IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., GALEBA, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 368/01 OF 2019

GRAND REGENCY HOTEL LIMITED ..... APPLICANT

VERSUS

PAZI ALLY ..... 1ST RESPONDENT

JUMANNE ALLY (*As administrator of the estate of the late Ally Abdallah Samatta*)**..... 2ND RESPONDENT**

[Application for Revision of the Decision of the High Court of Tanzania, (Dar es Salaam District Registry) at Dar es Salaam]

(Muruke, J.)

dated the 21st day of October, 2011
in
Civil Revision No. 13 of 2010
.....

RULING OF THE COURT

26th August and 6th September 2022

GALEBA, J.A.:

This is an application for revision where the applicant, Grand Regency Hotel Limited is moving the Court under section 4 (3) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] and rule 65 (1), (2) and (3) of the Tanzania Court of Appeal Rules 2009, (the Rules), to call for the record of the High Court in Civil Revision No. 13 of 2010 and satisfy itself as to the correctness, legality or propriety of any findings or orders of the High Court in that matter. The notice of motion is supported by the affidavit of Dr. Hans Aingaya Macha, the applicant's Managing Director.

The facts material to this application in terms of its background is that, Ally Abdallah Samatta (now deceased) was the original owner of a house on Plot No. 35 Block 'E', Likoma Street Kariakoo (the disputed house). He passed away on 27th April 1997 and in Probate and Administration Cause No. 398 of 2006, the Primary Court of Buguruni, appointed Hidaya Ally as an administratrix of his estate, although the person who had applied to be appointed as such was Pazi Ally, the first respondent in this application. The Primary Court also held that the disputed house was part of the deceased's estate and at the same time it held that the very property was jointly owned by Hidaya Ally, Pazi Ally, Jumanne Ally, Fatuma Ally, Sauda Ally, Rehema Ally and Idd Ally. Aggrieved, the first respondent moved the District Court of Ilala in Dar es Salaam to revise the decision of the Primary Court and declare, among others, that the house in question was not part of the estate of the late Ally Abdallah Samatta because before his demise, the deceased had transferred that property to the above children, except Hidaya Ally.

It appears that when the revision proceedings were pending in the District Court between the first respondent as the applicant and Hidaya Ally as the respondent, the Primary Court appointed MTC Auction Mart Co. Limited, which company auctioned the disputed property on 23rd March 2008 thereby disposing it to Grand Regency Hotel Limited, the applicant in

this application. A certificate of sale in that respect was issued by that court on 31st March 2008. On 21st January, 2010, the District Court dismissed Pazi Ally's application for revision having concluded that, the Primary Court was justified to hold that the property in question was part of the deceased's estate.

Still aggrieved, the first respondent successfully applied for a further revision against Hidaya Ally before the High Court which nullified the decisions of both the Primary Court of Buguruni and that of the District Court of Ilala. The decisions were nullified on grounds, among others, that the Primary Court had no jurisdiction and it erred when it determined the issue of ownership of the property in a probate and administration cause instead of only appointing the administrator of the estate, and leave the rest of the processes to be carried on by the appointed administratrix.

When the applicant became aware of the decision of the High Court, she lodged the present application for revision of the orders of that court, essentially, because according to Dr. Macha's affidavit, she was condemned unheard as the High Court nullified the decision of the Primary Court, including orders of the public auction at which she bought the disputed house. This complaint is the major issue that this application is all about.

When the application was called on for hearing before us on 26th August 2022, the applicant was represented by Mr. Daniel Haule Ngudungi, learned advocate, whereas the first respondent had the services of Mr. Godwin Muganyizi, also learned advocate. The second respondent, who had been appointed administrator of the estate of Ally Abdallah Samatta following the demise of Hidaya Ally, appeared in person, unrepresented by counsel.

After having studied the matter thoroughly and engaged learned counsel in a brief dialogue, before we were to proceed to hear the substantive application, we inquired from them, particularly from Mr. Ngudungi; **first,** whether the application was competent before the Court in the circumstances where the proceedings in the Primary Court, the District Court and even before the High Court, were Probate Proceedings. **Second,** whether the applicant did not have any alternative and a more effective remedy to pursue her rights other than by way of these revision proceedings, considering the nature of the complaint she wanted to present before the High Court, namely to establish or prove her ownership of the house and the money she had spent on purchasing it.

In addressing the Court, Mr. Ngudungi referred us to pages 249 and 250 of the record of application where the High Court in the impugned judgment, made the following order:

> *"By the powers conferred [on this court] by sections 43 (2), 44 (1) (a) and (b) of the Magistrates' Courts Act [Cap 11 R.E. 2002], and section 79 (1) and 95 of the Civil Procedure Code, [Cap 33 R.E. 2002], [I] do hereby quash all proceedings of the trial court i. e. Buguruni Primary Court in relation to ownership of the house in plot No. 35 Block 'E' Likoma Street Kariakoo, with subsequent orders thereto. Miscellaneous Civil Application No. 23 of 2007 of Ilala District Court cannot also stand, because it is based on the quashed proceedings of the ownership of the house in Plot 35 Block 'E' Likoma Street Kariakoo."*

According to him, the above pronouncement of the High Court, cast condemnation to his client without affording her a right to be heard, as an innocent purchaser for value of the house in question. In the circumstances, according to Mr. Ngudungi, the applicant was supposed to be made a party to the proceedings in the High Court for her to assail her rights and interests in the house. The learned advocate contended further that, whereas the order of the High Court dispossessed his client of the house she had lawfully purchased, the court did not make any comment or make any order in respect of his client's TZS. 100,000,000.00 that she had paid in acquisition of the property. To support his argument, Mr. Ngudungi referred us to several decisions of this Court that he had relied

upon in his written submissions including the **Bank of Tanzania v. Said Marinda and the Attorney General,** Civil Application No. 74 of 1998, **V.I.P. Engineering and Marketing Ltd and Two Others v. Citibank Tanzania Limited**, Civil References No. 6, 7 and 8 of 2006 and **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 33 of 2002 (all unreported).

As to any availability of any more effective remedy other than insisting to nullify the decision of the High Court, Mr. Ngudungi even more emphatically stressed that the only avenue for the applicant to achieve his right was to be made a party to the proceedings before the High Court, short of which the proceedings of the High Court are a nullity, and there was no optional remedy.

For the above reasons, he contended that the application before us was a competent proceeding that deserved substantive hearing.

In reply Mr. Muganyizi submitted that this application is problematic, hence incompetent. That was so, he argued, because the High Court was dealing with probate proceedings which did not concern the applicant, so the latter did not have any interest in the proceedings before that court. If she felt aggrieved by the order of the High Court, he maintained, the applicant would, if she desired to assert her affected rights, file a suit in a court of competent jurisdiction to prove his claims. He moved the Court to

strike out the application with costs. On his part, the second respondent supported the stance taken by Mr. Muganyizi.

Naturally the issue before us is whether this application is competent in the context of the fact that the challenged proceedings in the High Court were probate proceedings in which the applicant had no interest.

Mr. Ngudungi's contention was that if the High Court was determined to dispose of the application the way it did, it was incumbent upon it to ensure that the applicant was made a party to the proceedings, for what it finally decided affected her interests in the real property that she had legally purchased in March 2008. The High Court, according to him, was supposed to join the applicant in the proceedings before it and determine her complaints.

The critical point is whether, while sitting in revision of a probate matter, the High Court would have jurisdiction to determine the applicant's land dispute in the same revision proceedings? Our response to this query will progressively unveil itself as we proceed, and by the time we get to the conclusion of this ruling, it will have stood out very clearly beyond any shadows.

In retrospect however, we are aware and we do share the same position as Mr. Ngudungi, that condemning a person without fully hearing him first is unlawful. It is, indeed unconstitutional as per the countless

decisions of this Court some of which were cited by him. So, if it happens, it is a violation of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania [Cap 2 R.E. 2002].

However, the right to be heard goes hand in glove with another constitutional tenet in all democratic societies called Access to Justice. It is impossible for subjects or litigants to enjoy the right to be heard unless an effective procedure to access the courts of judicature is in place and made available to them. In the case of **Julius Ishengoma Francis Ndyanabo v. Attorney General** [2004] T.L.R. 14, this Court held thus:

> *"(v) Access to justice does not mean the mere filing of pleadings and paying the required court fees,* ***but it also includes the right to present one's case or defence before the courts":***
>
> [Emphasis added]

Thus, a person's right to be heard, in our view, is not achieved by merely joining one to the judicial proceedings like the applicant would like in this case. The person joined to the proceedings must be able to be fully heard on his rights in a legal cause to be presented. We are settled in our mind that in order for a full and meaningful enjoyment of a right to be heard, the court affording such a right to a litigant must be competent to fully hear the matter and finally determine the rights of the parties involved in the dispute. Otherwise, affording a person a right to be heard

by joining him to the proceedings while the court is not legally positioned to hear and fully determine the rights of the joined party, like the High Court in this case, is an act in vain. For instance, in the circumstances of this matter, affording a right to be heard to the applicant presupposed that the High Court had jurisdiction to hear and fully determine the complaints of the applicant once joined in the probate proceedings. But in this case, can we certainly free of any doubt, hold that the applicant's claim on land ownership would be effectively assailed, completely and finally determined before the High Court within the revision proceedings of a probate and administration matter?

Mr. Ngudungi's submissions suggested an affirmative response to the above query. However, to agree with him would be tantamount to condemning the High Court for not doing that which it had neither known procedure nor mandate to do effectively and completely. That is so because, the position of the law in civil proceedings generally, is that for a party to be believed and succeed in a civil action, he must observe the procedures detailed under the law. That is, to have a land claim properly before the High Court, one needs to observe the provisions of the Civil Procedure Code [Cap 33 R.E. 2002, now R.E. 2019] particularly section 22, Orders IV, VI and VII. Further, to effectively prosecute one's case, he must invariably call witnesses and lead evidence in terms of section 110

(1) of the Evidence Act, [Cap 6 R.E. 2002 now R.E. 2022] and attain the standard required by section 3 (2) (b) of the same Act. Short of that, we know of no rules of evidence or of procedure enacted for purposes of accommodating adjudication or trials of land disputes within revision proceedings emanating from probate causes.

Mr. Muganyizi, who was also supported by the second respondent submitted that if the applicant had his rights interfered with by the order of the High Court in the revision before it, she had a right to file a civil suit in order to prove his claims against the administrator. Mr. Ngudungi strongly contested the proposition, arguing that there is no law that compelled his client to file a suit. However, we did not hear him telling us whether there was any law in existence which forbids filing a suit as proposed by his counterpart.

Nonetheless, in the case of **Saida M. Mnyone v. Salum Nassoro Mgonza** [2010] T.L.R. 366, it was held that determining one's right without hearing him first violates a right to be heard, a principle of Natural Justice. However, the Court went on to hold that:

> *"(ii) There may be cases where the property of a deceased person may be in dispute. In such cases all those interested in determination of the dispute or establishing ownership may institute proceedings against the administrator or the*

administrator may sue to establish claim of the deceased's property."

On the same position, see also **Ibrahim Kusaga v. Emanuel Mweta** [1986] T.L.R 26 and **Khalifa Seleman Saddot v. Yahya Jumbe and Others**, Civil Application No. 20 of 2003 (unreported).

In our view, the circumstances obtaining in the matter before us, is one such cases in which a party alleging to be a lawful owner should be at liberty to file a case to establish his or her claim, instead of striving by all means to have the decision of the High Court nullified, which act, in any event, cannot guarantee the applicant's right to be heard. Therefore, we do not agree with Mr. Ngudungi that the only remedy available at law to the applicant in the aftermath of the impugned decision of the High Court, was only to seek to nullify the latter court's decision.

Although we do not agree with Mr. Ngudungi's position, we cannot leave the applicant in limbo and suspense with no definite course to take in pursuit of her rights. So, in order to ensure that the applicant's rights are effectively and completely adjudicated upon, it is in our firm judgment, that the appropriate cause of action that ought to have been taken soon after the passing of the impugned decision or which the applicant may take henceforth, is to file a law suit against the administrator of the estate

of the late Ally Abdallah Samatta in a court of competent jurisdiction and prove her claims there.

That said and done, we find no meaningful reason to consider another ground of application which was challenging the High Court for entertaining the application while the name Hidaya Ally was not indicating that she was an administratrix of the estate of the deceased. Besides, there was no dispute that she was in all the courts below an administrator of her late father's estate, and not in her individual capacity.

For the above reasons, this application is incompetent and we hereby strike it out with costs.

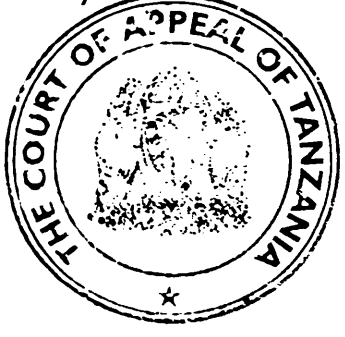
DATED at **DAR ES SALAAM** this 2nd day of September, 2022

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The judgment delivered this 6th day of September, 2022 in the presence of Mr. Daniel Ngudungi, also holding brief of Mr. Godwin Muganyizi for 1st Respondent and 2nd Respondent present in person, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL