IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 505 OF 2016

MARY DANIEL ..... APPLICANT

VERSUS

NATIONAL HOUSING CORPORATION .....RESPONDENT

[Application for Revision of the Order of the High Court of Tanzania, Land Division at Dar es Salaam]

(Mjemmas, J.)
Dated the 8th day of April, 2015
in
Land Case No.153 of 2007

.....

RULING OF THE COURT

26TH August & 22nd October, 2020

WAMBALI, J.A.:

The applicant, Mary Daniel sued the respondent, National Housing Corporation and two others (not parties to this application) before the High Court of Tanzania, Land Division at Dar es Salaam, in Land Case No.153 of 2007. Noteworthy, according to the record of the application for revision, it is unfortunate that the dispute between the parties has not been heard and determined by the High Court to date as it has been pending there and in this Court for almost thirteen years due to various reasons.

Essentially, the circumstance which has prompted the present application for revision is due to the fact that on 11th April, 2013, the High

Court (Mziray, J – as he then was) dismissed the applicant's suit with costs for her failure to appear on the date of hearing. In the aftermath of the said dismissal, the applicant made the application before the same court for restoration of the suit. Consequently, in its ruling delivered on 11th March, 2015 the High Court (Mziray J) granted the application and restored Land Case No.153 of 2007. It was further ordered that the hearing should proceed before another judge. Noteworthy, immediately after the delivery of the ruling, although the then trial judge did not record the reason for not proceeding with the hearing of the case, he generally directed as follows: -

> "the *case to be mentioned on 8/4/2015 at 9:00 a.m before the Judge in charge for reassignment".*

Following that direction, on the same day the case file was placed before Mjemmas, J (as he then was) for necessary orders. On the contrary, Mjemmas, J. did not make a specific order of reassignment to another judge for continuation of hearing of the case as directed by Mziray, J. Instead, he made a different order in which he granted the applicant leave to refile the case subject to the Law of Limitation Act. To appreciate what transpired before Mjemmas, J on 8th April, 2015, for purpose of this ruling, we deem it appropriate to reproduce a substantial part of the proceedings as hereunder: -

"Ms. ***Kilawe**: Hon Judge, I have a prayer to make*

***Court:** Before you make your prayer I have some comments to make in relation to the order of Mziray, J. Justice Mziray has set aside the dismissal order made on 11/04/2013. He has also ordered for the restoration of the suit in the register.*
In my humble opinion, in the register the case has already been marked "dismissed," the only way remaining is for the plaintiff to file the suit afresh. To do otherwise is to create a vicious circle of backlog.

***Mr. Sekule**: Hon. Judge, there is another important thing. The first defendant has never appeared in the Court. In my opinion the plaintiff was supposed to join the Attorney General because the first defendant is a Government Agency. The plaintiff may withdraw the suit with leave to refile.*

***Mr. Kilawe**: Hon. Judge, I am not the decision marker. I will convey the message to the advocate for the plaintiff.*
***Order**: As stated before the plaintiff is advised to refile the case afresh following the restoration order by Mr. Justice Mziray. Leave to refile is granted subject to the Law of Limitation Act.*

Sgd. G. J. K. Mjemmas
JUDGE
08/04/2015".

It is against that background that the applicant has approached the Court urging us to call for and examine the record of proceedings of the High Court to ascertain the legality, correctness and appropriateness of the order of Mjemmas, J made on 8th April, 2015 directing the appellant to refile the case subject to the Law of Limitation Act. The thrust of the applicant's contention in this application is that the order of Mjemmas, J which overturned the ruling of Mziray, J restoring the dismissed Land Case No. 153 of 2007 for her failure to appear was irregular and improper.

When the application was placed before us for hearing, Dr. Rugemeleza Nshalla, learned counsel appeared for the applicant, whereas Mr. Aloyce Sekule, learned Principal Legal Officer entered appearance for the respondent.

Before we commenced the hearing, Mr. Sekule rose and intimated to the Court at the outset that the respondent did not oppose the application. In the event, he urged us to grant the applicant's prayer by nullifying the proceedings and setting aside the order of Mjemmas, J dated 8th April, 2015 and thereby restore the order of Mziray, J dated 11th April, 2013 so that Land Case No. 153 of 2007 can proceed for hearing

before another judge at the High Court. Finally, the learned counsel prayed that each party should bear own costs.

Mr. Sekule's concession to the application was quickly welcomed by the applicant's counsel who did not wish to explain further on the written submission he lodged earlier on in Court in support of the application. He essentially urged us to grant the applicant's prayer as per the concession and submission of the learned counsel for the respondent. However, he strongly differed with Mr. Sekule's prayer with regard to costs. He thus firmly pressed the Court to grant the applicant the costs she has incurred in lodging the application.

At this juncture, the pertinent issue for our determination is whether the proceedings and order of Mjemmas, J dated 8th April, 2015 are legally tenable.

Firstly, we wish to remark that the preliminary observation by Mjemmas, J that since in the court's register Land Case No.153 of 2007 was indicated to have been dismissed, the only option left was for the plaintiff to file the suit afresh, was, with profound respect, unfortunate. We have no hesitation to state that the order of Mziray, J that restored that suit in the register and ordered the hearing to proceed was consistent with the provisions of Order IX Rule 9 (1) of the Civil Procedure Code Cap.33 R.E. 2019. Certainly, as indicated in the said

ruling the then trial judge was satisfied that the applicant had demonstrated sufficient cause to show that her non - appearance was not caused by her negligence or willful conduct. Therefore, we are compelled, with respect, to emphasize that the restoration of the case was not meant to "*create a vicious circle of backlog*" as opined by the learned judge. On the contrary, the said order aimed to facilitate fair administration of justice between the parties to the dispute by ensuring that both sides were heard before the final decision was made by the High Court.

In the event, we are settled that the duty of Mjemmas, J when the case file was placed before him as the judge in charge or a trial judge as the case would have been, was to reassign to another trial judge or set the date of hearing as the suit had been properly restored as required by the law.

In the circumstances, we are constrained to observe that the advice given by Mjemmas, J to the applicant to refile the case after the order of restoration by Mziray, J, was not proper as it is contrary to the spirit of the provisions of Order IX Rule 9 (1) of the Civil Procedure Code which requires that once the suit is restored in the register it must be set for hearing. This is regardless of whether it adds to the existing backlog of the court or otherwise. We think it is in this regard that as per the practice of the courts in Tanzania, to ensure speedy dispensation of

justice without undue delay, cases falling into the category of backlogs are given priority when it comes to setting the date of hearing.

Consequently, we have no hesitation to declare that the order of Mjemmas, J which followed after his earlier said advice, that is, granting leave to the applicant to refile the case subject to the Law of Limitation Act, was irregular and unjustified.

In the circumstances, we agree with Mr. Sekule who supported the application and urged us to nullify the proceedings and set aside the order of Mjemmas, J dated 8th April, 2015. In the event, we accordingly grant the application for revision as prayed by the applicant.

In the result, in terms of Section 4 (3) of the Appellate Jurisdiction Act, Cap.141 R.E. 2019, we revise and nullify the proceedings and set aside the order of Mjemmas, J dated 8th April, 2015. Consequently, we remit the case file to the High Court, Land Division and order that Land Case No. 153 of 2007 should be set for hearing as soon as practicable as the dispute between the parties has been pending in court for longtime.

On the other hand, considering the circumstances of this application and the voluntary concession of the respondent to the applicant's prayer, we respectfully decline the prayer of the applicant to be awarded costs.

On the contrary, we order that parties shall bear their respective costs.

DATED at **DAR ES SALAAM** this 20th day of October, 2020

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of October, 2020 in the presence of Mr. Joston Mwanukuzi holding brief for Mr. Rugemeleza Nshala, learned counsel for the applicant and Mr. Joston Mwanukuzi holding brief for Aloyce Sekule, learned Principal Legal Officer for the respondent, is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL