IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL REVISION NO. 2 OF 2020

THE REGISTERED TRUSTEES OF MASJID MWINYI.....APPLICANT

VERSUS

1. PIUS KIPENGELE
2. MOEZ JAFFERALI MORBIWALA
3. THE REGISTRAR OF TITLE
4. THE COMMISSIONER FOR LANDS
5. THE HONOURABLE SOLICITOR GENERAL
6. MINISTRY OF LANDS AND HUMAN SETTLEMENTS

.....RESPONDENTS

(Revision from the proceedings and decision of the High Court of Tanzania, at Dar es Salaam)

(Mgonya,J.)

dated the 29th day of April, 2020
in
Land Case No. 24 of 2019

RULING OF THE COURT

9th June, & 9th August, 2021

MKUYE, J.A.:

These revision proceedings were commenced by the Court *suo motu* following a letter of complaint dated 26th May, 2020 addressed to the Hon. Chief Justice concerning the manner Land Case No. 24 of 2019 was dealt with. Upon receipt of the said letter the Hon. Chief Justice, on 28th May,

2020 directed that the revision proceedings be opened *suo motu* in order to:-

> *"...look into the legality of the ownership of House No. 58 Plot No. 32 Block 77 Somali - Gerezani Streets Kariakoo (Ilala District) together with House No. 59 Plot 17 Block 56 Mchikichini Kariakoo (Ilala District) both arising from the estate of the late Aziza Omari."*

The Hon. Chief Justice further directed that:-

> *"Let all parties concerned be notified and heard where possibly, including the Solicitor General, the Registrar of Titles and the Ministry of Lands and Human Settlements."*

Before embarking to the application on merit, we deem obliged to narrate, albeit briefly, the background of the matter leading to this application.

The matter has a chequered history. It began with the demise of one, Aziza Omari (the deceased) who passed away on 4th July, 1991. The deceased during her life time was the lawful owner of two houses on surveyed plots identified as Plot No. 32 Block 77 Somali – Gerezani Streets and Plot No. 17 Block 56 Mchikichini street located at Kariakoo area within Dar es Salaam Region. Upon her demise, one, Daniel Zakaria petitioned

before the Resident Magistrates' Court for Dar es Salaam Region at Kisutu in Probate and Administration Cause No. 89 of 1991, for letters of administration and was duly appointed as administrator of the deceased's estate. Thereafter, the administrator sold the house on Plot No. 32 Block 77 at Somali Street to Pius Kipengere (the 1st respondent herein) and the House on Plot No. 17 Block 56 at Mchikichini Street was sold to one, Steven Hussein Mwamkwa who later sold it to Moez Jafferali Morbiwala (the 2nd respondent herein).

It is noteworthy that, while the application by Daniel Ezekiel for appointment as an administrator was pending, also one, Mzee Mwinshehe Mgumba petitioned for letters of administration in respect of the same estate of the deceased before Kariakoo Primary Court in Ilala District (Probate and Administration Cause No. 89 of 1991) and was subsequently granted such letters of administration while Daniel Zakaria had already been granted with such letters or rather appointed an administrator of the same deceased's estate.

The appointment of Mzee Mwinshehe did not last long as the Resident Magistrates' Court of Dar es Salaam at Kisutu, (Kimaro PRM) after

realizing the existence of the previous grant, nullified the grant of letters to Mzee Mwishehe Mgumba.

From there, it appears that the matter went calm until in 2011 when the Registrar of Titles rectified ownership of Plot No. 32 Block 77 at Somali Street by deleting the name of the 1st respondent and substituting for it with His Excellence the President. After being aggrieved by that move, the 1st respondent instituted Land Case No. 85 of 2012 at the High Court but the same was struck out for being preferred in contravention of section 102 (1) of the Land Registration Act, Cap 345, R.E. 2002 which requires that for any dissatisfaction with a decision of the Registrar of Titles, an appeal lies to the High Court within three months from the date of that decision.

The 1st respondent, then sought extension of time to institute his appeal vide Misc. Application No. 30 of 2016 which was granted by Hon. Dyansobera, J. Thereafter, he instituted Land Appeal No. 10 of 2018 challenging the decision of the Registrar of Titles and upon hearing the parties the High Court through Luvanda, J. found the appeal had merit and quashed the Registrar of Title's decision with a direction that the name of

the 1st respondent be reinstated in the Land Register. The applicant was not amused with that decision. She instituted in the High Court Land Case No. 24 of 2019 claiming ownership of the two disputed Plots. Upon hearing the parties on among the points of objection raised by the 1st and 2nd respondents that suit was time barred, Mgonya, J. sustained the preliminary objection that the suit was time barred in respect of the 1st respondent and the same was struck out.

At this juncture we wish to pose and observe that in between there were other matters going on in various courts in relation of the same matter. Such matters include :-

(1) Civil Revision No 14 of 1993 - Mzee Mwishehe v. Daniel Zakaria Mapigano, J. (as he then was) dated 25/2/1994.

(2) Civil Case No. 200 of 1995 - The Registered Trustees of Masjid Mwinyi v. Daniel Zakaria, Pius Kipengele and Steven Mwamkoa, Makanja, J. (as he then was) dated 12/5/1998.

(3) Civil Appeal No. 196 of 2000 - Abdallah Rashid v. Daniel Zakaria Muro, J. (as she then was) dated 20/12/2001.

(4) Misc. Land Application No. 30 of 2016 - Pius Kipengele v. The Registrar of Titles, The Commissioner for Land, The AG and

The Registered Trustee of Masjid Mwinyi (RTMM) Dyansobera, J dated 30/4/2018 involving extension of time.

(5) Land Case No. 85 of 2012 struck out on 1/3/2016.

(6) Land Appeal No. 10 of 2018 - Pius Kipengele v. The Registrar of Titles, the Commissioner for Land, The AG and RTMM Luvanda, J, dated 12/11/2018.

(7) Land Case No. 24 of 2019 - RTMM v. Pius Kipengele and Moez Jafferali Morbiwala, Mgonya, J. dated 29/4/2019

Dissatisfied by the decision by the High Court Land Case No. 24 of 2019, the applicant wrote a letter of complaint to the Hon. Chief Justice, the subject of the matter at hand contending a foul on complicity by the courts in denying moslems property that had been bequeathed to them by Waqf. In the said letter as shown at page 416 of the record of revision, the complaint was specifically directed to the decision of Mgonya, J. It is upon that complaint letter that the Hon. Chief Justice and after having considered the nature of the matter directed that the revisional proceedings be commenced *suo motu* as we have hinted earlier on.

When the application was called on for hearing, the applicant was represented by Messrs Daimu Halfani, Mashaka Ngole and Ashiru Hussein

Lugwisa, learned advocates whereas the 1st respondent was represented by Messrs Philemon Mutakyamirwa and Sylvanus Mayenga, also learned advocates. The 2nd respondent was advocated by Mr. Godwin Musa Mwapongo and the 3rd, 4th, 5th and 6th respondents had the services of Mr. Deodatus Hilary Nyoni, learned Principal State Attorney assisted by Mr. Daniel Chacha Nyakia, Ms Grace Eliud Lupondo and Ms. Kause Kilonzo, all learned State Attorneys.

Before commencement of the hearing of the application on merit, Mr. Mayenga sought and was granted leave to bring to the attention of the Court the issue they had discovered in the course of preparation of the hearing of the application.

Mr. Mayenga submitted that, though this is an application for revision *suo motu,* there are two crucial documents which are not included in the record of revision. He pointed out that after the decision in Land Case No. 24 of 2019 was delivered, the applicant lodged a notice of appeal and a letter applying for the ruling and drawn order on 30th April, 2020 but in the record of revision only the letter applying for the documents is included while the notice of appeal is not included. He argued that as the complaint

to the Hon. Chief Justice was brought on 26th May, 2020 after the notice of appeal had been lodged, it means that the applicant is trying to ride two horses at the same time. He argued further that, it has been the position of this Court that where there is a notice of appeal there cannot be a room for seeking another remedy. While relying on the case of **Tanzania Electricity Company Ltd (TANESCO) v. Mufungo Leonard Majura and 14 Others,** Civil Revision No. 5 of 2016 (unreported), the learned counsel urged the Court to find that since there is a notice of appeal, the revisional proceedings *suo motu* cannot proceed as it is tantamount to an abuse of the Court process. In this regard, he implored the Court to strike out these revision proceedings with costs.

Mr. Mwapongo, also conceded to what was submitted by Mr. Mayenga. He reasoned out that while on appeal the Court can exercise revisional powers, it cannot exercise appellate jurisdiction when dealing with revision. In this regard, he was of the view that failure to include the notice of appeal in these proceedings which basically relates to the impugned decision of Hon. Mgonya, J., was done purposely and that, this amounted to the abuse of the Court process. He said, as the notice of appeal is already in this Court, the instant revision has no legs to stand on.

Like Mr. Mayenga, he urged the Court to strike out these revisional proceedings to pave the way for the appeal to proceed.

On his part, Mr. Nyoni in his brief presentation also conceded to what was presented by his colleagues without more.

In response, Mr. Halfani resisted the preliminary point raised by Mr. Mayenga arguing that the *suo motu* revisional proceedings were properly before the Court because of the communication between the Private Assistant and the Chief Justice which gives validity of these proceedings. He explained that according to that communication the matter involves the issue of probate as well as the issue of ownership of the disputed properties. On top of that, he said, the fact that the matter involves many issues, explains why the Hon. Chief Justice directed the parties such as the Registrar of Titles, Commissioner for Land and Ministry of Lands and Human Settlements to be included though they were not parties in Land Case No. 24 of 2019.

As to the issue that there is already filed a notice of appeal, he was of the argument that there was nothing wrong as the complainant was not prohibited from complaining despite the existence of the notice of appeal.

He also argued that the case of **Tanzania Electricity Company Ltd (TANESCO)** (supra) cited by Mr. Mayenga is distinguishable as the matter at hand involves a land matter and probate while in that case only one issue was involved.

In the end, the learned counsel for the applicant was of the view that the prayer for striking out the application is not tenable as it is a revision *suo motu* and that the applicant cannot be condemned to costs. In any case, he urged the Court to dismiss the preliminary objection so as to pave way for the revision proceedings to proceed with the hearing.

In rejoinder, Mr. Mayenga insisted that the issue in Land Case No. 24 of 2019 alleging fraud needs to be dealt with in an appeal which was the proper remedy. That, so long as there is an appeal process the revision proceedings cannot stand. On their part, Mr. Mwapongo and Mr. Nyoni in essence reiterated their submission in chief except that Mr. Nyoni added that allowing this kind of proceedings is tantamount to endless litigation.

We have considered the rival submissions regarding the issue challenging the proprietness of these *suo motu* revisional proceedings. In the first place we wish to point out that these revisional proceedings were

not initiated by a party where the adversary party can challenge its propriety or otherwise – see the decisions of the Court in **Millicom (Tanzania) N. V. v. James Alan Russel Bell and 5 Others,** Civil Revision No. 3 of 2017 (unreported) while referring to the case of **Balozi Abubakar Ibrahim and Another v. MS Benandys Limited and 2 Others,** Civil Revision No 6 of 2015 (unreported). This is so because as was alluded to earlier on, these revisional proceedings were initiated by the Hon. Chief Justice in his direction dated 28th May, 2020.

In dealing with this issue which seems to challenge the propriety of these *suo motu* revision proceedings, we think, it is important first to revisit its origin. In other words, we need to revisit how and when the Court was bestowed with the revisional jurisdiction. Essentially, when this Court was established in 1979, it was vested with appellate jurisdiction alone. According to the Appellate Jurisdiction Act, (the AJA), the Court was not vested with revisional jurisdiction whereby it could inspect or correct errors be it procedural or substantive which might have been committed by the High Court. The mandate of the Court was limited to the appellate jurisdiction and matters related to appeals as per section 4(2) of the AJA which provided as follows:-

"(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power, authority and jurisdiction vested in the Court from which the appeal is brought."

It would appear that this situation caused problems and thus in 1993, the AJA was proposed to be amended so as to cure the mischief. The purpose of the amendment was clearly explained in the Objects and Reasons for the Bill which proposed to amend the law where it was stated as follows:-

"The Bill is designed to amend the Appellate Jurisdiction Act in order to give the Court of Appeal supervisory and revisionary powers over the High Court. At the moment the Court of Appeal exercises revisionary powers over the High Court only when an appeal lies over the matter on which the High Court had exercised revisionary powers. Otherwise, the Court has only appellate powers and it cannot inspect or correct errors on the decisions of the High Court which are not subject of appeal".

Through the Appellate Jurisdiction (Amendment) Act, 1993 (No. 17 of 1993) which was enacted after the Bill was passed by the Parliament, section 4 was amended by deleting subsection (2) and substituting for it with two new subsections which introduced the Court's revisional powers/jurisdiction in terms of subsections (2) and (3) as follows:-

> *"(2) For all purposes of an incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall,* ***in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision*** *and the power, authority and jurisdiction vested in the Court from which the appeal is brought.*
>
> *(3) Without prejudice to subsection (2), the Court of Appeal shall have* ***the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*** [Emphasis added]

In the case of **Moses J. Mwakibete v. Editor – Uhuru Shirika la Magazeti ya Chama and Another Co. Ltd** [1995] TLR 134 which was later followed by the case of **Transport Equipment Ltd v. Devram P. Valambhia** [1995] TLR 161, the Court discussed at length the issue of applicability of the provisions of section 4 (3) of the AJA and it came to the conclusion that under the said provision, the Court could engage on revision *suo motu* proceedings whether or not the right of appeal exists or whether or not it has been exercised in the first instance. In particular in the case of **Moses J. Mwakibete** (supra), it was stated that:-

> " *The revisional powers conferred by section 2 (3) [now 4(3)] of the Appellate Jurisdiction Act 1979 are not meant to be used as an alternative to the appellate jurisdiction of the Court of Appeal; accordingly,* ***unless acting on its own motion,*** *the Court of Appeal cannot be moved to use its revisional powers under section 2(3) [now 4(3)] of the Act in cases where the applicant has the right of appeal with or without leave and has not exercised that right."* [Emphasis added]

Yet, in 1996, the Court, in the case of **Halais Pro - Chemie Industries Ltd v. Wella A.G.** [1996] TLR 269 reaffirmed the legal position taken in the two cited cases regarding revisional jurisdiction of the

Court under section 4 (3) of the AJA and it further held among others that:-

> *"The Court may,* ***on its own motion "and at any time,"*** *invoke its revisional jurisdiction in respect of proceedings in the High Court."* [Emphasis added]

In essence, the Court widened the scope in which it could exercise its revisional powers under section 4 (3) of the AJA, and included, the notion that it can on its own motion and at any time commence such proceedings. But again, in the case of **Olmeshuki Kisambu v. Christopher Naingola** [2002] TLR 280, the Court, while dealing with the same provision of law, it held among others that the Court will not proceed *suo motu* in cases where the applicant has the right of appeal, with or without leave, and has not exercised that right. However, the Court qualified that position when it stated that:-

> *"However, the Court will proceed under the subsection where there...* ***exists good and sufficient reasons to justify recourse of the subsection".*** [Emphasis added]

But again, in the most recent case of **Millicom (Tanzania) N.V.** (supra) when the Court was confronted with an akin scenario after having revisited a number of the decided cases it came to the conclusion that:-

> *"It is clear from all these cases that this Court can exercise* ***its revisional jurisdiction suo motu, at any time which is in line with the manifest intention of parliament in deciding to vest this Court with supervisory powers over the High Court in order to determine the propriety or otherwise of the finding order or any decision of the High Court regardless of proceedings being finalized by the High Court."***
> [Emphasis added]

Having revisited the background of the revisional power/jurisdiction and how it evolved and has been invoked in various decisions, we think, we are now in a position to tackle the issue before us.

In this matter, Mr. Mayenga, the learned counsel for the 1st respondent who has been supported with Mr. Mwapongo and Mr. Nyoni for the remaining respondents has argued that the revisional proceedings are incompetent and cannot proceed with hearing since the applicant has filed a notice of appeal intending to challenge the decision in Land Case No. 24

of 2019 (Mgonya, J.) and the same has neither been withdrawn nor struck out at the instance of the respondents. On the other hand, Mr. Halfani is of the view that the applicant was not prohibited from complaining despite the existence of the notice of appeal.

In the first place, we wish to state that it is common knowledge that there was Land Case No. 24 of 2019 whose decision was handed down on 29th April, 2020. Immediately thereafter on 30th April 2020, a notice of appeal was lodged against that decision as we had a glance on it. Further to that, on 30th April 2020 the applicant lodged a letter requesting to be supplied with the certified copies of proceedings and the Ruling thereof. It is also common ground that, according to the record the said notice of appeal has neither been withdrawn nor struck out according to the law or at the instance of the respondents.

On our part, we are aware of such a well-established principle that a party to the case cannot be allowed to ride two horses at the same as it amounts to the abuse of the court process - See **Hamisi Said Mkuki v Fatuma Ally,** Civil Appeal No. 147 of 2007 (unreported). Also, in the case of **Tanzania Electricity Company Ltd (TANESCO)** (supra) that was

cited by Mr. Mayenga, the Court struck out the *suo motu* revision application on account that it was instituted while the notice of appeal was already lodged. In doing so it cited the case of **Tanzania Company Limited & Others v. Tri-Telecommunication Tanzania Limited** [2006] 1 EA 393 where it was observed:

> *"...since the appeal process was actively being pursued, it would be improper for the Court to allow the parties to invoke the revisional jurisdiction while at the same time pursuing the appeal process. This would also amount to riding two horses at the same time. That is by invoking the revisional jurisdiction while at the same time pursuing the appeal process. This Court cannot be allowed, it is improper."*

However, it is our considered view that **Tanzania Electricity Company Ltd (TANESCO)** (supra), is distinguishable to the matter at hand. We think that in the present application the circumstances are distinguishable with the above cited case because there are special matters which were considered by the Court in ordering the *suo motu* revision of the proceedings – see also **Moses J. Mwakibete** (supra), **Transport Equipment Ltd** (supra) and **Olmeshuki Kisambu** (supra). Those

matters are: **One,** though the notice of appeal has been lodged by the applicant in respect of the decision of Mgonya, J, in Civil Case No. 24 of 2019 involving the applicant and two other respondents, so far the High Court has dealt with the dispute between the parties others concerning the disputed properties in about six cases, the most recent being Land Appeal No. 10 of 2016 as per the background facts we have alluded to above. Indeed, in all other matters, there is no evidence that an appeal has been lodged before this Court. **Two,** in all case dealt by the High Court on the disputed properties, parties are not the same as those in Land Case No. 24 of 2019. Therefore even if the intended appeal against Mgonya,J. is actively processed before the Court, other parties will not have a right to join in that appeal as they were not parties to the original case. The remedy for an interested party who has no right to appeal is to lodge an application for revision. **Three,** we think that whatever decision which will be made in the intended appeal, the dispute between the parties on the disputed properties which has been severally dealt by the High Court will not put the matter to rest.

In addition to that, we think that it is in view of these special circumstances that in ordering a *suo motu* revision, the Court directed the

joining of other parties to the dispute who might have been affected by the decision which would be reached in the intended appeal as we have alluded to above.

The objective of clothing the Court with such revision jurisdiction and in particular engaging *suo motu* revision was for rendering justice to all by mandating this Court of the last resort in the land, unfettered judicial powers at any time to inspect and or correct apparent procedural and substantive errors, irregularities and illegalities committed by the High Court which cannot be remedied in the absence of an appeal – See **Attorney General and 2 Others v. Oplent Ltd,** Civil Revision No. 1 of 2015 (unreported).

If we may add, the *suo motu* mandate which is the Court's inherent power is crucial so as to avoid perpetrating illegalities and errors by way of correction.

Since it is settled that the Court has mandate to engage *suo motu* revision, we are certain that the PO must fail.

With all said and done, we find the point of objection raised by the respondents to be misconceived. We, accordingly, overrule it. We further

order that the Registrar should fix these *suo motu* proceedings for hearing in the next convenient session of the Court.

It is so ordered.

DATED at **DAR ES SALAAM** this 6th day of August, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L.K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of August, 2021 in the presence of Mr. Ashiru Hussein Lugwisa, counsel for the applicant and Mr. Sylvanus Mayenga counsel for 1st Respondent and also hold brief for Mr. Godwin Mwapongo, counsel for the 2nd respondent and Ms. Neisha Shao, State Attorney for the 3rd ,4th ,5th and 6th respondents is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL