IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KWARIKO, J. A., LEVIRA, J.A And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 204 OF 2019

JOHN BARNABA MACHERA .... APPELLANT

VERSUS

NORTH MARA GOLD MINE LIMITED .... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Mwanza District Registry at Mwanza)

(Matupa, J.)

dated the 17th day of April, 2019

in

Civil Case No. 29 of 2016

....

JUDGMENT OF THE COURT

13th & 20th July, 2022

LEVIRA, J.A.:

The appellant, John Barnaba Machera was aggrieved by the decision of the High Court of Tanzania (Matupa, J.) at Mwanza District Registry (the trial court) in Civil Case No. 29 of 2016 which dismissed his suit for being time barred. Therefore, he has preferred the present appeal.

Before determining the grounds of appeal as presented in the memorandum of appeal, we find it imperative to narrate, *albeit* briefly, the background of this matter as follows: The appellant is a businessman

dealing with mining activities at Nyamongo Kerede Village, Kemambo Ward in Tarime District. His mining area borders the respondent's mining area and thus they are neighbours. In 2008 a conflict arose based on the conduct of their day-to-day activities which led to the institution of Land Case No. 22 of 2009 in which the appellant sued among others, Barrick North Mara Gold Mine Limited. The suit was not determined on merit having been confronted with a preliminary objection regarding the jurisdiction of the court which was sustained as the High Court was satisfied that the nature of dispute between the parties was based on mineral rights. As such, the Land Division of the High Court of Tanzania at Dar es Salaam (Mziray, J. as he then was) sustained the preliminary objection and struck out the suit. Thereafter, the appellant instituted Civil Case No. 113 of 2012 in the High Court of Tanzania at Dar es Salaam (Utamwa, J.), this time around suing Barrick North Mara Gold Mine Limited alone. For another time, the respondent raised preliminary objections on time limitation and cause of action which were dismissed and the appellant was granted leave to amend the plaint so as to make the cause of action clearer.

The appellant filed an amended plaint as ordered by the trial court, which included the Inspector General of Police (IGP) and the Attorney

General (AG) as the second and third defendants respectively who initially were not parties in the original plaint. Upon discovering this anomaly, the High Court engaged the parties to address it on that aspect and the appellant readily conceded. As a result, he withdrew the suit and was granted leave to refile. Acting on the leave of the High Court, the appellant refiled a new suit in the trial court registered as Civil Case No. 29 of 2016 against North Mara Gold Mine Limited subject of the instant appeal. However, the new suit was not free from challenges as the respondent raised a preliminary objection which had two limbs. **First,** that the suit was time barred in terms of Item 6 of the Schedule to the Law of Limitation Act [Cap 89 R.E. 2002] (the LLA) read together with Order XXIII Rule 2 of the Civil Procedure Code [Cap 33 R.E. 2002] (the CPC). **Second,** in the alternative, that North Mara Gold Mine Limited, the respondent herein, was not a party to Land Case No. 22 of 2009 filed in the Land Division of the High Court of Tanzania at Dar es Salaam and Civil Case No. 113 of 2012 before the trial court, thus in terms of Item 6 of the Schedule to the LLA, the suit was time barred.

The trial court (Bukuku J. – the predecessor Judge) having heard the parties overruled the first limb of objection as she found that the suit was not time barred having excluded the time spent by the appellant in

prosecuting his case in court. As for the alternative objection, the learned Judge held that the issue as to whether Barrick North Mara Gold Mine Limited is different from North Mara Gold Mine Limited is a matter of evidence to be ascertained at the hearing of the suit inter-parties. Therefore, she concluded that the purported point of preliminary objection is not a point of law as a point of law cannot be raised if any facts have to be ascertained. Consequently, the alternative preliminary objection was overruled and the suit was ordered to proceed to its next stage.

However, in existence of such order, another learned Judge of the trial court (Matupa, J. – the successor Judge) picked from where his predecessor had ended and proceeded under Order XIV Rule 2 of the CPC by inviting the parties to adduce evidence in respect of the overruled objection. Witnesses were called and having heard them, on 17th April, 2019, the learned successor Judge pronounced his "Judgment" which dismissed the suit under section 3 (1) of the LLA for being time barred; hence, the current appeal as intimated above.

At the hearing of the appeal, the appellant was represented by Dr. Chacha Bhoke Murungu, learned advocate, whereas the respondent enjoyed the services of Mr. Faustin Anton Malongo, also learned advocate. Before commencement of the hearing of the appeal, with leave of the

Court, Mr. Malongo withdrew the notice of cross-appeal which he had earlier on filed in Court on 13th September, 2019. Also, with leave of the Court, Dr. Murungu added a new ground of appeal. For convenience purposes, we shall refer the additional ground of appeal as the first ground and those in the memorandum of appeal shall start with number two, making a total of six grounds of appeal as follows:

1. *"That, the successor trial Judge did not comply with Order XVIII Rule 15 (1) and the proviso thereto of the CPC in that he did not record the reasons for taking over the conduct of the case."*

2. *The Successor Trial Judge without having jurisdiction, erred in law when he re-opened and reversed the decision of his fellow and predecessor Judge (Hon. Bukuku, J as she then was) on the second purported preliminary point of objection which had earlier been finally and conclusively determined by the court on 19th October, 2017.*

3. *The successor trial Judge grossly erred in law and in fact when he made a finding that the second point of preliminary objection was not decided but was deferred by the predecessor trial Judge (Hon. Bukuku J as she then was) in her Ruling delivered on 19th October, 2017.*

4. *The successor trial Judge erred in law by disposing of a purported second preliminary point of objection under Order XIV, Rule 2 of*

the Civil Procedure Code, CAP 33 R.E. 2002 by resorting to witness testimony and documentary evidence in exhibits.

5. *The trial successor Judge grossly erred in law when he granted costs to the Respondent on a matter which the High Court had raised suo mottu thereby causing injustice and greater prejudice to the appellant.*

6. *The trial successor Judge grossly erred in law and fact when he hurriedly made the impugned decision without first making an order on the application for recusal of the trial Judge and without calling on parties to the suit to address the trial court on the application for recusal despite that the application for recusal had already been filed in court by the appellant in person on 18th March, 2019 and copies thereof were served on the trial judge personally by registered mail on 18th March 2019, the respondent's counsel on 19th March, 2019 at 12.30 PM and was also served on the appellant's counsel, and the Honourable Registrar of the High Court of Tanzania."*

Since the first three grounds of complaint relate to a jurisdictional issue, we shall dispose of them first before embarking on the remaining grounds, if such need arises. Gathering from the record before us, the respective grounds of complaint and related submissions of the learned counsel, issues revolving thereto are mainly two; the propriety or otherwise of the successor Judge taking over the matter from where the

predecessor Judge had ended and the validity of proceedings before the successor Judge.

Dr. Murungu submitted in respect of the first ground of appeal to the effect that it was wrong for the successor Judge to step into the conduct of this matter without assigning reasons for so doing. This act, he said, contravened Order XVIII Rule 15 (1) of the CPC, Amendment of the First Schedule, Rules, 2021, G.N. No. 760. He referred us to pages 1128 – 1129 of the record of appeal where on 23rd March, 2018 the predecessor judge made some orders and adjourned the hearing of the suit to 15th May, 2018. Immediately thereafter, the coram that followed was of 23rd November, 2018 and the successor Judge presided over the matter. However, he said, the record of appeal is silent as to why he took over from the predecessor Judge. According to Dr. Murungu, all what the successor Judge did vitiated the proceedings, the purported judgment and the decree.

Regarding the second ground of appeal, Dr. Murungu argued that the successor Judge had no jurisdiction to reverse the decision of his predecessor in the second point of preliminary objection regarding time limitation. He referred us to page 1130 of the record of appeal where the successor Judge invited the parties to address the court whether they can

proceed with the suit under Order XIV Rule 2 of the CPC and thereafter he ordered the suit to proceed on the following day.

It was Dr. Murungu's further argument that, Order XIV Rule 2 of the CPC gives the court power to deal with issues of law only, therefore, the successor Judge was wrong to try the issue of identity of the respondent under that provision. He went on to state that, after all, the issue regarding identity of the respondent had already been decided upon by the predecessor Judge as the same was overruled at pages 185 – 199 and 200 – 201 of the record of appeal.

He firmly averred that the next stage ordered by the predecessor Judge was the Final Pre-Trial Conference (FPTC) and thus the successor Judge had no jurisdiction as he was *functus officio* to re-open it as the matter had already been decided. As such, he said, the second point of preliminary objection regarding identity of the respondent became *res judicata* and thus the successor Judge had no jurisdiction. He supported his arguments with the following cases: **Scholastica Benedict v. Martin Benedict** [1993] T.L.R.1; **Laemthong Rice Company Ltd v. Principal Secretary, Ministry of Finance** [2002] T.L.R. 389; **Malik Hassani Suleiman v. S. M. Z.** [2005] T.L.R. 236; and, **Esso Tanzania Limited v. Deusdedit Rwebandiza Kaijage** [1990] T.L.R. 102.

Submitting on the third ground of appeal, Dr. Murungu was very brief that the predecessor Judge did not defer the second point of preliminary objection, he again referred us to pages 198 – 199, 200 -201 of the record of appeal. Therefore, he said, the successor Judge erred when he made a finding that the second ground of preliminary objection was deferred. Finally, Dr. Murungu urged us to allow the appeal with costs.

In reply, Mr. Malongo opposed the appeal. He preferred to argue the second and third grounds of appeal together and the first ground separately.

His response to the first ground of appeal regarding the change of Judges without assigning reasons, Mr. Malongo stated that this ground is based on a new law which was enacted in the year 2021, while the impugned decision was of 17th April, 2019. Therefore, he averred that the successor Judge cannot be faulted by contravening the law which was non-existent at the time of conducting the proceedings of the matter at hand. He thus concluded that this ground of appeal be dismissed as it is baseless.

In respect of the second and third grounds of appeal, Mr. Malongo submitted that the successor Judge did not re-open and reverse the

decision of the predecessor Judge on the second point of preliminary objection. Expounding, Mr. Malongo submitted further that, the decision of the predecessor Judge as far as the second limb of objection is concerned was that, the same did not qualify to be called a preliminary objection because it needed evidence to determine the identity of the respondent. He referred us to pages 198 to 199 of the record of appeal where the predecessor Judge was categorical that the said issue is a matter of evidence to be ascertained at the hearing of the suit inter-parties.

According to him, the successor Judge was right to determine that issue first as it was left pending by his predecessor by calling witnesses where Diane Mwake Wamuza (DW1) tendered a certificate of change of names which enabled the successor Judge to realise that, they were two different legal persons and thus the suit was time barred.

Mr. Malongo argued firmly that Order XIV Rule 2 of the CPC does not only deal with preliminary points of objection, but the court can hear any legal point under that provision. As such, he said, the issue of time limitation is a mixture of both points of law and facts which needs evidence. He elaborated that, the cause of action arose on 11th April, 2008 as per paragraphs 9, 10 and 11 of the plaint and the suit was

instituted eight (8) years later, that is, on 28th November, 2016. Since this is a tort case, its limitation period is three (3) years and in the circumstances, the suit was time barred as it was decided by the successor Judge. At any rate, he said, the successor Judge was not *functus officio* and the principle of *res-judicata* does not apply in this case. He went on arguing that, had it been that the successor Judge determined the first ground of preliminary objection it could be said that the matter was *res-judicata*. Therefore, Mr. Malongo submitted that all the cases cited by Dr. Murungu in respect of these grounds of appeal are irrelevant. As for him, the successor Judge was completing what had been left by his predecessor.

Finally, he urged us to dismiss the appeal because the successor Judge did not error. When probed by the Court, Mr. Malongo stated that the successor Judge was properly guided under Order XIV Rule 2 of the CPC to first try a legal issue despite the fact that issues were not yet framed and the date of FPTC had already been fixed as it can be seen at page 1129 of the record of appeal.

Dr. Murungu made a brief rejoinder regarding reliance on Order XIV Rule 2 of the CPC by the successor Judge. He contended that if at all the successor Judge intended to determine the legal issue, he was supposed

to deal with it under Order XVIII of the CPC which deals with hearing of suits. Failure to abide by that order led him into giving a premature decision which he called a judgment. Emphatically, he submitted that parties were not involved by the court in framing issues on malicious destruction of properties and thus Order XIV Rule 2 of the CPC was irrelevant as the evidence is not law but facts. According to him, the successor Judge misinterpreted and misapplied Order XIV rule 2 of the CPC.

He urged us to revert to pages 198 – 199 of the record of appeal and submitted that, the predecessor Judge even decided the second limb of preliminary objection by stating that *"in the upshot, I find that this purported preliminary objection fails to meet the test laid down in the* ***Mukisa Biscuit's*** *case supra"* and finally overruled the objection. Therefore, he said, both points of preliminary objection were decided by the predecessor Judge.

In conclusion, Dr. Murungu stated that the successor Judge was wrong to reverse the decision of his predecessor. He thus urged us to allow the appeal with costs.

We appreciate the in-depth submissions by the counsel for the parties. We must admit that they have given us the insight of what had

transpired before the trial court which is useful for the determination of this appeal. However, with respect, we do not find ourselves in a position to utilise each and every material presented before us having gone through the grounds of appeal and the entire record. As we intimated above, all the arguments fall under two vital issues calling for our determination; to wit, whether it was proper for the successor Judge to take over the matter from where the predecessor Judge ended by invoking Order XIV Rule 2 of the CPC and whether the proceedings before the successor Judge were valid. If the answers to these issues will be in the negative, we shall end there, but if it will be in affirmative, we shall as well consider issues arising from other grounds of appeal. Having considered circumstances of the case, we shall not labour to determine as to whether the successor Judge failed to record reasons for taking over the conduct of the suit from his predecessor. This is only for a main reason that, the matter was still at the preliminary stage as the predecessor Judge was yet to record evidence on substantive matter which could affect the rights of the parties, as far as malicious damage to properties is concerned.

With that road map in mind, we now embark to determine as to *whether it was proper for the successor Judge to take over the matter*

from where the predecessor Judge had ended by invoking Order XIV Rule 2 of the CPC. It is glaring that the predecessor Judge dealt with the preliminary issues involved the determination of the following preliminary objections:

1. *That, in terms of Item 6 of the Schedule to the LLA read together with Order XXIII Rule 2 of the CPC the suit is time barred.*
2. *That, North Mara Gold Mine Limited was not a party to Land Case No. 22 of 2009 filed in the Land Division at Dar es salaam, Civil Case No. 113 of 2012 filed in the High Court Dar es salaam Registry and the dispute lodged with the Commissioner for Minerals, in terms of Item 6 of the Schedule to the LLA thus, the suit is time barred.*

It is clear from the record of appeal whereby at page 196, the predecessor Judge dismissed the first ground of preliminary objection as she concluded that the suit was not time barred having stated:

> *"It is evident that treading by the provision of Order XXII Rule 2 (a) (b) of the Civil Procedure act (sic), read together with section 21 (1) of the Law of Limitation Act,* ***this suit is not time barred.*** *The time during which the plaintiff has been prosecuting his case in court should be excluded. That said, I hold that, this*

point of objection has no merit. It is dismissed". [emphasis added].

Regarding the second preliminary objection, the learned predecessor Judge overruled it. Part of the decision is found at page 199 of the record of appeal where the learned predecessor Judge had the following to say:

> *"In the upshot, I find that this* ***purported preliminary objection fails*** *to meet the test laid down in the* ***Mukisa Biscuits's*** *case (supra). I agree with the learned counsel for the plaintiff that,* ***this objection is incompetent and it is accordingly overruled.*** *Having addressed both points of objection, I hereby order that costs shall abide the outcome of the matter* ***which is to proceed to its next stage.*** *Order accordingly."* [Emphasis added].

The above excerpts show clearly that, the predecessor Judge had determined both preliminary objections and ordered the matter to proceed to its next stage. However, the controversial issue which led to the current appeal is in respect of the order of the predecessor Judge that *"the matter to proceed to its next stage".*

When the successor Judge took over the matter on 7th February 2019, he proceeded under Order XIV Rule 2 of the CPC to deal with the

second preliminary objection under the pretext that the successor Judge had deferred it. Order XIV Rule 2 of the CPC stipulates:

> *2. "Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."*

This provision governs the framing of issues which is an important step in the conduct of civil cases. By so doing, contentious issues between the parties are identified and determined by the court. In **Celina Michael v. Mtanzania Newspaper and 6 others,** Civil Appeal No. 320 of 2017 (unreported), the Court stated that, failure to frame issues arising out of the pleadings has the danger of leaving the parties' controversy unresolved which may lead to false outcome of the case and wastage of time as it had happened in that case.

It is also on record that, when the successor Judge took the conduct of the matter, he made the following order:

> *"The order of the court was very clear that the determination of limitation on account of the identity of*

parties is triable. ***This court has to try the issue for it be disposed of it may be subject of an appeal any way.*** *Let us proceed with the issue under* ***Order XIV Rule 2 of the CPC.*** *Let Mr. Malongo start to prove his assertion that the defendants are different."* [Emphasis added].

Thereafter, witnesses for both sides were called to testify on the said assertion that defendants (respondent herein) are different. Having heard the parties, in his decision which he titled as *"JUDGMENT"* of 17th April, 2019, the successor Judge's opening statement read as follows:

> *"I pronounce myself on my interpretation of the decision of madam Bukuku, J. dated 19th October, 2017. The decision is contained in the following paragraph ...."* (page 1087 of the record of appeal).

At page 1091 of the record of appeal, the successor Judge continued to state:

> *"I found myself at a difficulty as to how to proceed with the second limb of the decision of my learned sister. I thought that* ***the question of limitation is a fundamental one.*** *It has to be disposed of first, be it as a preliminary point of law or a mixed point of law and fact as it happened in this case.* ***My learned sister could not dispose of it as preliminary***

> ***objection because she found it be triable.*** *The issue here is whether what I intend to do is to determine the correctness of the decision of my predecessor Judge. Definitely I am not." [Emphasis added].* [Emphasis added].

At page 1093 of the record of appeal, the successor Judge continued to satisfy himself as follows:

> *"The exercise I have embarked on is in accord with the decision of the honourable predecessor Judge. I resolved to try the matter under Order XIV Rule 2 of the Civil Procedure Code. Which provides as follows:*
>
> *2. Where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issue first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."*

Thereafter, the successor Judge proceeded to determine the issue he framed at page 1096 of the record of appeal which reads:

> *"Whether Barrick North Mara Limited against which the cases No. 22 of 2009 and 113 of 2012 (Dar es Salaam Registry) is the same as North Mara Gold Mine Limited the defendant in this case"*

At page 1101 the successor Judge made the following finding:

> *"Even with the inquiry, still the result is the same, that there is no evidence to relate to the two names. The suit in the present name cannot be done without the leave of the court...the cause of action for tort is in terms of Item 6 of the first schedule is three years, that time on the pleadings, has long expired. Accordingly, the suit is dismissed under section 3(1) of the Law of Limitation. The defendant shall have costs of this case only, as they are alien to the first cases."*

We have deliberately reproduced at length what had transpired so as to be able to determine the issues we have raised. We learn from the sequence of events from when the successor Judge took the conduct of this matter, he acknowledged to have been faced with a dilemma on how to proceed with the matter. Resorting to Order XIV Rule 2 of the CPC, was according to him, the best viable option. Now, whether he properly conducted himself under that provision, this is the question which we shall shortly answer.

In his submission in support of the appeal, Dr. Murungu argued that it was not proper for the successor Judge to invoke the above provision of the law to determine an issue which had already been determined by his predecessor Judge. Instead, the matter was supposed to proceed to

the next stage as it was ordered by the predecessor Judge, which was FPTC. To the contrary, Mr. Malongo pressed that the successor Judge took a proper move to determine that issue first in which, the matter involved was on point of law.

Having closely examined the record of appeal, we are unable to align with Mr. Malongo's line of argument and we shall give reasons: **One,** it is on record that two points of preliminary objection over time limitation were raised in alternative before the predecessor Judge and the decision thereof was delivered. The first preliminary objection was dismissed as the court ruled out that the suit was not time barred; and the second one was overruled on ground that, it was a factual matter which required to be ascertained by evidence. Therefore, in the circumstances, the decision of the court as far as the raised objections were concerned was certain. **Two,** the predecessor Judge ordered the matter to proceed to the next stage where the First Pre-Trial Conference was conducted and the Mediation process took place unsuccessfully. Thereafter, the predecessor Judge fixed a date for FPTC. In the circumstances, the points of objection were conclusively determined by the predecessor Judge and regardless of any ambiguity whatsoever, it was, with respect, not proper for the successor Judge to reopen the

preliminary objection, reframe the respective issue for determination and eventually, determine it. We say so because, had it been that the successor Judge abided by the order made by the predecessor Judge, he would not have framed a single issue or rather use piece meal approach on pretext of a legal issue and proceed to determine it in disregard of other legal issues, which perhaps, required attention of the court before determining factual issues pertaining to the dispute between the parties. This was not compatible with a sound policy to avoid multiplicity, duplicity and endless ligations. It is settled principle that litigation must come to an end – see: **Abdon Rwegasira v. the Judge Advocate General,** Criminal Appeal No. 5 of 2011 (unreported).

Three, this was a misdirection of the successor Judge who sat as an appellate Court over the decision of his fellow Judge of the same court which was, with respect, irregular. In a nutshell, the successor Judge was *functus officio* in determining what had been already decided by the predecessor judge. **Four,** we are of the considered view that, reframing an issue which had already been determined by the predecessor Judge was an unnecessary and unprocedural move which we are unable to condone. We therefore, find that it was not proper for the successor Judge

to invoke Order XIV Rule 2 of the CPC to take over the matter from where the predecessor Judge ended by reframing and determining a single issue.

Suffices to state that, holistic approach of dealing with disputes between the parties to a suit serves time and it ensures certainty of decisions on what is in controversy between the parties, hence timely justice.

For what we have endeavoured to discuss above and for the interest of justice of the matter at hand, we find that holistic approach is the best way of dealing with it. The parties should be availed opportunity to participate in the process of framing issues pertaining to their dispute. To be precises, both legal and factual issues. Thereafter, let the court decide them in accordance with the priority provided by the law, that, legal issues have to be determined first.

Having so stated, we allow the appeal, nullify the proceedings from where the successor Judge took over the conduct of the case, that is, on 23rd November, 2018 and quash the judgment and orders thereof subject of the current appeal. As the first three grounds are sufficient to dispose of the appeal, we shall not determine the remaining grounds. Consequently, we order the case file to be remitted back to the trial court before another Judge to proceed with the trial of the matter from where

the predecessor Judge ended. We make no order as to costs having considered the circumstances of this matter.

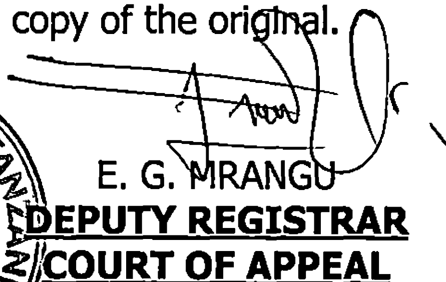
DATED at **MWANZA** this 19th day of July, 2022.

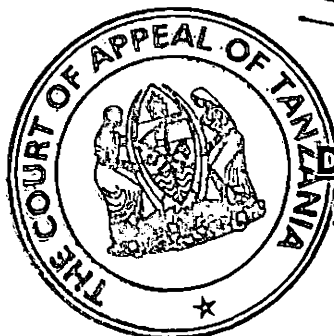
M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2022 in the presence of Appellant in person and Mr. Constantine Mutalemwa, learned counsel holding brief of Mr. Faustine Malongo, the learned counsel for the Respondent is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL