

TANZANIA / JUDGMENT

mohamed hassan rehani vs national microfinance bank plc ltd and another 2023 tzhc 19668 31 july 2023

COURT
TZHCDECIDED
31 July 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
SONGEA AT SONGEA LAND APPEAL NO. 30 OF 2023 MOHAMED HASSAN REHANI
..... APPELLANT VERSUS NATIONAL MICROFINANCE BANK PLC LTD
..... 1ST RESPONDENT YONO AUCTION MART & CO. LTD 2ND
RESPONDENT (Arising from the decision of the District Land and Housing Tribunal for Songea at
Songea in Land Application No. 114 of 2018)

RULING

31st and 31st July, 2023 KISANYA, J.: This appeal was filed by Mr. Vicent Kasale, learned advocate on behalf of the appellant, Mohamed Hassan Rehani. It seeks to challenge the decision of the District Land and Housing Tribunal for Songea at Songea (the trial tribunal) handed down on 22nd July, 2022, in Land Application No. 114 of 2018. In the impugned decision, the trial tribunal dismissed the appellant's land application for refund of TZS 46,000,000 arising from the purchase price and improvement of house on Plot Number 367, Block G, Namtumbo Town, within Namtumbo District. For reasons which will shortly become apparent, the grounds of appeal will not be reproduced. 1 On perusal of the trial tribunal's record, this Court noticed that Hon. N. Ndimbo - chairperson handled the matter from its beginning. He took down the testimony of the sole witness for the plaintiff, Mohamed Hassan Rehani (PW1). Following transfer of Hon Ndimbo to another duty station, the case filed was re-assigned to Hon J. Raphael, also chairperson, who did not take down the testimony of any witness. Thereafter, Hon. Lukeha- chairperson, took over the trial of the case. He received the testimonies of the defence witness (DW1). He also wrote and delivered the impugned

judgment.

When the appeal was called for hearing, Messrs Vicent Kassale and Emmanuel Ngongi, learned advocates, appeared for the appellant and respondents, respectively. At the inception of the hearing, a procedural issue was raised suo motu by this Court. In view of the provision of Order XVIII, rule 10(1) of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC), the learned counsel

for the parties were asked to address the court on the implication of the takeover of the trial by Hon. Lukeha. Responding to the issue raised suo mottu by the Court, Mr. Kasale submitted that, the takeover of the case by Lukeha, Chairperson, without giving any reasons was irregular. The learned counsel further submitted that the taking over was contrary to Order XVIII, Rule 10(1) of the CPC. He thus, moved this Court to nullify the whole proceedings conducted by Lukeha, and the judgment arising thereto and remit the matter for retrial from the stage where Hon. Lukeha took over the matter. On that account, the learned counsel found no need of arguing the grounds of appeal. In conclusion, he prayed for each party be ordered to bear its own costs. Mr. Ngongi was in agreement with Mr. Kasale that the provision of Order XVIII, rule 10(1) of the CPC was not complied because Hon. Lukeha did not give the reasons for taking. He was also at one with the appellant's counsel that, the proper remedy is to nullify the proceedings from the stage where Hon. Lukeha took over the matter and the judgment thereto. In the circumstances, the learned counsel did not press for costs of this appeal. Having gone through the record and considered the submissions from the learned counsel for both parties, I prefer to start my deliberation on the issue under consideration by reproducing the provision of Order XVIII, Rule 10 (1) of the CPC. It 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 3 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 above cited provision has been interpreted in a number of cases to the effect that, a judicial officer who commences the trial of the case is duty bound to finalize the same unless there are cogent reasons. It is also settled position that the successor judge or magistrate is mandatorily required to put on record the reasons of taking over a partly heard case from his predecessor. See for instance the case of *MS Georges Center Limited vs The Honourable Attorney General Another* (Civil Appeal No 29 of 2016) 2016 TZCA 629 (28 July 2016) where the above cited provision was interpreted in the following terms: "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." 4 Apart from assessment of credibility of witness, the Court of Appeal went on holding that the above legal requirement aims at protecting integrity of judicial proceedings which hinge on transparency. It held as follows: "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 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." Similar stance was taken in the case of *Fahari Bottlers Limited and Another vs Registrar of Companies and Another* [2000] T.L.R 102 in which the Court of Appeal held that: "The system is meant not only to facilitate case management by trial magistrates and judges but also to promote

accountability on their part. Failure to follow this procedure was certainly irregular and was amenable to the revision process.” 5 In the recent case of Geita Gold Mine vs Truway Muneth Another (Civil Appeal No. 66 of 2020) 2023 TZCA 17407 (13 July 2023), the Court of Appeal made it clear that the position on individual calendar system is still good law which has worked in tandem with the overriding objective principle. It is common ground that, in the case at hand, Hon. Lukeha did not assign the reason of taking over the case file which had been re-assigned to Hon. J. Raphael, Chairperson. Being guided by the above cited provision, Hon. Lukeha - Chairperson had no mandate to proceed with the trial of the matter. In that respect, I agree with the learned counsel for both parties, all proceedings pertaining to the takeover by Hon. Lukeha was a nullity. In consequence, the judgment and decree that arose therefrom are also a nullity. On the foregoing reason, I find no need of reproducing and discuss the grounds of appeal against the impugned decision. In the exercise of the revisional jurisdiction of this Court, I quash and set aside the proceedings which followed after the taking over of the trial by Hon. Lukeha-Chairperson up to and including the judgment and decree of the trial tribunal. I remit the case file to the trial tribunal for the trial to proceed before another chairperson, in accordance with the law. 6 Considering that this appeal is disposed of basing on the issue raised by the Court, suo mottu, I order for each party to bear its own costs. It is so ordered. DATED at SONGEA this 31st day of July, 2023. S.E. KISANYA JUDGE 31/07/2023 Ruling delivered this 31st day of July, 2023 in the presence of Mr. Lazaro Simba, learned advocate for the appellant and holding brief of Mr. Emmanuel Ngongi, learned counsel for the respondents. S.E. KISANYA JUDGE 31/07/2023 7

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