

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: NDIKA, J.A., KIHWELO, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 282 OF 2020**

**NISHATI PLUS LIMITED.....APPELLANT**

**VERSUS**

**NICE CATERING CO. LTD.....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania, Commercial Division  
at Mwanza)**

**(Magoiga, J.)**

**dated the 09<sup>th</sup> day of August, 2019**

**in**

**Commercial Case No. 05 of 2019**

.....

**JUDGMENT OF THE COURT**

*25<sup>th</sup> & 27<sup>th</sup> September, 2023*

**MWAMPASHI, J.A:**

This appeal arises from the decision of the High Court of Tanzania, Commercial Division, at Mwanza ("the High Court") dated 09.08.2019, in Commercial Case No. 05 of 2019. In that case, the High Court (Magoiga, J.), dismissed the appellant's application for default judgment made under rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by Rule 13 of GN, No. 107 of 2019 ("the Commercial Rules") on account that the appellant had failed to prove its claim by affidavit as required by the law. Disgruntled, the appellant has preferred the instant appeal.

Briefly, the facts from which this appeal arises are as follows: Vide High Court Commercial Case No. 05 of 2019, the appellant herein, Nishati Plus Co. Ltd, a limited liability company, sued the respondent, Nice Catering Co. Ltd, for TZS. 71,312,310/= being the value of groceries it had allegedly supplied to the respondent. In its written statement of defence, the respondent totally denied to have ever been engaged in any business with the appellant.

According to the record of appeal, after the First Pre Trial-Conference had been conducted by Phillip J., and also after the mediation had failed, the matter was adjourned to 10.07.2019 for the Final Pre Trial Conference before Fikirini, J. (as she then was). On 10.07.2019, before the matter could proceed, a point of preliminary objection was raised by the appellant's counsel that the respondent's written statement of defence as well as the witness statements had been filed in contravention of rules 19 (1) and 50 (1) (h) of the Commercial Rules. It was thus, prayed for the same to be struck out. The counsel for the respondent readily conceded to the objection and the written statement of defence and witness statements were accordingly struck out with costs. Consequently, the counsel for the appellant further prayed for an adjournment so that he could file an application for a default judgment as required by rule 22 (1) of the Commercial Rules. The prayer was granted and the matter was adjourned and fixed to proceed on 07.08.2019.

On 07.08.2019, it was not Fikirini, J. (as she then was) who presided over the matter. Without assigning any reason, Magoiga, J, took over the matter and as the application for default judgment had already been filed, the learned successor Judge proceeded with the determination of the application and for the reasons we have stated above, he dismissed it.

Aggrieved by the dismissal of the application for default judgment, the appellant has preferred the instant appeal on the following two grounds of complaint:

- 1. That the learned successor Judge (Hon. Justice Magoiga, J.) erred in law and fact by taking over the trial of a suit from the predecessor Judge (Hon. Justice Fikirini, J.) without recording or assigning reasons thereof as mandatorily required in law. In the alternative*
- 2. That the trial Judge erred in law for not considering the claims of Tshs. 71,712,310/= as stated in the plaint, annexures and witness statements as being admitted by the respondent following the striking out of the written statement of defence and witness statement.*

In pursuance of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") written submissions for and against the appeal were filed by the counsel for the parties. While the appellant's submission was filed on 11.08.2020, that of the respondent, was filed on 09.09.2020.

At the hearing of the appeal, Messrs. Godfrey Martin Basasingohe and Constantine Mutalemwa, both learned advocates, represented the appellant whereas, the respondent had the services of Mr. Erick Kamugisha Rweyemamu, also learned advocate.

Submitting for the appellant, it was Mr. Mutalemwa who took the floor. He began by abandoning the second ground of appeal which, as we have indicated above, was raised in the alternative. Thereafter, without more, Mr. Mutalemwa adopted the appellant's written submissions and prayed for the first ground of appeal and consequently the appeal, to be allowed with costs.

In the written submissions in support of the first ground, it was submitted that the successor Judge (Magoiga, J.) took over the matter from his predecessor (Fikirini, J. as she then was) without assigning reasons for doing so. This, it was contended, was not only contrary to Order XVIII rule 10 (1) of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") but it was also against the rationale behind that provision as underscored by the Court in **Mariam Samburo (Legal Personal Representative of the late Ramadhan Abas) v. Masoud Mohamed Joshi and 2 Others**, Civil Appeal No. 109 of 2016 (unreported).

As it was for Mr. Mutalemwa, Mr. Rweyemamu, learned advocate for the respondent, adopted the written submissions he had earlier filed in

opposing the appeal and on the basis of the submissions, he prayed for the first ground to be found unmerited. He thus prayed for the dismissal of the appeal with costs.

According to the respondent's written submissions filed in countering the first ground of appeal, it was submitted that the reason for the succession in question was due to the fact that the matter was assigned to the successor Judge on a special session and that the parties were so notified. It was further argued that the requirement under Order XVIII rule 10 (1) of the CPC is not mandatory but it is in the discretion of the successor Judge or magistrate to either assign reasons or not. Finally, it was submitted that the case of **Mariam Samburo** (supra), is distinguishable mainly because in the instant case the parties were notified of the fact that the case was scheduled for special session.

There was no rejoinder by Mr. Mutalemwa.

Having considered the submissions made for and against the first and sole ground of appeal, and also having examined the record of appeal, it is our observation, as we have also alluded to above, that there is no dispute that the successor Judge did not assign reasons for the succession in question. It is crystal clear at page 108 of the record of appeal that, while Fikirini, J. (as she then was) who was handling the matter had adjourned it and was ordinarily expected to proceed with it on 07.08.2019,

but when the matter was called on to proceed on the said date, it was Magoiga, J. who presided over and handled the matter. The successor Judge did not assign or put on record reasons for the succession. For the above reasons, we will not be in haste if we will, at this very juncture, respectfully, disagree with Mr. Rweyemamu who contended that the reason for the succession was known because the matter was assigned for special session and that the parties were so notified. Such a contention came from the bar and it was not borne out by the record. It is a settled position that a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on it. See – **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002]2 EA. 627.

The only issue for our determination is whether, under the circumstances of this matter, the omission by the successor Judge to assign reasons for the succession was fatal and did prejudice any of the parties.

Order XVIII rule 10 (1) of the CPC which form the basis of the appellant's grievances provide that:

*"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 is such evidence or memorandum has been taken down or made by*

*him or under his direction under the rules and may proceed with the suit from the stage at which his predecessor left it”.*

Although it is not expressly provided under the above provision, that reasons for succession of trial magistrates or judges should be assigned or recorded by the successor judge or magistrate, it is a settled position that reasons for the succession should be assigned by the successor judge or magistrate. Further, we are in agreement with Mr. Mutalemwa that in **Mariam Samburo** (supra), the Court stressed the importance for successor judges or magistrates to assign reasons for succession because, among other things, it promotes accountability on the part of the successor judge or magistrate. However, as the Court observed in **Diamond Motors Limited v. K-Group (T) Limited**, Civil Appeal No. 50 of 2019 (unreported) while appreciating **Mariam Samburo** (supra), each case must be decided based on its own circumstances, the focus being on whether the omission to assign reasons has prejudiced any party or not. Based on the above and due regard being had to the operation of the overriding objective principle, it is our considered view that whether the omission to assign reasons for succession of trial judges or magistrates, is fatal or not, depends on whether the omission has prejudiced any of the parties or not.

The above discussion takes us to the question whether, under the circumstances of the instant case, any party, and in particular the appellant, was prejudiced by the omission by the successor Judge to assign reasons for the succession. Having examined the record of appeal, particularly the stage of the proceedings when the successor Judge took over the matter, we have observed that apart from the fact that the appellant has totally failed to show how it was prejudiced by the succession, in fact, the succession occasioned no injustice to any of the parties. At the stage of the succession, what was pending before the High Court was the application for default judgment, which the predecessor Judge had not even set eyes on it. Upon taking over, the successor Judge determined the application mainly on the basis of the affidavit filed in support of the application. In those circumstances, where there was no evidence taken or any memorandum made by the predecessor Judge, there was no trial or hearing envisaged and within the meaning of Order XVIII rule 10 (1) of the CPC.

In our recent decision in **Farid F. Mbaraka and Another v. Domina Kagaruki and Another**, Civil Appeal No. 293 of 2022 (unreported), in which the successor judge had not assigned reasons for succession and in which the matter was decided on the basis of affidavits and arguments made by the counsel, a similar point that Order XVIII rule



10 (1) of the CPC was in contravention, was raised. In dismissing the complaint, the Court stated that:

*"With respect, we do not share with Mr. Nkoko the view that by considering the affidavits, the learned judge conducted a hearing within the meaning of Order XVIII rule 10 (1) and (2) of the CPC ... Conversely, we agree with Mr. Rwebangira that the provisions of rule 10 (1) of Order XVIII of the CPC are relevant in recording evidence in the course of which a judge or magistrate observe the demeanour of witnesses. That is the reason rule 10 (1) of Order XVIII of the CPC refers to evidence".*

Similarly, in the case of **Salima Mohamed Abdallah v. Joyce Hume**, Civil Appeal No. 149 of 2015 (unreported) the Court had an opportunity to expound the application of Order XVIII rule 10 (1) and (2) of the CPC by stating that:

*"For this provision to come into play, hearing of the suit must have started by recording of evidence by one judge before it is taken over by a successor judge after the predecessor is prevented from conducting the suit under the circumstances provided in the said provision... In this regard, we have no hesitation to state that a close reading of the above quoted provision leads us to the understanding that the successor judge or magistrate assigns reasons for taking over the*

*continuation of trial after the trial has started and evidence heard partly by his predecessor who has been prevented from concluding the trial”.*

Guided by the above cited authorities and for the reasons we have given, we find that apart from the fact that Order XVIII rule 10 (1) of the CPC was not offended, the omission by the successor Judge to assign reasons for taking over the matter from his predecessor did not prejudice the appellant.

Consequently, we hereby dismiss the appeal with costs.

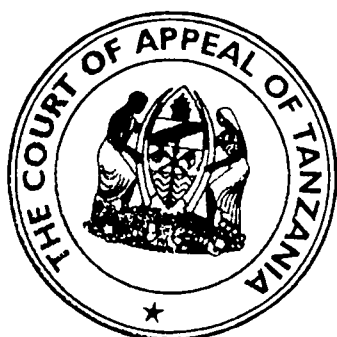
**DATED** at **MWANZA** this 26<sup>th</sup> day of September, 2023.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

P. F. KIHWELO  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 27<sup>th</sup> day of September, 2023 in the presence of Mr. Constantine Mutalemwa, learned counsel for the appellant and Mr. Alfred Tukiko Okechi, learned counsel for the respondent, is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**