

IN THE HIGH COURT OF TANZANIA
(MWANZA DISTRICT REGISTRY)
AT MWANZA

CIVIL APPEAL NO. 09 OF 2019

*(Appeal from the Judgment of the Resident Magistrates' Court of Mwanza at Mwanza
(Ruboroga, SRM) Dated 23rd of October, 2018 in Civil Case No. 23 of 2016)*

NMB KENYATTA BRANCH APPELLANT

VERSUS

THERESIA FRANCIS SAGIDA RESPONDENT



JUDGMENT OF THE COURT

14th May, & 15th May, 2020

ISMAIL, J.

This is an appeal that arises from the decision of the Resident Magistrates' Court of Mwanza at Mwanza, which was delivered on 23rd October, 2018. The appellant emerged as a losing party. The proceedings from which this appeal emanated were instituted by the respondent for recovery of the sum of TZS. 7,056,900.00 that was allegedly fleeced from her bank account, held with the appellant. This sum was allegedly deposited into the respondent's account on multiple occasions, only to find out, subsequently, that the same had been siphoned out without the

respondent's knowledge and/or consent. Enraged by the appellant's inaction, the respondent instituted proceedings which culminated in the decision which is the subject of the instant appeal. The trial court ordered a refund of the entire sum plus interest thereon, at the rate of 14%, from the date on which the cause of action arose to the date of full payment.

This decision did not amuse the appellant. He instituted this appeal, impugning the trial court's decision on a trio of grounds of appeal as follows:

- 1. That the trial Magistrate erred in law and facts by disregarding the evidence by the appellant's witness regarding registration of NMB Mobile services.*
- 2. That the trial Magistrate erred in law and facts by not taking into account the plaintiff's admission to have lost her ATM card prior to the alleged unlawful withdrawal of funds from her account.*
- 3. That the trial Magistrate erred in law for not assigning reasons for the re-assignment of the court case file from the previously assigned magistrate.*

When the matter was called for hearing on 14th May, 2020, Mr. Vedastus Laurean, the learned counsel who represented the respondent conceded to ground three of the appeal. He attested to the fact that succession of the matter from Hon. S.T. Kiama, RM., who presided over and heard the plaintiff's case, to Hon. Y. Ruboroga, SRM., who took over,

heard the defence case and finally disposed of the matter, was fatally irregular. He prayed that evidence recorded by the successor magistrate be expunged from the record and have the matter remitted back to the trial court to cure the irregularity. The learned counsel prayed that there should be no order as to costs, noting that the anomaly was entirely of the trial court's making.

Ms. Marina Mashimba, learned advocate whose services were enlisted by the appellant, was amenable to the respondent's prayer. She, too, implored this Court to right the wrong committed by the trial court by vitiating the portion of the irregular testimony and order the trial court to conduct a re-trial.

As unanimously contended by the counsel for the parties, at stake are the trial proceedings which run from 30th August, 2018, when Hon. Ruboroga took over the conduct of the matter, to 23rd October, 2018, when he handed down the decision, the subject of the instant disputation by the parties. The counsel's contention is that the proceedings are anomalous.

Ascertainment of the correctness or otherwise of what the learned counsel contend took me to the heart of the trial proceedings. My attention was first drawn to page 32 of the typed proceedings at which the plaintiff's

case opened, before Hon. S.T. Kiama, RM. This proceeded until 25th March, 2018, when the plaintiff's case was closed. After this, the matter changed hands briefly, until 30th August, 2018, when Hon. Ruboroga took over and presided over the defence case, held on 25th September, 2018. Significantly, in none of these two dates did he inform the parties of succession and reasons thereof. The law recognizes that in some situations, involvement of judicial officers in the cases may be brought to a premature end, for this or that reason, and be succeeded by another judicial officer, a judge or a magistrate. When that happens, the obligation of the successor judge or magistrate is to put on record the reasons for the takeover of the partly heard case. This imperative requirement is enshrined in Order XVIII Rule 10 (1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (CPC). For a better appreciation of the import brought about by the said provision, it behooves me to reproduce the substance of it as hereunder:

*"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 import of this requirement has been emphasized in many a decision of this Court and the Court of Appeal. In ***Mariam Sumbiro (Legal Personal Representative of the Late Ramadhani Abas v. Masoud Mohamed Joshi & 2 Others***, CAT-Civil Appeal No. 109 of 2016 (DSM-unreported), the Court of Appeal of Tanzania had the following observation:

"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 reason behind that, the overriding objective does not implore or require the Court to disregard jurisdictional matters which go to the root of the trial of the suit. For it is upon assignment when a judge or magistrate is clothed with authority to entertain a particular matter."

The superior bench's reasoning in this matter was inspired by the decision in ***National Microfinance Bank v. Augustino Wesaka***

Gidimara T/A Builder Paints & General Enterprises, CAT-Civil Application No.74 of 2016 (unreported), wherein its own holding in **M/S Georges Limited v. The Honourable Attorney General and Another**, CAT-Civil Appeal No. 29 of 2016 (unreported) was quoted with approval. It was held in the latter case as follows:

"The general premise that can be from the above provision is that once the trial 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 the 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 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."
[Emphasis is supplied].

See also ***Fahari Bottlers Ltd and Another v. The Registrar of Companies & Another***, CAT-Civil Revision No. 1 of 1999; and ***Kajoka Masanga v. Attorney General and Another***, CAT-Civil Appeal No. 153 of 2016 (all unreported).

The proceedings reveal, quite clearly, that Ruboroga, SRM., who staged a late entry into the proceedings as a successor magistrate did not put any semblance of a remark as to why this partly heard matter fell into his hands from Hon. Kiama, RM., who handled a big chunk of the proceedings. This implies that what constituted the reason for the takeover is a matter which was kept in the successor magistrate's breasts. The disdainful conduct demonstrated by the successor magistrate in the trial proceedings - abhorrent in all respects - defied the fact that assignment of reasons informs the parties as to why his predecessor could not take the trial proceedings to their tail end. True as well, is the fact that such requirement serves to weed out unscrupulous behaviours of changing magistrates at will, and for sinister or selfish motives. These behaviours, if not nipped in the bud, have the potential of defeating the Court's intention and duty of ensuring that the orderly conduct of the proceedings is conserved, and proceedings are insulated from any possible meddling by judicial officers who are not assigned the responsibility of handling

particular proceedings (See: ***Priscus Kimaro v. Republic***, CAT-Criminal Appeal No. 301 of 2013 (unreported)). As accentuated by this Court in ***Twaribu Amri @ Mohamed v. Republic***, HC-Criminal Appeal No. 119 of 2019 (Mwanza –unreported), assignment of reasons *"is a rule against the unscrupulous; a rule against anarchy in the administration of justice. It is a way of ensuring integrity of the judicial proceedings."*

The rallying call in all of the cited decisions is that where such flaws occur, the appropriate course of action is to have the discrepant proceedings gotten out of the way by declaring the flawed part a nullity, and order a retrial. It is the path on which I am also prepared to walk. I allow the appeal, order nullification of the flawed part of the proceedings and the ensuing judgment. In consequence thereof, I order that the matter be remitted to the trial court for re-trial to cure the anomaly.

It is so ordered.

DATED at **MWANZA** this 15th day of May, 2020.




M.K. ISMAIL
JUDGE

Date: 15/05/2020

Coram: Hon. M. K. Ismail, J

Appellant: Present online Mobile No. 0755 838 567

Respondent: Absent

B/C: B. France

Court:

In view of the COVID 19 pandemic, and pursuant to the order (if any) the appellant is present online, the appeal is heard by way of Audio Teleconference.

Sgd: M. K. Ismail
JUDGE
15.05.2020

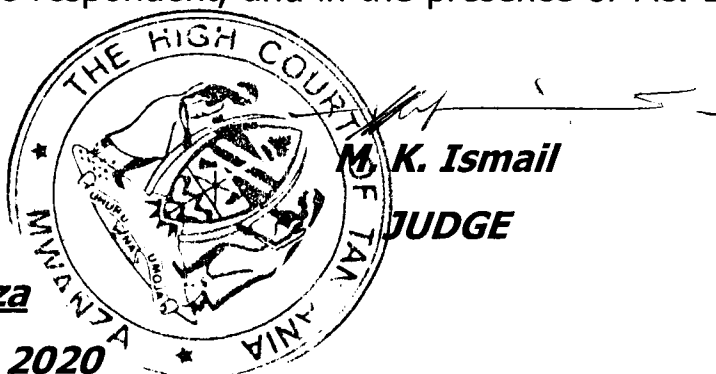
Ms. Marina Mashimba:

My Lord, I appear for the appellant and hold Mr. Vedasto Laurean's brief for the respondent. The matter is for judgment and we are ready.

Sgd: M. K. Ismail
JUDGE
15.05.2020

Court:

Judgment is delivered in chamber in virtual attendance by Ms. Marina Mashimba, learned Counsel for the appellant and holding Mr. Laurian's brief for the respondent, and in the presence of Ms. Beatrice B/C, this 15th May, 2020.



At Mwanza

15th May, 2020