IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 24/08 OF 2019

WILLIAM GETARI KEGEGE ..... APPLICANT

VERSUS

1. EQUITY BANK
2. ULTIMATE AUCTION MART } **.....RESPONDENTS**

(Application for Revision from the Ruling and Order of the High Court of Tanzania, at Mwanza)

(Mgeyekwa, J.)

dated the 31st day of August, 2018
in
Miscellaneous Land Application No. 99 of 2018
.....

RULING OF THE COURT

5th & 7th May, 2021

MWAMBEGELE, J.A.:

The genesis of the dispute between the parties to this application, as can be gleaned from the record before us, is a loan of Tshs. 5,000,000/= advanced to the applicant by the first respondent. A squatter house No. 021/450 at Buzuruga Nyakato in the City of Mwanza secured the loan. It happened that the applicant failed to service the loan in full. He had

repaid only Tshs. 4,327,000/= and Tshs. 1,273,000/= was outstanding. On 30.08.2014, the first respondent, through the second respondent, exercised the right of mortgage and sold the security at Tshs. 3,000,000/=.

The applicant was not happy with the auctioning of the house. He thus filed a suit in the District Land and Housing Tribunal claiming for, *inter alia*, an order that the sale of the mortgaged house without a court order was unlawful. The District Land and Housing Tribunal dismissed his suit. His first appeal to the High Court (Makaramba, J.) was also unsuccessful. He was aggrieved by the decision of the High Court on appeal. However, he was late to set the appeal process in motion. Still interested to assail the decision of the High Court in this Court, he filed an application in the High Court seeking extension of time to file a notice of appeal, leave to appeal and apply for certified copies of proceedings, judgment and decree in appeal.

The High Court purported to grant the prayers by the applicant but at the end of the day, granted him leave to lodge an appeal in the Court within thirty days. The resultant drawn order simply said the application was granted and the applicant was given thirty days within which to file

"the intended application" to appeal to the Court. The applicant found the ruling and its accompanying drawn order confusing. He thus lodged the present application seeking to have the ruling and drawn order of the High Court revised. The grounds in the notice of motion read:

> *"(a) That the impugned ruling and extracted order are fraught with services (sic) illegality, confusions and irregularities;*
>
> *(b) That the applicant had applied for extension of time in which to file Notice of Appeal, leave to Appeal to the Court of Appeal and apply for certified copies of proceedings, judgment and Decree in Appeal out of time which was neither granted nor refused but instead extension of time to file the Appeal to the Court Appeal was granted;*
>
> *(c) That the ruling and extracted order made under the application sought by applicant are* ***tainted with illegalities, confusion and irregularities*** *which the High Court granted; and*

(d) That the High Court Judge had no jurisdiction to entertain the application for extension of time to file Appeal to the Court of Appeal out of time which was not sought by applicant in the High Court application."

The supporting affidavit reads in the relevant paragraphs 6 through to 12 as follows:

"6 That, I conceded to start afresh to process my Appeal to the Court of Appeal by applying for extension of time to file ***Notice of Appeal, leave to appeal and applying for certified copies of proceedings, judgment and decree in appeal. Hereby attached a copy of Application and marked Annexture "WGK 4".***

7. That this application arises out of the ruling and extracted order of the High Court of Tanzania at Mwanza Registry by ***Madam Mgeyekwa J.*** *delivered on the 31st day of August, 2018 in Misc. Land Application No. 99 of 2018. Hereby attached a copy of proceedings, ruling and extracted order and* ***marked as annexture "WGK '5" '6' and '7"".***

8. That, being dissatisfied with the ruling and extracted order of the High Court of Tanzania seeking application for extension of time in which to file ***Notice of Appeal, leave to appeal to the Court of Appeal and apply for certified copies of proceedings, judgment and decree in appeal*** *out of time.*

9. That, in that application Misc. Land Application No. 99 of 2018, the High Court Judge instead of determining the application I prayed for extension of time to file Notice of Appeal, leave to appeal and apply for certified copies of proceedings, Judgment and Decree in Appeal but was granted to file Appeal to Court of Appeal.

10. That, the High Court Judge entertained the application ***which was not sought by applicant before*** *it.*

11. That, I pray this honourable Court to revise the High Court proceedings, ruling and extracted order in pursuit of justice.

12. That, I make this affidavit in support of the Notice of Motion as I have already stated

hereinabove that this error created a lot of confusion on a ruling and extracted order."

When the application was called on for hearing before us, the applicant appeared in person, unrepresented. The respondents were represented by Mr. Sifaeli Muguli, learned counsel.

The applicant had earlier on filed written submissions in support of the application which he sought to adopt as part of his oral arguments. The respondents neither filed affidavits in reply nor written submissions to resist the application and Mr. Muguli intimated to the Court at the hearing that they did not do that because the respondents did not intend to oppose the application.

In the written submissions, the applicant reiterated what he deposed in the supporting affidavit in the paragraphs reproduced above. In essence, the applicant submitted that the High Court granted what he did not ask and kept silent on what he asked. He clarified that what he prayed for was extension of time to file a notice of appeal, leave to appeal and applying for certified copies of proceedings, judgment and decree in appeal. Those prayers were not granted by the High Court and, rather

unwittingly, granted him extension of time to file an appeal before the Court of Appeal which prayer he did not ask and he was given thirty (30) days from the date of the delivery of the ruling within which to do so. Reinforcing his argument that the High Court erred in so doing, he referred us to our decision in **The Managing Director, Kenya Commercial Bank (T) Limited & Another v. Shadrack Ndege**, Civil Application No. 7 of 2009 (unreported) in which we observed that the High Court erred in considering a matter which was not before it.

Having submitted as above, the applicant prayed that his application be allowed so that the apparent errors in the ruling and drawn order of the High Court are rectified.

On the part of the respondents, Mr. Muguli reiterated his stance to support the application. However, we wish to interpose here that we restricted Mr. Muguli to reply on legal matters only because he was curtailed to go beyond that due to his failure to file an affidavit in reply. On this premise, he simply submitted that the High Court granted what the applicant did not ask for and left unattended the three prayers he made.

We have considered the applicant's uncontested application. We must confess that at first, we were inclined to think that the applicant's complaints could have been resolved by using the slip rule under section 96 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (the CPC). However, upon our mature reflection, we discovered that the shortcoming was not trivial as we thought. Neither could it be rectified by the slip rule under the provisions of section 96 of the CPC. We recollected what the Court said in **Sebastian Stephen Minja v. Tanzania Harbours Authority**, Civil Application No. 107 of 2000 (unreported) was the scope of the slip rule under section 96 of the CPC. In that case, considering the scope and purview of the slip rule under the section, the Court made the following observation:

> *"Rule 40 (1) [now Rule 42 (1)] of the Court Rules is a provision which empowers the Court to make certain corrections in its judgement after it had been delivered. In order to avoid violating the functus officio principle the corrections are limited in scope. The Court can correct a clerical mistake such as where the word "from" instead of the intended word "for" had been written, or an*

arithmetical mistake such as the figure "108" instead of the intended figure "180" appearing the judgment. It can also correct an error arising from an accidental, that is to say unintended, slip or omission. For example, if the Court intended to say "we allow the appeal" but by a slip of the pen wrote "We dismiss the appeal". The word "dismiss" was not intended and is wholly inconsistent with the reasoning in the judgement. Similarly, in Rule 40(2) if in its judgement the Court says that the appeal has been allowed with costs but in the extracted order it is shown that the appeal was dismissed with costs, the order can subsequently be coerced so that it conforms with the judgement. A judgment cannot be corrected under Rule by bringing into the judgment a new matter which does not appear naturally to have been in the contemplation of the Court when the judgement was being written."

We are aware that the Court was making reference to slip rule under the Court of Appeal Rules which are applicable in the Court of Appeal. However, we are certain that the principle holds true to the slip rule embodied in section 96 of the CPC as well which is applicable in the High

Court. If we are pressed to cite an authority on the slip rule under section 96 of the CPC, our decision in **Jewels & Antiques (T) Ltd v. National Shipping Agencies Co Ltd** [1994] immediately comes to our mind. In that case, we said the "slip rule" under section 96 of the CPC is applied to correct clerical mistakes and accidental slips or omissions by officers of the court in judgments, decrees or orders. As the High Court held in **VIP Engineering & Marketing Limited v. Societe Generale De Surveillance (S.A) & Another**, Commercial Case No 16 of 2000 (unreported) to which we subscribe as depicting the correct position of the law in our jurisdiction, that "a litigant should not be allowed to suffer through the mistake of an officer of the Court connected with the administration of justice and that Courts have a duty to ensure that Court records are true and that they represent an accurate record of the proceedings."

We also feel apt to explain at this juncture why we restricted Mr. Muguli to address us on only points of law on account that the respondents did not file any affidavit in reply to contest the application. Our reason for doing so is purely legal. It is trite that a party who has not filed an

affidavit to contest what has been deposed in an affidavit supporting an application may be entitled to an oral reply but only on matters of law; not on matters of fact. That this is the law has been stated in a number of our decisions – see: **Fransisca Mbakileki v. Tanzania Harbours Corporation**, Civil Application No. 71 of 2002, **Finn Von Wurden Petersen and Another v. Arusha District Council**, Civil Application No. 562/17 of 2017 **Fweda Mwanajoma and Another v. Republic**, Criminal Appeal No. 174 of 2008 and **Jonas Betwel Temba v. Paul Kisamo and Another**, Civil Application No. 10 of 2013 (all unreported). In **Finn Von Wurden Petersen** (supra), for instance, the Court relied on its previous decision in **Yokobeti Sanga v. Yohana Sanga**, Civil Application No. 1 of 2011 (unreported) to hold:

> *"... it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit ....*
>
> *Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law."*

Luckily, the learned counsel for the respondents is not unaware of this settled position of the law. As a true officer of the court, he was quick to oblige.

Adverting to the application at hand, we, like the applicant and respondent, agree that the High Court did not grant what the applicant asked. We glean the prayer by the applicant from the body of the Chamber Summons filed on 02.05.2018 as:

> *"The Honourable Court may be pleased to extend time to the applicant to apply for the extension of time* ***to file Notice of Appeal, leave to appeal to the Court of Appeal of Tanzania and apply for certified copies of proceedings, judgment and Decree in Appeal out of time.****"*
> [Emphasis added].

It is apparent from the Chamber Summons reproduced above that the prayer by the applicant for extension of time was three-fold; **first**, to file a notice of appeal, **secondly**, for leave to appeal to the Court and, **thirdly**, for leave to apply for certified copies of the proceedings, judgment and decree in appeal. In its ruling handed down on 31.08.2018, the High

Court purported to grant the applicant's three-fold prayer but, out of what seems to be an inadvertency, did not. Instead, the High Court granted extension of time to file an appeal. We will let part of the last two paragraphs of the ruling of the High Court speak for itself:

> *"... I am of the respectful opinion that the applicant has delayed to lodge his application due to the delay by court supplying the copies therefore the applicant has advanced sufficient reason* ***to warrant this Court grant the extension of time to file a Notice of Appeal and Application for leave to Appeal to the Court of Appeal.***
>
> *Leave for extension of time is therefore granted to the applicant* ***to file the appeal before the Court of Appeal.*** *The time of filling the intended application is extended for thirty days (30) days from the date of this ruling."*
>
> [Emphasis supplied].

And its attendant drawn order extracted from the foregoing ruling reads in the relevant part:

> *"i. The application is granted.*

ii. The time of filing the intended application is extended for thirty days (30) from the date of this ruling."

Flowing from the above, we agree with the applicant that the ruling of the High Court and its concomitant drawn order are unclear and confusing. While the ruling in the last but one paragraph correctly grants two limbs of the three-fold prayers by the applicant, the last paragraph overlooks and grants what was not prayed for; enlargement of time to file an appeal before the Court of Appeal. The flanking drawn order is equally confusing and omnibus; granting the application and allowing the applicant to file "the intended application" within thirty days of the ruling. The applicant's application for extension of time to file a notice of appeal, to give leave to appeal to the Court and to apply for certified copies of proceedings, judgment and decree in appeal, remained unanswered in the final order in the last paragraph of the ruling and in the consequent drawn order. That was an error on the part of the High Court warranting this Court to exercise its powers of revision under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (henceforth "the AJA"). In **The Managing Director, Kenya Comercial Bank (T)**

Limited (supra), we were confronted with an analogous situation. There, like here, the applicant was granted what he did not pray for. The applicant had applied for leave to appeal but the High Court determined an application for a certificate on point of law which was not before it. We held:

> *"... we are of the settled mind that the High Court fundamentally erred in law in failing to determine the application for leave to appeal and instead purported to determine an application for a certificate on point of law which was not before it. The error cannot be left to stand as it prejudiced the applicants. We accordingly have no option but to invoke the Court's revisional powers to nullify and set aside the ruling and order ...."*

The Court proceeded to allow the application with costs.

The same was the case in **Sebastian Stephen Minja** (supra) in which the Court held that a single Justice of the Court had erred in law in granting extension of time to appeal out of time whereas the application before him was an application for leave to appeal. The Court proceeded to allow the reference with costs.

Adverting to the matter at hand, on the strength of the authorities of **The Managing Director, Kenya Comercial Bank (T) Limited** (supra) and **Sebastian Stephen Minja** (supra), we find and hold by granting the applicant extension of time to file an appeal to the Court of Appeal which was not before it, that the High Court, certainly, jumped the gun. This brought about confusion complained of by the applicant. This unfortunate state of affairs might have been triggered by the High Court starting off the ruling on the wrong foot – it kicked off by saying "this is an application for extension of time to file a notice of appeal out of time prescribed by law". That was not entirely correct. We have said above more than once that an application before the High Court was one for extension of time to file a notice of appeal, for leave to appeal and for applying for copies of proceedings, judgment and decree in appeal.

In the final analysis, we engage section 4 (3) of the AJA and nullify the ruling and drawn order of the High Court dated 31.08.2018. Consequently, we remit the matter to the High Court for composition of a fresh ruling by the same Judge which will take on board the prayers of the applicant. We make this order while taking judicial notice that the Judge

responsible is still stationed at Mwanza. However, if for any reason the Judge will not be available, we order another Judge with jurisdiction to step into her shoes.

This application is allowed. As the application was not contested and given the peculiar circumstances of the case where the error is purely the court's, we make no order as to costs.

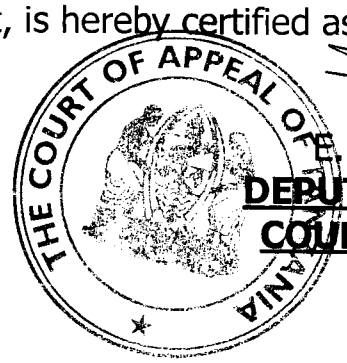
DATED at **MWANZA** this 7th day of May, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 7th day of May, 2021 in the presence appellant in person, and Mr. Sifael Moguli, the learned counsel for the respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL