IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A., And KEREFU, J.A.)

CIVIL APPLICATION NO. 467/17 OF 2016

ATTORNEY GENERAL .... APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY .....1ST RESPONDENT

ALEX MSAMA MWITA .....2ND RESPONDENT

(Application for Revision from the judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mgetta, J.)

Dated the 15th day of September, 2014

in

Land Appeal No.55 of 2012

.....

RULING OF THE COURT

22nd July & 07th August, 2020

WAMBALI, J.A.:

This is an application for revision in which the applicant urges the Court to call for and examine the judgment, ruling, orders and proceedings of both the District Land and Housing Tribunal of Temeke in Land Application No.219 of 2009 delivered on 20th May 2011 and the High Court of Tanzania, Land Division dated 15th September, 2014 in Land Appeal No. 55 of 2012. The application has been preferred through

the Notice of Motion supported by the affidavit of Ms. Ellen Rwijage State Attorney and counsel for the applicant.

The grounds upon which the applicant seeks the intervention of the Court through revision are: -

a) *That, the decision of the court is erroneous for being procured in contravention of sections 37, 38 and 39 of the Land Act Cap.113 of which even the High Court had noted and agreed that the sale was in violation of the said provisions of law.*

b) *That, the Tribunal had no jurisdiction to determine the dispute in question as the value of the property exceeded the pecuniary jurisdiction of the Tribunal.*

c) *That, the High Court of Tanzania and the Land Tribunal faulted the law by not considering that the registered land cannot pass to another person before the former being revoked.*

d) *That, the High Court and the Tribunal erroneously and illegally admitted the evidence by the 2nd respondent.*

e) *That, the applicant is the Chief Legal adviser to the Government and guardian of public property and interest and that he was not a party to Land Appeal Case No. 55 of 2012 where the parties*

were TANZANIA PORTS AUTHORITY AS APPELLANT AND ALEX MSAMA MWITA AS DEFENDANT.

f) *That the property in dispute is Government property held by the 1st Respondent which a sole owned Government Authority.*

g) *That the Applicant became aware of the existence of iand appeai case No.55 of 2012 in which the parties were TANZANIA PORTS AUTHORITY AS APPELLANT AND ALEX MSAMA MWITA AS DEFENDANT in February when the same was forwarded to the Applicant for information and necessary legal action by the Permanent Secretary of the Parent Ministry of the 1st Respondent vide a letter dated 01/02/2016 with Ref. No. FA 87/257/01 received at our Office on 02/02/2016.*

Noteworthy, before the application was called on for hearing the second respondent lodged a notice of preliminary objection comprising three points and served upon the applicant. On 22nd July, 2020 when the application was placed before us the hearing could not therefore proceed as we had to determine the respective points of objections.

At the hearing, the applicant was represented by Mr. Gabriel Malata, learned Solicitor General assisted by Ms. Pauline Mdendemi,

learned State Attorney. On the other side, the first respondent was represented by Mr. Christian Chiduga, learned State Attorney while the second respondent was represented by Mr. Samwel Shadrack Ntabaliba, learned counsel.

At the outset, Mr. Ntabaliba abandoned the first point of preliminary objection which was to the effect that the application was time barred. We accordingly marked it to have been abandoned. Therefore, the remaining points of objection for our determination are; First, that the affidavit in support of the application is defective for containing arguments and legal conclusion. Second, that the application is an abuse of the court process as there is a pending notice of appeal which was lodged by the first respondent challenging the judgment and decree of the High Court which the applicant seeks to be revised by the Court.

We propose to start with the second point of preliminary objection concerning the existence of the notice of appeal.

It was submitted by Mr. Ntabaliba for the second respondent that soon after the High Court delivered its decision on 15th September, 2014, the first respondent was aggrieved and lodged a notice of appeal on 23rd September, 2014 and the same was served to the second

respondent. In the circumstances, he argued that as the notice of appeal has not been withdrawn, the applicant cannot apply to revise the judgment and decree of the High Court which is also the subject of the intended appeal as the notice of appeal is still pending in Court. In the event, Mr. Ntabaliba was of the strong opinion that although the applicant was not a party to the proceedings before the High Court but seeks to safeguard the interest of both the Government and the first respondent who is solely owned by the same government, the two matters, that is, the intended appeal and the current application for revision of the same decision cannot go together as it is an abuse of the court process. In the premises, he urged us to sustain the second point of preliminary objection and strike out the application with costs.

Mr. Malata strongly and spiritedly defended the propriety of the applicant's application contending that as the applicant was not a party to the proceedings before the High Court it is a settled position of this Court that the only recourse to challenge such decision is through an application for revision as it became aware of the existence of the respective decision on 2nd February, 2016 after the information from the parent ministry of the first respondent. Moreover, the learned Solicitor General submitted that the argument of the learned counsel for the

second respondent that there is a notice of appeal lodged by the first respondent and thus the applicant cannot prosecute the application is misplaced. In his view, as the first respondent has not taken essential steps to lodge the intended appeal in terms of Rule 91 (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the said notice is automatically deemed to have been withdrawn. When he was probed by the Court to substantiate his argument by any decision of this Court to that effect he said he had none for that particular time but persistently maintained that in his view that was the correct interpretation of Rule 91 (a) of the Rules. In the end, based on his argument in respect of the second preliminary point of objection he implored us to find that the same has no merit, overrule it and proceed with the hearing of the application on merits. Mr. Chiduga for the first respondent totally associated himself with the submission made by Mr. Malata.

From the foregoing submission firstly we have no doubt that Tanzania Ports Authority is a body corporate by virtue of section 4(1) (a) of the Ports Authority Act, 2004 capable of suing and being sued. However, section 3 of the Public Corporations Act **[CAP 257 RE.2002]** defines a public corporation as follows:

"Public corporation" means any corporation established under this Act or any other law and in which the Government or its agent owns a majority of the shares or is the sole shareholder."

In the light of the stated position of the law, the Tanzania Ports Authority as a public corporation is under the control of the Government, notwithstanding its corporate status of being capable of suing and the Attorney General may intervene in any suit instituted by it or against it as clearly provided by section 4(2) of the Ports Authority.

In the premises, it is the contention of the learned Solicitor General that as the Government through the Attorney General has interest in the present application for challenging the proceedings of both the Tribunal and the High Court she is entitled as the Chief legal custodian of public property to institute this application to defend those interests. In this regard, we are mindful of the provisions of sections 6(a) and 17(1) (2) (a) and (b) and (3) of the Office of Attorney General (Discharge of Duties) Act [Cap 268 R.E. 2002]. Specifically, section 6 (a) of the Act provides as follows: -

"In the discharge of the functions under sub article (3) of the Article 59 of the Constitution, the

Attorney General shall have and exercise of the following powers:

> *To appear at any stage of any proceedings, appeal, execution or any incidental proceedings before any court or tribunal in which by law the Attorney General's right of audience is excluded.*

We must state that we have no problem with the above expounded position of the law on the status of the first respondent and the powers of the applicant to intervene and take over the proceedings instituted by the respective authority even where the applicant's right of audience is excluded. We are also aware of the position of the law that a person who was not a party to the proceedings in which he is interested and a decision is made in his absence, she is entitled to approach Court to seek redress through revision.

However, since it is not disputed that when the applicant lodged the present application to safeguard the interests of the first respondent and the Government a notice of appeal had been lodged by the said first respondent, we therefore wonder as to why the appellant did not invoke the provision of section 6 (a) to apply to the court to be joined as an interested party in the intended appeal in order to safeguard those

interests. It is instructive to note that in **Attorney General v. Hammers Incorporation Co. Ltd and the Board of Trustees of the Cashewnut Industry Fund,** Civil Application No. 270 of 2015 (unreported), we remarked that to allow a party to prosecute an application for revision where one of the parties has initiated the process towards lodging the appeal is to cause confusion in the administration of justice. We held a firm view that this applies even where the applicant was not a party to the impugned proceedings before the lower court or tribunal. In the present application, the observation is sounder as the applicant seeks to defend the same interest of the first respondent who is wholly owned by the Government and has initiated the process to challenge the decision by lodging the notice of appeal.

As to the submission of the counsel for the applicant that the notice of appeal is automatically deemed to have been withdrawn, with profound respect, we do not agree with that proposition as it is not backed by the settled position of the law. In **Mohamed Enterprises Tanzania Limited v. The Chief Harbour Master and The Tanzania Ports Authority,** Civil Appeal No. 24 of 2015 the Court stated in clear terms that the notice of appeal does not automatically cease to have effect upon the party's failure to take essential steps to institute the

appeal. It emphasized that a notice of appeal ceases to have effect upon a Court order deeming it to have been withdrawn in terms of Rule 91 (a) of the Rules. The Court made reference to its two decisions in **East African Development Bank v. Blueline Enterprises Limited,** Civil Appeal No. 101 of 2009 and **Williamson Diamond Limited v. Salvatory Syridion & Another,** TBR Civil Application No. 15 of 2015 (both unreported) in which in the latter case it was stated that: -

> *"It seems to us that the purpose of Rule 91 (a) is to flush out such notices of appeal as have outlived their usefulness. That power is vested in the Court. We are further of the view that in exercising such power, the Court may do so* ***suo motu*** *(after giving notice to the parties) or it may be moved by any party who may or ought to have been served with a copy of the notice of appeal under Rule 84 (1) of the Rules".*

In the present matter there is no evidence of any order of the Court deeming the notice of appeal lodged by the first respondent on 23rd September, 2014 to have been withdrawn as the second respondent who was served with the said notice in terms of Rule 84(1) of the Rules has not approached the court to have the same withdrawn. Unfortunately, the counsel for the first respondent who fully supported

the submission made by the applicant's submission did not wish to confirm or deny the fact that the notice of appeal has been deemed to be withdrawn. However, in the light of the record of the application and the submissions made by the counsel for the parties, the notice remains intact in the Registry of the Court. It is in this regard that in **the East African Development Bank's v. Blueline Enterprises Limited** (supra) the Court emphatically stated that: -

> *"Going by the practice of this Court a notice of appeal which is deemed to have been withdrawn under Rule 84 of the Court of Appeal Rules, 1979 Now (Rule 91 (a) of the Rules) is usually followed by an order from the Court to that effect...Mr. Kesaria could not produce any such order. So in the absence of such an order or any order...striking out the notice it follows that, as stated above, the notice is still intact".*

In the circumstances, as the notice of appeal lodged by the first respondent to challenge the decision of the High Court in Land Appeal No 55 of 2014 is still intact, we hold that this application which intends to safeguard the interest of both the first respondent and the Government through revision cannot be maintained. We therefore sustain the second point of the preliminary objection.

In the event, and in the light of the decision we have taken in respect of that point of objection, we do not deem it appropriate to consider the first point of objection. Consequently, we strike out the application with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 4th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 07th day of August, 2020 in the presence of Ms Alice Ntulo, learned Senior State Attorney assisted by Ms Pauline Mdendeni State Attorney for the Applicant/Republic and Ms. Alice Ntulo, learned State Attorney hold brief of Mr Christian Chiduga, learned State Attorney for the 1st Respondent and Mr. Gibson Ngojo, learned counsel for the 2nd Respondent, is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL