IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., KIMARO, J.A. And MJASIRI, J.A.)

CIVIL REVISION NO. 4 OF 2011

1. **OYSTERBAY PROPERTIES LTD.**
2. **KAHAMA MINING CORPORATION LTD** } **.....APPLICANTS/DECREE HOLDERS**

VERSUS

1. **KINONDONI MUNICIPAL COUNCIL**
2. **THE HON. ATTORNEY GENERAL**
3. **COMMISSIONER FOR LANDS** } **.....DEFENDANTS/JUDGMENT DEBTORS**

AND

1. **PATRICK RUTABANZIBWA**
2. **JOSEPH ISHENYI SHEWIO**
3. **MRS. ALBINA BURRA** } **.....RESPONDENTS**

(Revision from the decisions of the High Court of Tanzania, (Land Division) at Dar es Salaam)

(Nchimbi, J.)

dated the 19th day of October, 2009 and 2nd September, 2011
in
Land Case No. 14 of 2008

RULING OF THE COURT

9 & 18 November, 2011

MSOFFE, J.A.:

Before us are revision proceedings. For proper appreciation of the circumstances in which the Court was prompted to take this course under Section 4 (3) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) it is

convenient to set out the background of the matter. For convenience and ease of reference we will refer to the parties herein by their names or titles, as the case may be. Although the parties are cited as applicants, defendants/judgment debtors and respondents, respectively, we will not refer to them as such in this Ruling because by its nature, strictly speaking, in this application there is no applicant or respondent. Henceforth, the citation herein above is essentially for convenience only. We also wish to state here that in exercise of our discretion under Rule 65 (6) of the Tanzania Court of Appeal Rules, 2009 we invited the parties to address us. In the process, further to their oral submissions the parties' respective advocates filed written submissions. While we commend them for the effort we will not address each and every point that was raised in their submissions.

On 24/1/2008 Oysterbay Properties Ltd. and Kahama Mining Corporation Ltd. instituted Land Case No. 14 of 2008 before the Land Division of the High Court of Tanzania at Dar es Salaam against Kinondoni Municipal Council, The Hon. Attorney General and the Commissioner for Lands. Among the reliefs sought were: -

(a) *A declaration that the suit land, Plot Nos. 1860 and 1861 is the property of the 2nd Plaintiff and not of the Defendants.*

(b) *Demolition of the buildings built by the Defendants and vacant possession of Plots Nos. 1860 and 1861.*

Thereafter, there were several adjournments. On 19/11/2008 the case was assigned to Nchimbi, J. to mediate as a mediator Judge. The proceedings that followed do not show clearly whether the case went to full mediation. Instead, on several occasions the parties sought adjournments because they were trying to settle the matter out of court and, if successful, come back to court and record a settlement. On 16/10/2009 the parties executed a DEED OF SETTLEMENT AND COMPROMISE OF SUIT which they presented for filing in court on 19/10/2009. Under the Deed of Settlement Oysterbay Properties Ltd. were to be given alternative plots. On 19/10/2009 Nchimbi, J. made the following Order in the presence of all the parties: -

Order: *In terms of the settlement deed filed herein in respect of the instant case, the matter is*

marked as settled. The terms of the deed are hereby registered to form the basis of the decree.

Thereafter the Order, which was a consent judgment so to say, was followed by a decree in which, as per the terms of the Deed of Settlement, ordered thus: -

1. *That the **1st** Defendant's Plot Nos. 1272 and 1273 Msasani Peninsula **be** converted to commercial/residential user and **be** transferred/allocated to and vest in Oysterbay Properties Ltd. as legal and beneficial owner thereof.*
2. *Each party shall bear its costs.*
3. *That this compromise shall be filed **and the Honourable Court is requested to issue a decree in its terms.***
4. ***That upon signing of this Deed,** this case shall be marked settled and there will be no further claims whatsoever.*

(Emphasis supplied.)

From this outset, we wish to consider and decide whether the above so called decree was a decree in the true sense of the law capable of giving rights to the parties. In this regard, there are a number of points we will make as shall be demonstrated hereunder.

Under Section 3 of the Civil Procedure Code (CAP 33 R.E. 2002) (the CPC) a decree is defined as: -

> *... the formal expression of an adjudication which, so far as regards the court expressing it,* ***conclusively determines the rights of the parties*** *with regard to all or any of the matters in controversy in the suit...*
>
> (Emphasis supplied.)

In our considered view, the above decree did not conclusively determine the rights of the parties. We say so because a close look at paragraphs 1, 3 and 4 thereto will show that its full implementation was dependant upon the taking of further and future action(s) in the matter. This is evidenced by the use of words like*...**be** converted to...**be** transferred/allocated... upon signing of this Deed...* etc. In this sense, if

the future events or actions were not going to happen the rights of the parties would not have been conclusively determined. If all that were to happen, we think with respect, the decree was going to be only an empty document incapable of giving rights to the parties. We do not therefore, think that the above was the sort of decree envisaged under section 3 *(supra)*.

The Deed of Settlement, which led to the Order dated 19/10/2009 and the eventual decree, was a contract, if we may respectfully say so. It is elementary that a contract is an agreement entered into by two parties or more with the intention of creating a legal obligation. Any valid contract will contain terms which are certain and complete. If the terms of the contract are uncertain or incomplete, the parties cannot be said to have reached an agreement in the eyes of the law. Indeed, section 29 of the Law of Contract Act (CAP 345 R.E. 2002) underscores this same point. Section 29 reads: -

> *66. An agreement, the meaning of which is not certain, or capable of being made certain, is void.*

In this sense, conditions are terms which go to the very root of a valid contract.

A look at the Deed of Settlement will show that it was uncertain and incomplete because, as already observed, its execution was dependant upon future actions. Furthermore, no terms in the form of conditions were attached to the Deed! Ideally, there ought to have been conditions attached to it with the usual default clause, of course. So, since the Deed was uncertain, incomplete and had no conditions attached to it, it follows that in law it was not a contract. Since it was not a contract it was not capable of forming the basis of the Order dated 19/10/2009, the resultant Decree and the subsequent proceedings which we will address hereunder.

The Decree in this matter also suffers from another serious difficulty or shortcoming. As correctly submitted by Mr. Michael Jeremia Kamba, Mr. Pius Mboya and Mr. Athumani Matuma Kirati, learned Principal State Attorney, Senior State Attorney and State Attorney, respectively; and also by Mr. Audax Kahendaguza Vedasto, learned advocate for Mr. Patrick

Rutabanzibwa, Mr. Joseph Ishenyi Shewio and Mrs. Albina Burra (cited herein as respondents but are not parties in Land Case No. 14 of 2008), compliance with paragraph 1 of the decree required actions from two Government departments. In terms of Section 6(3) (k) of the Urban Planning Act No. 8 of 2007 the first action of change of use of the land was to be done by the Director of Urban Planning. The second action was to be effected by the Commissioner for Lands who would allocate the lands and issue certificates thereof. The question, as posed by Mr. Vedasto, would be whether these persons were part of the land case in question. As correctly answered by him, we agree with him that the quick and incorrect answer would be that they were parties by virtue of the fact that the Attorney General was party to the Deed of Settlement in whose name under Section 6(3) of The Government Proceedings Act (CAP 5 R.E. 2002) all suits against the Government are filed. But that would be a simplistic answer because under Section 6(2) thereto the Attorney General comes in only after the other Government departments and officers have taken part in receiving the ninety days notice within which to deal with the case in issue. Section 6(2) provides: -

> *6(2) No suit against the Government shall be instituted and heard unless the claimant previously submits to the Government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of the claim against the Government, and shall send a copy of his claim to the Attorney-General.*

In this case, the notice appearing on page 38 of the record was addressed to the Commissioner for Lands, among others. The record does not show whether the Director of Urban Planning was served with the notice as per the requirement under section 6(2) above. At any rate, the notice was *"for the recovery of more than USD 1,372,000 plus costs..."* The notice therefore, had nothing to do with the plots mentioned under paragraph 1 of the decree. Be as it may, execution of paragraph 1 of the decree would not have, therefore, been possible for want of involvement by the Director of Urban Planning from the early stages of the case.

In conclusion on the above points, since there was no decree capable of execution it follows that all the subsequent proceedings in the matter

were a nullity because they had no leg to stand on. They had no basis, so to speak. For this single reason, we could have easily determined these revision proceedings at this stage by making the necessary order for nullification of the relevant proceedings. But for purposes of completeness, we have found that it is necessary and prudent to visit the other proceedings in the record before us.

As can be gathered from the record, execution of the above decree became impossible, perhaps due to some of the reasons we have endeavoured to give above. This prompted Oysterbay Properties Ltd. and Kahama Mining Corporation Ltd. to file an application on 22/3/2010 citing Mr. Patrick Rutabanzibwa, Mr. Joseph Ishenyi Shewio and Mrs. Albina Burra as the **1st**, **2nd** and **3rd** respondents, respectively. The application, which was by way of a chamber summons, was made under Section 95 of the CPC and Section 2(3) of the Judicature and Application of Laws Act (CAP 358 R.E. 2002) plus any other enabling provisions, and it was intended *"to summon the Respondents herein and punish them for violating the clear and categorical orders of this Honourable Court, Hon. A. A. Nchimbi, J. in Land Case No. 2008... dated 19th October 2009..."* It is also evident from

the averments under paragraph 7 of the affidavit deponed by Mr. ABBA PATRICK MWAKITWANGE that the application was also intended to ensure that *"the honour and dignity of the court as well as the office of the Attorney General"* were not brought into disrepute. Nchimbi, J. heard the parties by way of written submissions. On 2/9/2011 he delivered his Ruling in which he found Mr. Patrick Rutabanzibwa, Mr. Joseph Ishenyi Shewio and Mrs. Albina Burra *"guilty"* of civil contempt and accordingly sentenced each one of them to pay a fine of shs. 500,000/= or six months imprisonment in default. It was also ordered that: -

> *...**all concerned** have to comply with the terms of the deed of settlement registered by this court on 19/10/2008 (sic) by signing the title deeds also within a span of five days from today...*
>
> *(Emphasis supplied.)*

As submitted by Mr. Kamba, Mr. Mboya, Mr. Kirati and Mr. Vedasto, we too are of the view that the *"contempt"* proceedings were pregnant or fraught with several problems/shortcomings in law. We will not address all the shortcomings canvassed by learned counsel. For purposes of this Ruling, we will highlight only a few features in the said proceedings.

To start with, as already stated, the application was made under Section 95 of the CPC. This is a general provision which is usually invoked where there is no specific provision to cover a particular situation. In this case, for all intents and purposes, this was an application for execution of a decree. If so, the proper provision that ought to have been invoked in support of the application ought to have been Section 42(c) of the CPC which reads in part as follows: -

> *42. ... the court may, on the application of the decree holder, order execution of the decree -*
> *(a) ...*
> *(b) ...*
> *(c) by arrest and detention in prison.*

In this sense, it was wrong to move the court under Section 95. We are supported in this view by this Court's decision in **Tanzania Electric Supply Company v Independent Power Tanzania Ltd;** AND **The Permanent Secretary Ministry of Energy and Minerals and two Others v Independent Power Tanzania Ltd.,** Consolidated Civil Applications Nos. 19 of 1999 and 27 of 1999 (unreported) where Samatta,

J.A. (as he then was) made the following pertinent observation to the effect that section 95 –

> *...does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do, and does, is to save inherent powers of those courts. The section is undoubtedly a very useful provision, but it is not a panacea for all ills in the administration of justice in civil cases. Commenting on section 151 of the Indian Code of Civil Procedure, which is in pari materia with that section, the learned authors of The Law of Civil Procedure, 6th ed., observed, at p.324, as follows: -*
>
> > *The power is intended to supplement the other provisions of the Code and not to evade them or to invent a new procedure according to individual sentiment.*

So, *prima facie*, section 95 constituted no authority to the High Court to entertain the application before Nchimbi, J. We also note that, as stated above, section 2(3) of the Judicature and Application of Laws Act was cited

in support of the application. Admittedly, the CPC cannot be said to be exhaustive. It is legitimate therefore, to apply, under section 2(3) above, the relevant rules of common law and general statutes of application in force in England on the twenty second of July, 1920. But that can only be done where the CPC is silent. In this case, as demonstrated above, the CPC is not silent.

In a number of occasions this Court has stated that a court can only be moved to hear and determine an application if a proper provision of law is cited. We are supported in this view by a number of decisions made by this Court, notably this Court's recent decision in **Chama cha Walimu Tanzania v Attorney General**, Civil Application No. 151 of 2008 (unreported) wherein it was stated: -

> *It may also be worth while pointing out here that the gravity of the error in omitting either to cite the enabling provision or citing a wrong one was succinctly stated by this Court in the case of* ***CHINA HENAN INTERNATIONAL COOPERATION GROUP v SALVAND K. A.***

***RWEGASIRA**, Civil Application No. 22 of 2005 (unreported). This Court said: -*

> *...Here the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107(2) (e) of the Constitution. It is a matter which goes to the very root of the matter. We reject the contention that the error was technical.*

Henceforth, in **Chama cha Walimu** the Court stated that the High Court (Labour Division) was duty bound to strike out the application for want of citation of the applicable provision of the law. The principle in **Chama cha Walimu** equally applies in the justice of this case. Since the court was wrongly moved, Nchimbi, J. ought to have struck out the application.

The next point we wish to address in relation to the *"contempt"* proceedings is the right to be heard. The record before us shows that on 15/4/2010 one Mr. Muyunge appeared on behalf of Mr. Patrick Rutabanzibwa, Mr. Joseph Ishenyi Shewio and Mrs. Albina Burra, and intimated that they were intending to file a counter affidavit. On 17/5/2010 Mr. Muyunge reported that they had failed to file the counter affidavit after which he prayed for, and was granted, extension of time to file the counter affidavit. Up to 21/6/2011 no counter affidavit was filed as a result of which the court decided to determine the application by calling on the parties to file written submissions in support of their respective positions in the matter. The submissions were eventually duly filed. It will be observed at once here that the court took this step without inquiring from Mr. Muyunge as to why the three persons had up to that date failed to file the counter affidavit. In taking this step, we think, with respect, the judge erred. We say so because, although he did not say so in so many words, by asking the three persons to file a counter affidavit he, in effect, invoked the provisions of Order XIX Rule 1 of the CPC by inviting them to prove their side of the case by an affidavit. Having done so, we think, again with respect, the judge ought to have pursued this course to a conclusive end

before asking the parties to file written submissions in support of their respective positions in the matter. As it is therefore, in the circumstances of this case, the above three persons were not given a full hearing because they did not put up evidence in the form of a counter affidavit to contest the evidence of Mr. Patrick Abba Mwakitwange contained in the affidavit in support of the application, as it were. Admittedly, they filed written submissions. But submissions are not evidence. Ideally, submissions are mere statements of law or fact which are meant to supplement evidence already given. In the justice of this case, it occurs to us therefore, that the three persons were not accorded a full and fair hearing before they were *"convicted and sentenced".* The right to be heard was succinctly underscored by this Court in **Halima Hassan Marealle v Parastatal Sector Reform Commission,** Civil Application No. 84 of 1999 (unreported) thus:-

> *... the concern is whether the applicant whose rights and interests are affected is afforded the opportunity of being heard before the order is made. The applicant must be afforded such opportunity even if it appears that he or she*

would have nothing to say, or that what he or she might say would have no substance...

As correctly pointed out by Mr. Vedasto, the "*contempt*" application was for all intents and purposes an attempt by a decree holder to enforce the decree against third parties. The third parties here were Mr. Patrick Rutabanzibwa, Mr. Joseph Ishenyi Shewio and Mrs. Albina Burra. They were third parties because they were not parties to the decree issued pursuant to the Order dated 19/10/2009. With respect, this was improper because the CPC requires a decree to be enforced against a party to the suit. Indeed, this is the import and spirit of Order XX1 Rule 30(1) of the CPC which provides in part thus: -

*30(1) Where **the party** against whom the decree for... has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention as a civil prisoner...*

(Emphasis supplied.)

If we may repeat, since the above three persons were not parties to the suit, or judgment debtors so to speak, the decree could not be enforced against them.

Even if the above three persons had properly been found to be liable for contempt the *"punishment"* was illegal for contravening Section 46(1) (b) of the CPC providing for detention of a civil prisoner for a period of six weeks if the decree is not for payment of a sum of money. In this case the decree was not for payment of money so the *"imprisonment"* of six months was illegal. In similar vein, the alternative *"punishment"* of a payment of a fine of shs. 500,000/= would appear to be illegal. Admittedly, the amount of a fine to be paid is not stated in the CPC. In an ideal case however, the court could seek inspiration from **Section 114(1)** of the Penal Code (CAP 16 R.E. 2002) and impose a fine not exceeding five hundred shillings. Since **sub-section (1)** above provides for imprisonment for six months it is inconceivable that if it were to provide for an alternative to imprisonment for six weeks it would have stipulated a fine of 500,000/=! We think that it would have provided for a lesser amount of money. Yet again, the *"sentence"* meted by the judge was erroneous because it did not

provide for possibility of stoppage of detention before expiry of the six months. This went contrary to the spirit of the proviso to section 46 of the CPC which reads in part as under: -

> *Provided that he shall be released from such detention before the expiration of the said period of ... six weeks...*
> *(i) -*
> *(ii) on the decree against him being otherwise fully settled.*

Finally, the order that *"all concerned have to comply with the terms of the deed of settlement..."* was, as correctly pointed out by Mr. Kamba, Mr. Mboya, and Mr. Kirati, unclear and ambiguous. The order was incapable of enforcement against anybody because it was directed to nobody.

When all is said and done, acting under Section 4(3) of the Appellate Jurisdiction Act we hereby quash and set aside the Order of Nchimbi, J. dated 19/10/2009 and all the subsequent proceedings, notably the decree dated 19/10/2009, the chamber application filed on 26/3/2010 and the

Ruling of Nchimbi, J. delivered on 2/9/2011. The matter is remitted to the High Court (Land Division) for it to deal with Land Case No. 14 of 2008 in a manner it will deem fit, according to law, from where it stopped on 16/9/2009. We make no order as to costs.

DATED at **DAR ES SALAAM** this 17th day of November, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL