

TANZANIA / JUDGMENT

ms flycatcher safaris ltd hon minister for lands human settlements developments another 2021 tzca 546 30 september 2021

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THE COURT OF APPEAL OF TANZANIA AT ARUSHA fCORAM: MKUYE. J.A., KOROSSO, J.A., And KIHWELO, J.A.^ CIVIL APPEAL NO. 142 OF 2017 M/S FLYCATCHER SAFARIS LTD APPELLANT VERSUS HON. MINISTER FOR LANDS AND HUMAN SETTLEMENTS DEVELOPMENT..... I st RESPONDENT HON. ATTORNEY GENERAL 2nd RESPONDENT (Appeal from the Ruling and Drawn Order of the High Court of Tanzania, at Arusha) (Sambo, J.) dated the 23rd day of November, 2012 in Miscellaneous Civil Cause No. 7 of 2000 JUDGMENT OF THE COURT 15th & 30th September, 2021 KOROSSO. J.A.: The appellant, M/s Flycatcher Safaris Ltd applied for judicial review in the High Court of Tanzania Miscellaneous Civil Cause No. 7 of 2000. The appellant's prayers were for orders of certiorari to quash the revocation order in respect of Certificate of Title Number 9663 Land Office Number 12884 dated 29/9/1999. The background to this matter is that, the appellant company purchased a piece of land holding the certificate of title number 9663 Land Office Number 12884 dated 29/9/1999 (suit property/land). The record reveals that the suit land was previously owned by one Daulakhanu Habib Meghji who left the country in 1972. Upon his departure, the care of the land was left in the hands of Abdullah Osman @ Sumra. In 1986 the former owner of the suit land issued one Abul Sumra, a power of attorney. The power of attorney was subsequently used to realize the transfer of the suit land to a company known as Flycatcher Safaris Ltd (the appellant) owned by Abdul Sumra. In 1993, the Regional Land Development Officer wrote a letter to Abdul Sumra, essentially, a notice of 28 days to show cause why the right of occupancy of the suit land issued to the appellant should not be recommended for revocation for reasons that the transfer of the suit land to the appellant was fraudulent. The claims were that Abdul Sumra had used the power of attorney given to him by the former owner to fraudulently transfer the suit land to the appellant. Subsequently, the title to the suit land was revoked by the President on 29/9/1999. After the revocation of the said title to the suit land had been realized, the appellant being dissatisfied by the said action, lodged in the High Court, Misc. Civil Cause No. 7 of 2000, seeking judicial review as stated herein above. The High Court case was predicated on two issues thus: 2

- j. That the revocation was done without giving the applicant any Notice and or opportunity to make representation or to be heard at all and offended the rules of natural justice. ii. That the revocation order is wrong and contrary to principles of equity and natural justice in that the same was made without any consideration as to compensation for the applicant company investments and costs incurred over the said farm. Upon hearing and considering the cases for both parties, the High Court dismissed the matter with costs holding that the appellant (then the applicant) was duly heard before revocation was settled. The appellant was aggrieved by the decision of the High Court and thus lodged a memorandum of appeal armed with the following five grounds as paraphrased:
1. That, the successor Judge who took over the proceedings in High Court Civil Cause No. 7 of 2000 and finalized its hearing, erred in law in failing to record reasons for the take-over.
 2. That, the High Court erred in purporting to suo motu raise an issue related to the Powers of Attorney and adversely decided on that issue without according the appellant a right to be heard.
 3. That the High Court clearly erred in mixing up issues relating to donation of Powers of Attorney and the question of service of a notice to show cause why revocation should not be effected.
 4. That the High Court erred in purporting to hold without evidence that, the grant of Powers of Attorney in 1986 by Mr. Daulakhanu Habib Meghji to Mr. Abdul Sumra was calculated to frustrate the revocation exercise.
 5. The High Court erred in law in holding that, service of notice to show cause on the company Director in his private capacity constituted service on the company. On the day of hearing, the appellant enjoyed the services of Mr. Elvaison Maro, learned Advocate whereas, Mr. Hangi Chang'a, learned Principal State Attorney represented the Is*and 2nd respondents. In amplifying the grounds of appeal, Mr. Maro began by adopting the filed grounds of appeal and written submissions and providing a brief background to the matter. With respect to the first grievance, he faulted the conduct of the proceedings for having been presided over by more than one judge without assignment of reasons upon the successor Judge taking over from a predecessor. In his oral and written submissions, the counsel for the appellant expounded the fact that the proceedings of Miscellaneous Cause No. 7 of 2000 was first presided over by Mushi, J, on the 5/7/2002 when the appellant's advocate submitted in support of the cause and the learned State Attorney for the respondent made his reply submissions and thereafter the matter was adjourned to 11/10/2002 (see pages 79 and 80 of the record of appeal). On 11/10/2002 the day fixed to continue with hearing, the matter was adjourned, and thereafter the proceedings underwent several adjournments and mentions before Sheikh, J., Sambo, J. and the District Registrar. Finally, on 14/8/2012 the hearing of the matter proceeded before Sambo, J. who heard the reply submissions and then adjourned the matter for Ruling. However, from the first time Sambo, J. started presiding over the case on 28/5/2008, to the time he heard the reply submissions, no reasons were advanced on failure

of the predecessor judge (Mushi, J.) who had presided over the hearing of the matter (submissions in chief and reply from rival parties) to continue hearing the matter to its conclusion. The learned counsel argued that non assignment of reasons which led to the predecessor judge not to complete hearing and determining the matter contravenes Order XVIII rule 10 of the Civil Procedure Code, Cap 33 R.E 2002, now 2019 (CPC). To bolster his argument, he cited the 5 case of M/S Georges Centre Limited vs Attorney General and Another, Civil Appeal No. 29 of 2016 (unreported), which emphasized that once the trial of a case has begun before one judicial officer, that judicial officer has to bring it to completion unless there are some reasons hindering him/her and that the law imposes an obligation to the successor judicial officer to put on record why he/she has to take up the partly heard case from another. Although the case of Georges Center Limited (supra) dealt with proceedings in a "suit" as opposed to an application as was the case in the instant case, the learned counsel urged the Court to find that the spirit behind recording reasons for change of the presiding judicial officer is both applicable in suits and applications be it of a civil or criminal nature, The learned counsel also referred us to the case of VIP Engineering and Marketing Limited vs Mechmar Corporation (Malaysia) and Another, Civil Application Number 163 of 2004 (unreported) and where the Court dealt with proceedings arising from Miscellaneous Cause No. 254 of 2003 and a similar situation was considered. The case of Priscus Kimaro vs Republic, Criminal Appeal No. 301 of 2013 (unreported) was also referred to on the same point. In essence, the learned counsel for the appellant's contention was that failure by Sambo. J, to record reasons for taking over the proceedings of Miscellaneous Civil Cause No. 7 of 2000 (High Court) was irregular and should lead this Court to quash and set aside the impugned decision. On the respondent's side, no written submissions were filed and thus relied on oral submissions. Mr. Chang'a argued that the 1st ground of appeal lacked merit having regard to the fact that the appellant failed to show how he was prejudiced by the change of judges and the non- assignment of reasons for the change. He pointed out, that since the appellant had legal representation at all stages of hearing of the matter, failure by his legal representative to remind the successor judge of his duty to assign reasons for the absence of the predecessor judge meant that the appellant was not in any way prejudiced. He asserted that this fact is further reinforced by the record of appeal where at Page 84, the learned counsel for the appellant is recorded to have commented that the trial judge (Mushi, 3.) had retired, arid thus inferring that he was aware of the reasons for the absence of the predecessor judge. On the cases cited by the learned counsel for the appellant, the learned Principal State Attorney urged the Court to find the cited cases to be distinguishable having regard to the different circumstances obtaining between the current application and the cited decisions. He reasoned that as most of the cases referred to pertained to suits where evidence is gathered from testimonies of witnesses, whereas in the present case the presiding judges relied on mere submissions from counsel of the parties and the affidavits filed, a proper interpretation of Order XVIII Rule 10 of the CPC, should invariably address the rationale behind the said provision. He argued that the application of the said provision is envisaged where testimonies of witnesses have been heard by the predecessor judicial officer and not what was the situation in the application that is subject of the current appeal.

Mr. Chang'a also implored the Court to invoke the overriding objective principle and be guided by the case of Charles Chama and 2 Others vs The Regional Manager, TRA and 3 Others, Civil Appeal No. 224 of 2018 (unreported) especially the conditions highlighted therein. He concluded by urging the Court to find this ground unmerited and in the alternative if it finds otherwise, to adopt the way forward as expounded in the case of Mariam Samburo (Legal Representative of Late Ramadhani Abasi) vs Masoud Mohamed Joshi, Civil Appeal No. 100 of 2016 (unreported). The rejoinder by the appellant's counsel was mainly to challenge the argument by the learned Principal State Attorney that the overriding objective principle should apply in the present matter. He invited the Court to find the act of not assigning reasons for absence of the predecessor judge by the successor judge has far reaching effect than meets the eye, and cited the cases of Fahari Bottlers and Southern Highland Bottlers Ltd vs The Registrar of Companies and the National Bank of Commerce (1997) Ltd, Civil Revision No.1 of 1999 (unreported) referred in the case of VIP Engineering and Marketing Ltd (supra). He argued that the issue raised is not only an issue of the appellant having been prejudiced but it is a fundamental issue in the pursuit of justice since it relates to accountability and transparency in the process of adjudication as observed in VIP Engineering and Marketing Ltd case (supra). The learned counsel further contended that the duty imposed to a successor judge or magistrate who has the conduct of the case to give reasons when there is a change of a judge or magistrate under Order XVIII Rule 10 of the CPC is not similarly imposed on the parties. Having heard and considered the arguments from both sides on this complaint, evidently, both sides do not dispute that when Sambo, J. took over the hearing of the matter, that is, the final reply submissions from the appellant and proceeded to deliver the ruling, he as the successor judge did not provide reasons for taking over the hearing of the matter from Mushi, X, the predecessor judge who had heard the submission in chief from the appellant and the reply submissions from the respondent's counsel. This fact is clearly discerned from the record of appeal pages 83 and 84. Order XVIII Rule 10 of the CPC guides the process where there is a take over of hearing by presiding judicial officers. For ease of reference the said provision, Order XVIII Rule 10 states: "(1) 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 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 the predecessor left it." Undoubtedly, the above provision allows a successor judge or magistrate to take over and proceed to hear a matter to its conclusion where another judge or magistrate is prevented from proceeding and concluding the matter by death, transfer or any other cause. Case law has interpreted the above provision as requiring a successor judge or magistrate who takes over a matter where a witness or witnesses have testified to record the reasons for taking over the hearing of the case. See, Court decisions in Ms. Georges Centre Ltd (supra); Salma Mohamed Abdallah vs Joyce Hume, Civil Appeal No. 149 of 2015 10 (both unreported); and Charles Chama and 2 Others (supra), the latter observing the rationale for assignment of the reasons are relevant. In essence, the law is well settled on succession of judicial officers. Successor judicial

officers are empowered to deal with the evidence taken before another presiding judicial officer where the predecessor judicial officer is prevented from concluding the trial or suit by reason of death, transfer or other cause. Notwithstanding the above cited positions of this Court, in the instant appeal, it is important to determine whether Order XVIII Rule 10 is also applicable in the circumstances of this case as argued by the learned Principal State Attorney. Mr. Chang'a contended that the duty to the successor judge or magistrate to provide reasons on the whereabouts of one's predecessor upon take-over of a partly heard case cannot apply to an application hearing since the evidence therein emanates from sworn affidavits and not testimonies of witnesses, while the learned counsel for the appellant argued that the duty imposed to judges and magistrates to assign reasons for take over of a partly heard case by parity of reasoning also extends to applications such as the one subject of the instant appeal. He rationalized that this is for the purpose of ensuring transparency and accountability in adjudication of matters. Admittedly, this Court has had an opportunity to consider an application where the successor judge had not provided reasons for the absence of the predecessor judge. In the case of VIP Engineering and Marketing Ltd (supra), the applicant sought to move the Court for an order to call the proceedings of the High Court, Dar es Salaam Registry in Miscellaneous Civil Cause No. 254 of 2003 and revise them giving appropriate directions on the proper judge before whom the proceedings should be placed and proper sequence in which the proceedings should be responded to and a further order directing the High Court to appoint the official Receiver of Independent Power Tanzania Ltd. One of the issues which the Court deliberated on was the reassignment of Misc. Civil Cause No. 254 of 2003 to Ihema J. The Court observed that this gave them grave concern because there were no reasons recorded for taking the case out of the list of cases that were assigned to Oriyo, J. and putting it in the list of Ihema, J. The Court held: "The individual calendar system requires that once a specific judge or magistrate is assigned a certain matter then that judge or magistrate remains to be the one to deal with such matter to its conclusion unless there are exceptional circumstances for removing the matter from the specific judge or magistrate so assigned. Such exceptional circumstances must be recorded. This will no doubt avoid unnecessary speculation and is in line with transparency, which is vital in the dispensation of justice" Suffice to say, in view of the above cited case, the application of the provisions of Order XVIII Rule 10 of the CPC may not be limited in application particularly, since the rationale for the requirement for a successor judge or magistrate to assign reasons for taking over the hearing from the predecessor judge as discerned from the case of Charles Chama and 2 Others v\$ The Regional Manager TRA and 2 Others, Civil Appeal No. 224 of 2018 (unreported), where the Court was of the view that the justification for a judge or magistrate to provide reasons upon taking over the case from another is two folds; "one, that the one who sees and hears the witness is in the best position to assess the witness's credibility which is very crucial in the determination of any case before a court; and two that the integrity of judicial proceedings hinges on transparency. Where there is no transparency, justice may be compromised." Additionally, the third rationale picked from the case of Fahari Bottlers Limited and Another (Supra) is that, where there is a change of judicial officers, assigning reasons is to ensure compliance with

individual calendar system that requires a specific judge or magistrate once assigned a case to proceed with it to its conclusion unless exceptional circumstances occur to warrant this not to happen. To capitulate this point, the Court in the case of Fahari Bottlers Limited and Another (Supra) observed: "... 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 trial judges or magistrates, but also to promote accountability on their part. The unexplained failure to observe this procedure in this case is very irregular, to say the least. Such irregularities and the accompanying confusion, in our view are not amenable to the appellate process for remedy, They are amenable to the revisional process" (Also see, Oysterbay Villas Limited vs Kinondoni Municipal Council, Civil Appeal No. 173 of 2017) In view of the above stated position, we decline the invitation by the learned Principal State Attorney to find that the spirit of Order XVIII Rule 10 is not applicable to applications and agree with the learned 14 counsel for the appellant, that evidence is also found in affidavits which support an application, and the fact that in the application subject to the present appeal the predecessor judge had heard the submission in chief and the reply submission and was assigned the matter within the individual calendar frame, it meant he was expected to preside over the proceedings until its conclusion unless exceptional circumstances demanded otherwise to lead to another judge take over. In the instant appeal, upon taking over a partly heard case, the successor judge was obliged to provide reasons which led the predecessor judge not to conclude the instant matter to its conclusion. Since there were no reasons advanced by the predecessor judge, it meant there was no transparency and thus there was a risk of compromising the integrity of justice. We are constrained to state that this was a procedural irregularity. Nevertheless, taking into account what has been stated above and the circumstances of the instant case, we are of the view that failure of the successor judge to give reasons for change of judges at the stage where the submissions in chief have been heard and were on record, in a matter which its determination relied on oral, written submissions and affidavital evidence cannot be said to have materially prejudiced the 15 appellant. In any case, no grounds or evidence were advanced to show how the appellant was prejudiced by the same. We are of the view that the circumstances of the present case constrain us to find that the procedural irregularity discerned above is cured by application of the overriding principle as found in sections 3A and 3B of the Appellate Jurisdiction Act, Cap 141 RE 2019 (the AJA). Suffice to say, we have drawn inspiration from our holding in Charles Bode vs Republic, Criminal Appeal No. 46 of 2018 and Chacha Jeremiah Murimi and 3 Others vs Republic, Criminal Appeal No. 551 of 2015 (both unreported) and hold thus. The 2nd ground of appeal was argued in the alternative to the 1st ground. The complaint here according to Mr. Maro, is that the High Court erred in raising the issue on propriety of the Powers of Attorney given to Abdul Sumra from D.H. Meghji and considered suo motu by the Court without according the appellant the right to be heard on the same. The learned counsel argued that the High Court judge having assessed the said power of attorney and found that it was calculated to frustrate the revocation process, it was a finding prejudicial to

the rights of the appellant since the parties were not heard on the issue. For the learned counsel, the High Court's finding was erroneous since the appellant was condemned unheard on the issue. To cement his argument, on the 16 position of the law on the matter, he cited the case of DPP vs Sabinis Inyasi Tesha and Another [1993] TLR 237. In this case, the Court reiterated the cardinal principle of natural justice that a party should not be condemned unheard. Other cases cited by the learned counsel included Dishon John Mtaita vs DPP, Criminal Appeal No. 132 of 2004, Francis Kwang Musei vs W.P. Slaa and Others, Civil Application No. 2 of 1999, Scan Tan Tours Ltd vs The Registered Trustees of the Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 (all unreported). He thus prayed that the High Court's decision be vitiated and the appeal be allowed. The learned Principal State Attorney argued that the record of appeal when properly scrutinized show that the issue that the presiding judge considered was whether the applicant was accorded the right to be heard and thus the propriety of the power of attorney was not the main issue under scrutiny. Essentially, for the learned Principal State Attorney, the appellant was overemphasizing the issue of the power of attorney which was not an issue for consideration in the application and thus urged the Court to dismiss this ground. In rejoinder, the appellant was adamant that the presiding judge had relied on his findings related to the power of attorney in his ruling 17 which he argued, showed that the judge was highly influenced by his findings that the power of attorney was faulty. In our deliberation on this ground, we find it prudent to reproduce the segment in the Ruling of the High Court on propriety of the power of attorney found at page 96 of the record of appeal, it reads: "Based on the above plain facts, the move taken by Dauithkhanu Habib Meghji to give powers of attorney to Abdul Sumra, which was cleverly employed to transfer the land to their own company Flycatcher Safaris Limited/ was treacherously calculated to frustrate the move of the authorities, aimed at revocating the said title deed. We cannot allow this to flourish in our society at any cost With this background, and the knowledge held by Abdualah Osman @Abdul Sumra, it becomes dangerous to hold that the applicant company was not given a chance to be heard and that no reasons were advanced for the said revocation." In the above cited extract, clearly the presiding judge considered and determined that the power of attorney given to Abdul Sumra by Dauithkhanu Habib Meghji was part of treacherous plan to effect the transfer of the land to their own company Flycatcher Safaris Limited and frustrate any other transaction or disposition on the land. Essentially, the 18 presiding judge finding was that the issuance of the power of attorney was treacherous. This is what the appellant are complaining against that, the presiding judge made the said determination which led to his final conclusion without inviting them to submit on it, and thus denied them the right to be heard. A plethora of decisions of the Court have emphasized on the underlying essence for courts to ensure the right to be heard for all parties when conducting trials and hearing and up to the time of composing judgments, all in accentuating the principles of natural justice. In Mbeya- Rukwa Auto Parts and Transport vs Jestina Mwakyoma [2003] TLR 251 the Court stated: "It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In Ridge v. Baldwin [1964] AC 40, the leading English case on the subject it was held that a power which

affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in *Furnell v. Whangarei High School Board* [1973] AC 660, 19 "Natural justice is but fairness writ large and judicially." Indeed, observance of the right to be heard for parties in a trial or any proceedings cannot be overemphasized as observed in cases such as: *National Housing Corporation vs Tanzania Shoes and Others*

[1995] TLR 251, *Margwe Erro and Two Others vs Moshi Bahalulu*, Civil Appeal No, 111 of 2014 and *Yazidi Kassim Mbakileki vs CRDB*

[1996] LTD and Another; Civil Reference No. 14/04 of 2018 and *Abbas Sherally and Another vs Abdul S. H. M, Fazalboy*, Civil Application No.33 of 2002 (All unreported). In *Margwe Erro and Two Others* (supra), where the learned judge in the course of composing the judgment, posed some questions suo motu on whether exclusion of period of obtaining the decree can be dealt with in the appeal and ruled on them without inviting the parties to address her on the said questions which she found to be necessary in the determination of the said appeal, the Court held: "The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the High Court." 20 In the instant appeal, having revisited the record of appeal from the time Sambo, J. took over the hearing of the matter and also before his take over, there was no record showing that the parties were provided with an opportunity to argue on propriety of the said power of attorney. A scrutiny of the Ruling shows clearly that the issue was raised suo motu by the court as argued by the appellant's counsel, a fact also not disputed by the learned Principal State Attorney, who argued that the issue was not very crucial in determination of the matter before the court. Certainly, a scrutiny of the impugned ruling shows that the presiding judge did rely on his findings regarding his concern on the power of attorney in making his final determination of the matter. Failure to accord the parties the right to be heard on the propriety of the power of attorney in question denied the parties the right to be heard on the issue and we are satisfied this anomaly is fatal and vitiated the proceedings and Ruling. (See, *Dishon John Mtaita* (supra) and *Scan Tan Tours Ltd* (supra)). We are, thus, of the view that this ground is meritorious. In consequence, taking cognizance of our above holding, we are constrained to proceed to determine the other remaining grounds of appeal, finding it to be a futile exercise. In the end, we find merit in this appeal and allow it accordingly. In view of the peculiar circumstances of this case, we nullify the proceedings, quash and set aside both the Ruling and Drawn Order that arose therefrom. It is ordered that the case be remitted to the High Court and assigned to another Judge for hearing. In the interest of justice, each party to bear own costs. DATED at ARUSHA this 30th day of September, 2021. R. K. MKUYE JUSTICE OF APPEAL W. B. KOROSSO JUSTICE OF APPEAL P. F. KIHWELO JUSTICE OF APPEAL The judgment delivered this 30th day of September, 2021 in the presence of Mr. Valentine Nyalu, learned counsel for the appellant and Mr. Mkama Musalama, learned

State Attorney for the respondents, is hereby ce ' ' 22

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