IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: NYALALI, C.J., MFALILA, J.A., And LUBUVA, J.A.)

CIVIL APPLICATION NO. 51 OF 1996

BETWEEN

THE ATTORNEY GENERAL ..... APPLICANT

AND

MAALIM KADAU & 16 OTHERS .....RESPONDENTS

(Application for Revision from the decision of the High Court of Tanzania at Tabora)

(Mchome, J.)

dated the 2nd day of August, 1996

in

Civil Case No. 12 of 1995

R U L I N G

LUBUVA, J.A.:

In this matter the Attorney General is seeking to move the Court for an order that the decision of the High Court in Civil Case No. 12 of 1995 dated 2 August, 1996 be revised in order to correct illegalities and improprieties contained therein. A notice of motion was filed in which the ground for the application was stated:

> "there is no procedure for revision which is provided for under the rules and that there is an impeding order of the High Court that has been improperly issued against the Attorney General, who cannot appeal against it because he is not a party to Civil Case No. 12 of 1995."

The application is supported by an affidavit deponed to by Lawrence Kaduri, learned Principal State Attorney incharge of the Attorney General's Office Tabora Zone.

In the affidavit the historical background of the sequence of events giving rise to this matter is set out. At this juncture it is desirable to outline the facts in brief. It is common ground that in 1995 the company by the name of Kahama Mining Corporation Limited was licenced by the government of Tanzania to carry out mining activities in Kahama District. This company instituted High Court Civil Case No. 12 of 1995 at Tabora against the respondents. That is, the company was the plaintiff and the respondents in this application were the defendant in the suit. In that case the plaintiff Kahama Mining Corporation Limited had applied for a permanent injunction to restrain the respondents from interfering with the mining operations in the area. The plaintiff company had also sought an eviction order against the respondents who, in their written statement of defence counter claimed for compensation if they were to move out of the area where they claimed to have been living for years carrying on small scale mining activities.

While the Civil Case No. 12 of 1995 was still pending, the respondents had applied for the Attorney General to be joined as co-defendant in that suit. This was so, because it was thought that the respondents' defence raised basic constitutional rights issues. At that stage, it appears from the record the court having accepted that the case involved basic constitutional rights made the following orders:

> "I therefore declare that this suit involves questions on constitutional basic rights and duties and has to be dealt with under the provisions of the Basic Rights and Duties Enforcement Act, 1994. And I refer this case to such court and, according to section 10 of the Act

No. 33 of 1994 this matter shall be heard by the High Court composed of three High Court judges."

On Friday afternoon, 2nd August, 1996, the respondents filed as a matter of urgency an application seeking a temporary injunction to restrain the Kahama Mining Company and the government from evicting them (respondents) from the area before the main suit i.e. High Court Civil Case No. 12 of 1995 is finally determined. In their application, the respondents claimed that the police had been stationed at the respondents' village ready to evict them. The Attorney General who was yet to be joined as a party to High Court Civil Case No. 12 of 1995 on behalf of the government was not served with the notice of hearing of the application for temporary injunction. So, with unprecedented speed and urgency the application was heard and determined the same afternoon. The application was granted with the result that a temporary injunction was issued against Kahama Mining Corporation Limited, the Attorney General and their agents, servants, workers or representatives restraining them from evicting the respondents from their villages until the final determination of High Court Civil Case No. 12 of 1995.

The Attorney General was aggrieved by the order issued by the High Court (Mchome, J.). Though he was not a party to Civil Case No. 12 of 1995, the order was issued against him. Hence this application to this Court.

At the hearing of this application, Mr. Maira learned counsel holding brief for Mr. Kwikima on behalf of the respondents raised a preliminary objection. He argued that as the Attorney General had a right of appeal in this matter, it was not proper for him to bring up the matter by way of revision. It was his submission

that in terms of Section 4 of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 which invested the Court with revisional jurisdiction, a party who has the right of appeal cannot come to this Court by way of revision. In this case, he said, the Attorney General should have lodged an appeal. Prompted by the Court as to how this could be done since the Attorney General was not a party in the original case, Mr. Maira firmly maintained that rule 76 of the Court's Rules, 1979 allows any person who desires to appeal to the Court to do so. In his view, any person even if he is not a party to the original case, if in one way or the other he is affected he can lodge an appeal. He insisted that words should be given their natural meaning as they appear in the rules unless such interpretation results into absurdity. He referred us to the decision of this Court in Civil Reference No. 79 of 1992 - Transport Equipment Ltd. v D.P. Valambhia.

Responding to the preliminary objection, Mrs. Macha, learned Senior State Attorney for the Attorney General ardently submitted that the Attorney General not being a party to Civil Case No. 12 of 1995 could not lodge an appeal. She said, it would lead to an absurdity if the law allowed any person not involved in the original case to lodge an appeal. In that way, she stressed, a flood gate of appeals from the world at large would be opened.

At the end of the submissions by the learned counsel for both the applicant and the respondents on the preliminary objection, we reserved our ruling on the issue until at the end of hearing arguments on the whole matter before us. That is, depending on the direction our ruling would take on the objection, such would be embodied in the body of our decision in the application. We propose to deal first with the preliminary objection in this ruling.

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With respect, we agree with Mrs. Macha's submission on this point. While it is true that rule 76 of the Court's Rules, 1979 provides for any person to appeal to this Court, it defies logic and common sense that the provision was meant to allow any person at large even if he is not a party to the original case to take up an appeal to this Court as urged by Mr. Maira. In our considered opinion, the words 'any person' should be interpreted to mean any one of those involved in the original case and not otherwise. As interpretation along the lines canvassed by Mr. Maira, learned counsel would lead to an absurdity which was not intended in enacting the rules. It is our view that Civil Reference No. 7 of 1992 - Transport Equipment Ltd. v D.P. Valambhia to which we were referred is inapplicable to the instant case. In that case, unlike the instant case, the parties involved in the reference were the same parties who were involved in Civil Applications Nos. 13 and 29 of 1991 before a single Judge of this Court. So, the question of involving a person who was not a party to the original case did not arise. In the result, the preliminary objection is overruled.

We will next deal with the merits of the case. In the first place, the issue is whether the learned judge had authority to deal with the application. Mrs. Macha, learned Senior State Attorney categorically submitted that the learned judge had no such authority. She pointed out that as already indicated, at some stage when an application was made to join the Attorney General as party to the suit in High Court Civil Case No. 12 of 1995, there was an express order of the court to the effect that the matter including applications, would be heard by three judges of the High Court. Unless this order was vacated, Mrs. Macha countered, the learned judge had no authority to deal with

the case alone as he did. On the other hand, Mr. Maira, learned counsel boldly argued that the learned judge cannot be faulted because the granting of reliefs by way of a temporary injunction is a matter of discretion which, he said was judicially exercised. As the police were already at the site in the respondents' villages, Mr. Maira went on, speed was necessary in order to prevent a miscarriage of justice namely, the eviction of the respondents. Finally, it was Mr. Maira's submission that the circumstances of the case were such as to justify the application of the court's inherent powers under Section 95 of the Civil Procedure Code.

With the court order extracted above still on record unvacated, it is clear to us that the learned judge had divested himself of the authority to deal with the case singly. According to the order, because the suit involved constitutional basic rights, the case was to be heard by a panel of three judges of the High Court. This is in accordance with the provisions of Section 10 of Act No. 33 of 1994. Apparently, aware of this order, the learned judge advances two reasons why he still dealt with the matter. First, as he described it, 'the affair, cries haste and speed must answer it'. That is, as the police were already stationed at the villages of the respondents, anything could happen if the application was not heard that afternoon i.e. eviction. Secondly, that the panel of three judges to hear the application could not be convened at that time because his other two colleagues were absent from the station and he himself was due to leave the following day. With due respect to Mr. Maira, learned counsel we do not accept that the learned judge cannot be faulted for what he did in this matter because he exercised the discretion judicially in the matter which called for speedy action in order to prevent a miscarriage of justice. It is elementary that so long as the court order divesting the court of the authority to deal with

the case was still in force any further dealing with the case outside the terms of the order was incompetent. It cannot be justified on grounds of expediency or an apprehension of a miscarriage of justice. So long as the learned judge had no authority to deal with the case sitting as a single judge, it is inconceivable that the learned judge still dealt with the case fully aware of the existence of the court order. This is evident from the reasons advanced. In the circumstances, we are convinced that the learned judge was clearly wrong in assuming authority to deal with the application when the court order was still in force.

It beats us why the learned judge overlooked to invoke the otherwise day to day common procedure in situations of this kind that is familiar to judicial officers. Perhaps we venture to think, it was because of the peculiar and unusual manner in which the matter was handled. If the situation warranted to be dealt with so urgently, the learned judge could either seek assistance from the Principal Judge in Dar-es-Salaam or refer the parties to Dar-es-Salaam where the matter could be attended by a panel of three judges. This, he did not do but instead, he proceeded to deal with the matter in complete disregard of the order. This was as pointed out patently wrong on the part of the learned trial judge.

There is another ground of complaint in this application raised by the Attorney General. That the matter was heard ex parte and that he was not served with the notice of hearing of the application. According to Mrs. Macha, paragraph 3 of the affidavit in support of the application which was not countered, Mr. Kaduri, the Principal State Attorney incharge of the Attorney General's Office, Tabora Zone deponed that he was not served with the notice of hearing the application. He was however served with

a copy of the ruling of the application by Hon. Mr. Justice Mchome personally on Saturday evening, the day after the hearing of the application. She submitted that having regard to the fact that the Attorney General's Office in Tabora is within easy reach from the court building, in fairness to both parties, the Attorney General should have been served with the notice of hearing. On this, Mr. Maira's submission was that the learned judge properly invoked the court's inherent powers under Section 95 of the Civil Procedure Code, 1966.

From the record, it is shown that the application was filed late in the afternoon, Friday, 2nd August, 1996. Because of the circumstances of the case the learned judge decided to hear the matter ex parte. And what are the circumstances. As shown on record, it was feared that the applicants, the villagers, would be evicted any time by the police who were already stationed at the applicants' villages. The evidence in support of this apprehension was based on the reports from the news papers and the radio broadcast. We will advert to this aspect later. At this stage, we pose to ask ourselves whether the learned judge's decision to proceed to hear the application ex parte without notifying the Attorney General was justified. As shown the urgency of the matter was that there was an apprehension that the government by use of the police was threatening to evict the respondents from their villages. In that case, the government represented by the Attorney General was a necessary party to be heard in the application for a temporary injunction the subject matter of the application. Granted that the matter was of extreme urgency, still it is our view that the Attorney General's Office in Tabora could have been served with the notice of hearing without causing delay. This is so, having regard to the fact that the High Court building in Tabora is within easy

reach from the Attorney General's Office there. The notice could be effected physically by court process server or by telephone, failure to which, the matter could well be heard the next day, when, as shown in the affidavit the learned judge personally handed over a copy of the ruling to the Principal State Attorney. Unusual though it was, if the learned judge obliged to take a copy of the ruling in person on Saturday evening to the Principal State Attorney, we see no reason why he did not make a similar effort to notify the Principal State Attorney by telephone or by physical contact as he did the next day when he delivered a copy of the ruling. This would accord with the principle of natural justice which the learned judge commendably underscores in the course of his ruling when he states:

> "Natural justice requires that even a poor peasant at least he be consulted before a decision affecting his life is made. In court he deserves at least to be heard ——"

From this, it appears to us that this cardinal principle of justice was, with respect to the learned judge, applied in the reverse in so far as the Attorney General was concerned. This, we are convinced, was not fair and was done in such circumstances that raise doubts and suspicion as to the reasons behind it.

In the ruling, the learned judge sets quite correctly the legal position regarding the issuance of a temporary injunction against the government. He states that the application could not be granted under Order XXXVII of the Civil Procedure Code 1966 because the government was not a party yet to Civil Case No. 12 of 1995. The learned judge also considered the Government Proceedings Act 1967 as amended by Act No. 30 of 1994 which provides for a period of three months before

the government can be made a party to proceedings. So, he took the view that irreparable damage would be caused to the respondents (then applicants) if the court were to wait for three months before issuing the injunction order. The application was thus granted by invoking the inherent powers of the court under Section 95 of the Civil Procedure Code, 1966. We must at once point out that this was a misapplication of this section. The reason is not far to seek. It is trite knowledge that the inherent powers of the court provided under this section of the Civil Procedure Code are invoked in situations where the court has authority or jurisdiction to deal with the matter and there is no specific provision of the law in place. Where as in this case the court has no jurisdiction or authority and there are express provisions of the law as was the case here, which provisions were elaborately set out by the learned judge, it was an error on the part of the learned judge to invoke such powers. Mr. Maira's submission on this point is, with respect, rejected.

As stated before, the learned judge treated this matter with extreme urgency and haste. It was filed late on Friday afternoon, 2nd August, 1996 and it was finally determined the same day. The learned judge did so because the respondents in this application who were then the applicants were in danger of being evicted by use of the police. In support of this view, the learned judge stated:

> "There is probable truth in this as this morning I was reading about two news papers "Mtanzania" and the "Guardian" confirming that the government has decided to evict the applicant from the area. Radio Tanzania, which I also listen to has been broadcasting this over the last two days or so."

It hardly needs to be overemphasized that it is highly improper on the part of the court to rely on or to take into account radio and news papers reports as the basis of deciding the case. Time and again this Court has expressed the correct position in law for the courts in administering justice. The Courts should base their decisions on nothing else other than the evidence adduced in court and the applicable law in the circumstances of the case. In the instant case it is inexplicable why the learned judge fell into the serious error of taking into account press and radio reports as the basis of deciding the case. This was, in our view, highly improper. We urge the courts to refrain from such practices in future.

Consequently, in the circumstances of the case, the application succeeds and we agree to assume our revisional jurisdiction and exercising such revisional powers we set aside the order made by the High Court for the reasons set out in this ruling. The matter is left open for the parties to pursue in terms of the law if they so wish. It is so ordered.

Finally, though not part of the decision in this matter, we feel it appropriate to make the following observation. From the proceedings in this case it is apparent that the errors and the unsatisfactory features are in our considered opinion, glaringly of such a nature that with some diligence and a less sense of overzelousness could be avoided. It is earnestly trusted that the relevant authorities in the judiciary would take the necessary appropriate steps in drawing the attention of the relevant judicial officers to be extra careful in order to avoid a recurrence of such errors. This is particularly so because if the unfortunate impression is created that the judicial officers themselves

do not respect the law, it would be difficult for other people including the government to respect the law.

DATED AT DAR ES SALAAM THIS 26TH DAY OF FEBRUARY, 1997.

F. L. NYALALI
CHIEF JUSTICE

L. M. MFALILA
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

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

B. M. LUANDA
SENIOR DEPUTY REGISTRAR