

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 162/16 OF 2021

YUSUF SHABAN MATIMBWA..... APPLICANT

VERSUS

EXIM BANK (T) LIMITED.....1ST RESPONDENT

DASCAR LIMITED.....2ND RESPONDENT

JOHN HARAIID CHRISTER ABRAHAMSON.....3RD RESPONDENT

**[Revision of the Ruling, Drawn Order and Resultant Proceedings arising
from (Commercial Division) of the High Court of Tanzania,
at Dar es Salaam**

(Fikirini, J.)

dated 10th day of February, 2021

in

Commercial Review No. 9 of 2020

.....

RULING OF THE COURT

3rd & 7th October, 2022

MUGASHA, J.A.:

The applicant, Yusuf Shaban Matimbwa is seeking the indulgence of the Court to invoke its revisional jurisdiction in order to examine the propriety, correctness and legality of the Ruling of the High Court dated 10/2/2021 which was delivered against the applicant. The application is predicated under section 4 (3) of the Appellant Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) on five grounds which are conveniently condensed into mainly three grounds as follows:

1. The High Court, Commercial Division being the executing court of the Judgment and Decree in Commercial Case No. 51 of 2008, failing to exercise its jurisdiction vested by law to grant eviction orders sought by the applicant for the reasons that, the property in question is related to Court's order to stay execution in Civil Application No 21 of 2016 in which the applicant is not a party.
2. Upon issuing Certificate of sale by the Execution Court to the Applicant as a satisfaction of the decree of the Court, it was illegal and unprocedural for the Executing Court to put heavy reliance on Court of Appeal orders and proceedings relating to Civil Application No. 21 of 2016 purporting to stay execution of the judgment not related to the executed Decree.
3. An apparent error on the face of the record occasioned by the wrong dismissal of the application for eviction instead of having the same struck out or stayed.

The application is accompanied by the affidavit of Yusuf Shaban Matimbwa, the applicant. Through his advocate the applicant filed written submissions containing arguments for the application which at the hearing were adopted by the respective learned counsel to constitute an integral part of the oral submissions.

As gathered from the documents accompanying the application, the underlying background is to the effect that: The applicant vide a public auction purchased a property at a sum of TZS. 300,000,000.00 namely, Plot No. 16 Jangwani Beach, Dar es Salaam held under a certificate of title No. 43835. This was pursuant to execution of the judgment of the High Court in Civil Case 51/2008 dated 11/8/2009 rendered against the 1st respondent which was later overturned by the Court and decided in her favour.

The sale was followed by issuance of a certificate of sale which made the applicant to proceed with land registration processes resulting to the registration of the Title deed in his own name. However, as the 2nd and 3rd respondents continued to reside in the premises in question, the applicant lodged Misc. Commercial Application No. 58 of 2020 before the High Court seeking to evict them from the premises. The application was dismissed on ground that, eviction order was sought against the property related to Civil Application No. 21 of 2016 in which the Court on 22/8/2019, had granted stay of execution of judgment and decree in Commercial Case No. 64 of 2011 pending the hearing of Civil Appeal No. 147 of 2020. Subsequently, the applicant unsuccessfully sought a review of the decision of the High Court which had dismissed his application for eviction. It is against the said backdrop the applicant filed the present

application seeking to have the Ruling of the High Court revised as earlier stated.

At the hearing, the applicant had the services of Mr. Sylvannus Mayenga, learned counsel whereas the 1st and 3rd respondents had the services of the learned advocates Zacharia Daudi and Michael Mwambeta, respectively. The 2nd respondent though duly served with notice of the hearing, did not enter appearance and as such, the hearing had to proceed in her absence as per the dictates of Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In both oral and written submissions, it was contended that, the dismissal of the application for eviction was wrong having placed reliance mainly on the existence of the Court's stay order in respect of the same property which was also a subject of application for eviction. On this, it was the applicant's argument that, regardless of the property being the same, the proceedings were different and as such, it was incumbent on the Judge to determine the application for eviction to finality and grant it. That apart, it was contended that, the Court's stay order is to date not yet complied with which was viewed to have necessitated the finalization of the application for eviction by granting the same.

Regarding the propriety of the order which dismissed the application for eviction, it was argued that, having found that the application was not competent, it was incumbent on the learned High Court Judge to strike out the application or make a stay order instead of dismissing it because there was no determination on the merits of the application. That apart, it was Mr. Mayenga's argument that, in the absence of appropriate and specific orders of the High Court on the actual fate of the application a confusion has ensued. On this he pointed out that, while the learned Judge initially is on record to have reviewed the dismissal, she never made the resulting order in substitute of the dismissal. Thus, Mr. Mayenga urged us to grant the application and revise the decision of the High Court.

On the other hand, the application was not resisted by the present learned counsel for the respondents except Mr. Mwambeta for the 3rd respondent. He raised a preliminary objection on a point of law that, the present application is time barred and it deserves to be dismissed. On this, he argued that, since the impugned Ruling was delivered on 24/9/2020 the application is delayed having been filed on 8/4/2021. In rejoinder, this was opposed by Mr. Mayenga who pointed out of that, the subject of this application is Commercial Review No. 9 of 2020

whose Ruling was delivered on 10/2/2021 and as such, it is not time barred as suggested by Mr. Mwambeta.

We had to probe the learned counsel for the Exim Bank, the 1st respondent, if the 2017 sale of the property in question to the applicant was ever brought to the attention of the Court before the grant of stay order in Civil Application No. 21 of 2016. Having gone through the respective Ruling the learned counsel conceded that such fact was never brought to the attention of the Court. Yet, he maintained that the 1st respondent was not contesting the present application before the Court.

After a careful consideration of the submissions of the learned counsel, the issues for determination are: **one**, whether the present application is properly before us and **two**, the propriety or otherwise of the dismissal order of the application which is a subject of this application.

As to the propriety of this application, this need not detain us. It is prescribed under Rule 65 (4) of the Rules that an application for revision which is initiated by a party must be filed within sixty (60) days from the date of the decision sought to be revised. In this regard, although the present application makes reference to what transpired in Misc. Commercial Application No. 58 of 2020, it is expressly stated that what is a subject of revision in this application is the Ruling in Commercial

Review No. 9 of 2020 which was handed down on 10/2/2021. Thus, since the application was filed before the expiration of 60 days from the date of the impugned Ruling, it is not time barred and we overrule the objection raised by Mr. Mwambetta.

Next for consideration is the propriety or otherwise of the dismissal. All learned counsel were at one, that, the learned High Court Judge was obliged to grant the application for eviction considering that although the property involved is the same the proceedings were different. It is not in dispute that, the property which was a subject of the application for eviction was also a subject of stay order by the Court in the Ruling dated 22/8/2019 in Civil Application No. 21 of 2016. In the latter application before the Court, parties involved were Johan Harald Christer Abrahamson, Exim Bank (Tanzania), Phillip Griesel and Pradeep Gajjar. Therefore, the applicant herein was neither a party in the application for stay nor in the pending appeal.

From the record before us, it is glaring that the property in question was already purchased by the applicant when the Court's stay order was granted. However, as conceded by the 1st respondent's counsel that fact was never brought to the attention of the Court before it embarked to issue the stay order on 22/8/2019 which was after the sale effected in 2017. As the 1st respondent was pretty aware about the

previous sale transaction her conduct on the non-disclosure leaves a lot to be desired and we need not say more. In the circumstances, in the wake of the Court's stay order in relation Plot No. 16 Jangwani Beach which was also a subject of the application for eviction before the High Court, the learned High Court Judge was inclined to decline the grant of the eviction order as she could not do otherwise as suggested by all learned counsel.

Regarding the propriety or otherwise of the dismissal order, it was contended that, since the learned High Court Judge had agreed to have the dismissal order reviewed, it was thus not proper to dismiss the application for eviction in its entirety without making a finding on the substitution of the dismissal order. It was proposed that the striking out or staying the application would have served a better purpose.

It is glaring from the reasoned ruling of the High Court Judge that having accepted to have the dismissal order reviewed, this meant that she had acknowledged that the application was misconceived or it was not competent. As such, the application was thus, not capable of being dismissed having not being determined on the merits. We are fortified in that regard, because it is settled law that, where an appeal or application is found to be incompetent, the remedy is to strike it out instead of dismissing it. This was emphasised in the case of **NGONI**

MATENGO CO-OPERATIVE MARKETING UNION LTD. VS. ALI MOHAMED OSMAN (1959) E.A. 577. In that case, the appeal was found to be incompetent for not being accompanied by a necessary decree. Having considered the distinction between a dismissal and striking out of an appeal, the Court was of the view that the proper remedy was to strike out the appeal instead of dismissing for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. This broad statement of principle that an incompetent matter before the court deserves to be struck out as it is not capable of being dismissed was followed in the cases including **CYPRIAN MAMBOLEO HIZZA VS EVA KIOSO AND ANOTHER**; Civil Application No. 3 of 2010, **JOAN CONSTANTINE VS MOHAMED SLEYM**, Civil Application No. 25 of 2012 (both unreported).

Given the circumstances, we agree with the learned counsel that, the proper remedy was to strike out the application for eviction instead of dismissing it so as to enable the applicant a chance to file a competent application if need so arises. Staying the application is not the appropriate substitute because, there is nothing pending before the Court in which the applicant is privy to. It is the 1st respondent who is privy to the stay order pending the hearing of the appeal and better

placed to know if the stay order has been complied with or not but that seems to be an extraneous matter in the present application and we cannot pursue it. In this regard, we quash the dismissal order of the application for eviction and substitute it with the striking out order so as to enable the applicant at the opportune time to revert to Court to seek for appropriate order.

In view of what we have endeavoured to discuss, we find the application partly merited and it is hereby allowed to the extent stated. Given the circumstances of the matter, we make no order as to costs. It is so ordered.

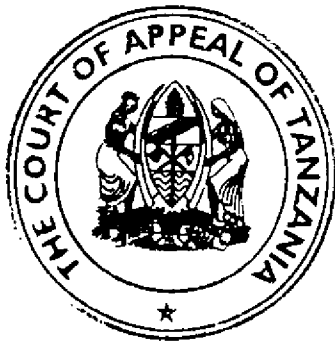
DATED at DAR ES SALAAM this 6th day of October, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 7th day of October, 2022 in the presence of Mr. Slyvannus Mayenga, Counsel for the Applicant, Mr. Slyvannus Mayenga hold brief for Mr. Zacharia Daudi, Counsel for the 1st Respondent, and also hold brief for Mr. Michael/ Mwambeta, Counsel for the 3rd Respondent, 2nd Respondent is absent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL