IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPEAL NO. 79 OF 2015

INTER-CONSULT LIMITED .....APPELLANT

VERSUS

1. MRS. NORA KASSANGA
2. MATHEW IBRAHIM KASANGA .....RESPONDENTS

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

(Lila, JK.)

dated the 31st December, 2014

in

Civil Case No. 267 of 1998

RULING OF THE COURT

26th September, 2018 & 8th February, 2019

MKUYE, J.A.:

In Civil Case No. 267 of 1998 before the High Court of Tanzania (Dar es Salaam Registry), Mrs. Nora Kassanga, the plaintiff/1st respondent sued Mr. Mathew Ibrahim Kassanga (1st defendant/ 2nd respondent), International Engineering Consultancy Services Ltd (2nd defendant/appellant) and Azan Seif Hemed (former 3rd Defendant) for

having conveyed a House No. 647 Block "F" Msasani Village under L.O. No. 154321, Title No. 44132 from the 2nd respondent to the appellant who later conveyed the same to the former 3rd defendant. In the said suit the 1st respondent (she) prayed for a judgment and decree as follows:-

(a) *A declaration that the property is a matrimonial property and that the 1st defendant [2nd respondent] had no power to convey it to the 2nd defendant [appellant].*

(b) *The subsequent disposition by the 2nd defendant [appellant] to one Azan Seif Hemed [3rd defendant] is wrongful;*

(c) *Damages;*

(d) *Costs of the suit; and*

(e) *Such other order or further relief the court deems fit and just.*

The defendants [2nd respondent, appellant and former 3rd defendant] jointly and severally denied the claims.

In the judgment handed down on 31/12/2014 (Lila JK as he then was) granted the suit and decreed as follows:

1) *The house is a matrimonial property.*

2) *The first defendant [2nd respondent] did not sell such house to the 2nd defendant [appellant].*

3) *As no title passed to the second defendant from the first defendant then no title passed from the second defendant to third defendant.*

4) *The purported sell of the house by the second defendant to third defendant is improper.*

5) *The third defendant's occupation of the house is illegal and improper and he should immediately vacate from it to give vacant possession to the plaintiff and first defendant. The appropriate procedure to effect this be strictly followed.*

6) *The third defendant should find legal ways of recovering his money (purchase price), if any really passed from the second defendant.*

7) *In view of the fact that the third defendant is not at fault as he might have been misled by the second defendant he is exempted from paying costs of the case to the plaintiff.*

8) *The plaintiff be paid half of the costs by the second defendant as the findings in this case also benefits him (her husband).*

Aggrieved by that decision, the appellant has brought this appeal to this Court on sixteen (16) grounds of appeal which for a reason that will shortly become obvious, we shall not reproduce them.

In reply to the memorandum of appeal, the 2nd respondent raised several points of preliminary objection, the notice of which was filed on 20/9/2018 to the effect that:-

i. *The appeal is time barred as it was filed on 14/7/2015 indicated at page 320 of the record which is the 63rd day as*

certified by the Registrar at page 319 of the record OR alternatively, the appeal is time barred since the appellant did not comply with Rule 90 (1) and (2) thus cannot benefit from the exception as certified by the Registrar at page 319 of the record.

ii. *The appeal is incompetent on several grounds to wit:-*

(a) *The appeal is preferred by a person who is not a party to the case and no amendments were made to join him in the pleading during trial, see plaint and written statement of defence at page 9-43 of the record of appeal.*

(b) *The decree at page 309 of the record accompanying the appeal is defective in that it contravenes Order XX Rule 6 of Civil Procedure Code Act Cap 33 RE 2002 by inserting the appellant as 2nd defendant while he is not pleaded at all in the plaint and never filed written statement of defence.*

(c) *The Notice of Appeal at page 312 of the record of appeal was filed by a stranger to the proceedings as*

against the proper appellant (2nd defendant) who requested to be furnished with the certified copies of judgment, decree and proceedings found at page 315 of the record.

(d) *The certificate of delay issued by the Registrar under Rule 90(1) and (2) certifying the exempted period requisite for the preparation of the certified copies of judgment and proceedings to the appellant is defective in that the Registrar exempted period to a person who is not a party to the proceedings.*

Before we could proceed with the hearing of the preliminary objection, Mr. Samson Mbamba rose to inform the Court that he had represented the former 3rd defendant in the High Court who is, incidentally, not a party to this appeal. He said, though the 3rd defendant was not made a party to this appeal, he was served with a notice of hearing. He, therefore, prayed to be given a right of audience under Rule 109 of the Tanzania Court of Appeal Rules, 2009 (the Rules).

Upon having no objection from the other parties we granted him the right of audience.

As it is usually the practice of the Court, since a notice of preliminary objection has been raised on the appeal, we allowed the same to be heard first before the appeal could be heard on merit.

When the appeal was placed before us for hearing, the appellant was advocated by Mr. Audax Vedasto and Mr. Philemon Mutakyamirwa learned counsel, whereas the 1st and the 2nd respondents were represented by Mr. Julius Bundala Kalolo and Mr. Daniel Ngudungi learned advocates, respectively.

It is worthy to note that, in the course of arguing the point of preliminary objection, Mr. Ngudungi abandoned the first limb of the 1st point of preliminary objection and argued the remaining limb together with the 2nd point which contains paragraphs (a) to (d) of the notice of preliminary objection.

Submitting in support of the remaining limb of the first point of preliminary objection, Mr. Ngudungi argued that the appeal was time

barred since the appellant failed to comply with Rule 90 (1) and (2) of the Rules to enable her benefit from the exception as certified by the Registrar. In elaboration he contended that, the appellant cited a wrong party, one **Inter Consult Ltd** in the judgment and decree instead of one **International Engineering Consultancy Services Limited** who was the proper party to the suit. He added that even the notice of appeal and the certificate of delay (page 319) cited the name of Inter Consult Ltd who was not a party to the suit. He said, in the absence of any order made by the trial court to change the name, the cited name of the appellant in the judgment, decree, notice of appeal and the certificate of delay was a defect which rendered the respective documents defective. For that reason he said, as the certificate of delay is defective it renders the appeal time barred liable to be struck out with costs.

Upon being prompted by the Court as to whether the succession of the trial judges was proper, he readily conceded that it was not properly done for failure by the successor judge to assign reasons for taking over the trial of the matter. For that default, he also insisted for the matter to be struck out with costs.

In response, Mr. Vedasto also readily conceded to the anomaly that the appeal was time barred on account of changing the name of the appellant from International Engineering Consultancy Services Ltd to Inter Consult Ltd without having a specific order made by the trial court putting the new name in the record of the trial court. For that reason, he contended, even the judgment ought not to be given in the name of Inter Consult Ltd and as such it was an irregularity. He, however, while relying on the cases of **James Kabalo Mapalala v. BBC,** [2004] TLR 143 and **Yahaya Selemani Mralya v. Stephano Sijia,** Civil Appeal No. 316 of 2017, (CAT) (unreported), urged the Court not to strike out the appeal with costs and instead proceed with revising the proceeding and quash them thereafter.

As regards the issue raised by the Court relating to the change of trial judges, he equally conceded that it was irregular for the successor judge taking over the trial without assigning reasons. On account of those irregularities, he urged the Court to quash the proceedings from where the successor judge took over the trial and order a retrial.

On his part, Mr. Mbamba acceded to what the other advocates submitted in relation to the change of the trial judges. While relying on the decision of **Kajoka Masanga v. Attorney General and Another,** Civil Appeal No. 153 of 2016 (unreported), he implored the Court to quash the proceedings from where the successor judge took over the trial and order a retrial from there.

As to Mr. Kalolo, he reiterated what other advocates submitted in relation to the change of the appellant's name. He added that the name of Inter-Consult Ltd was neither reflected in the pleadings nor annexed or listed under Order XIII of the Civil Procedure Code, Cap. 33, R.E. 2002 (the CPC). However, he was quick to argue that the anomaly fell under the rule of the Slip of a Pen and hence, the irregularity was correctable under section 96 of the CPC. He said, even the cases of **James Mapalala** (supra) and **Yahaya Selemani** (supra) were distinguishable. He was of the view that, the remedy to the shortcoming was to strike out the appeal which he urged the Court to do.

On the succession of the trial judges without reasons being assigned, he implored the Court to interpret Order XVIII rule 10 of the

CPC as in his view, it does not specifically require reasons to be assigned in case there is a change of judges. He said, the provision just requires parties to agree which they did. In that regard, he was of the view that even the cited case of **Kajoka Masanga** (supra) was not relevant (distinguishable).

The issues for determination by the Court are **one,** whether the appellant's name was properly changed; and **two,** whether there was a proper succession of trial judges.

After having examined the entire record of appeal and considered the oral submissions from all the parties it is common ground that in the plaint, written statements of defence, rejoinder to the written statements of defence and the closing submissions the appellant (2nd defendant), was cited as International Engineering Consultancy Services Ltd. Looking at the plaint which initiated the suit, it was between Mrs. Nora Kasanga as a plaintiff and Mathew Ibrahim Kasanga as the 1st defendant, International Engineering Consultancy Services Limited as the 2nd defendant and Azan Seif Hemed as the 3rd defendant. The parties went on to be so cited in the title of the suit in the written statements of

defence (page 39), reply to the written statement of defence (page 42) and the closing submissions except for the 2nd defendant (appellant) who in the title of her closing submission cited herself as Inter Consult Limited.

At page 44 of the record of appeal, however, there is included a certificate of change of name purportedly certifying the change of the name from International Engineering Consultancy Services Ltd to Inter Consult Ltd. It is, however, a document which was not attached to the 2nd defendant's written statement of defence. Neither was it listed in the list of documents as per Order XIII rule 4 of the CPC to be relied upon as was rightly submitted by Mr. Kalolo. Further to that, no endorsement was made by the trial court signifying its admission. Yet, at page 49 of the record, it shows that the trial court had drawn the attention of the parties to a certain document dated 10/3/1999. We say a certain document because the trial court did not mention it or explain its gist. At this juncture we find it appropriate to reproduce part of what transpired in the trial court on 2/7/1999 as follows:

"Court: Attention is drawn to the parties of document

dated 10/3/1999.

Mr. Mkate: We have no objection.

Mr. Kisanga: I have no objection my lord to such change of Name of second defendant.

Mr. Kalolo: We seem to have agreed upon the following issues:

1) Whether the property in question was material property

2) ....."

As it can be gleaned, though Mr. Kasanga, (1st defendant), seems to have had no objection to the "change of the 2nd defendant's name" after their attention was drawn by the trial court to a document which its gist is not shown, no order was made by the trial court to signify the change of the said name of the appellant. This means that the appellant's name remained unchanged.

Order I rule 10(2) of the CPC which governs the parties to the suit and the manner a party can be changed, provides as follows:-

> *"The court may, at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just,* ***order that the name of any***

party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, *or whose presence before the court may be necessary in order to enable the court effectively and competently to adjudicate upon and settle all the questions involved in the suit, be added."*

[Emphasis added]

In this case, as alluded earlier on, though there was an attempt by the trial court to introduce the purported change of the party and the other parties did not object, no order was made by the trial court to the effect that the name of the appellant was changed from International Engineering Consultancy Services Ltd to Inter Consult Limited. Interestingly enough, the record of appeal at page 51 shows that the 1st respondent, Mrs. Nora Kasanga (PW1) testified to know Inter Consult as their tenant since 1986. That is when the name Inter Consult Ltd featured for the first time in the proceedings. Mathew Kasanga, (DW1) at page 111 of the record of appeal also testified to have leased their house

to the Company known as International Engineering Consultancy Services Ltd which was also known as Inter Consult. Likewise, Martin Hillary Matem (DW2) (the Administrator of the 2nd defendant) at page 125 of the record of appeal testified about Mathew Kassanga selling the disputed house to Inter Consult Ltd Company and that they paid him in instalments. As to DW3, one Carlos Mbingamno who was a Land Officer also testified on the transfer of ownership which was consented to by the Commissioner for Lands, from Inter Consult Company to Azan Seif Hemed (former 3rd defendant) though he also testified about knowing nothing about Mathew Kassanga selling or transferring the suit house to Inter Consult Company. On his part, Azan Seif Hemed (DW4) testified to have purchased the suit house on Plot No. 647 Block "F" Msasani Area from Inter Consult Company also known as International Engineering Consultancy Services Ltd. Apart from that, the payment vouchers at pages 187 to 199 used to effect payments from appellant to the 2nd respondent and various communications were headed Inter Consult Ltd. Unfortunately, the trial court also fell into the same trap of citing the appellant in the title of the suit as Inter Consult Ltd. This discrepancy culminated in citing an improper party in the succeeding documents

including the decree, notice of appeal (pg 312-314), the certificate of delay (pg 319) and the memorandum of appeal which are subject to this preliminary objection and readily conceded by all parties.

However, we wish to emphasize that, though the name Inter Consult was widely pronounced in the proceedings and was so cited in the judgment, decree, notice of appeal, certificate of delay and the memorandum of appeal, there was no formal order of the trial court signifying the change of the appellant's name from International Engineering Consultancy Services Ltd to that of Inter Consult Ltd. This was, indeed, a discrepancy in the name of the appellant appearing in the pleadings and the one appearing in the judgment and all other documents mentioned above.

We have considered Mr. Kalolo's argument that the discrepancy is correctable under section 96 of the CPC which states as follows:-

> *"96. Clerical or arithmetical mistakes in the judgments, decree or orders, or errors arising therein from any accidental slip or omission may at any time, be corrected by the Court either on*

its own motion or on the application of any of the parties."

In our considered view, matters which are intended to be corrected under the above provision are those involving typing errors which are minor capable of being cured under the Slip Rule. In this case a party to the suit has been changed without an order of the trial court. On the other hand, we agree with Mr. Kalolo that **Mapalala' case** (supra) is distinguishable because in that case the name of the party was changed following an application for review on a matter which was conclusively determined. In the matter at hand the name of the party was changed without any order of the trial court.

Be it as it may, we agree with Mr. Vedasto that substitution of the appellant's name from International Engineering Consultancy Services Ltd to Inter Consult Ltd without any specific order of the trial court was an irregularity which was fatal. It is an irregularity which does not fall within the ambit of the provisions of section 96 of the CPC. For that matter, we agree with both Mr. Ngudungi and Mr. Vedasto that the appeal is out of time for the appellant having failed to comply with Rule

90(1) and (2) of the Rules. She cannot benefit from the exemption under that Rule. We, therefore, find the appeal is incompetent liable to be struck out. It is also noteworthy at this juncture that we need not consider other points of objection since they are all based on the same issue.

Ordinarily, after having made a finding that the appeal before us is incompetent for being time barred, we would have proceeded with striking it out. However, as we have noted another anomaly on the face of the record and we are seized with the record of appeal, we have found it appropriate to have a glance on it rather than striking it out. This stance was also taken by this Court in the case of **Yahaya Selemani Mralya** (supra) where, though the Court found the appeal incompetent due to an incomplete record of appeal, it did not strike it out but went further to examine the irregularity apparent on the face of the record and revise it.

In this matter, we have no doubt, as was conceded by all parties that there was a succession of trial judges without any reason being

assigned by the successor judge. This matter was presided over by several judges before coming to its conclusion. It started by Katiti, J on 25/2/199 whereby on 2/7/1999 he recorded the evidence of PW1. From there the matter changed hands to several judges like Luanda J, Massati J, Kalegeya J, Aboud J, and Lila J, who eventually recorded the evidence of Mathew Ibrahim Kassanga (DW1) and Martin Hillary Materu (DW2) and later as JK when he received the defence of Carlos Mbingamno (DW3) and Azan Seif Hemedi (DW4). He also received the closing submissions and composed the judgment which was delivered on 31/12/2014. But when the last successor judge who recorded the evidence of other witnesses took over it is not shown if he recorded reasons for such taking over.

In a situation like this, we think that Order XVII rule 10(1) of the CPC is pertinent. It empowers the judges or magistrates in certain circumstances to take over or to deal with the evidence taken by other judges or magistrates in civil matters. The said provision provides as hereunder:-

"10(1) Where a judge or magistrate is prevented by death, transfer or other cause from conducting 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."

Looking at the provision it would seem that it does not specifically provide for reason(s) to be assigned by a successor judge or magistrate for taking over the matter from a predecessor judge or magistrate as Mr. Kalolo appeared to suggest. However, despite such state of affairs, this Court in the case of **Ms. Georges Centre Limited v. The Honourable Attorney General and Ms. Tanzania National Road Agency,** Civil Appeal No. 29 of 2016 (unreported), considered the scope of said rule and at the end it vitiated all the proceedings conducted by the successor judge including the judgment and decree and returned the proceedings for continuation by the High Court in accordance with the law. The Court in that case stated as follows:-

"The general premise that can be gathered 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 access the witness 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.*** *See also the case of* ***Kajoka Masanga v. The Attorney General and Principal Secretary***

Establishment, *Civil Appeal No. 153 of 2016;* ***National Insurance Corporation of (T) Limited v. Jackson Mahili,*** *Civil Appeal No. 94 of 2011 (both unreported)."*

[Emphasis added]

In the latter case of **National Insurance Corporation Limited** (supra) the Court went further to elaborate the purpose of Order XVII rule 10(1) of the CPC on the requirement to **give reasons for taking over the trial from one judge or magistrate** by another as to promote transparency and minimize chaos in the administration of justice and, hence, enhance the integrity of judicial proceedings.

The Court even went a further milestone and took inspiration to the interpretation of the provisions of sections 214 and 299 of the Criminal Procedure Act, Cap 20 RE 2002, which essentially carry a similar scope with Order XVII rule 10(1) of the CPC in the case of **Priscus Kimaro v Republic,** Criminal Appeal No. 301 of 2013 (unreported) where it stated as follows:-

"...where it is necessary to reassign a partly heard matter to another magistrate the reason for failure of the first magistrate to complete must be recorded. ***If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed."***

[Emphasis added]

We think, we cannot depart from that interpretation. We are increasingly of the considered view that, even in this case the successor judge ought to have assigned reasons for taking over the trial of the case. On that account, we find that it was irregular for the successor judge to take over the proceedings from the predecessor judge without assigning reasons.

Given the irregularities, we are constrained to exercise revisional powers conferred upon us by virtue of section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and nullify the proceedings, quash the judgment and set aside the decree delivered by the successor judge

and order a retrial before a different judge in accordance with the law. We, however, make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 4th day of February, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL