IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: JUMA, C.J., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 405/13 OF 2018

HASSAN KIBASA .... APPLICANT

VERSUS

ANGELESIA CHANG'A .... RESPONDENT

(Application for revision of the proceedings, ruling and order of the High Court of Tanzania at Iringa)

(Sameji, J.)

dated the 31st day of March, 2017

in

Miscellaneous Land Application No. 40 of 2016

....

RULING OF THE COURT

28th & 30th April, 2021

NDIKA, J.A.:

The applicant, Hassan Kibasa, seeks revision under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019) and Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") of the proceedings, ruling and order of the High Court of Tanzania at Iringa in Miscellaneous Land Application No. 40 of 2016. He moves the Court to give directions or orders paraphrased as follows:

1. That the High Court erred in maintaining its position that Miscellaneous Land Application No. 15 of 2016 was premised on

wrong enabling provisions and that Miscellaneous Land Application No. 27 of 2012 originated from the Ward Tribunal of Ruaha.

2. That the High Court's ruling and order in Miscellaneous Land Application No. 40 of 2016 were wrongly made.

3. That the High Court wrongly dismissed Miscellaneous Land Application No. 40 of 2016 instead of rejecting it.

4. That Miscellaneous Land Application No. 40 of 2016 was properly before the High Court as there was an apparent error on the face of the record that Miscellaneous Land Application No. 15 of 2016 arose from Miscellaneous Land Application No. 27 of 2012 that the High Court wrongly adjudged to have originated from the Ward Tribunal of Ruaha, not the High Court.

5. That the proceedings, rulings and orders in Miscellaneous Land Applications Nos. 15 and 40 of 2016 be set aside.

6. That Miscellaneous Land Application No. 15 of 2016 be reopened for hearing on the merits before the High Court.

It is essential to provide at the beginning the factual antecedents of this matter as deciphered from the main record and the supplementary record before the Court.

The applicant was the losing party in the District Land and Housing Tribunal of Iringa in Land Appeal No. 76 of 2010 in which he contested the decision of the Ward Tribunal of Ruaha dated 8th September, 2010 rendered in favour of Angelesia Chang'a, respondent. Although he was desirous of appealing to the High Court against the aforesaid decision of the District Tribunal, he did not file his intended appeal within the prescribed limitation period. Consequently, he filed Miscellaneous Land Application No. 27 of 2012 in the High Court at Iringa pursuant to section 38 (1) of the Land Disputes Courts Act, Cap. 216 R.E. 2002 (now R.E. 2019) ("the LDCA") pursuing extension of time within which to appeal. In its ruling handed down on 9th October, 2015, the High Court (Shangali, J.) dismissed the matter on the ground that there was no good and sufficient cause for condonation of the delay involved.

Resenting the above outcome, the applicant approached the High Court vide Miscellaneous Land Application No. 15 of 2016 predicated on section 47 (1) of the LDCA seeking leave to appeal to this Court against the aforesaid refusal of extension. We shall henceforth refer to this matter as "the leave application." It occurred that the application was greeted with a preliminary objection based on two points to the effect that it was "defective for want of

proper attestation" and that "the affidavit in support of the application was defective." In its ruling dated 2nd September, 2016, the High Court (Sameji, J., as she then was), at first, dismissed the preliminary objection on the ground that it was misconceived. However, before she took leave of the matter in the course of her ruling, it dawned on her that the application was predicated on wrong enabling provisions of the law. On the authority of five decisions of this Court which she cited on the effect of the ailment she had raised *suo motu*, she struck out the matter on the reason that wrong citation of enabling provisions rendered the application incompetent.

Still unwaveringly, the applicant went back to the High Court vide Miscellaneous Land Application No. 40 of 2016 moving it to review its decision of 2nd September, 2016 in Miscellaneous Land Application No. 15 of 2016 pursuant to section 78 (a) and Order XLII, rule 1 (1) (a) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019) ("the CPC"). This matter, which we shall refer to henceforth as "the review application", was pegged on two grounds alleging existence of manifest errors on the face of the ruling. In particular, the applicant claimed that the finding that the application was anchored on wrong enabling provisions of the law was a mistake or error apparent on the face of the record. This pursuit bore no fruit as the High Court

(Sameji, J., as she then was) dismissed it with costs on 31st March, 2017 for want of merit. Since in terms of Order XLII, rule 7 (1) of the CPC, the High Court's rejection of the review is not appealable, revision to this Court is the applicant's only available remedy, hence this application.

For the applicant before us was Mr. Jally Willy Mongo, learned counsel, who, at the outset prayed for and obtained leave of the Court in terms of Rule 4 (2) (a) of the Rules to argue an additional point to the effect that the applicant was denied an opportunity to be heard in the leave application on a point raised by the High Court *suo motu* and on which the matter was decided. Referring to pages 47 to 49 of the supplementary record of revision, Mr. Mongo contended that after the High Court had dismissed the preliminary objection in its first part of the ruling, it went ahead, in the rest of ruling, deliberating and striking out the application on account of incompetence arising from wrong citation of enabling provisions, an issue raised *suo motu* without hearing the parties. Referring to pages 8 to 11 of the typed decision of the Court in **OTTU on Behalf of P.L. Assenga and 109 Others v. AMI (Tanzania) Ltd.**, Civil Application No. 44 of 2012 (unreported), counsel submitted that any decision arrived at without according the affected party the right to be heard cannot be left to stand.

In the circumstances, Mr. Mongo urged that the decision of the High Court in the leave application be nullified along with the proceedings and the decision in review application that stemmed from a nullity. On the way forward, the learned counsel stated that although he had moved the Court to reopen leave application for a fresh hearing on the merits before the High Court, that course was unfeasible because leave to appeal is no longer a requirement for land matters originating from the High Court following the amendment of section 47 (1) of the LDCA.

In the alternative, Mr. Mongo made considerable submissions urging us to find that review application was properly before the High Court as there was an apparent error on the face of the record in the decision in leave application, which ought to have been reviewed and rectified. The error was that the High Court wrongly adjudged that Miscellaneous Land Application No. 27 of 2012 did not originate from it, but the Ward Tribunal of Ruaha. He gallantly argued that the application for leave was rightly laid under section 47 (1) of the LDCA and that section 47 (2) of that Act, requiring a certificate on point of law, was inapplicable.

On the part of the respondent, Mr. Rwezaula Kaijage, learned counsel, reviewed the chequered history of the dispute and submitted that the decisions of the High Court in both applications (the leave and review applications) were sound in law. He contended that as the matter before the High Court originated from the Ward Tribunal of Ruaha, the applicant should have laid his application vide Miscellaneous Land Application No. 15 of 2016 under section 47 (2) of the LDCA for a certificate on point of law.

As regards the applicant's complaint that his right to be heard was abrogated, Mr. Kaijage conceded, initially, that the High Court raised the issue of incompetence *suo motu* and that it decided the matter on it without hearing the parties. However, he parted ways with his learned friend contending that the High Court was justified to act as it did because it was incumbent upon it to interpret and apply the law accordingly. On the substance of the application for review, he countered that the High Court could not have vacated or nullified its own decision. We understood him to mean that the impugned decision was not amenable to review and that the said court was essentially *functus officio*.

It was Mr. Mongo's contention in rejoinder that in line with the reasoning in **OTTU** (*supra*) even though the High Court had power to raise any threshold

question *suo motu*, it ought to have reopened the proceedings and heard the parties on the point before it decided the matter on it.

In the light of the submissions of the learned counsel for the parties, we reviewed the record. It is our considered view that this matter turns on the question whether the High Court properly and correctly decided the application for leave on the issue of its incompetence it raised *suo motu*. In view of the settled position on the point, we have no difficulty in answering this issue in the negative.

To begin with, it is evident from the record that in its ruling of 2nd September, 2016, the High Court, at first, dismissed the preliminary objection on the ground that it was misconceived. Then, the court proceeded to raise the question of incompetence *suo motu* in the course of composition of the ruling and ultimately struck out the matter on that ground without hearing the parties. For clarity, we wish to let the record, at page 48 of the supplementary record, speak for itself right after the court had dismissed the preliminary objection:

> *"After making that determination, I have further perused the main application itself for the purposes of* ***having it proceed on merit as prayed by the***

> ***applicant. I have, however, observed that the same has been filed under a wrong provision of the law.*** *"* [Emphasis added]

After some discussion and reference to a number of authorities on the point, the court concluded, at page 50 of the supplementary record, that:

> *"In the upshot, Misc. Land Application No. 15 of 2016 filed on 18th May, 2016 and which is now before me, is incompetent and is hereby struck out. However, since this matter had been raised by the Court suo motu, I make no order as to costs."*

In the case of **OTTU** (*supra*) cited by Mr. Mongo, the Court faced an akin situation. It was moved to review a decision it had made earlier on a point of law it raised *suo motu* in the course of composing its ruling. In its decision, quashing and setting aside the ruling and orders the subject of the review, the Court held that:

> *"We think the course taken by the Court in raising and deciding a point of law when composing the ruling which affects the rights of the parties without affording them opportunity [to be heard] is a violation of one of the principles of natural justice, namely, the right to be heard – audi alterem partem."*

In the above decision, the Court referred to the holding in its earlier decision in **Abbas Sherally and Another v. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) that:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice".*

In **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251, also referred to in **OTTU** (*supra*), the Court underlined that the right to be heard is not just a principle of natural justice but a constitutional imperative in Tanzania:

> *"In this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part:*

> (a) *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

The text of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, Cap. 2 R.E. 2002 cited in the above quotation loosely translates in English as follows:

> "(a) *when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or other agency concerned."*

See also: **National Housing Corporation v. Tanzania Shoe Company and Others** [1995] TLR 251; and **Director of Public Prosecutions v. Sabinis Inyasi Tesha and Another** [1993] TLR 237 on the right to be heard as a peremptory principle.

Given the settled position of the law as discussed above, we find without any hesitation that the course taken by the learned High Court Judge to

determine the application for leave on a point she raised *suo motu* in the course of composing her judgment without affording the applicant an opportunity to be heard constituted an incurable defect that went to the root of the matter rendering her decision and order null and void. The same fate must befall the subsequent proceedings, ruling and order in the review application as they stemmed from a nullity.

We would ordinarily have remitted the application for leave to the High Court for a fresh hearing in accordance with the law and procedure, but we are in agreement with Mr. Mongo that doing so is clearly uncalled-for and impractical. As rightly argued by him, leave to appeal is no longer a prerequisite for land matters arising from the High Court's exercise of its original jurisdiction following the amendment of section 47 (1) of the LDCA by section 9 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, No. 8 of 2018.

Since the foregoing is sufficient to dispose of this matter, we find no pressing need to deal with the rest of the issues canvassed by the parties.

In fine, the application is granted. In the result, we quash and set aside the ruling of the High Court in Miscellaneous Land Application No. 15 of 2016 as well as the subsequent proceedings, ruling and order in Miscellaneous Land Application No. 40 of 2016. In view of the circumstances of this matter, we order each party to bear its own costs.

It is so ordered.

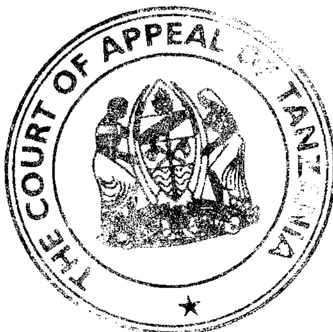
DATED at **IRINGA** this 29th day of April, 2021

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 30th day of April, 2021 in the presence of Mr. Jally Mongo, counsel for the applicant and Mr. Rwezaura Kaijage, counsel for the respondent is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL