IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL REFERENCE NO. 2 OF 2014

MEHAR SINGH t/a THAKER SINGH.....APPLICANT

VERSUS

1. **HIGHLAND ESTATES LIMITED**
2. **THE LIQUIDATOR KAMPUNI YA UCHUKUZI DODOMA LTD.** **.....RESPONDENTS**
3. **CONSOLIDATED HOLDING CORPORATION**

(Reference from the decision of a single justice of Appeal of the Court of Appeal of Tanzania)

(Mmilla, J.A.)

dated the 27th day of February, 2014
in
Civil Application No. 155 of 2011

RULING OF THE COURT

22nd June & 11th July, 2016

MUSSA, J.A.:

This reference relates to landed properties standing on Plots nos. 17, 18, 19 and 20, Kizota area, Dodoma Municipality. It is common ground that the properties which are comprised on Certificate of Title No. 8109DRL, were originally registered in the name of Kampuni ya

Uchukuzi Dodoma, Limited which is presently under the receivership of the second and third respondents. It is equally undisputed that the referred properties were sold by public auction to the first respondent on the 12th September, 2004 in execution of a decree issued by the High Court (Commercial Division) arising from Commercial Case No. 247 of 2001. Nonetheless, on the 10th December, 2004 the sale was set aside by the same court (Kalegeya, J., as he then was).

Aggrieved by the order of setting aside the sale, the first respondent sought the intervention of this Court by way of revision in Civil Application No. 183 of 2004 which was preferred under section 4(3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws (AJA). At the hight of the revisional proceedings, the order setting aside the sale was quashed and the certificate of sale was re-issued to the first respondent in a Ruling of the Court that was pronounced on the 5th April, 2011 (Rutakangwa, J.A., Mbarouk, J.A., And Massati, J.A.). It is, perhaps, pertinent to apprise that throughout the trial and, later, the revisional proceedings the applicant herein did not feature at all and, so to speak, he was not a party to the proceedings. As it were, the applicant came to the fore a good deal later, on the 24th November,

2011 when he lodged a Notice of Motion seeking extension of time within which to file an application for the review of the Ruling of this Court comprised in Civil Application No. 183. In the Notice of Motion, the applicant impleaded the respondents herein who, incidentally, were parties before the trial and revisional proceedings. The application was preferred under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and the grounds sought to be relied by the applicant in the Notice of Motion were that:-

> *"(i) The applicant being the bona fide purchaser for the value of the property was not a party to the proceedings and as such he was not aware and the respondents had not made the applicant to know of the proceedings for the revision in Civil Application No. 183 of 2004 and execution proceedings in Commercial Case No. 247 of 2001.*
>
> *(ii). The applicant was not given an opportunity of being heard and as a consequence was not heard by the Court and the decision of the Court in Civil Application No. 183 of 2004 has affected*

and is likely to deprive the applicant of the property."

As it turned out, the Notice of Motion was greeted with a preliminary point of objection raised by Mr. Wilson Ogunde who was representing the first respondent to the effect that the applicant had, in the first place, no *locus standi* to move the Court for review, the more so as he was not a party to the trial proceedings as well as the revisional proceedings before this Court. In response, Mr. Daimu Khalfan who was representing the applicant sought to impress the Court that the word *"party"* under the provisions of Rule 66(1) (b) of the Rules is wide enough to embrace a third party whose interests are prejudiced by the decision desired to be reviewed. In the upshot, a single Justice (Mmilla, J.A.) concluded the matter thus: -

"...I find and hold that such decision which was given by this Court cannot be challenged by way of review by a person who was not a party before it."

The applicant is dissatisfied and he presently seeks to have the decision of the single Justice reversed. At the hearing of the reference,

the applicant entered appearance in person, whereas the first respondent was represented by Mr. Wilson Ogunde, learned Advocate. The second and third respondents had the services of Mr. Ntuli Mwakahesya, learned Senior State Attorney. The applicant initially sought to have the hearing of the appeal adjourned, but since the parties have lodged their respective written submissions, it was agreed and resolved that the matter would conveniently be determined and disposed upon those written submissions. It is noteworthy, however, that the second and third respondents did not file any written submissions.

In his written submissions, Mr. Daimu Khalfani sought to impress us that the phrase **"a party"** as used in Rule 66(1) (b) of the Rules simply means a party to the review application before the Court. Thus, to him, it will suffice to entitle an applicant as **"a party"** if such applicant shows that he had vested interest in the decision desired to be reviewed and that he was wrongly deprived of an opportunity to be heard. As a corollary to his argument, the learned counsel urged that an applicant need not necessarily be involved in the impugned proceedings to meet the requirements of Rule 66(1) (b) of the Rules.

To buttress his submissions, Mr. Khalfani referred us to a host of decisions of this Court: Civil Application No. 183 of 2004 – **Highland Estate Ltd. Vs Kampuni ya Uchukuzi Dodoma Ltd and Another** (unreported); Civil Application No. 68 of 2011 – **Tanga Gas Distributors Ltd Vs Mohamed Salim Said and Two others** (unreported); Civil Application No. 21 of 2012 – **Blueline Enterprises Ltd Vs East Africa Development Bank** (unreported); **Tanzania Transcontinental Trading Company Vs Design Partnership Ltd** [1999] TLR 258; and **Chandrakant Joshubhai Patel Vs The Republic** [2004] TLR 218.

For his part, Mr. Ogunde submitted that the applicant was not a party in both the trial proceedings in the High Court and the revisional proceedings before this Court. To that extent, he urged, the applicant cannot seek reliance on the provisions of Rule 66(1) (b) of the Rules which only avails to parties. To fortify his argument, the learned counsel for the first respondent referred us to two decisions: **The Attorney General Vs Maalim Kadau and 16 others** [1997] TLR 69; and **Mbeya – Rukwa Autoparts and Transport Ltd Vs Jestina George Mwakyoma** [2003] TLR 251.

Having summarized the learned rival submissions, it is noteworthy that whereas the ultimate desire of the applicant is to have the decision of the Court reviewed, all the decisions sought to be relied by the learned counsel for the applicant are with respect to the subject of revision as distinguished from review. Thus, it is instructive to have a clear hindsight that the jurisdiction and power of review is, by its nature and essence, quite distinct from the jurisdiction and power of revision. In review, the aim is to have a second look at the Court's own judgment with a view to correct a manifest mistake apparent on the face of the record and, where appropriate, to defuse a resulting miscarriage of justice, that is, if any of the grounds specified in Rule 66(1) of the Rules are shown (see **Chandrakant Joshubhai Patel Vs The Republic** (*supra*)). Conversely, in revision, the purpose is to enable the Court to satisfy itself as to the regularity, correctness, legality or proprietness of any finding, ruling or decision of the High Court. Thus, whereas in review the Court is restricted within the four corners of its own decision and Rule 66(1) of the Rules, in revision, the Court concerns itself with the regularity of an inferior decision or proceedings of the High Court.

It is common ground that in the exercise of its revisional jurisdiction, the Court has, upon numerous decisions, held that a person whose rights or interests have been prejudiced by a High Court decision may approach this Court in revision even if he/she was not a party to the proceedings giving rise to the impugned decision (see for instance, **Highland Estate Ltd Vs Kampuni ya Uchukuzi Dodoma** *(supra)*; and Civil Application No. 104 of 2008 – **Mgeni Seif Vs Mohamed Yahaya Khalfani** (unreported).

On the other end, review proceedings are completely on a different footing and the question whether or not a third person who was not involved in the original case would similarly have *locus standi* to institute review proceedings, is what is at the center of the learned rivalry before us. Whereas, Mr. Khalfan contends in the affirmative, Mr. Ogunde takes the opposite position. For purposes of clarity, we find it apt to reproduce Rule 66(1) of the Rules in full: -

> *"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds –*

(a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or

(b) A party was wrongly deprived of an opportunity to be heard;

(c) the courts' decision is a nullity; or

(d) the court had no jurisdiction to entertain the case; or

(e) the judgment was procured illegally, or by fraud or perjury." [Emphasis supplied.]

We have purposely supplied emphasis to paragraph (b) of the Rule owing from the fact that, in the desired application, the applicant intends to rely on the paragraph as a ground for review. Thus, we are confronted with the question whether or not the applicant was **"a party"** within the meaning contemplated by the paragraph. As already intimated, the ultimate desire of the applicant, as expressed in the Notice of Motion, is to claim that he was not given an opportunity of being heard at the hearing of Civil Application No. 183 of 2004. But as, again, already hinted upon, the applicant did not feature as a party in

the referred proceeding, just as he was not a party to the preceding High Court proceedings.

We are of the view that the situation which we are faced with is, in some ways, analogous to the question which the Court had to grapple with in the case of **Attorney General Vs Maalim Kadau** *(supra)*. In that case, the Court was called to construe the provisions of Rule 76(1) of the old 1979 Court of Appeal Rules which were a replica of the present Rule 83(1). In response to an argument that the provision allows any person, who is in one way or the other affected by a decision of the High Court, to appeal even if he/she was not a party to the original case, the Court made the following observations: -

> *"While it is true that Rule 76 of the Court 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... 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."

In **Mbeya – Rukwa Auto parts and Transport Ltd Vs Jestina Mwakyoma** (supra), the foregoing reasoning was adopted and extended to the construction of section 5 of AJA in subsections 2(a) (i) and (b) which, respectively, refer to **"the parties"** and **"a party"**. Thus, the Court held that under the referred provisions, a person who was not involved in the original case is not a party and does not, in the result, have a right of appeal.

With respect and, by parity of reasoning, we are of the settled view that the words "**a party**" as used in Rule 66(1) (b) refer to a person who was involved in the proceedings desired to be reviewed. The contrary be held will open the flood gates and, consequently, review proceedings will be engulfed by busybodies. To this end, we find ourselves unable to fault the decision of the Single Justice to the effect that the applicant had no *locus standi* to, in the first place, institute the desired review proceedings. We, accordingly, dismiss the reference with costs and, having done so, we find it needless to have

to explore the options which are available to the applicant. That exercise is, after all, an exclusive prerogative of the applicant.

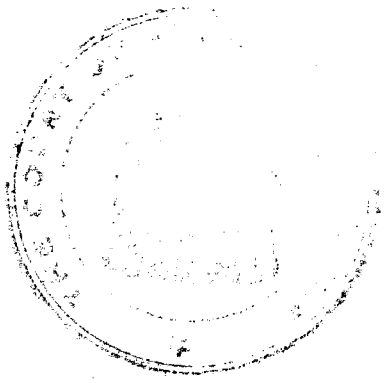
DATED at **DAR ES SALAAM** this 30th day of June, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

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



E.F. FUSSI
DEPUTY REGISTRAR
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