IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A. And KHAMIS, J.A.)

CIVIL APPLICATION NO. 429/17 OF 2019

M. B. BUSINESS LIMITED ..... APPLICANT

VERSUS

AMOS DAVID KASANDA ..... 1st RESPONDENT

COMMISSIONER FOR LANDS ..... 2nd RESPONDENT

ATTORNEY GENERAL ..... 3rd RESPONDENT

(Application for Revision of the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(De-Mello, J.)

dated the 29th day of November, 2012

in

Miscellaneous Land Appeal No. 61 of 2012

.....

RULING OF THE COURT

5th & 13th July, 2023

SEHEL, J.A.:

This is an application for revision. The applicant moves the Court to call for and examine the correctness, legality and/or propriety of the proceedings of the High Court of Tanzania, Land Division at Dar es Salaam (the High Court) in Miscellaneous Land Appeal No. 61 of 2012 (the appeal) and its resultant *ex parte* judgment and decree dated 29th November, 2012. The notice of motion is supported by an affidavit sworn

by Silvery B. Buberwa, the Managing Director of the applicant. On the other hand, the 2nd and 3rd respondents filed an affidavit in reply deposed to by Edwin Joshua Webiro, learned State Attorney, whereas, the 1st respondent did not file any.

In order to appreciate the genesis of these revisional proceedings we find it necessary to, first, give the background to the matter. The same is gathered from the affidavital evidence, pleadings and proceedings before the High Court. At issue is the property comprised on Plot No. 1070 Block 'N' situated at Tabata Area in Dar es Salaam Region (the disputed property). The said property was in 1992 granted to the 1st respondent through a Certificate of Title No. 43982 with Letter of Offer No. 15379. On 15th April, 2004, the Ministry for Lands and Human Settlement Development wrote a letter to the 1st respondent with Ref. No. LD/172680/84 informing him that on 3rd February, 2004, the President approved a revocation of his Certificate of Title in respect of the disputed property. Subsequent to the revocation, the Commissioner for Lands published the said revocation in the Government Gazette of 21st May, 2004.

The record shows that, on 9th February, 2004, that is, immediately after revocation of the 1st respondent's title, the applicant was granted

ownership over the disputed property through Certificate of Title No. 57102 with Letter of Offer No. 226960. It happened that the applicant had a dispute with one Elliot Mahali (not a party to these proceedings) over the disputed property. Hence, in July, 2009, it sued him together with the 2nd and 3rd respondents through Land Case No. 187 of 2009 (the suit) before the High Court. Being aware of the said suit, on 15th June, 2010, the 1st respondent through the legal services of D.S. Ngalo, learned advocate, filed a third-party notice for leave to be joined as a third party in the suit. Again, on 5th July, 2011, he filed an application for leave to be joined as a defendant in the same suit.

While the said suit was still pending determination, in 2012, the 1st respondent lodged an appeal, Miscellaneous Land Appeal No. 61 of 2012, before the High Court against the 2nd and 3rd respondents challenging the revocation made in 2004. In that appeal, the 1st respondent prayed for the following:

1) *The declaratory order that the decision of the Commissioner for Lands to revoke the right of occupancy was unlawful and/or unconstitutional thus the court may be pleased to order specific performance.*
2) *Costs of the petition of appeal be borne by the respondents.*

3) *General damages at the tune of TZS. 500,000,000.00.*

4) *The court to make any other orders or remedies.*

The 2nd and 3rd respondents did not enter appearance. Therefore, the High Court proceeded *ex parte* against them. At the end, it allowed the appeal and awarded the 1st respondent all the reliefs prayed for.

Upon becoming aware of the existence of the High Court's decision, the applicant lodged the present motion claiming that it has a vested interest in the disputed property but was not made a party before the High Court despite the 1st respondent having prior knowledge of the applicant's title over it. The motion is pegged on the following grounds; one, that the applicant was denied a right to be heard in the appeal. Two, that the filing of an appeal was an abuse of due process of the court as the 1st respondent already applied to be joined as a party in the previous suit i.e. Land Case No. 187 of 2009. Three, that the High Court had no jurisdiction to hear and determine the appeal. Four, that the High Court erred in entering judgment against the 2nd and 3rd respondents without receiving evidence from either side. The 2nd and 3rd respondents acknowledged, in their joint affidavit in reply, that the High Court had no jurisdiction over the appeal and the decision was arrived at without any evidence adduced by the parties.

When the application was called on for hearing, the applicant was represented by Mr. Wilson Edward Ogunde, learned advocate, while, Messrs. Ayoub Gervas Sanga and Ibrahimu Ramadhani Kabelwa, both learned State Attorneys represented the 2nd and 3rd respondents. The 1st respondent did not enter appearance despite being dully served with a notice of hearing by publication in Mwananchi newspaper hence hearing of the application proceeded in his absence in terms of Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

After adopting the affidavit, Mr. Ogunde contended that by the time the 1st respondent lodged an appeal before the High Court, he was well aware of the vested interest which the applicant had in the disputed property but decided not to implead it and neither did he disclose such facts before the High Court. He elaborated that in 2009, the applicant filed a suit seeking a declaratory order and permanent injunction over the disputed property against Elliot Mahali, the 2nd and 3rd respondents. Later on, in June 2010 and July, 2011, the 1st respondent sought leave to be made a party in the said suit. Mr. Ogunde added that since the applicant was not made a party in the appeal, it was denied its basic constitutional right to be heard as guaranteed under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time (the Constitution). At the end, Mr. Ogunde urged the

Court to allow the application by nullifying the High Court's proceedings, quashing the *ex parte* judgment and setting aside the resultant decree. He further prayed to the Court to make an order for rehearing of the appeal in which the applicant will be afforded a right to be heard.

Having adopted the affidavit in reply, the learned State Attorney supported the application and added that the 1st respondent preferred a wrong procedure in impugning the decision of the President. Elaborating further on this point, Mr. Sanga argued that the High Court was not properly moved under section 102 of the Land Registration Act, Cap. 334 R.E. 2019 (the LRA) because, he said, the decision which the 1st respondent was impugning did not emanate from the Registrar of Titles. He added that, a party can only challenge the decision, order or act of the Registrar of Titles made in performance of his/her duties under the LRA by way of petition of appeal and not otherwise. To fortify his submission, Mr. Sanga cited to us our decision in the case of **George Benjamin Fernandes v. Registrar of Titles & Another**, Civil Appeal No. 65 of 2018 [2021] TZCA 664 (4 November, 2021; TANZLII) where the Court dealt with an appeal arising from an appeal filed before the High Court pursuant to section 102 of the LRA challenging the rectification of the Land Register and revocation of the certificate of title made by the Registrar of Titles, under section 99 (1) of the LRA. The

learned State Attorney contended that in the present application, the revocation was made by the President and not by the Registrar of Titles. He also pointed out that, the Registrar of Titles was not even made a party before the High Court proceedings. In conclusion, Mr. Sanga beseeched us to find that the entire proceedings of the High Court were null. He also beseeched us not to condemn the 2nd and 3rd respondents to pay costs.

Mr. Ogunde had no rejoinder to the submissions made by the learned State Attorney.

From the parties' submissions, the central issue for our determination is whether the applicant was denied a chance to be heard in the appeal lodged by the 1st respondent before the High Court.

It is a well established principle of natural justice that before any decision is reached parties should be accorded a right to be heard unless provided otherwise by the law. This right is also constitutionally guaranteed as rightly submitted by Mr. Ogunde that Article 13 (6) (a) of the Constitution stipulates that:

> *"To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following principles; namely:*

(a) when the rights and duties of any person are being determined by the Court or any other agency ***that person shall be entitled to a fair hearing*** *and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned..."* [Emphasis is added]

In the case of **Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R 251, the Court re-affirmed that the right to be heard is both constitutional and fundamental one when it held that:

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law..."

Furthermore, in the case of **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 [2009] TZCA 17 (9 April 2009; TANZLII) the Court reiterated on the observance of the right to be heard before making any adverse decision or order. In that application, the respondent, Standard Chartered Bank (Hong Kong) Limited, who was the creditor of the Company petitioned before the High Court for

administration order and appointment of an administrator of the Company. Having heard the applicant alone, the High Court granted the petition without issuing notices to the interested parties such as the Company itself and the appointed provisional liquidator. When the appointed provisional liquidator became aware of the said administration order, he lodged, a complaint, by way of a letter, to the Chief Justice, and in turn, the Court acted *suo motu* under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019) through revisional proceedings. Grappling with the principle of natural justice, and in particular, the *audi alterum partem* that no person shall be condemned unheard, the Court said:

> *"...no decision must be made by any court of justice, body or authority, entrusted with the power to determine rights and duties, so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*

It is further a well established principle of law that any decision reached in contravention of the basic right to be heard cannot be left to stand even if the same decision would be reached had the party been heard - see: the decision of this Court in the cases of **The Director of Public Prosecutions v. Sabini Inyasi Tesha & Another** [1993]

T.L.R. 237, **National Housing Corporation v. Tanzania Shoe Company Limited & Others** [1995] T.L.R. 251 and **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) to mention but a few. In the latter case, the Court observed that:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it wiii be nullified, even if the same decision would have been reached had the party been heard,*** *because the violation is considered to be a breach of natural justice." [Emphasis added]*

In the instant application, it is without doubt, and as conceded by both learned counsel for the parties that, the applicant was not made a party to the purported appeal lodged by the 1st respondent. It is further garnered from the record that, in 2012 when the 1st respondent lodged the petition of appeal, he was already aware of the fact that the applicant was also claiming right over the disputed property. Nonetheless, he proceeded to lodge a petition of appeal excluding the applicant. It is also on record that the High Court declared that the

revocation of the 1st respondent's Certificate of Title was unlawful. Clearly, that decision adversely affected the subsequent grant of the certificate of title conferring ownership over the disputed property to the applicant, as the applicant who had a vested interest in the disputed property was not afforded a right to be heard before making such adverse order which affected its rights. In that regard, we entirely agree with Mr. Ogunde that the failure by the 1st respondent to implead or disclose material facts in the High Court prejudiced the applicant's right over the disputed property. Accordingly, we find merit to the application. We proceed to revise and quash the proceedings of the High Court, set aside the *ex parte* judgment and the decree extracted therefrom.

Ordinarily, we would have ordered the High Court to rehear the appeal but as rightly argued by the learned State Attorney, the 1st respondent improperly moved the High Court by filing a petition of appeal while the revocation order was not made by the Registrar of Titles. We have stated herein that the decision to revoke the certificate of Title of the 1st respondent was approved by the President and the Commissioner for Lands published the said approval in the Government Gazette of 21st May, 2004 in compliance with the provisions of section 49 (1) of the Land Act, Cap. 113 R.E. 2019. Therefore, if the 1st respondent was aggrieved by such revocation, he ought to have challenged it by

filing a suit or a judicial review as it was held in the case of **Patman Garments Industries Ltd v. Tanzania Manufacturers Ltd** [1981] T.L.R. 304.

At the end, we allow the application to the extent stated herein. We make no order as to costs since it was not pressed upon by the learned counsel for the applicant.

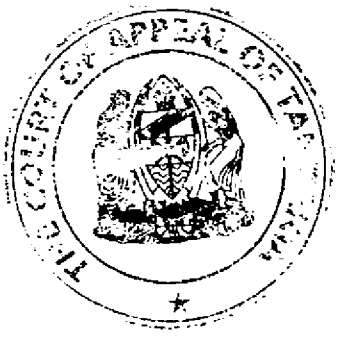
DATED at **DAR ES SALAAM** this 12th day of July, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 13th day of May, 2023 in the presence of Mr. Deogratious Ogunde, learned counsel for the applicant, Ms. Edina Mwamlima, learned State Attorney for the 2nd & 3rd respondents and in the absence of the 1st respondent who could not be traced, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL