

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL NO. 15 OF 2022

(Appeal from the Judgment and Decree of the District Court of Nyamagana at Mwanza
in Civil Case No. 14 of 2006)

BETWEEN

MANTRAC TANZANIA LIMITED APPELLANT

VERSUS

RAYMOND COSTA RESPONDENT

JUDGMENT

24/2/2023 & 12/5/2023

ROBERT, J:-

The appellant was sued successfully by the respondent in the District Court of Nyamagana (the trial Court) in a tortious claim for TZS 94,000,000/= being general damages for malicious prosecution, malicious imprisonment, lowering of reputation and TZS 4,000,000/= being special damages for costs incurred to attend a criminal case in Mwanza from Dar es salaam. The trial Court awarded the respondent TZS 98,000,000/= as general and special damages as well as interest and costs of the suit. Aggrieved, the appellant preferred this appeal challenging the whole decision

of the trial Court armed with nine grounds of appeal which I take the liberty to reproduce as follows:-

- 1. The Learned trial Magistrate erred in law and fact in holding that the Respondent was maliciously prosecuted by the Appellant;*
- 2. The learned trial Magistrate erred in law and fact in holding that the dismissal of the charges against the respondent by the Nyamagana District Court meant that there was no reasonable and probable cause to justify the respondent prosecution.*
- 3. The learned trial Magistrate erred in law and fact in disregarding the evidence of DW2 to the effect that John Welsh when he reported the issue of theft only suspected Christopher Livingstone and Shadrack who were employees of the Appellant.*
- 4. The learned trial Magistrate erred in law and fact by basing his judgment on conjecture, extraneous matters, and speculations.*
In particular, the learned Magistrate erred:-
 - (a) In holding that the prosecution of the respondent was done due to business jealousy, Mantrac were not happy to see the Respondent dealing with caterpillar parts from other source. The learned trial Magistrate erred in failing to note that there was no evidence to that effect.*
 - (b) In holding that the respondent was doing business and owned a company styled Smart Investment Ltd and that obviously meant that he had customers he dealt with and his arrest led them to ask so many questions which in turn*

meant that the act was injurious to the Plaintiff and damaged his character. The learned trial Magistrate erred in failing to note that there was no evidence from any customer to support his findings.

(c) In holding that the Respondent's reputation was lowered without proof.

- 5. The learned trial magistrate erred in law and fact in basing his findings on the strength of evidence in criminal case beyond the Respondent's acquittal. In doing so, the Learned Trial Magistrate failed to note that neither conviction nor acquittal in a criminal case binds a trial court in a civil suit and vice versa on similar allegations.*
- 6. The Learned Trial Magistrate erred in law and fact in holding that the respondent was falsely imprisoned.*
- 7. The Learned Trial Magistrate erred in law and fact in holding that the Respondent is entitled to TZS 4,000,000/= as special damages without proof.*
- 8. The Learned Trial Magistrate erred in law and facts in taking into consideration the loss allegedly suffered by Smart Investment Limited in determining damages to be awarded to the Respondent. By doing so the Learned Trial Magistrate erred by considering irrelevant factors in assessing general damages.*

9. The Learned Trial Magistrate erred in law and fact by awarding TZS 94,000,000/= as general damages. In doing so the Learned Magistrate erred in law by granting exorbitant damages.

The appeal was disposed of by way of written submissions. Appellant's written submissions were prepared and filed by Messrs. Gaspar Nyika and Libent Rwazo, learned counsel for the appellant whereas Mr. Audax Kahendaguza Vedasto, learned counsel prepared and filed respondent's submissions.

Prior to the submissions on the grounds of appeal, counsel for the appellant wished to bring to the attention of the Court a new issue which they discovered in the proceedings of the trial Court. They submitted that the case was tried by more than one Magistrate and the successor Magistrate (Hon. Shaidi, SRM) did not record reasons for taking over the matter from his predecessor (Hon. Mhina, RM). They argued that, this act vitiates the whole proceedings of the matter. Hence, they considered this to be an illegality and prayed for leave of the Court to raise it as the 10th ground of appeal to the effect that, the learned successor Magistrate (Hon. Shaidi, SRM) erred in law for not recording reasons for taking over the matter from (Hon. Mhina, RM). To support this ground, they referred the Court to the

case of **John Barnabas Machera vs North Mara Gold Mine Limited**, Civil Appeal No. 204 of 2019, CAT at Mwanza, (unreported) at page 5 in which the Court of Appeal faced a similar ground of appeal.

They maintained that although Order XVIII, rule 10(1) of the Civil Procedure Code, Cap. 33 R.E. 2019 allows a successor magistrate, in the event of death, transfer or other cause of the predecessor magistrate, to proceed with the suit from the stage at which his predecessor left it, it is a trite law that a successor magistrate who takes over the partly heard case must advance the reasons for taking over. They maintained further that, when the matter is reassigned without assigning reasons for so doing the successor magistrate who takes over lacks jurisdiction to try the matter. To strengthen their argument they referred the Court to the case of **Mariam Samburo (Legal Personal Representative of the late Ramadhan Abas) versus Masoud Mohamed Joshi & 2 others**, Civil Appeal No. 109 of 2016, CAT at Dar es salaam (unreported) at page 8 where the Court held that:

"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 the 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. Mtenga, cannot be cured by overriding objective principle suggested by Dr. Lamwai”

The learned counsel further referred this Court to page 10 of that decision where the Court of Appeal held that:

“Therefore, in the appeal at hand, we find and hold that, the takeover of the partly heard case by the successor judges mentioned above was highly irregular as there were no reason for succession advanced on record of appeal. We think that the circumstances of the suit which was before the High Court, reasons for successor judges were important especially the first who took over. In the circumstances, we are settled that, failure to by the said successor judge to assign reasons for the reassignment made them to lack jurisdiction to take over the trial of the suit and therefore, the entire proceedings as well as the judgment and decree are nullity.”

The learned Counsel for the appellant reminded the Court that, in the cited case of **MARIAMU SAMBURO** (supra), the Court of Appeal cited with approval the case of **M/S Georges Limited vs The Honorable Attorney General and another**, Civil Appeal No. 29 of 2016; **Fahari Bottlers Limited and another vs Registrar of Companies and another**, civil revision No. 1 of 1999; **Kajoka Masanga vs Attorney General and another**, Civil Appeal No. 153 of 2016; **Modorosi village council and two**

others vs Tanzania Breweries Limited and Four Others, Civil Appeal No. 66 of 2017 and **Njake Enterprise vs Blue Rock Limited and another**, Civil Appeal No. 69 of 2017.

Based on their submissions on this issue, the learned counsel invited the Court to make a finding that the successor Magistrate, Hon. Shaidi, SRM erred in law in failing to assign the reasons for taking over the trial of the case from Hon. Mhina, RM when he took over the matter on 7/2/2008 and nullify the trial Court proceedings and set aside the judgment and decree.

The appellant's submissions on a newly proposed ground of appeal was sturdily opposed by the Counsel for the respondent on a number of reasons. First, he argued that the issue of succession of magistrates was not raised by the counsel for the appellant who participated in the trial from the first appearance on 6/4/2006 to the date of judgment on 10/8/2008 nor was it raised in the final submissions. He maintained that the jurisdiction of this Court at appellate level does not extend to fresh matters not raised in the trial Court. To buttress his argument he referred the Court to the Court of Appeal decisions in the cases of **Sebastian Kinyondo vs Dr. Medard M. Mutungi** (1999) TLR 479 at page 486; **Ibrahim Yusuph Kalist and 3 others vs Republic** (Criminal appeal No. 204 of 2011 and **The Registered**

Trustees of Social Action Trust Fund vs Happy Sausages Ltd (2002)

TLR 285.

Secondly, he submitted that the proposed ground is not in the Memorandum of appeal and it is out of time. He argued that Order XXXIX Rule 1(2) of the Civil Procedure Code, Cap. 33 R.E. 2019 requires the ground of objection against a trial court's decision to be set out in the Memorandum of appeal. He argued that submissions are intended to substantiate the grounds raised in the Memorandum of appeal by conducting hearing of the appeal under Order XXXIX Rule 16 of the CPC not bringing an appeal.

Further to that, he maintained that, even if it were proper to bring this ground at the submissions stage, it would still fail for the reason that it was brought out of the prescribed time. He argued that grounds of appeal are statutorily required to be contained in the Memorandum of Appeal under Order XXXIX Rule 1 of the CPC and the Memorandum of Appeal is statutorily required to be filed within 90 days of the decision being appealed against. In the absence of an order extending time any ground coming after the 90 days is out of time and deserves to be dismissed under section 3 of the Law of Limitations Act, Cap. 89 R.E. 2019.

He maintained that, the decision appealed against was passed in 2008, although the Court of Appeal extended time for its filing on 25/2/2022 in Civil Appeal No. 90 of 2018, counting from that time, the 90 days period expired on 24/5/2022 hence the new ground proposed in the submissions is filed out of time and should be dismissed. He referred the Court to the case of **Stephen Masato Wasira vs Joseph Warioba** (1999) TLR 334 where the Court of Appeal held that where the matter is time barred the only power available to the Court is to dismiss it not to strike it out.

Thirdly, he submitted that it is in the interest of justice that there be finality in litigation. Thus, a right not claimed within time is taken to be a right waived. He faulted the appellant for asking the Court for the first time to reflect its memory back to what transpired 16 or 14 years ago when the errors in the succession of magistrates was alleged to have been committed and make orders curing the same today. He cited the case of **Barclays vs Physician Hussein**, Civil Appeal No. 19 of 2016 where he argued that the Court of Appeal invoked the principle of *vigilantibus non dormientibus aequitas subvenit* and *interest rei publicae ut sit finis litium* to deny leave of a person who had missed the procedure to come back to correct the same a longtime after he messed up, saying that would defeat the purpose of

having the law which sets limitation of time for actions to be instituted and pursued.

He submitted further that, the remedy is to quash the proceedings from when the error of changing magistrates without recording a reason was committed and to give the Court an opportunity to record the cure, who can be expected to know what happened in 2006 after 16 years, he asked. Suppose a retrial is ordered and the reason for succession is correctly traced which witness can assure the Court to have a realistic memory as to what happened in 2004 which is 18 years back when the incidence in question happened, he kept asking. He further submitted that, one can see that the rule which was established as a rule of justice is resorted to for injustice. As justice delayed is justice denied.

He maintained that, this Common law rule is enjoying statutory recognition in Tanzania even on such otherwise indispensable matters like jurisdiction of courts. Regarding failure to object to the territorial jurisdiction of a court, section 19 of the CPC embraces this rule in the words:-

19. No objection as to the place of suing shall be allowed by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity.

Fourthly, he submitted that, the succession from Ndunguru, RM to Mhina, RM is misconceived. He argued that, since Nduguru, RM did not take part in the hearing process, it is wrong to connect his succession with any rule regarding what is to be done when presiding magistrates change in the case. He submitted that, it is only attending a case at a hearing stage that matters. He cited the case of **Ecobank vs Future Trading Co. Ltd**, Civil Case No. 82 of 2019 to support his argument.

Fifthly, he submitted that, a change from Mhina, RM to Shaidi, SRM is misconceived as well. He made reference to the case of **Diamond Motors Ltd vs K-Group**, Civil Appeal No. 50 of 2019 where the CAT considered all the authorities cited and other authorities not cited by the appellant and cemented the position that, the rule that the Court must record a reason of change is not absolute. There is no statutory requirement that there must be certain words in the record stating the reason for change. The final Court stated that the tests are whether the parties were not aware of the succession of Judges and whether the parties are prejudiced with the changes. At page 19 of the Judgment in that case where the High Court had not recorded the reason of succession, the Court of Appeal observed:-

"unlike in the cited cases, the parties in the first appeal were all aware as to why successor judge was reassigned with the case. They only sought the direction/a way forward from the successor judge. Therefore, the parties were not prejudiced in any way"

He argued that, in the present case the proceedings of 3/3/2008 at page 73, the appellant who is raising the issue of succession of magistrates was aware of the succession of the magistrates from Mhina, RM to Shahidi, RM, there is nothing to suggest that either the appellant did not know why the former magistrate changed or that it was prejudiced by the change. He maintained that the appellant has raised the matter because he lost the case. The appellant appearing through Malongo, advocate stated that:

"The case was before Hon. Mhina, no possibility the plaintiff is not aware that you took up the case. I pray for next 7/4/2004."

In a brief rejoinder on this issue, counsel for the appellant reiterated that the successor magistrate failed to assign the reasons for taking over the trial of the case from Mhina RM when he took over the matter on 7/2/2008.

On the argument raised that the point raised is time barred as it was not raised with other grounds of appeal, he argued that the appellant sought leave of the Court to raise an additional ground under Order XXXIX R.2 of the CPC R.E. 2019. The learned counsel maintained that, since the

respondent has already responded to the additional ground, the Court can decide the ground as required under Order XXXIX, Rule 2 supra.

He maintained further that, the respondent's submissions are misconceived since it is settled principle that the point of law in any matter can be raised at any stage even when the matter is at the Court of Appeal. It can also be raised suo motto by the Court itself. He made reference to the Court of Appeal decision in the case of **R.S.A Limited vs Hanspaul Automechs Limited & another**, Civil Appeal No. 179 of 2016 (unreported) at page 12.

He submitted further that, since the respondent has submitted on the merit of the additional ground and cited the case of **Ecobank Tanzania Limited and Diamond Motors Limited** (supra) which is also the same as the position established in the case of **John Barnabas Machera vs North Mara Gold Mine Limited** (supra) cited in submissions in chief. He argued that if the predecessor judge/magistrate has already heard the testimony the reason for taking over must be given and parties must be asked if they are willing to continue where the predecessor stopped. In the Ecobank case the point of law challenging the successor judge taking over without assigning reason was dismissed on reason that the successor judge did not

hear any issue framed by his predecessor judge although at the time of taking over the issues were already drafted by the predecessor judge, the successor judge determined the issues which were amended before her and the case was heard in totality by the successor judge.

In the case before this Court, they argued, while Hon. Mhina, RM heard the testimony of PW1, PW2 and DW1, Hon shaidi, SRM heard the testimony of DW2 and composed the judgment. Therefore the predecessor magistrate had already heard most of the testimony of the witnesses.

In the **Diamond Motors case** cited by the Respondent, the successor judge opted to proceed where the case had reached and the same was accepted by the parties (pg 18 of the judgment). The Court made a finding that parties were not prejudiced in the circumstances. In the present case the record is silent on what the successor magistrate decided to do. The fact that Mr. Malongo appeared and told the Court that the case was before Mhina as submitted by the Respondent does not show that the parties were aware of the reason for the transfer and does not signify their acceptance if any. Thus, the two cases are distinguishable.

He thus invited the Court to find that a point of law can be raised at any time and that failure to record reasons for taking over by the successor magistrate vitiated the proceedings and the appellants were prejudiced since the successor magistrate failed to analyze evidence which was adduced before his predecessor and connect with the evidence adduced before him.

In light of the conflicting submissions made by the parties in relation to this matter, it is apparent that this is a relevant issue that requires resolution prior to any consideration of other grounds.

In general, appellate courts are unlikely to consider issues that were not raised by the parties in the lower courts or in the appeal. This is because the parties have the responsibility to raise all relevant issues and arguments in their initial filings or during the proceedings and failing to do so may result in waiver of those issues. However, it is a settled law that an issue raised on a point of law challenging jurisdiction of the Court can be raised at any stage since the jurisdiction to determine any matter is a creature of statute (See **R.S.A. Limited vs Hanspaul Automechs Limited & another**, (supra).

Therefore, since failure of a successor magistrate to record reasons for taking over a matter from their predecessor is considered a jurisdictional

issue, then the lack of such recording may be raised by either party or by the Court *sua sponte* if it becomes aware of such a potential jurisdictional defect at any stage of the case.

Where an appeal is filed on time or after obtaining an order of the court to file an appeal out of time, the fact that a prayer for additional ground of appeal is made after the prescribed time of appeal do not arise. What is required is for the appellant to seek leave of the court to pursue the additional ground of appeal under Order XXXIX, Rule 2 of the CPC. That said, I grant leave for the appellant to pursue the additional ground of appeal. As prayed, I will refer to the additional ground of appeal as ground no. 10 which reads as follows:

10. That, the learned Successor Magistrate (Hon. Shaidi, SRM) erred in law for not recording reasons for taking over the matter from (Hon. Mhina, RM).

Since the 10th ground raises a jurisdictional issue, I will proceed to address the matter raised brought up in this particular ground before moving on to the other grounds, if such need arises.

The concern raised by the counsel for the appellant in this ground is that, it was wrong for the successor Magistrate to take up the conduct of

this matter from his predecessor without assigning reasons for so doing contrary to Order XVIII Rule 10(1) of the CPC, Cap. 33 R.E. 2019.


From the record of the trial Court, it appears that issues for determination of the case were framed on 25/4/2007 before Hon. Mhina, RM who after framing of issues proceeded to hear the testimony of PW1, PW2 and DW1 until 7/2/2008. Thereafter, Hon. H.A. Shaidi, SRM took over from 3/3/2008 without recording any reasons for taking over and proceeded to hear the testimony of DW2 and compose the judgment. I find the proceedings of the Successor Magistrate to be irregular considering the stage the trial had reached before the takeover. In the circumstances, the successor Magistrate's failure to assign reasons for taking over deprived him of the jurisdiction to take over the trial (See **Mariam Samburo** (supra)). This renders the proceedings of the Successor Magistrate and the entire judgment a nullity.

That said, I allow this appeal, invoke the revisionary powers vested in this Court and nullify the proceedings of the trial Court from 3/3/2008 where the successor Magistrate took over the conduct of the case and quash the judgment and orders thereof. Since this ground is sufficient to dispose of this appeal, I shall not determine the remaining grounds. As a consequence,

I order that the case file be remitted back to the trial Court before another Magistrate to proceed with the trial of the matter from where the predecessor Magistrate ended. I direct that hearing be expedited considering that the matter has been pending for almost two decades now. I make no order as to costs.

It is so ordered.




K.N. ROBERT
JUDGE
12/5/2023