IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., KWARIKO, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 402/01 OF 2017

SIMON HAMISI SANGA ..... APPLICANT

VERSUS

1. STEPHEN MAFIMBO MADWARY
2. UDUGU HAMIDU MGENI **.....RESPONDENTS**

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

(Mkasimongwa, J.)

dated the 14th day of July, 2017

in

Miscellaneous Civil Application No. 107 of 2016

RULING OF THE COURT

21st October & 5th November, 2019

MWANGESI, J.A.:

By way of Notice of Motion made under section 4 (3) of the Appellate Jurisdiction Act, Cap 141 Revised Edition of 2002 **(the AJA)**, and Rule 65 (1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**), the applicant is moving the Court to revise the decision of the High Court of Tanzania at Dar es Salaam (Mkasimongwa, J.), in Miscellaneous Civil Application No. 107 of 2016, which was handed down on the 14th day of July, 2017.

On the hearing date, the fifth ground of the application was dropped and thereby, remaining with four grounds which have been advanced as to why the impugned decision should be revised. They read that: -

1. *The fate of the applicant was determined unheard by Hon. Mkasimongwa, J. in Miscellaneous Civil Application No. 107 of 2016 and therefore, the decision was illegal.*
2. *The decision of Hon Mkasimongwa J., in Miscellaneous Civil Application No. 107 of 2016 was obtained by fraud after the applicant had designedly omitted the name of the applicant in order to short-circuit the decision of this Hon. Court (Kalegeya, J.A. as he then was), in Civil Application No. 9 of 2010.*
3. *The decision of Hon. Mkasimongwa, J., is not in consonance with the order of this Hon. Court dated the 29th January, 2016 in Civil Application No. 186 of 2008, which ordered the High Court to investigate on who, between the applicant and the first respondent, is the lawful purchaser of Plot No. 39 Block 73, Mchikichini Street, Kariakoo, Dar es Salaam.*
4. *In complying with the order issued by this Court, in Civil Application No. 186 of 2008, the first respondent omitted to join*

the applicant to the proceedings of Miscellaneous Civil Application No. 107 of 2016 which was determined by Mkasimongwa, J. The applicant being the purchaser of the suit premises in a public auction conducted on the 1st February, 2004 in pursuance of the order of Hon. Ihema, J. (Rtd.) in Civil Revision No. 49 of 1998, and now the registered owner of the same, ought to have been joined to the said Miscellaneous Civil Application No. 107 of 2016.

The Notice of Motion is supported by a sworn affidavit, which was taken by Mr. Simon Hamisi Sanga, the applicant. Additionally, in terms of the provisions of rule 106 (1) of **the Rules**, on the 10th November, 2017, the applicant lodged written submissions in amplification of the notice of motion.

On the other hand, the first respondent lodged an affidavit in reply on the 9th November, 2017, which was sworn by his advocate one Mr. Herbert Herme Hezekia Nyange (deceased). The same was later supplemented by an affidavit sworn by the first respondent himself, was lodged in Court on the 24th November, 2017. There was yet another affidavit in reply which was sworn by the first respondent, which was

lodged on the 27th May, 2019, still resisting the application for revision. There was however, no written submissions lodged by the same.

The second respondent on his part, did neither lodge an affidavit in reply, nor written submissions.

When the application was called on for hearing before us on the 21st October, 2019, Mr. Samson Mbamba, learned counsel, entered appearance to represent the applicant, whereas the first respondent, entered appearance in person, legally unrepresented. The second respondent on the other hand, had the able services of Mr. Cornelius Kariwa, learned counsel.

Upon taking the floor to address us on the notice of motion, Mr. Mbamba, requested the Court to adopt the affidavit of the applicant, which was lodged in support of the notice of motion, as well as the written submissions which were lodged to expound the notice of motion, as part and parcel of his oral submissions. He had nothing more.

Briefly, it is averred by the applicant in paragraphs 2 to 7 of his affidavit that, he purchased the disputed house situated on Plot No. 39 Block 73 Mchikichini Street, along Kariakoo within the City of Dar es Salaam, in a public auction which was conducted by Unyangala Auction

Mart, and supervised by Kisutu Resident Magistrate's Court, on the 1st day of February, 2004. The sale was made in compliance with the decision of the High Court, dated the 6th August, 2003 in Civil Revision No.49 of 1998 (Ihema, J.).

Subsequent to the public sale of the disputed house as indicated above, the first respondent lodged in this Court, Civil Application No. 186 of 2008 wherein, he challenged the order of the High Court, to order the public sale of the house which belonged to him and his late wife. This Court upon hearing the parties, remitted the case file to the High Court, with direction that it had to conduct investigation into the disputed ownership of the house between the first respondent and the applicant, and give the appropriate orders.

The basis of the remission of the case by this Court to the High Court, was founded on the fact that, the Court discovered that the disputed house had been sold twice that is, the first sale was made to the first respondent, on the 12th day of August, 1993, while the second sale was made to the applicant, on the 1st day of February, 2004.

In what was purported to be in the pursuance of this Court's direction as given above, the first respondent, lodged in the High Court, Miscellaneous Civil Application No. 107 of 2016 wherein, he featured as

the applicant, and the second respondent, was placed as the first respondent, and another person who was not a party in the matter which was before this Court, was made the second respondent. To his surprise, the High Court (Mkasimongwa, J), after hearing the parties in the said application, gave a ruling to the effect that the first respondent and his late wife, were the lawful owner of the suit property.

It is the argument of the applicant that, the decision of the High Court, was faulty for two reasons that **first**, it flouted the order of this Court dated the 29th January, 2016 which directed the Court to conduct investigation in regard to the ownership of the suit property between the first respondent and the applicant, both of which had appeared before it on the disputed property. **Secondly**, the decision of the High Court was improper, because he, the applicant who had interest on the suit property, was condemned unheard in respect of the suit property.

On his part, the first respondent being a lay person, also had nothing substantial to add to the affidavits and the supplementary affidavit, which had been lodged in Court earlier on to counter the application by the applicant. In the same, it was averred that he is the rightful owner of the disputed property, after having purchased it from one Mwinyihamisi Hamidu Mgeni, in his capacity as the administrator of

the estates of the late Hamidu Mgeni, on the 12th August, 1993. In that regard, the first respondent's submission was that the public auction purported to have been conducted by Unyangala Auction Mart on the 1st February, 2004 was null and void and of no effect whatsoever, against his interests in the suit property.

With regard to the variance of the parties in Civil Application No. 186 of 2008 which was before this Court, and Miscellaneous Civil Application No. 107 of 2016 which was lodged in the High Court, it was the view of the first respondent that, the error occasioned in the names of the second respondent (the applicant), was innocuous and did not occasion any injustice to the applicant. To that end, he prayed for dismissal of the application for revision, because it was void of merits. Furthermore, the applicant asked the Court to condemn the respondents to bear the costs of the application.

The oral submission by the learned counsel for the second respondent, was to the effect that he did neither lodge an affidavit in reply, nor written submissions in respect of this application, because he is at one with the applicant, in all fours. Mr. Kariwa, submitted further that, he represented the second respondent in the High Court, and that the anomalies complained of by the applicant, were noted and pointed

out only that they fell onto deaf ears. He therefore, implored the Court, to grant the relief being sought by the applicant, by nullifying the decision of the High Court, and let the applicant be heard in regard to his rights on the suit property in compliance with this Court's order.

In view of the submissions from either side above, there is only one issue which calls for deliberation and determination by the Court, that is whether the application by the applicant for revision of the decision of the High Court, dated the 14th July, 2016 is founded. To begin with, we are sufficiently satisfied from the available record in the case file that, the applicant was not a party in the decision which he seeks to be revised. That being the case, there was no right of appeal to him, to challenge such decision. And the fact that he intends to contest the propriety and legality of the proceedings in the said decision, the only way available to him, in which he could move the Court to examine the said proceeding, is by way of an application for revision. We held in **Mabalanya Versus Sanga** [2005] 1 EA 236 that: -

> *"Revision under section 4 (3) of the Appellate Jurisdiction Act, Cap 141* ***(the AJA****), entails examination by the Court of the records of any proceeding before the High Court for purposes of satisfying itself as to the correctness, legality or*

any other decision and the legality of any proceedings before the lower courts."

The challenge being made by the applicant to the decision of the High Court, according to his application, is basically founded on the decision of this Court in Land Application No. 186 of 2008, wherein he was a party. The relevant portion of the decision of the Court, wherein the applicant pegged his complaint reads thus:

> *"However, we have noted some irregularities in the sale in that, the property in question was sold twice. Initially, it was sold to and registered in the name of the applicant (now the first respondent) and his late wife. Subsequent thereto, it was sold to the second respondent (now the applicant), in an auction ordered by the District court of Kisutu. However, it would be inappropriate for the Court to interfere at the state reached. In the circumstances, we direct that the file be remitted to the High Court to investigate into the matter and make appropriate orders."*

Unfortunately, the High Court did not act on the above order of this Court, *suo motu.* On the contrary, it was the first respondent, who lodged Miscellaneous Civil Application No. 107 of 2016, which was

purportedly used by the High Court, to investigate into the ownership of the suit property. It is however noted that, while the parties in Civil Application No. 186 of 2008 in this Court, to which its order was referring to, were one Mr. Stephen Mafimbo Madwary, being the applicant, and Messrs. Udugu Hamidu Mgeni and Simon Hamisi Sanga, who were the respondents, in Miscellaneous Civil Application No. 107 of 2016 in the High Court, the applicant was Mr. Stephen Mafimbo Madwary, and the respondents were, Messrs. Udugu Hamidu Mgeni and Stephen Hamisi Sanga.

From the above scenario, two facts appear apparent to us that is, **one**, that the High Court, failed to discharge its duty by not acting on the order of this Court promptly. **Two,** in acting on the application which was lodged by the first respondent, the High Court, misdirected itself in that the application lodged by the first respondent, was against the spirit envisaged by this Court in its order. This is verified by the content of the application which was lodged by the first respondent. While the direction of this Court, was for the High Court to make an investigation into the circumstances leading to the suit property being sold twice that is, to the first respondent, and later to the applicant, on the contrary, the application by the first respondent had three prayers which were for: -

1. *An order extending time for the applicant (first respondent) to file a complaint of having been dispossessed of his immovable property situated on Plot No. 39 Block 73 Mchikichini, Kariakoo Dar es Salaam.*
2. *A finding that, the applicant (first respondent) and his wife Sekii Kiyoko, were bona fide claimants in respect of the property mentioned above, at the time of the order of its sale by this court on the 8th August, 2003.*
3. *An order to the effect that the applicant (first respondent) and the estate of his late wife Sekioo Kiyoko, be put back in possession of the property mentioned above.*

Part of the ruling of the High Court, which is relevant to the determination of this application after it had considered the submissions given on behalf of the first respondent (applicant), and the first respondent (second respondent), in the absence of the second respondent, who was not traced, reads thus:

> *"On the basis of the above discussion, I find merit in this application. Time in which to file a complaint of having dispossessed of (sic) immovable property described as Plot No. 39*

Block 73 Mchikichini Street, Kariakoo Dar es Salaam is extended. Secondly, the Court finds that the applicant and his late wife Sekioo Kiyoko, were bona fide claimants in respect of the property described above, when the order for sale by this Court was being given on 6th August, 2003. Thirdly, it is ordered that the applicant and his late wife be put back in possession of the property in dispute. Fourthly, the respondents should severally and jointly bear the costs of this application."

On looking at the application which was lodged by the first respondent, in the High Court, one cannot fail to note that it was problematic. While in the first ground the prayer is for extension of time to lodge a complaint, the subsequent two prayers were subject to the first ground being granted first. As if that was not enough, the High Court, as well fell into the same error that, after granting the extension of time, it proceeded to grant the subsequent prayers which ordinarily, ought to have been sought from the Court, in a different application that had to be lodged after grant of the extension of time.

The foregoing anomaly apart, as pointed out earlier, the direction of this Court, was for the High Court, to investigate into the disputed ownership of the suit property between the first respondent and the applicant, by hearing the parties, who had previously appeared before it. Since the finding of the High Court, in regard to the ownership of the disputed house was made without involving the applicant, apparently such finding of the Court, which condemned the applicant unheard, was illegal. It is a well settled principle of law that, any decision made without giving a right of hearing to someone who has interest in it, is illegal. See: **Judge In-charge, High Court of Tanzania at Arusha, and the Attorney General Versus Nin Munuo Ng'uni** [2004] TLR 44, **Abubakar Ali Himid Versus Edward Nyelusye,** Civil Appeal No. 70 of 2010 and **Grand Regency Hotel Limited Versus Pazi Ally and Five Others,** Civil Application No. 100/01 of 2017 (both unreported).

It is perhaps, pertinent to observe that in **the Judge In-charge's case** (supra), the Court was faced with the issue as to whether or not the order of the Judge In-charge, which had been made in accordance with the stipulation of the law, without according a hearing to the affected party, was assailable. In answering the issue in the affirmative, the Court stated that:

"Section 22 (2) (b) of the Advocates Ordinance, which gives a Judge of the High Court, power to suspend an advocate, does not dispense with the right to be heard, and current trend and tempo of human rights demand that there should be a right to be heard even for such interim decisions."

In line with our previous stance as aforesaid above, we find merit in the application by the applicant that, the decision of the High Court, dated the 14th July, 2017 which condemned the applicant unheard, was illegal and cannot be left to stand. Invoking the powers vested on us by the provision of section 4 (3) of **the AJA**, we nullify the proceedings and ruling of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (Mkasimongwa, J.), in Miscellaneous Civil Application No. 107 of 2016, with direction that the order of this Court, contained in the ruling of the Court dated the 22nd December, 2015 to investigate into the sale of the suit property to both the first respondent and the applicant, and thereafter give appropriate orders, be complied with. And the fact that this matter has been pending in court for a long time, we

direct that it be given the priority by fast tracking it. We order the costs to be charged in the main cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 31st day of October, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 5th day of November, 2019 in the presence of Ms. Aziza Msangi, learned counsel for the applicant and Mr. Hamis Mlaponi, learned counsel for the 1st respondent and Mr. Issa Juma Mganga, learned counsel for the 2nd respondent is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL