

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MKUYE, J.A., KIHWELO, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 603/17 OF 2021

RAFII SAID MPENDU APPLICANT

VERSUS

**ADAM ALLY MKALAPEMA (Administrator of the
estate of the late ALI MKALAPEMA)**

1ST RESPONDENT

FRANK MARETO

2ND RESPONDENT

MALIKI ALI MKALAPEMA

3RD RESPONDENT

DANSTUN FABIAN (BAMBO)

4TH RESPONDENT

**(Application for Revision against the decision of the High Court of Tanzania
(Land Division) at Dar es Salaam)**

(Mwenegoha, J.)

Dated the 30th day of September, 2021

in

Misc. Land Application No. 84 of 2018

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RULING OF THE COURT

4th & 21st November, 2022

MAKUNGU, J.A.:

The applicant through the services of Mr. Juma Nassoro, learned advocate filed a Notice of Motion under Rule 65 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") seeking to move the Court to call for and examine the record of the High Court of Tanzania (Land Division) at Dar es Salaam, so as to satisfy itself as to the legality, correctness and propriety of

the decision made by the High Court (Mwenegoha,J) in Misc. Land Application No. 84 of 2018 on the 30th September, 2021. The grounds in the notice motion are as follows:

- 1. That the decision is erroneous on the face of records as it upholds the proceedings, Judgment and decree in Land Appeal No. 87 of 2013 of the High Court, Land Division and Land Case No. 15 of 2010 of the District Land and Housing Tribunal for Temeke in which the respondents were advocated by a person called Mr. Mapunda imposture as an advocate.*
- 2. That the decision which emanated from application for review is not appealable to this Court.*
- 3. That the decision is illegal as it upholds the decision in Land Case No. 15 of 2010 of the District Land and Housing Tribunal for Temeke reached without compliance of mandatory requirements of receiving and considering the opinion of the tribunal's assessors sat with the Chairman*

and the same was made without proper evaluation of the evidence tendered.

The notice of motion is supported by an affidavit of the applicant. The respondents, on the other hand, resisted the application by filing a joint affidavit in reply affirmed by the respondents.

On the day the application was called on for hearing, Messrs. Juma Nassoro and Geoffrey Martin, learned advocates, appeared for the applicant and respondents respectively.

Mr. Nassoro commenced his submission by adopting the notice of motion, affidavit and written submissions both filed in support of the application and then briefly submitted that the grounds for the application had been well articulated in the affidavit. He highlighted that from the written submissions of the respondents, he observed that the respondents prayed that the application be dismissed because the imposture advocate having been already punished there is no need for this Court to punish the respondents. He argued us not to allow that notion otherwise the Court

would be tantamount to condoning illegality. He prayed that the application be granted with costs.

Mr. Martin, who stood up for the respondents, fully adopted the joint affidavit in reply and the written submissions in opposition to the notice of motion. To him, the grounds in the notice of motion are wholly bereft of substance. He submitted that the respondents did not know that Mr. Mapunda was an imposture and considering that he was punished, it is not proper to punish the respondents. For that reason, he prayed the application be dismissed with costs.

In his rejoinder, Mr. Nassoro submitted that the issue is not to punish the respondents but to correct the records of the court which are not correct because the name of Mr. Mapunda still appeared in the proceedings. He added that the fact that, the fake advocate was convicted and punished does not make the proceedings legal. In this regard, he sought reliance in the case of **Edson Osward Mbogoro v. Dr. John Emmanuel Nchimbi**, Civil Appeal No. 140 of 2006 and stressed that it is relevant in this case. In the premises, he reiterated that the application be granted with costs.

We have considered the notice of motion, the affidavit in support thereof and the submissions by the counsel of the parties. The main issue for our determination is whether this application is worthy to be granted.

It is apparent that the decision of the High Court in Land Appeal No. 87 of 2013 before Mutungi, J was reviewed via Misc. Land Application No. 84 of 2018 before Mwenegoha, J and what is sought to be revised is the latter decision of the High Court of which no appeal against an order which emanated from review is allowed as per the provisions of **Order XLII (7)** of the Civil Procedure Code [Cap. 33 R.E. 2019]. In the circumstances it is clear that the applicant's right to appeal against the intended review order is statutorily taken away and in that situation this application is not an alternative to an appeal. The Court in the case of **Transport Equipment Ltd v. D.P. Valambhia** (1995) TLR 161 had this on revision:

"It is trite law that revision is not alternative to an appeal."

We have carefully gone through the written submissions of the parties; the respondents resist the application on the ground that by then it was beyond their control to know the status of one Mapunda who impersonated himself as an advocate who appeared and offered them with legal services at the District Land and Housing Tribunal and at the High Court. Finally the imposture advocate was discovered after all the proceedings on merit at the stage of District Land Housing Tribunal and the High Court had been completed. Going by that reason, the respondents claimed that they should not be punished to the wrong done by the imposture advocate.

On the other hand, the applicant stands on his point that the appearance of unqualified person in prosecution of cases at the two lower courts render the entire proceedings to be tainted with illegalities and irregularities.

It is a trite position of law that the purpose of revision is to call for the lower courts records and examine them to satisfy as to the legality, correctness and propriety of their decisions. The applicant is required to establish the genuine reasons for the Court to carry out a revision and in the instant application the applicant has established that the proceedings of the

lower courts that is the District Land and Housing Tribunal in Land Case No. 15 of 2010 and that of the High Court in Land Appeal No. 87 of 2013 were tainted with illegalities and irregularities as the respondents case was prosecuted by (unqualified person) one, Mr. Mapunda who was not an advocate.

It is evident that the record of the District Land and Housing Tribunal together with its judgment clearly speak louder and recognized Mr. Mapunda as an advocate for the respondents and the same Mr. Mapunda appears in the proceedings of the High Court and in its judgment dated 27th May, 2014 as the advocate for the respondents. It is without any piece of doubt that the said Mr. Mapunda was and is not an advocate and there is a judicial notice on that. Having said so, it is our settled view that right to legal representation is the constitutional right but it has to be exercised in a rightful way. Legal representation offered by the purported advocate of the respondents in the lower courts contravenes the provisions of the law under sections 39 (1) and 41 (1) of the Advocates Act [Cap 341 R.E. 2019]. Section 39 (1) reads:

"39 (1) Subject to the provisions of section 3, no person shall be qualified to act as an advocate unless:-

(a) his name is on the Roll,

(b) he has in force a practicing certificate; and

(c) he has a valid business licence,

and a person who is not so qualified is in this part referred to as an unqualified person."

And section 41(1) provides that:

"41 (1) No unqualified person shall act as an advocate, or agent for suitors or, as such, issue out any summons or other process, or commence, carry on or defend any action, suit or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction or act as an advocate in any cause or matter, civil or criminal."

Basing on the above provisions of the law, what proceeded before the District Land and Housing Tribunal and the High Court, in our view was a nullity and the Court cannot let it to stand out.

This position of the law has been positively applied in a number of decisions of this Court; one of them is **Edson Oswald Mbogoro** (supra),

which has been relied upon by Mr. Nassoro. In that case the appellant who was an unsuccessful candidate of the Parliamentary Elections of 2005 for the Songea Urban constituency, having lodged the petition, he applied for extension of time to apply for exemption from paying of security for costs. The application was dismissed following a preliminary objection to the effect that the Court lacked jurisdiction to adjudicate on such application. Aggrieved by that decision the appellant lodged an appeal to the Court of Appeal. Before the hearing of appeal there were preliminary objections to the effect that the appeal was incompetent because the Notice of Appeal, the Memorandum of Appeal and the Records of Appeal were drawn, signed, certified and lodged by an advocate who was not entitled to practice before the High Court and the Court of Appeal and that no leave to appeal had been obtained in terms of section 5(1) (c) of the Appellate Jurisdiction Act 1979. After satisfying itself that the point of objections raised have merit, the Court held among others that:-

"Although there is no specific statutory provisions on the point, if an advocate in this country practices as an Advocate without having a current practicing certificate, not only does he act illegally but also

whatever he does in that capacity as an unqualified person has no legal validity. It follows that the notice of appeal, the memorandum of appeal and the record of appeal which were prepared and filed in this Court by unqualified person purporting to act as an Advocate of the Appellant were of no legal effect."

When we relate what transpired in the above discussed case to the present one, we hasten to state that we disagree with Mr. Martin that **Edson Oswald Mbogoro's**, case (supra) is distinguishable to the present case because the circumstances herein are more or less the same.

Having so found, we sustain the first ground in the notice of motion. This finding will alone suffice to grant this application and for that matter, we need not belabour on the other grounds which were raised in the notice of motion.

It follows therefore, that, having looked at the totality of the proceedings both at the District Land Housing Tribunal and the High Court, we are inclined to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] and nullify the proceedings of the District Land and Housing Tribunal and its judgment in Land Case No.

15 of 2010, the High Court's proceedings and its judgment in Land Appeal No. 87 of 2013 and that of Misc. Land Application No. 84 of 2018. Having nullified the proceedings and judgments, we remit the record to the District Land and Housing Tribunal for it to start hearing afresh. The application is therefore allowed with no order as to costs.

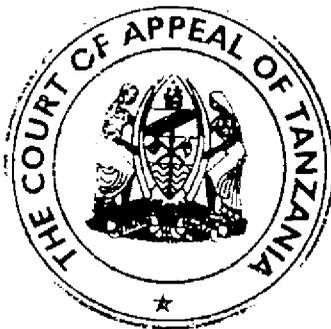
DATED at DAR ES SALAAM this 15th day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2022 in the presence of the applicant, 2nd and 3rd respondents in person and in the absence of 1st and 4th respondents, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL