IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MUSSA, J.A.)

CIVIL APPLICATION NO. 94 OF 2013

ARCOPAR (O.M.) S.A.....APPLICANT

VERSUS

1. **HARBERT MARWA AND FAMILY INVESTMENTS CO. LTD.**
2. **SIMON DECKER**
3. **ATTORNEY GENERAL**
4. **BADAR SEIF SOOD**

.....RESPONDENTS

(Application for revision from the decision of the High Court of Tanzania at Dar es Salaam)

(Sheikh, J.)

dated the 5th day of April, 2013
in
Civil Case No. 173 of 2009

RULING OF THE COURT

28th April & 15th May, 2015

MUSSA, J.A.:

In the High Court of Tanzania, Dar es Salaam registry, the first respondent sued the second, third and fourth respondents over ownership of a registered piece of land and a house situated on plot No. 43, Mtwara crescent, within Dar es Salaam city, under a certificate of title No.

186035/17. We shall henceforth refer the disputed property to simply as the "suit land".

From the proceedings below, it was common ground that, the suit land was originally owned and registered in the name of the first respondent. On the 6th May, 1996 the first respondent mortgaged the suit land to the second respondent to secure a loan amounting to US$ 130,000. The mortgage deed provided that the loan was payable in one lump sum, not later than the 7th June, 1996. On the 27th February, 1997 the second respondent executed a deed through which the suit land was transferred to him on account of the first respondent's alleged default of the mortgage terms. A little later, on the 15th August, 1997 the second respondent executed another deed through which he transferred the suit land to the applicant herein, a private company with limited liability and incorporated in Costa Rica. A good deal later, on the 4th September, 1998 there was yet another transaction through which the applicant transferred the suit land to the fourth respondent.

Against the foregoing backdrop, as already intimated, the first respondent sued the second, third and fourth respondents seeking, *inter alia*,

to nullify the respective dispositions involving the suit land and a declaration to the effect that she was still the lawful owner of the same. In the upshot, the High Court (Sheikh, J.) entered judgment in favour of the first respondent and concluded the matter as follows: -

> *"I hereby direct the 2nd defendant through the Registrar of Titles to rectify the Land Register and to cancel in the Register maintained by him under the Act, the registrations effected by him of the transfers of the premises in favour of the 1st defendant, Arcopar and the 3rd defendant, Mr. Badar Seif Sood and all entries relating thereto, and to restore to full force and operation with effect from the 17th day of April 1997, the registration of the charge/mortgage in favour of the 1st defendant."*

From the foregoing concluding remarks, it is noteworthy that the trial court just as well nullified the transaction in which the applicant was involved despite the fact that the latter was not a party to the trial proceedings.

Dissatisfied, the applicant is presently moving the Court to nullify the trial proceedings in revision on account that she was condemned unheard. The application is predicated under the provisions of section 4(3) of the

Appellate Jurisdiction Act, Chapter 141 of the revised laws (AJA), as well as Rules 48(1) and 65(1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The same is accompanied by an affidavit sworn by a certain Orlando Savio Mathew D'Costa who held himself as an agent of the applicant.

At the hearing before us, the applicant had the services of Mr. Sylvester Shayo, learned Advocate, whereas the first respondent was advocated by two learned counsels, namely, Mr. Charles Semgalawe and Mr. Zephrine Galeba. Mr. Kalolo Bundala and Mr. Dilip Kesaria, learned Advocates, respectively, represented the second and fourth respondents, whilst Mr. Obadia Kameya, learned Principal State Attorney, appeared for the third respondent. It is, perhaps, pertinent to observe from the very outset that the learned counsels for the second and fourth respondents outrightly supported the application in their respective written submissions as well as their oral address before us.

Mr. Shayo commenced his address by fully adopting the Notice of Motion, the accompanying affidavit and his written submissions in support thereof. In his written submissions, the learned counsel sought to impress

that the applicant was not notified of the proceedings of the High Court and, not being a party to the said proceedings, she did not, therefore, participate in the trial. And yet, counsel urged, on account of the nullification of her transaction with the fourth respondent, the trial court condemned and deprived her rights without being afforded a hearing. Mr. Shayo further submitted that the applicant was a necessary party whose non-joinder vitiated the trial proceedings. In conclusion, the learned counsel for the applicant urged us to nullify the trial proceedings with an order for a retrial. To buttress his conclusions, Mr. Shayo sought reliance on a barrage of authorities; viz-Civil Appeal No. 136 of 2006 – **Farida Mbaraka and Another Vs. Domina Kagaruki**, Criminal Appeal No. 132 of 2004 – **Dishon John Mtaita Vs. The DPP,** Civil Application No. 44 of 2012 – **OTTU and Others Vs. AMI (T) Limited** (All unreported); **Amon Vs. Raphael Tuck and Sons** [1996] 1 All ER 273 and; **Mbeya – Rukwa Autoparts and Transport Ltd. Vs. Jestina George Mwakyoma** [2003] TLR 251.

As already intimated, Mr. Bundala and Mr. Kesaria, respectively, for the second and fourth respondents, fully supported the applicant's quest.

To fortify his support, the learned counsel for the second respondent referred to us the decisions of this Court in the case of **Mbeya – Rukwa Autoparts** (*supra*); Civil Application No. 133 of 2002 – **Abbasi Sherally and Another Vs. Abdulsultan Fazalboy** (unreported); Civil Application No. 72 of 2002 – **Chief Abdallah Saidi Fundikira Vs. Hillal L. Hillal** (unreported) and; **Farida Mbaraka** (*supra*).

On his part, Mr. Kesaria referred to us to section 135(1), (2) and (3) of the Land Act, Chapter 113 of the revised laws, as well as a handful of case law comprised in **Abbas Sherally** (*supra*); Consolidated Civil Reference Nos. 6, 7 and 8 of 2006 – **VIP Engineering Limited and Two others Vs. Citibank Tanzania Limited** (unreported); **Chief Abdallah Said Fundikira** (*supra*); Civil Application No. 20 of 2003 – **Khalifa Seleman Saddot Vs. Yahya Jumbe and Four others** (unreported); **Peter Adam Mboweto Vs. Abdallah Kwala and Another** [1981] TLR 33; **Omari Yusufu Vs. Rahma Abdulkada** [1987] TLR 169; **Ismail and Another Vs Njati** [2008] 2EA 155; **Ze Yu Yang Vs. Nova Industrial Products Ltd.** [2003] 1EA 362 and; the unreported Civil Appeal No. 150 of 1993 (CAK) –

As regards the right to be heard, Mr. Kesaria insistently submitted that the breach of the principles of natural justice is so basic to the extent that a decision which is arrived at in violation of a right to a hearing will be nullified even if the same decision would have been reached had the party been heard. Submitting on the applicant's alleged prior knowledge of the High Court proceedings, the learned counsel for the fourth respondent urged that not being a party to the trial proceedings, the applicant rightly preferred the application for revision at hand.

The third respondent did not file written submissions but, in his short address before us, Mr. Kameya contended that the application is entirely bereft of merit. The learned Principal State Attorney advised that upon the nullification of the first transaction, the transfer involving the applicant was necessarily bound to follow the same fate. As such, the court would have arrived at the same conclusion irrespective of the non-joinder of the applicant in the trial proceedings.

In reply to the respective submissions of her adversaries, the first respondent filed lengthy submissions which Mr. Semgalawe fully adopted. In a nutshell, counsel for the respondent predicated his argument upon three contentions: **First,** that the applicant was not such a necessary party whose impleadment in the suit was absolutely imperative for determining the controversy between the parties and, additionally, whose absence, no decree could have been passed. **Second,** Mr. Semgalawe submitted that an application for revision can only avail to a party who can demonstrate to the Court that he/she was not aware of the proceeding sought to revised. Counsel urged that, to the extent that the applicant was fully seized of the trial proceedings, the application at hand is misconceived. **Third,** counsel for the first respondent sought to impress that the power of attorney appended to the affidavit of Mr. D'costa is invalid for contravening the provisions of the repealed companies Act and for want of attestation. In sum, Mr. Semgalawe urged that the application is entirely without a semblance of merit and that the same should be dismissed with costs.

On our part, we have dispassionately considered and weighed the competing as well as the submissive contentions by counsel from either side.

To begin with, we are profoundly thankful to all learned counsels for their able and detailed submissions on the matter. But, as will soon become apparent, we need not dwell on each and every detail comprised in the submissions much as, to us, the determination of this application turns on a narrower compass pertaining to the issue whether or not the High Court decision was devastatingly tainted with the illegality of having been arrived in violation of one of the cardinal rules of natural justice.

Nonetheless, ahead our consideration and determination of this issue, we deem it opportune to dispose of the seemingly preliminary points of contention raised by the first respondent to the effect that the application at hand is misconceived. As hinted upon, counsel for the first respondent contends, firstly, that the applicant was aware of the High Court proceedings and, for that matter the application is misconceived, secondly, he says, the application is misconceived for the reason that the power of attorney attached to the affidavit is legally invalid.

The two points of contention should not detain us as we find them to be easily disposable. To begin with, it is not quite a precondition that to entitle himself/herself to the revisional jurisdiction of the court, an applicant

of the application it is beyond question that the deponent swore on facts of which he verified to be true to the best of his knowledge. That sufficed to meet the requirement and, to that end, the concern raised by counsel for the first respondent is just as well misconceived.

Addressing now the nitty-gritty of the matter, for a start, we should restate the cardinal principle of natural justice that a person should not be condemned unheard. Fair procedure demands that a party ought to be heard before an order adverse to him is issued by a court of law or tribunal, hence the common law rule: *Audi alteram partem.* In this country, we happily note that the right to be heard is not merely a common law principle, rather, it is an enshrined Constitutional right. In this regard, Article 13(b) (a) of the Constitution declares in part:-

> *"Wakati haki na wajibu wa mtu yeyote vinahitajika kufanyiwa uamuzi na mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".*

That is to say, a person has the right to be heard and, for that matter, to be fully heard before a court of law or tribunal hands down any decision adverse to him.

In the matter under our consideration, it cannot be doubted that the ultimate order of the trial court was adverse to the interests of the applicant. Equally beyond question, is the fact that the trial court did not accord the applicant a hearing ahead of its nullification of the transaction involving the applicant and the fourth respondent. In **Mbeya – Rukwa Autoparts** (supra), it was held by the Court that a decision reached without regard to the principles of natural justice and in contravention to the constitution is void and of no effect. In this regard, we should observe, with respect that Mr. Kameya's attempt to salvage the decision is untenable. As was correctly rejoined by Mr. Kesaria, where natural justice is violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of natural justice. Corresponding remarks were made by the Court in **Abbas Sherally and Another** (supra):-

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated in numerous decisions. That right is so basic that a decision which is arrived at in violation*

of it will be nullified even if the same decision would have been reached had the party been heard....."

To this end, we find merit in the application and, having adjudge the decision of the High Court to be void, we need not consider the other points raised in the submissions. In the result, we invoke our revisional jurisdiction and quash the entire proceedings of the High Court. We remit the matter back to the High Court with a direction to proceed with the hearing of the suit *denovo* after the applicant has been added as a party in terms of Order I Rule 10(2) of the Civil Procedure Code. It is, accordingly, ordered.

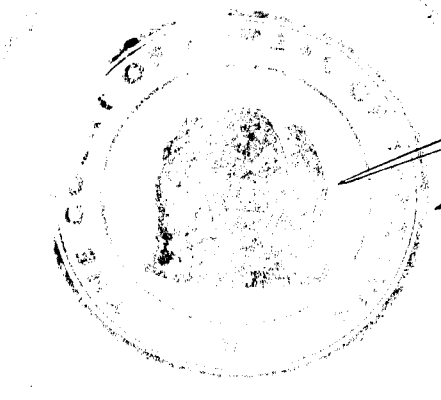
DATED at **DAR ES SALAAM** this 07th day of May, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL