IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 97 OF 2016

JOSEPH WASONGA OTIENO.....APPELLANT

VERSUS

ASSUMPTER NSHUNJU MSHAMA.....RESPONDENT

((Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Songoro, J.)

dated the 25th day of June, 2015
in
Commercial Case No. 87 of 2012

JUDGMENT OF THE COURT

17th August, & 24th October, 2017

MUGASHA, J.A.:

The respondent **ASSUMPTER NSHUNJU MSHAMA** instituted a summary suit against the appellant **JOSEPH WASONGA OTIENO** claiming among other things, repayment of an outstanding loan of Tshs. 210,000,000/=. It was alleged that, the loan was granted to the appellant on 11.1.2011 and attracted interest of Tshs. 10,000,000/= per month. The said loan was to be repaid within six months from the date of its grant.

With leave of the court, the appellant was allowed to defend the suit by filing a written statement of defence. In the WSD, he only admitted the claim of Tshs. 20,000,000/= and opposed the rest of the claim. Following an unsuccessful mediation, the suit proceeded to a full trial and it was concluded in favour of the respondent. The High Court ordered the appellant to repay the respondent a sum of Tshs. 149,222,000/= as part of the outstanding loan; Tshs. 5,000,000/= as general damages, interest of 4% per annum on the decretal sum from the date of judgment till final payment plus costs of the suit.

During trial, the appellant himself testified as DW1 on 13/3/2014, before Nchimbi, J. (the predecessor judge). Also, on 17/7/2014 **ANNA WADI JOSEPH** testified as DW2 before the predecessor judge. Subsequently, the hearing was for one reason or the other adjourned and the predecessor judge did not complete the trial. On 24/1/2015, the Deputy Registrar made an order to the effect that, since the trial judge was transferred, the matter would be assigned to another judge. However, no re-assignment was done and on 4/3/2015 the case file landed before

Songoro, J. (successor Judge). Thereafter, what ensued is reflected at pages 360 to 363 of the record of appeal as follows:

> *"**4/3/2015***
>
> ***Coram**: Honourable Songoro, Judge*
>
> ***For the Plaintiff**: Mr. Mosha holding brief of RK Rweyongeza, Advocate*
>
> ***For the Defendant**: Gabriel Mnyele, Advocate*
>
> ***CC**: Kanyochole SH*
>
> ***Mr. Mosha holding brief RK Rweyongeza**: My Lord in this case right to begin the case was shifted to defendant; because defendant said she had already paid the money. Now it is the turn of the plaintiff to state her case we are ready for the hearing of the plaintiffs' case.*
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> ***Sgd. Songoro***
>
> ***JUDGE***
>
> ***4/3/2015***
>
> ***MR. Mnyele:** I have objection.*
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> ***Court:** Hearing to continuation 18/3/2015*
>
> ***Sgd. Songoro***
>
> ***JUDGE***
>
> ***4/3/2015***
>
> ***18/3/2015***

Coram: Honourable Songoro, Judge

For the Plaintiff: *Mr. Mosha holding brief of RK Rweyongeza, Advocate who is being assisted by Jackline.*

For the Defendant*: Mr. Marando, Advocate.*

Mr. Mosha, Advocate*: My Lord, Mr. Rweyongeza Advocate is in the High Court appearing before Hon. Mugasha Judge. He is praying for adjournment because Jackline is voiceless*

Sgd. Songoro

JUDGE

18/3/2015

Court*: Hearing to be at 11:00am parties are absent all.*

Sgd. Songoro

JUDGE

HEARING CONTINUES*.*

Mr. Marando Advocate*: My Lord, I appear for defendant, Mr. Rweyongeza Advocate, Ms. Jacline Rweyongeza and Mosha. The case is coming for the plaintiff.*

Mr. Rweyongeza, Advocate: My Lord, we have two witnesses

Sgd. Songoro

JUDGE

18/3/2015."

The successor Judge proceeded to hear the plaintiff/respondent's case and composed the judgment which was delivered on 24/6/2015.

Aggrieved, on 5th July, 2015 the appellant lodged a notice of appeal to challenge that judgment and its resulting decree, hence the present appeal. The appellant filed a memorandum of appeal with seven grounds of appeal. For reasons which will become apparent later, we have deemed it necessary not to reproduce the grounds of complaint.

At the hearing, Mr. Dismas Rweyongeza represented the appellant. Mr. Richard Rweyongeza and Mr. Elisaria Mosha represented the respondent. Having heard the appeal, in the course of our deliberations we were inclined to consider the propriety of the trial which was conducted by two judges. As such, we decided to reconvene the parties on 24/8/2017 to address us as to whether or not order XVIII rule 10 sub-rules 1 of the Civil Procedure Code [Cap 33 RE. 2002] was complied with. With leave of the Court parties were allowed to bring their arguments by way of written submissions.

It was submitted for the appellant that, since the successor judge took over the trial after the appellant had already testified before the predecessor judge, without assigning reasons thereto, that was in violation of Order XVIII rule 10 (1) of the Civil Procedure Code. Besides, the learned

counsel added, the successor judge did not make any such reflection in his judgment. As such, the appellant's counsel urged us to quash and set aside the impugned decision and order a trial de novo. The learned counsel however did not cite any case law to support this proposition.

On the other hand, Mr. Rweyongeza learned counsel for the respondent pointed out to be aware of the decisions of the Court on consequences of non-compliance with Order XVII rule 10 (1) where the trial is presided over by more than one judge. He cited to us the cases of **NATIONAL MICRO FINANCE BANK VS AGUSTINO WESAKA GADIMARA t/a BUILDERS POINTS AND GENERAL ENTERPRISES,** Civil Appeal No. 74 of 2016, **GEORGES CENTRE LIMITED VS THE HONOURABLE ATTORNEY GENERAL AND ANOTHER,** Civil Appeal No. 29 of 2016, and **KAJOKA MASANGA VS. THE ATTORNEY AND PRINCIPAL SECRETARY ESTABLISHMENT**, Civil Appeal No. 153 of 2016 (all unreported). However, he urged us to depart from the previous decisions. The learned counsel argued, in the previous decisions the Court did not consider Rule 117 (2) of the Rules, 2009 which restricts the Court to order the retrial in circumstances where the improper admission of the evidence has occasioned a substantial wrong

or miscarriage of justice affecting the parties on matters in controversy and the Court may give final judgment on the remaining aspects.

Therefore, the learned counsel argued that, the Court should be guided by Rule 117(2) when addressing the non-compliance with Order XVIII rule 10 (1) of the CPC which according to him essentially relates to the evidence taken by the predecessor judge. He further argued, under Order XVII rule 10(1) of the CPC the judge or magistrate enjoys wide and unquestionable discretion to continue with the evidence taken by the predecessor or start afresh without consulting the parties. Commenting on the handling of the evidence adduced before the predecessor judge, Mr. Rweyongeza was of the view that, the successor judge in his judgment did not rely on the demeanour of witnesses to analyse the evidence which constitutes another reason for the unworthiness of the retrial. The learned counsel also viewed that, the remedy of retrial is not worthy in the present case because the parties neither complained nor challenged the conduct of trial proceedings being handled by more than one judge.

Mr. Rweyongeza also submitted, since the matter under scrutiny was a commercial case there is no doubt that the evidence was properly

recorded because in commercial cases the evidence is electronically recorded. However, Mr. Rweyongeza did not tell the Court if the reasons for change of presiding judges could not be recorded electronically as part of the proceedings. He concluded by urging the Court not to order a retrial because of the restriction under Rule 117 (2) of the Rules.

At the outset, we wish to point out that, this appeal originates from a commercial trial case governed by the High Court (Commercial Division) Procedure Rules, 2012 Government Notice No. 250 of 2012 (the Commercial Court Rules). And, in case of a lacuna in the Commercial Court Rules, the CPC is applicable. Apparently, under Rule 3 of those Rules, a commercial case is defined as a civil case involving *inter alia,* a matter considered to be of commercial significance. We did not find any provision in the Commercial Court Rules regulating the mandate of judges to take over and deal with the evidence taken by other judges or ousting the application of the Civil Procedure Code. This is cemented by inexhaustive nature of the Commercial Rules and that is why, Rule 2 of the Commercial Court Rules, and allows the application of the CPC in case of a lacuna. In

this regard, since the trial under scrutiny was a civil case involving a matter of commercial significance, the mandate of judges to take over and deal with evidence taken by other judges is generally regulated by Order XVIII rule 10 sub-rule 1 of the CPC which provides:

> " *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 had 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."*

More than a decade ago, in the case of **FAHARI BOTTLERS AND ANOTHER VS THE REGISTRAR OF COMPANIES AND THE NATIONAL BANK OF COMMERCE LIMITED [2000]** TLR 102, the Court was faced with a situation in which the case changed hands between three judges and no reasons were given on record for the change. The Court emphasized the essence of the case once assigned to an individual judge or magistrate; it has to continue before that particular judge or magistrate to its final conclusion unless there are good reasons for doing otherwise. For a better

understanding of what precipitated the holding of such emphasis, we wish to restate at length what the Court said in that case at pages 118 to 119 as follows:

> *"Three judges were involved at various stages of the proceedings. When such a situation occurs there is likely to be confusion, unless the succeeding judges thoroughly study the record of previous proceedings. This does not seem to have been done in this case.* ***Moreover, no reasons are given on record to explain the changes of judges, especially when the individual calendar system requires that once a case is assigned to an individual judge or magistrate, it has to continue before that particular judge or magistrate to its final conclusion, unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by the trial judges or magistrates, but also to promote accountability on their part. The unexplainable failure to observe this procedure in this case is certainly irregular, to say the least. Such irregularities and accompanying confusion in our view are not amenable to the appellate***

process for remedy. They are amenable to the revisional process."

(See also the case of **VIP ENGINEERING AND MARKETING LTD VS MECHMAR CORPORATION (MALAYSIA) BERHAD OF MALAYSIA,** Civil Application No. 163 of 2004 (unreported).

[Emphasis supplied.]

Also in a recent decision of **MS GEORGES CENTRE LIMITED VS THE HON. ATTORNEY GENERAL AND MS TANZANIA NATIONAL ROAD AGENCY**, Civil Appeal No. 29 of 2016 (unreported), referred by the respondent's counsel but urged us to depart from it, the Court considered the scope of Order XVIII rule 10 and the reason behind imposing upon a successor judge or magistrate to put on record why he/she has to take up a case that is partly heard by another. It was thus in addition underscored as follows:

*" ... There are a number or reasons why it is important that a trial started by one judicial officer must be completed by the same judicial officer....**as 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 supplied].

After due consideration, the Court of appeal nullified all the proceedings conducted by the successor judge including the judgment and decree and remitted the proceedings to the High Court for continuation of the trial in accordance with the law.

The decision of **MS GEORGES CENTRE LIMITED** (supra) was relied upon by the Court in the case of **KAJOKA MASANGA** (supra) which was also cited by the respondent. In **KAJOKA MASANGA** the predecessor judge heard the plaintiff's case and successor judge heard the defence case and composed a judgment. The Court considered the trial proceedings to be irregular and highly prejudicial. As such, the Court quashed all proceedings,

judgment and decree and directed the case file to be placed before another judge for a fresh trial.

In a nutshell, in all the cited three decisions, the trial proceedings were found to be irregular and highly prejudicial because the predecessor judges never completed the trials to conclusion and after those cases ended in the hands of successor judges, no reasons were assigned or explained to the parties by the successor judges on the change of judges. We shall be guided by the stated principles in determining the propriety or otherwise of the trial proceedings under scrutiny.

Both counsel are not disputing about the change of the presiding judges at the trial under scrutiny. However, learned counsel locked horns on the consequences of non-compliance with Order XVIII Rule 10 (1) of the Civil Procedure Code. While the appellant's counsel argues that the omission can be remedied by quashing and setting aside the impugned decisions and ordering a fresh trial, the learned counsel for the respondent challenged such stance. He argued that, the omission was not fatal because: **One,** while availing reasons for change is unquestionable domain

of the successor judge, the parties neither raised any complaint nor challenged the respective proceedings handled by two different judges. And that **two,** since Order XVIII Rule 10(1) of the CPC deals with the evidence, the Court cannot order a retrial beyond reasons stated under Rule 117 (2) of the Rules.

We must point out that we find Mr. Rweyongeza's submission disturbing on the proposal that the Court should not interfere where parties have not complained or challenged the irregular proceedings. This is because; the Court derives its powers under the Constitution of the United Republic of Tanzania, 1977, (the Constitution) the Appellate Jurisdiction Act as well as the Court of Appeal Rules, 2009. Under these laws, the Court derives jurisdiction to determine appeals from the High Court, as well as to call and examine proceedings before the High Court for the purposes of satisfying itself with the correctness, legality or propriety of any finding or order or any decision and as to the regularity of the proceedings of the High Court. (See **SHARIFF ABDALLA SALIM AND ANOTHER VS MAHSEN ABDALLA SALIM,** Civil Revision No. 11 of 2016 (unreported). Moreover, under article 107B (e) of the Constitution, it is directed that, in discharging

their judicial functions, all the courts apart from being independent, shall be bound by the Constitution and the laws of the land. In this regard, the courts are not bound by the likes or dislikes of the litigants.

The binding obligation to follow the Constitution and the law is not waived by the absence of complaints of the litigants on glaring omission or irregular proceedings. In this regard, in our considered view, the Court has jurisdiction to correct the irregular proceedings of the courts below irrespective of absence of the complaints of the parties as the Court can on its own motion call and correct the irregular proceedings. This is the intendment of the legislature in enactment of section 4(3) of The Appellate Jurisdiction Act [Cap 141 RE. 2002]. To argue otherwise, would tend to make legislation meaningless, a reality not within the grasp of Mr. Rweyongeza, render the courts powerless and defeat the ends of justice. In other words, the administration of justice will be blocked if the Court does not interfere to correct irregular proceedings of the courts below merely because the litigants have not complained.

As to whether Rule 117(1) when read together with Rule 117 (2) restricts the Court to order the retrial in case of non compliance with Order

XVIII rule 10 (1) of the CPC, this being the first appeal we have deemed it pertinent to reproduce the whole of Rule 117 (1), (2), and (3) which provide as follows:

> *117.-(1)* ***Except as hereinafter provided,*** *the Court may order that a new trial be held of any matter tried by the High Court in the exercise of its original jurisdiction.*
>
> *(2) A new trial shall not be granted on the ground of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage of justice has thereby been occasioned; and if it appears to the Court that such wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the Court may give final judgment as to part of the matters, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.*
>
> *(3) A new trial may be ordered on any question without interfering with the finding or decision upon any other question.*
>
> [Emphasis supplied].

Under Rule 117(1) of the Rules, the Court has general power to order a retrial of any matter tried by the High Court. However, the use of words "*Except as hereinafter provided",* subjects sub-rule 1 to sub-rule 2 which is an exception to the general rule. Sub-rule 2 limits the Court to order the remedy of retrial on instances of improper admission or rejection of evidence at the trial occasions substantial wrong or a miscarriage of justice affecting part of matters under controversy and may give final judgment to the part of the matters.

Thus, Rule 117 (2) of the Rules does not bar the general power of Court to order the retrial and that is why there are other instances whereby on account of omissions resulting into miscarriage of justice where for example: the trial court acted without jurisdiction or parties were denied a right to be heard which is in line with the general mandate under Rule 117 (1) of the Rules. Furthermore, in the present matter, at the moment, since the Court has not questioned the improper admission of the evidence or its rejection, with due respect we find Mr. Rweyongeza's argument misplaced. What is at stake is failure by the successor judge to assign

reasons on change of presiding judges which is contrary to Order XVIII the appellant's counsel that, in the matter at hand, rule 117 (2) of the Rules restricts the Court order a retrial.

In the present matter, failure by the successor judge to give reasons for change of judges prevented the parties from knowing and exercising their right to have either the continuation of trial from where it ended or a fresh trial. It was incumbent on the successor judge to address the parties irrespective of there being any complaint. In this regard, in the light of what we have endeavored to explain, we do not think that it is prudent to depart from our previous decisions which in our considered view is still good law.

On account of the successor judge taking over the continuation of the trial without recording reasons as to why the case was before him, we find this in the present matter irregular and highly prejudicial as we noted in our previous decisions. Therefore, the proceedings by the successor judge including the judgment and the decree cannot be salvaged.

As to the way forward, in the light of what we said in the **FAHARI BOTTLERS** case on such irregular proceedings being amenable in a revision,