

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A. And LUG-KINGIRA, J.A.)

MBY CIVIL APPLICATION NO. 4 OF 1995

In the Matter of an intended appeal

BETWEEN

TUMBEKE SYEJO APPELLANT

AND

RAPHAEL MWANTIKA RESPONDENT

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

(Hon. Mwipopo, J.)

dated 26th May, 1995

in

Civil Review No. 1B of 1995

RULING OF THE COURT

RAMADHANI, J.A.:

The applicant, Tumbeke Syejo, has moved this Court to revise the proceedings and the judgment of the High Court at Mbeya in its appellate jurisdiction.

MWIPOPO, J. in his judgment dated 10/08/94 made three errors. First, he regarded Raphael Mwantika as the appellant and referred to Tumbeke Syejo as the respondent. That was not so. The situation was the other way round. Tumbeke Syejo was the appellant and Raphael Mwantika was the respondent.

The second error he made was to regard Mr. Mwakilasa, learned advocate, as representing Raphael Mwantika and treated Mr. Mwangile, learned counsel, as the advocate of Tumbeke Syejo.

The learned judge was right that Mr. Mwakilasa was representing the appellant, who was in fact Tumbeke Syejo and NOT Raphael Mwantika, and Mr. Mwangole advocated for the respondent, who was Raphael Mwantika and NOT Tumbeke Syejo.

Upon an application for a review by Mr. Mwakilasa, MWIPOPO, J. made the correction by labelling Tumbeke Syejo the appellant being represented by Mr. Mwakilasa and put the tag of the respondent on Raphael Mwantika advocated for by Mr. Mwangole.

The third error was not as cosmetic as that. The learned judge after mistakenly regarding Raphael Mwantika as the appellant took all the proved facts of Raphael Mwantika and assigned them to the appellant. Likewise, he placed all the established facts of Tumbeke Syejo at the door of the respondent.

Thus, when the learned judge, said in his judgment that the appellant lost, he had in mind Raphael Mwantika (whom he had erroneously regarded as the appellant) with all the facts he had proved in the lower court, to have lost. In the same vein, MWIPOPO, J. took Tumbeke Syejo (whom he had mistakenly treated as the respondent) with all the facts he had established in the lower court, to have won.

In short the learned judge was seized of the two sets of facts. However he ascribed either set of facts to a wrong litigant and hence arrived at a dimetrically opposite conclusion.

So, if the titles of appellant and respondent are appropriately bestowed on Tumbeke Syejo and Raphael Mwantika respectively and if the facts are accordingly ascribed, then the one who succeeded in that appeal was Tumbeke Syejo, the appellant.

The learned judge ought to have gone thus far in correcting his judgment in review. This is what Mr. Mkumbe, learned advocate, representing the applicant, Tumbeke Syejo, wanted us to do in this application for revision.

The respondent, Raphael Mwantika, was not represented and so, the Court took the pain of explaining everything clearly to him. He understood when it was put to him that the learned judge treated him as Tumbeke Syejo and vice versa. He consented to be regarded as himself again and so, this Court should correct that error. However, he requested the Court not to disturb the outcome in the High Court, that is, to leave the order that the appeal by Tumbeke Syejo was dismissed.

It is obvious to us that Raphael Mwantika wants his cake and to eat it at the same time. If the error by the learned is corrected then the appeal was allowed and hence the plot of land in dispute belongs to Tumbeke Syejo who was the appellant in the High Court. That is what we are about to do.

For the avoidance of doubt we have invoked our revisional jurisdiction as explained below.

OXLII R(1) of the Civil Procedure Code, 1966 provides that "And order of the court [High Court] rejecting the application [for review] shall not be appealable". The learned judge did not expressly reject the application but from what he did, he rejected the review. Thus Tumbeke Syejo could not have appealed from the order of the learned judge of 26/05/95 and seek this Court to rectify the record by way of appeal. In such a situation his remedy lies in revision as this Court

decided in Hallais Pro-Chemie v. Wella A.G., /1996/ T.L.R. 269 at 272 where it was provided:

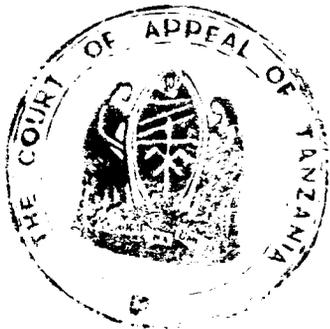
"(iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;".

Thus, under section 4(3) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993, we have "the power, authority and jurisdiction" to revise the judgment and the ruling of MWIPOPO, J.

So, we grant the application by Tumbeke Syejo and correct the judgment of 10/08/94 by MWIPOPO, J. We order that the judgment to read that the appeal by Tumbeke Syejo succeeded.

As the error was caused by the learned judge despite the review he was asked to conduct, it would be grossly unfair to order the respondent to bear the costs of this application. We therefore, order each party to bear his own costs. It is so ordered.

DATED at MBEYA this 2nd day of April, 2001.



A. S. L. Ramadhani
JUSTICE OF APPEAL

D. Z. Lubuva
JUSTICE OF APPEAL

K. S. K. Lugokingira
JUSTICE OF APPEAL

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

(A. G. Fwarija)
DEPUTY REGISTRAR