IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A, And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 535/17 OF 2021

KHAMIS ALLY KHAMIS..... APPLICANT

VERSUS

SAIDI A. MBAGA.....1ST RESPONDENT

VERONICA KIBWANA (as the Administratrix of the Estate of the iate JACOB KIBWANA).....2ND RESPONDENT

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

(Mwaimu, J.)

dated the 27th day of May, 2014
in
Land Case No. 67 of 2004

.....

RULING OF THE COURT

20th February & 10th March, 2023.

MWANDAMBO, J.A.:

The applicant Khamis Ally Khamis was aggrieved by the ruling of the High Court (Land Division) dismissing his application for review from the judgment of the same court in Land Case No. 67 of 2004 delivered on 11/06/2014. He has preferred an application for revision wherein he prays for an order setting aside and quashing the decisions in Land Review No. 651 of 2020 and Land Case No. 67 of 2004 allegedly for being illegal, improper, incorrect and contradictory in law.

The notice of motion has listed seven grounds behind the application supplemented by an affidavit affirmed by the applicant himself.

By way of background, the respondents successfully sued the applicant for trespass over a piece of land known as Plot No. 345, Jangwani Beach Area, Dar es Salaam City in Land Case No. 67 of 2004. The High Court (Mwaimu, J.) entered judgment for the respondents declaring the appellant a trespasser over that land. Discontented, the applicant challenged that decision by way of review in Land Review No. 651 of 2020 citing ten grounds in a memorandum of review preferred under the provisions of sections 78, 95, 96 and 97 as well as Order XLII rules 1 (1) (a), (b) and (2), 2 and 3 of the Civil Procedure Code, henceforth, the CPC. Out of the ten grounds canvassed by the applicant, the High Court (Mgeyekwa, J.) found eight of them untenable. The learned judge allowed ground one and two in relation to the name of the second plaintiff (respondent) following the death of the original plaintiff appearing in the title of the plaint. The learned judge also allowed ground two which related to the correct date of the judgment in the suit; 27/05/2014 as against

11/06/2014. Still aggrieved, the applicant has preferred this application as alluded to above.

The respondents have resisted the application through an affidavit in reply deponed to by Ms. Rita Chihoma, learned advocate who continues to represent them as she did in the High Court.

It may not be completely irrelevant to remark at this stage that, for all intents and purposes, the application is a conglomerate of various complaints and issues from both the judgment in the main suit and the ruling in the application for review. Not surprisingly, the applicant seeks orders for quashing and setting aside both decisions through this application which ought to be confined to the alleged errors in the impugned ruling of the High Court from an application for review. Apparently, gleaned from the affidavit in reply, the applicant lodged the instant application after the Court had struck out his notice of appeal from the decision of the High Court in the suit for failure to institute his appeal within the time prescribed by the Court of Appeal Rules, 2009 (the Rules).

At the hearing of the application, the applicant enjoyed the services of Mr. Khalfan Hamis Msumi, learned advocate who, despite

adopting the contents of the founding affidavit, abandoned all grounds in the notice of motion except ground one which contends that the decisions of Land Review No. 651 of 2020 and Land Case No. 67 of 2004 are illegal, improper, incorrect and contradictory in law unless revised, quashed and set aside by the Court.

The essence of Mr. Msumi's submission in this remaining ground was premised on paragraphs 7, 8, 9, 10 and 11 of the founding affidavit. Skipping the details, the said paragraphs raise the complaint that the judgment of the High Court was a nullity by reason of failure or omission to join the administrator of the deceased plaintiff Jacob Kibwana following his demise before the completion of the trial. Mr. Msumi boldly argued that the failure to join the administrator of the estate of the late Jacob Kibwana in the suit was fatal rendering the proceedings and the resultant judgment a nullity. He urged that, the High Court ought to have nullified it in the application for review. The learned advocate prevaricated a lot when asked whether the High Court had power to nullify its own proceedings and judgment. Needless to say, the learned advocate urged that, owing to the mismatch of the parties, the Court ought to allow the application placing reliance from its decision in **Samueli**

Kobelo Muhulo v. National Housing Corporation, Civil Application No. 442/17 of 2018 (unreported) for the proposition that, mismatch of parties in the proceedings rendered them confusing and incapable of comprehension and liable to be quashed by the Court in revision.

Replying, Ms. Chihoma urged us to dismiss the application for being misconceived. The learned advocate drew our attention to the proceedings in Land Case No. 67 of 2004 referred in the impugned ruling showing that Veronica Jacob Kibwana, the administratrix of the deceased, was substituted as a party to the suit as far back as 17/10/2010. While conceding the omission to reflect that substitution in the judgment, Mr. Chihoma urged that such omission was a mere irregularity which did not render the judgment a nullity contrary to the applicant's contention.

In rebuttal, Mr. Msumi reiterated that, since the administratrix was not joined, the proceedings before the High Court were a nullity. Needless to say, he conceded that the application for review was partly allowed but that did not preclude the applicant from seeking revision before the Court.

It is significant that the applicant's application before the High Court sought to review the judgment in the suit on grounds, amongst others, that the omission to join an administratrix of the deceased plaintiff constituted an error manifest on the record warranting a nullification of the impugned judgment. It is not entirely clear to us how could the High Court nullify its own judgment in the manner prayed by the applicant. Strangely, the applicant has reiterated that prayer in the notice of motion. All we can say without mincing words is that the Court cannot grant that prayer simply because it is untenable.

Having so said the issue falling for our consideration and determination is whether, upon the High Court granting the applicant's prayers which had the effect of reflecting the correct parties in the judgment and the date thereof, the applicant could still come to this Court for revision. It seems to us that, notwithstanding the undisputed fact that the High Court (Mziray, J. as he then was) substituted the name of the first applicant as a legal representative of the original plaintiff (the deceased), there was an omission to reflect that aspect in the judgment. Obviously, that was a reviewable error and indeed this is exactly what the High Court did in its ruling at page

15 thereof. Mr. Msumi conceded as such but was adamant that there was a mismatch of the parties rendering the judgment a nullity allegedly because the substitution was not done within 90 days of the death of the deceased plaintiff.

We understood Mr. Msumi predicating his argument on item 16 of Part III of the schedule to the Law of Limitation Act. Granted that was the case, was it amenable to review under Order XLII rule (1) of the CPC? Our answer is that it was not so for two reasons. One, having substituted the first plaintiff/respondent in the suit the High Court was *functus officio*. It could not sit on its own order and do what the applicant would have wanted it to do; nullifying its judgment. Two, whether the joining of the legal representative in the suit was not made within the prescribed period was not an error manifest on the record warranting a review. It required a long-drawn process of arguments to arrive at one or other conclusion which took away that complaint from the realm of a reviewable error.

It is glaring that, the learned judge had regard to the principles governing applications for review as evident at pages 10, 11 and 12 of the ruling relying on, amongst others, the Court's decision in

Chandrakant Joshubhai Patel v. Republic [2004] T.L.R. 218. It is significant that decision made reference to several Indian decisions discussing Order XLVII of the Code of Civil Procedure Act V of 1908 of India *impari materia* with Order XLII of the CPC.

There is still one aspect which makes the applicant's quest wholly untenable. The suit before the High Court was instituted by two plaintiffs; the deceased and the second respondent. In terms of Order XII rule 2 of the CPC, the suit could have proceeded by the surviving plaintiff assuming that the legal representative of the deceased had not applied to be joined within 90 days. It is doubtful whether the applicant's prayer for nullification of the judgment would have been tenable.

Finally, since there is no dispute that the first respondent was made a party to the suit and the High Court rectified the omission to have the name of the first respondent's name reflected in the judgment in an application for review, we do not find any substance in the argument that there was any mismatch of the parties warranting our interference in this application. Indeed, the Court's decision relied upon in the learned advocate's submission is miles

apart from the facts in this application. There is nothing close to any mismatch of the parties making the proceedings incomprehensible.

In the event, we find no merit in the application and dismiss it with costs.

DATED at **DAR ES SALAAM** this 8th day of March, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 10th day of March, 2023 in the presence of Mr. Khalfan Msumi, learned counsel for the Applicant and Ms. Rita Chihoma, learned counsel for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL