It is not convincing because the requirement to disclose reasons of the takeover under **Order XVIII Rule 10(1) of CPC** is a jurisdictional matter and if we are to go with the

reasoning of Mr. Majogoro, it means that **Hon. Marwa RM** acquired jurisdiction at the time he was composing the judgment which means that the proceedings that were used to compose the judgment would still be irregular for want of jurisdiction, which must lead to an irregular judgment. That brief discussion terminates the argument that the reasons for the takeover may be gathered from the judgment of the successor magistrate.

Another argument was that the reasons were contained in the ruling of this court in civil revision no 8 of 2020. This ground has only sweet melody in the ears but no more. That is so because, *first* as stated above, the obligation to state the reasons is placed upon the successor magistrate or judge see **Georges Limited v. Attorney General (supra)**. This court in civil revision no 8 of 2020 was not the successor magistrate or judge, rather it was the high court. *Secondly* the order made by this court did not confer jurisdiction to any particular magistrate leave alone to **Hon. Marwa RM**. In other words, to state that this court in civil revision no 8 of 2020 conferred jurisdiction unto **Hon. Marwa RM** to take up the matter from **Hon. Mushi SRM**, will be to read too much into that ruling. The ruling at page 17 ordered thus;

'Trial of the main suit shall proceed before another magistrate.'

In the circumstances, the point that reasons were contained in the ruling of this court in revision no 8 of 2020 is therefore settled as misconceived.

There was too, an issue that the requirement is a technicality clashing with the spirit of **Article 107A (2) (e) of the Constitution**. With the greatest respect to counsel for the respondent, that is not the case. The following shall demonstrate why. In the case of **Kinondoni Municipal Council v Q Consult Limited** (supra), the Court of Appeal held at page 6 as follows;

'...in the absence of any reason on the record for the successor by a judicial officer in a partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the takeover of the partly heard case become a nullity. Without much ado, we wish to state that we wholly subscribe to that position.'

Further in **Mariam Samburo v Masoud Mohamed Joshi and others** (supra) the Court of appeal held at page 8 that;

'...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 ...cannot be cured by the overriding objective principle ... The reason behind being that, the overriding objective principle does not implore or require the Court to disregard jurisdictional matters which go to the root of the trial of the suit.'

For purposes of clarity, the above means is ***first***, that, the act of stating reasons prior to taking over proceedings by a successor magistrate or judge is the act that clothes the said incoming judicial officer with appropriate mandate or powers to try a case, called jurisdiction in law and ***secondly***, the omission or failure to state reasons by the succeeding magistrate or judge goes to the root of the trial and cannot be cured by an application of the overriding objective principle. Therefore let us respect the Constitution; that sacred Mother Law has never stated that judicial officers can preside over court matters in which they do not have jurisdiction to handle according to law.

With the above discussion, this court makes the following orders;

1. All proceedings that were recorded and orders that were passed by **Hon. Marwa RM** including the judgment and decree in civil case no 16 of 2020 between the appellant and the respondent are hereby nullified.
2. The original record in civil case no 16 of 2020 is hereby ordered to be remitted to the resident magistrate's court of Musoma for continuation of hearing from the point where **Hon. Mushi SRM** ended the hearing.
3. Upon receipt of the record, the honorable resident magistrate in charge or any judicial officer acting in his capacity may assign the matter to any magistrate for purposes of continuation of trial as stated above, except that the matter shall not be assigned to **Hon. Mushi SRM** as ordered in civil revision no. 8 of 2020.
4. This appeal is stuck out for seeking to challenge a nullity.

DATED at MUSOMA this 4th December 2020



Z. N. Galeba
JUDGE
04.12.2020