

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

CIVIL APPEAL NO. 02 OF 2022

(Arising from the decision of the Bunda District Court in Civil Case No.21 2020)

MASINDA NGÁRITA GANJERU APPELLANT

VERSUS

1. ERNEST MWITA NYAMHANGA

2. EVARIST THOMAS MADAHA



..... RESPONDENTS

JUDGMENT

8th March 2023

F.H. MAHIMBALI, J.:

The appellant has been aggrieved by the decision of the trial court (Bunda District Court), which awarded him general damages of 5,000,000/= out of the claimed amount of 70,000,000/=. Thus, the basis of this appeal, mainly is contesting that the award was minimal.

During the hearing of this appeal, the appellant appeared in person whereas the respondents were represented by Emmanuel Paul, learned advocate.

While reading the trial court's proceedings, I noticed two apparent errors: firstly, the composed judgment being authored by Hon. Kamuntu

Resident Magistrate, (Successor Magistrate) instead of Hon. Manento, also Resident Magistrate. There are no reasons stated by the successor magistrate. Secondly, that the first trial magistrate did not append his signature after recording the evidence of PW1.

With these pertinent legal issues which if established vitiate proceedings, I asked the parties to address the Court whether the irregularities pointed out contravened **Order XVIII Rule 5 and Order XVIII, Rule 10 (1)** of the Civil Procedure Code, Cap 33 [R.E 2019] (the CPC) and the effect of the said irregularities.

On his part, Mr. Emmanuel Paul, learned counsel for the respondent conceded that the proceedings are irregular as per law and thus nullity. He prayed that this Court to nullify the proceeding and quash the decision thereof.

On his part, the appellant had nothing material to address. He just submitted that he has nothing to submit on this as he is not learned in law. However, he let this Court to take the right course as per law.

Considering the trial court's records and submission made by both parties, I am of the view that the issues on authenticity of the evidence adduced by PW1 and the successor magistrate taking up the matter without assigning reasons are sufficient to dispose off this appeal.

I wish to state at the outset that, the law is settled regarding the succession of judges and magistrates. It gives them power to deal with the evidence taken before another judge or magistrate where the predecessor judge or magistrate is prevented by reason of death, transfer or other cause from concluding the trial of a suit. For clarity, Order XVIII rule 10(1) of the CPC provides 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."***[Emphasis added]**.

On this stand, Court of Appeal's decisions in **National Microfinance Bank v. Augustino Wesaka Gidimara T/A Builders Paints & General Enterprises**, Civil Appeal No. 74 of 2016 (unreported), the Court quoted with approval its decision in **M/S Georges Limited v. The Honourable Attorney General and Another**, Civil Appeal No. 29 of 2016 (unreported) at pages 5-6; where it was held as follows with regard to the above provision:

"The general premise that can be 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 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."[Emphasis added].

A similar view was also considered in **Fahari Bottlers Ltd and Another v. the Registrar of Companies and Another**, Civil Revision No. I of 1999 and **Kajoka Masanga v. Attorney General and Another**, Civil Appeal No. 153 of 2016 (both unreported). Therefore, in the case at hand, it was unjustifiable by Hon. Kamuntu, learned Resident Magistrate to take over the matter and proceed with it without assigning reasons. He must have assigned reasons for doing so, if Hon. S.A Manento was legally prevented from doing so.

As regards to the second legal anomaly, the first trial magistrate recorded the evidence of PW1 without appending his signature at the

end of PW1's testimony. Now, looking at the CPC, the procedure for recording of evidence is provided for under **Order XVIII, R. 5** which is reproduced as hereunder:

*"The evidence of each witness shall be taken down in writing, in the language of the court, by or in the presence and under the personal direction and superintendence of the judge or magistrate, not ordinarily in the form of question and answer, but in that of a narrative and **the judge or magistrate shall sign the same.**" [Emphasis added].*

The said provision makes clear that, the evidence of each witness must be taken down in writing by or under the personal direction of the judge or magistrate in a narrative and the judge or magistrate is required to sign after the evidence of each witness. The provision is couched in mandatory forms. Thus, it must be complied with.

The rationale of requiring the trial judge or magistrate to sign after the evidence of each witness is to authenticate the recorded evidence. This position was underscored in **Yohana Musa Makubi vs R**, Criminal Appeal No. 556 of 2015 when the Court of Appeal held that: -

"We are thus, satisfied that, failure by the Judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted."

From the above position mentioned, failure by the trial judge or magistrate to append his/her signature after recording the evidence is fatal to the proceedings. See the case of **Joseph Elisha vs Tanzania Postal Bank**, Civil Appeal No. 157 of 2019 CAT at Iringa.

Reverting to the case at hand, it is evidenced through the trial court's proceedings that the learned trial magistrate (S.A Manento) did not append his/her signature after recording the evidence of PW1. Therefore, in the light of the above decision, the authenticity of the evidence adduced during the trial is at issue. The omission by the trial magistrate to append his signature after recording the evidence of the witness is an incurable irregularity. Therefore, the proceedings of the trial court dated 16th June 2021 when PW1 adduced his evidence is a nullity. It also affected the judgment and decree thereon.

For the foregoing reasons, I shall not dwell into determining the grounds of appeal.

In the event, I am inclined to exercise the revisionary powers vested in this Court and under section 44 (1) b of the Magistrate Courts Act, Cap 11 R. E. 2022 hereby do nullify all the proceedings of the trial court starting from 16th June 2021, quash and set aside the judgment and decree thereon. Consequently, I order a retrial of the case starting from the proceedings prior to the recording of evidence of PW1 on 16th

June 2021. For the interest of justice, it is ordered the matter be expeditiously heard before another magistrate with jurisdiction. Considering the issue that dispose the case was raised by the Court ***suo moto***, I make no order as to costs.

DATED at MUSOMA this 8th day of March 2023.



F.H. Mahimbali
JUDGE

Court: Judgment delivered 08th day of March, 2023 in the presence of the Appellant, Ms. Emmanuel Paul, advocate for the respondent and Mr. Kelvin Rutalemwa, RMA.

F. H. Mahimbali

Judge