

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 312/17 OF 2017

FELIX LENDITA.....

.....APPLICANT

VERSUS

MICHAEL LONG'IDU.....

RESPONDENT

**(Application for revision from the decision of the High Court of
Tanzania at Arusha**

(Opiyo, J.)

**dated the 2nd day of March, 2017
in
Land Appeal No. 14 of 2016**

RULING OF THE COURT

03rd & 11th December, 2018

KWARIKO, J.A.:

The applicant herein lost a suit for recovery of land to the respondent herein before the Ward Tribunal of Sokon II. He successfully appealed against that decision before the District Land and Housing Tribunal of Arusha. However, the applicant lost the appeal before the High Court of Tanzania at Arusha. He has

now come before this Court by way of revision of the decision of the High Court. The application has been preferred by a notice of motion made in terms of section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the Act). The applicant raised the following grounds in support of the notice of motion:

- 1. That, the judgment and decree of Land Appeal No. 14/2016 which was delivered on 2 March, 2017 in favour of the respondent was based on judgment of Application No. 4/2014 in Sokoni II which is (sic) time barred.*
- 2. That, the Hon. Judge failed to dismiss this Land Appeal No. 14/2016 regardless of the fact that the trial tribunal lack (sic) pecuniary jurisdiction to entertain this land dispute which the estimate value (sic) is not less than twenty million (Tshs 20,000,000/=).*
- 3. That, the respondent does not have locus stand to sue the applicant because he is not an Administrator of the estate of the late Mzee Long'idu.*
- 4. That, the Hon. Judge failed to put into consideration submission of the applicant that all witnesses called by the respondent before trial tribunal their testimonies were*

hearsay evidence which is not admissible before any court of law this is because no any witness was present during a time this transaction between two parties was conducted instead of only one witness who is mother of the applicant.

However, the affidavit sworn by the applicant purporting to support the notice of motion clearly raises different matters as follows: that, the judgment which the Deputy Registrar pronounced to the parties on 2/3/2017 showed that the applicant won the appeal, while on the other hand, the copy of that judgment supplied to him on 5/4/2017 indicates that he had lost the appeal. The affidavit reveals also that, by the time the applicant was supplied with the impugned decision, he was already time barred to appeal to this Court.

On his part the respondent did not file an affidavit in reply, but on 21/4/2017 his advocate Dr. Ronilick E. K. Mchami, learned counsel, filed a notice of preliminary objection on the following three points of law:

- (i) *The Civil Application No. 1 of 2017 is incompetent in this Hon. Court because it contravenes section 47 (1)*

and section 47 (2) of the Land Disputes Courts Act, 2002, the same ought to be dismissed with costs.

(ii) The Civil Application No. 1 of 2017 is incompetent in this Hon. Court because is brought under section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] of a section which only allows the Court of Appeal to initiate and conduct revisional proceedings before the High Court of Tanzania, and it does not allow an individual like the Applicant to initiate revisional proceedings on any proceedings either pending before or determined by the High Court of Tanzania in this Hon. Court, hence the only remedy for it is to have it dismissed with costs.

(iii) The Civil Application No. 1 of 2017 is incompetent in this Hon. Court because it contravenes a well established and known principle found in several decided cases by this Hon. Court including the reported case of Augustino Lyatonga Mrema versus Republic and Dr. Masumbuko Lamwai [1999] T.L.R at page 273 to the

effect that in order to invoke the Tanzania Court of Appeal's power of revision there should be no right of appeal on the matter, the only remedy for it is to have it dismissed with costs.

At the hearing of the application, Mr. Lengai Loitha, learned advocate, appeared for the applicant while the respondent enjoyed the services of Dr. Ronilick Mchami, learned advocate.

As it is the practice, we started with the hearing of the preliminary objection. In relation to the first point of objection, Dr. Mchami argued that, if the applicant was aggrieved by the decision of the High Court, he had the right of appeal against it as provided under section 47 (1) (2) of the Land Disputes Courts Act [CAP 216 R.E. 2002] (the Act). He argued that, the applicant should have used that right.

In relation to the second point of objection Dr. Mchami contended that, it was wrong for the applicant to invoke section 4 (3) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002] (the AJA). He argued that, that provision gives this Court power to call and revise the proceedings of the High Court *suo motu*. According to

the learned counsel, the applicant ought to have cited section 4 (2) of AJA as an enabling provision for this application.

Dr. Mchami contended in the third point of objection that, the applicant's right was to appeal against the impugned decision in terms of section 47 (1) (2) of the Act, and not to file revision. He referred the Court to the cases of **AUGUSTINO LYATONGA MREMA v. REPUBLIC & ANOTHER** (supra), **MOSES MWAKIBETE v. THE EDITOR UHURU LTD** [1995] T.L.R 134 and **HALAIS PRO CHEMIE INDUSTRIES LTD v. WELLA A.G** [1996] T.L.R 296.

In his counter-argument regarding the first point of objection, Mr. Loitha submitted that, because the applicant had opted to file an application for revision, the provision of section 47 (1) (2) of the Act which relates to appeal, is not applicable.

In the second point of objection, Mr. Loitha contended that section 4 (3) of the AJA is the proper provision in this respect. He cemented his contention by the decision in the case of **JULIUS CLEOPA & 3 OTHERS v. JOSIA LENGOKYA**, Civil Application No. 46 of 2015 (unreported).

As regards the third point of objection, it was Mr. Loitha's argument that the respondent's counsel ought to have cited the applicable law instead of the decided case of **AUGUSTINO LYATONGA MREMA** (supra). He went further to argue that this point of objection is not pure point of law but a fact which needs evidence to be proved. He added that, the applicant preferred an application for revision because the High Court gave two conflicting decisions on the same matter as shown in the affidavit. He relied on the case of **SHARIFA TWAHIB MASSALA v. THOMAS MOLLEL & 3 OTHERS**, Civil Application No. 67 of 2011 (unreported), which held that a preliminary objection should be on pure point of law.

In his rejoinder submission Dr. Mchami argued that, the applicant has based his application on a matter which is not in the court record. He added that, there is nothing on record which supports the applicant's contention that when delivering the judgment, the Registrar pronounced that the appeal was dismissed. Dr. Mchami argued that since the allegation is not borne out by the record, the same cannot be the basis of the application for revision. He contended further that, each case

should be decided on its own circumstances, thus the **JULIUS CLEOPA's** case (supra) is distinguishable from the case at hand. He said that, in an application for revision, a party can only move the Court under section 4 (2) of AJA and not section 4 (3).

Finally, Dr. Mchami argued that the third point of objection raises a pure point of law. He said that it was proper to rely on the decisions of the Court of Appeal including **AUGUSTINO LYATONGA MREMA's** (supra) because they are binding on matters of law.

Having considered the counsel's opposing submissions, for the sake of convenience; we shall first decide the third point of objection. Dr. Mchami argued that because the applicant has a right of appeal under section 47 (1) (2) of the Act, he should not have come by way of a revision. Section 47 (1) (2) of the Act provides;

“(1) Any person who is aggrieved by the decision of the High Court in the exercise of its original, revisional or appellate jurisdiction, may with the leave from the High Court appeal to the

Court of Appeal in accordance with the Appellate Jurisdiction Act.

(2) Where an appeal to the Court of Appeal originates from the Ward Tribunal the appellant shall be required to seek for the Certificate from the High Court certifying that there is point of law involved in the appeal”.

It is clear from the cited provision of the law that, any party aggrieved by the decision of the High Court in its original, revisional or appellate jurisdiction on a land matter, may file appeal to the Court of Appeal in accordance with the AJA. Thus, because this matter originated in the Ward Tribunal of Sokon II, the applicant should have appealed to this Court after getting a certificate from the High Court that a point of law is involved as regards the impugned decision. Thus, the applicant had a right of appeal under that provision of the law.

There is a plethora of authorities to the effect that, revisional powers of the Court can only be invoked where there is no right of appeal. Some of them are; **TRANSPORT EQUIPMENT LTD v.**

DEV RAM P VALAMBHIA [1995] T.L.R 161, **MOSES J. MWAKIBETE v. THE EDITOR-UHURU, SHIRIKA LA MAGAZETI YA CHAMA & ANOTHER** [1995] T.L.R 134 and **HALAIS PRO-CHEMIE v. WELLA A.G** [1996] T.L.R 269. Others are, **M/S NBC LIMITED v. SALIMA ABDALLAH & ANOTHER**, Civil Application No. 83 of 2001 and **KEZIA VIOLET MATO v. NATIONAL BANK OF COMMERCE & 3 OTHERS**, Civil Application No. 127 of 2005 (both unreported).

In the case of **TRANSPORT EQUIPMENT LTD** (supra) this Court held *inter alia* that;

“The appellate jurisdiction and the revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive; if there is a right of appeal then that right has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of the Court of Appeal.”

Similarly, in the **AUGUSTINO LYATONGA MREMA's** case (supra), the Court held among other things that;

“To invoke the Court of Appeal’s power of revision there should be no right of appeal in the matter; the purpose of this condition is to prevent the power of revision being used as an alternative to appeal.”

According to the law therefore, where there is a right of appeal the power of revision of this Court cannot be invoked. Such powers are exercised in exceptional circumstances. The question that follows is; has the applicant shown any exceptional circumstances to warrant this Court to exercise its revisional powers while he has a right of appeal?. The answer to this question is in the negative for the following reasons. Having scrutinized the grounds raised in the notice of motion, we only find the same fit to be grounds of appeal; we have also found that, the affidavital evidence does not support the grounds in the notice of motion. However, even if the allegations raised in the affidavit are considered, it is not hard to find that, the basis of the

complaints therein concerning the Deputy Registrar are not contained in the decision of the High Court.

This Court cannot therefore be called upon to revise something which does not arise out of the proceedings and contained in the court record. Furthermore, whether or not the Registrar said anything contrary to the contents of the judgment of the High Court, such statement would not change that judgment.

Finally, it appears that, the applicant preferred this application because he was time barred to institute an appeal. This is contained in paragraph 10 of his affidavit. It says;

“That, at the time I received my copies of judgment and decree of the court on 5th April, 2017 it was already time barred for me to lodge appeal before this honorable Court of Appeal”.

The proper move for the applicant, who was represented by an advocate, was to apply to appeal out of time, instead of resorting to this fruitless exercise.

For the foregoing, we agree with Dr. Mchami that the application is incompetent. We therefore find no need to discuss other points raised by the respondent. The application is hereby struck out with costs.

It is so ordered.

DATED at **ARUSHA** this 10th day of December, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL