IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MAIGE, J.A.)

CIVIL REVISION NO. 347/17 OF 2018

HOSSEA KIHWELO ... .1ST APPLICANT

MUTTA PASCHAL EMMANUEL .....2ND APPLICANT

REHEMA HEMEDI DILANGALA ... .3RD APPLICANT

NOVATUS MBAIKAIZE .....4TH APPLICANT

HAPPY ELIAMEN AKARO .....5TH APPLICANT

ASHURA BAKARI LOKO .....6TH APPLICANT

VERSUS

ABDALLAH RAMADHANI MKUMBA .....1ST RESPONDENT

KIJOGOO MWISHEHE .....2ND RESPONDENT

(Revision from the judgment of the High Court of Tanzania
(Land Division) at Dar es Salaam

(Mwangesi, J.)
17th day of November, 2016
in
Miscellaneous Land Appeal No. 03 of 2016

RULING OF THE COURT

19th & 30th August, 2022

MAIGE, J.A.:

The dispute giving rise to this Revision relates to a three acres land at Mkokozi hamlet within Vikindu village in Mkuranga District ("the suit property"). The suit property, it would appear, had been a subject of two different proceedings between the respondents herein at the Ward Tribunal for Vikindu ("the trial tribunal") namely; Land Dispute Number 45 of 2006 ("the first complaint") and Land Dispute Number 49 of 2012

("the second complaint"). In the first complaint which was instituted by the first respondent, the trial tribunal declared the first respondent the lawful owner of the suit property. Conversely, in the second complaint lodged by the second respondent, it was the second respondent who was declared the rightful owner of the property. It is clear from the record that, while the judgment in the first complaint was not appealed against, the one in the second complaint was appealed against, to the District Land and Housing Tribunal for Mkuranga ("the first appellate tribunal") vide Land Appeal No. 26 of 2014, without a success. In a further appeal to the High Court, Land Division ("the second appellate court"), the concurrent decisions of the trial tribunal and first appellate tribunal were nullified and set aside and henceforth the instant proceedings.

It is worthy of note that, at the point in time when the decision in the second complaint was being pronounced, the decision in the first complaint was still intact. It was set aside subsequent thereafter when the first appellate tribunal was dealing with an execution proceeding in Land Application No. 04 of 2013. It is because of that reason that, in the second appeal, the decision of the first appellate tribunal upholding the decision of the trial tribunal was questioned for being *res-judicata* to the decision in the first complaint.

Upon scrutiny of the record, the second appellate court was satisfied that, since the second complaint was lodged while the decision in the first complaint was intact, it was *res judicata* to the decision in the first complaint. The second appellate court further held as follows:

> *"The other thing which this Court has to consider is whether the rejection of the District Land and Housing Tribunal to execute the decision of the Vikindu Ward Tribunal in Land Dispute Number 2006 was justiciable. The Court after going through the proceedings regarding Land Dispute Number 45 of 2006, has failed (sic) any justifying bases to fault the finding of the Ward Tribunal contained therein. The composition of the members of the Ward Tribunal was in compliance with the requirement stipulated by the law".*

Having observed as aforestated, the second appellate court quashed the holding of the first appellate tribunal and directed that, the decision in the Land Dispute No. 45 of 2006 be executed in response to the application that was presented by the first respondent. The second respondent who was the judgment debtor in the judgment in the first complaint did not challenge it.

The applicants, it would appear, purchased the suit property or part thereof from the second respondent on different dates in between 2013

and 2016. As they were not parties in the proceedings at the second appellate court, the applicants have initiated the instant revision questioning the correctness, legality and propriety of the same on account, among others that, they have been denied a right to be heard despite their interests on the suit property. The instant revision was preceded by an order of this Court which delivered on 14th June, 2018 vide Civil Application No. 252/17 of 2017, granting the applicants 21 days within which to file the revision.

When this application was being instituted, the first respondent was alive. He filed an affidavit in reply, a notice of preliminary objections and written submissions in opposition to the application. Alas, the first respondent expired on 31st day of October , 2019. The record indicates that, on 29th April, 2020, two persons namely; Mussa Ramadhani Mkumba and Victor Ally Kipengele, were appointed by the Kimara Primary Court, vide Mirathi Na. 60 of 2020 as the administrators of the estate of the first respondent. The record further reveals that, . in 2020, Mr. Victor Ally Kipengele filed Civil Application No. 115/01/2020 seeking to be joined in the place of the first respondent. He subsequently withdrew the application in an understanding that, he would together with his co-administrator, file it afresh. They have however not filed any

application despite several adjournments of the hearing of the appeal to give them more time so to do. That is so, notwithstanding that more than twelve years have elapsed since the demise of the first respondent.

Therefore, when the matter came for hearing before us on 19th August, 2022 in the presence of the first, second, fourth, sixth applicants and the second respondent in persons and in the absence of the third and fifth applicants who were duly served, we ordered that, the hearing of the matter proceeds in the absence of the first respondent with a note that, the reason for our order would be incorporated in the final Ruling. We took also in consideration the fact that the revision has been jointly instituted by all the applicants and a written submissions in support thereof has been filed.

Since the notice of preliminary objection by the first respondent raised a jurisdictional issue, we found ourselves unable to do without ascertaining the validity or otherwise of the same. So that we did not deny the parties a right to be heard on the point, we directed them to, apart from addressing the substance of the revision, make any comment on the said legal point. We had it in our minds that; in the event the legal point was valid, that would be the end of the story.

Being laypersons, neither of the parties made any comment on the point rather than generally asserting that, the revision was within time. Having examined the notice of motion, the affidavit and the order extending time, we are satisfied that; as the order was delivered on 14th day of June, 2018 and the instant motion lodged on 5th July, 2018, it was well within the allotted 21 days. The preliminary objection is thus misconceived and it is overruled accordingly.

On the substance of the revision, the applicants adopted their notice of motion, joint affidavit and written submissions to read as part of their oral arguments and urged the Court to grant the application as sought in the notice of motion. The second respondent on his part conceded to the motion. He had also so conceded in his written submissions.

At the outset, it is imperative to explain why we opted to proceed with the hearing of the revision in the absence of the legal representative of the first respondent on the record. We understand that, before 2019, the law on the effect of the death of a party during pendency of civil proceedings as per rule 57(3) and 105 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) was such that; a civil application or appeal would not abate on the death of a party thereto. The Court was

however obliged, upon an application being made by an interested party, to cause joinder of the legal representative of the deceased as a party in place of the deceased.

In 2019, both the provisions were amended. Rule 57 which relates to abatement of civil application was amended by adding after subrule (3) a new provision of subrule (4) which provided as follows:

> *(4) Where no application is made by the legal representative under subrule (2) or interested party under subrule(3) within twelve months, the application shall abate".*

Besides, rule 105 which relates to the effect of death of a party in the pendency of civil appeal was amended by designating rule 105 as subrule (1) and adding new provisions of subrules (2) and (4) which provided as follows:

> " *(2) Where an application under subrule (1) is not made within twelve (12) months, the appeal shall, if the deceased person is the respondent, proceed with the absence of the respondent.*
>
> *(3) Any person claiming to be the legal representative of a deceased party or any other interested person, may apply to revive the appeal; and if it is proved that he was prevented by good cause from continuing the*

appeal, the Court shall revive the appeal upon such terms as to costs or otherwise as it deems fit".

Similar provisions were added in rule 78 (2) and (3) which pertains to the effect of death of a party in the pendency of criminal appeal. Pertinent to note is the fact that; while the effect of death of a party in both applications and appeals was similar before 2019 amendment, after the amendment the same has been significantly different. Whereas in civil application the effect of failure to apply for succession of the proceedings is not stated, in civil appeal it is clearly stated. It is such that, failure to apply for a joinder of the legal representative of the deceased within twelve months renders the appeal abated if the dead person is the appellant and justifies the appeal to proceed in the absence of the legal representative if the dead person is the respondent. In addition, the legal representative of the deceased is entitled, upon good cause being shown, to apply for revival of the proceedings.

While the provision of rule 57 makes reference of death to a party to an application, neither the Appellate Jurisdiction Act nor the Rules defines what an application is. However, in the Rules, applications both criminal and civil are covered by Part III which is entitled "APPLICATIONS". It starts from rule 44 to 64. As it can be noted, the

applications envisaged in this Part are those which are ancillary to appeals. They involve such matters as extension of time to appeal, leave to appeal, certificate on points of law, amendment of documents, striking out a notice of appeal and so on. These applications, with the exception of those mentioned in rule 60, are dealt with by a single Justice of the Court. Rule 60 provides as follows:

> *"60(1) Every application other than an application included in subrule (2) shall be heard by a single Justice save that application may be adjourned by the Justice for determination by the Court".*

Revision is not among the applications set out in subrule (2) of the Rules. In our view, the use of the clause "every application" in rule 60(1) of the Rules in drawing the line of demarcation between civil applications dealt with by a single justice and those dealt with by the full court excludes, by necessary implication, revision from the applications covered by part III of the Rules. In the Rules, revision is covered under part IIIA which is entitled "REVISION". It has its own procedure of institution distinct from applications under part III.

Admittedly, the provision of rule 78 which relates to abatement of criminal appeals is applicable in criminal revision by virtue of rule 67 of the Rules which provides that:

> *"67. This Part of the Rules shall apply only to appeals and revisions from the High Court acting in original, appellate and revisional jurisdiction in criminal cases and matters relating to them".*

In the instant matter, what is before the Court is a civil revision. Under rule 82 of the Rules, it has been made very clearly that Part V which deals with civil appeals applies only to appeals from the High Court or tribunals. It does therefore, not apply to revision.

It is our view however, that, since both revisions and appeals have the effect of finally and conclusively determining the substantive rights of the parties, the effect of death of a party in the two proceedings cannot be different. We think, the provision of rule 105 of the Rules would apply analogously to civil revision in the same way as the provision of rule 78 applies to criminal revision. In the circumstance, we shall invoke the provision of rule 4(2) (a) of the Rules and direct that, the procedure in rule 105(1), (2) and (3) of the Rules in relation to the effect of death of a party to an appeal is applicable in civil revision. It is on that account

that, we decided to proceed in the absence of the legal representative of the first respondent.

Having said that, we shall proceed to consider the substance of the revision by having regard to the notice of motion, affidavits and the written submissions. The applicants have justified their *locus standi* in these proceedings on account that, they were not made parties to the proceedings despite having interest on the suit property. On the same reason, they have moved the Court to invalidate the judgment and proceedings of the second appellate court on account that, they were denied a right to be heard.

The appeal to the second appellate court, it is apparent, was a second appeal. The applicants fault the second appellate court by declaring the first respondent a lawful owner of the suit property in an appeal wherein the applicants were not made parties despite their interests on the suit property. The applicants' alleged titles on the suit property is traced from purchase agreements with the second respondent between 2013 and 2016. In its judgment, the second appellate court did not go to the merit of the concurrent decisions of the lower tribunals on the ownership of the suit property. Its decision was based on the jurisdiction of the trial tribunal to determine the second complaint which

was initiated at the point in time when neither of the applicants had acquired interests on the suit property. In the circumstance, we think, the second appellate court cannot be faulted for denying the applicants a right to be heard.

The second appellate court is also condemned for confirming the decision in the first complaint despite being fatally defective for want of corum. The findings of the second appellate court on that aspect has two elements. First, it resolved that, the proceedings at the trial tribunal was *res judicata* to the decision in the first complaint. This aspect, it would appear to us, has not been faulted. In our reading, we agree with the second appellate court that, for the reason of the decision in the first complaint being intact when the second complaint was being instituted, and the parties and the subject matter being the same, the trial tribunal was estopped from entertaining the second proceedings. The first appellate court can thus not be faulted.

On the second aspect, we agree in the first place that, the appeal before the second appellate court was not against the decision in the first complaint and its related execution order. However, reading the judgment of the first appellate tribunal between lines, one can establish

that, the appellate chairperson justified the validity of pursuit of the second complaint on account that the judgment and proceedings in the first complaint were quashed in the execution proceedings in Miscellaneous Application No. 04 of 2013. If we can quote, the appellate chairperson stated at page 4 of the judgment as follows:

> *"Briefly, the respondent had formerly sued the appellant before the Ward Tribunal, Civil Case No. 45/2006 which its proceedings and judgment were quashed in Misc. Application No. 4/2013 by this tribunal after its original file was lost at the trial tribunal".*

Though we agree with the applicants that, the second appellate court would not, in the absence of the record of the first complaint and its related execution proceeding, confirm the decision in the first complaint and hold that it was not irregularly procured, in principle, the finding of the second appellate court on the validity of the order of the first appellate tribunal quashing the decision in the first complaint is correct in effect. The reason being that a judgment of a court cannot be quashed in an execution proceeding. There should be an appeal or revision before the higher tribunal.

In the final result and for the foregoing reasons, the motion for Revision fails save for the finding that, the trial tribunal was duly constituted in the first complaint which is quashed and set aside. We shall not give an order as to costs in the circumstances.

DATED at **DAR ES SALAAM** this 26th day of August, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered this 30th day of August, 2022 in the presence of the 1st, 2nd, 3rd,5th and 7th applicants in person and the 2nd respondent also appeared in person, is hereby certified as a true copy of the original.

J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL