IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 405/17 OF 2019

KHALID HUSSEIN MUCCADAM.....APPLICANT

VERSUS

NGULO MTIGA (as legal personal representative of the Estate of ABUBAKAR OMAR SAID MTIGA) .....1ST RESPONDENT

TULIBAKO TABU KYOMA.....2ND RESPONDENT

MR. ABDALLAH MAKATTA MWINYIMTUMA T/A SENSITIVE AUCTION MART & COURT BROKER.....3RD RESPONDENT

[Application for Revision of the Decision and Proceedings of the Decree of the High Court of Tanzania (Land Division) at Dar es Salaam]

(Opiyo, J.)

dated 22nd day of July, 2019

in

Misc. Land Application No. 290 of 2009

.....

RULING OF THE COURT

5th May & 11th August, 2023

MKUYE, J.A.:

Before us is an application for revision brought by way of a notice of motion predicated under section 4 (3) of the Appellate Jurisdiction Act and Rule 65(1) (2) and (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) in which the applicant is seeking for the intervention of the Court to call for, examine and revise the proceedings and decision of the High Court of Tanzania (Land Division) by Hon. Opiyo J. dated 22/7/2019 in Misc. Land Application No. 290 of 2009.

The notice of motion is supported by the affidavit deponed by Khalid Hussein Muccadam, the applicant. The grounds upon which the application is premised are that: **One**, the court failed to exercise jurisdiction vested upon it by the law to investigate the objection. **Two**, the court improperly refused to evaluate and consider the applicant's objection on ground that it was not maintainable. **Three**, the applicant was not given a fair hearing as his objection was not determined on merit.

Before embarking on the application on merit, we find it appropriate to give a brief background leading to this application. It goes as follows:

According to what can be gleaned from the record, sometimes in October, 2007 the applicant purchased from the 2nd respondent a residential building situated on Plot No. 322 Block "A", Mikocheni area within Dar es Salaam City held under CT No. 186314/102. It appears that while enjoying a peaceful comfort of his home, to his surprise, on 23/5/2019, the 3rd respondent emerged and affixed onto the building a demolition order in execution of a lawful court order emanating from Execution No. 39 of 2018 arising from Land Case No. 184 of 2016.

It appears further that Plot No. 322 Block A that the applicant purchased had extended into the adjacent Plot No. 320 Block "A" which belonged to the 1st respondent, for which the demolition order sought to demolish. The applicant was not amused with this development. He, thus, on 27/5/2019 lodged objection proceedings in the High Court (Land Division) to challenge the execution order which he strongly believed had affected his ownership of the suit plot.

At the hearing of the application before the High Court, the applicant contended that he was not a party to the said decision giving rise to the execution process and he remains to be a bonafide purchaser for value of the suit Plot. The respondents, on the other hand, contested the application arguing that the documents in possession of the applicant did not confer him any title to Plot No. 320 and that the demolition order was not in respect of Plot No. 322 that the applicant owned.

The learned Judge having heard the parties decided that the application was not maintainable because the trial court had already determined the issue of ownership of the suit property. The objection proceedings were, therefore, dismissed with costs for lack of merit.

Ahead of hearing of the application, on 10/8/2022 the 1st respondent lodged a notice of preliminary objection (the PO) on point of law that:

> *"The application is incompetent for being filed contrary to the requirement of Order XXI rule 62 of the Civil Procedure Code, Cap 33 R.E. 2019".*

When the application was called on for hearing the applicant was represented by Mr. Sylvester Eusebi Shayo, learned counsel; whereas the 1st respondent was represented by Ms. Anna Marealle teaming up with Mr. Kephas Mayenje both learned counsel. The 2nd respondent had the services of Mr. Yassin Mdee, learned counsel and the 3rd respondent enjoyed the services of Mr. Abdallah Makatta, also learned counsel.

In arguing the PO, Mr. Mayenje took off by arguing that, the application was misconceived since the applicant's objection proceedings filed before the High Court under Order XXI rule 58 and 59 together with sections 38 (1) (2) and (3) and 95 of the Civil Procedure Code (the CPC), had been dismissed and that in such situation he argued, the applicant was not allowed to file an appeal or revision but to file civil suit as per Order XXI rule 62 of the CPC. He referred us to the case of **Sosthenes Bruno and Another v. Flora Shauri**, Civil Appeal No. 249 of 2020 (unreported), where the Court stated that:

"Under rule 62 of that Order (Order XXI) the decisions of the court under rules 59 and 60 are final and not appealable. However, a party aggrieved by the decision under rule 62 of Order XXI, may lodge a suit in the court competent jurisdiction as per this Court's decisions in the ***Bank of Tanzania v. Devram P. Vaiambhia,*** *Civil Reference No. 4 of 2003 and* ***Kezia Violet Mato v. The National Bank of Commerce and Three Others,*** *Civil Appeal No. 127 of 2005 (both unreported).*

Also, the learned counsel referred us to the case of **Amour Habib Salum v. Hussein Bafagi**, Civil Application No. 76 of 2010 (unreported) where it was stated that:

"...the law is quite clear that an order which is given in determination of the objection proceedings is conclusive..."

He also cited the case of **Kezia Violet Mato v. The National Bank of Commerce and 3 Others,** Civil Application No. 127 of 2005 (unreported), where the Court emphasized the need to exhaust all available remedies provided by the law before invoking the revisional jurisdiction of this Court.

Mr. Mayenje was against the proposition to depart from the Court's earlier decisions on the position of the law since there were no conflicting decisions on the point. He argued further that the case of **Katibu Mkuu Amani Fresh Sports Club v. Dodo Ubwa Maboya and Another,** Civil Appeal No. 88 of 2002 (unreported) listed by the applicant allowing orders in objection proceedings to be revised or appealed against is distinguishable.

He, thus, implored the Court to find that the application is misconceived and dismiss it.

On their part both the 2nd and 3rd respondents, and, understandably so, being lay persons had nothing to contribute and left the matter to the Court to determine.

In response, Mr. Shayo argued that there was no conclusive determination under Order XXI rule 62 of the CPC since Opiyo, J. did not determine the objection proceedings. That, the High Court Judge did not investigate the substance of matter before her and that she dismissed the application instead of striking it. He added that, as the High Court Judge did not determine the objection proceedings, the applicant could not have filed a new suit. He insisted that the remedy for the matter which is incompetent is to strike it out and not to dismiss it. Reference

was made in the case of **Yusufu Shabani Matimbwa v. Exim Bank (Tanzania) Limited and Another** Civil Application No. 162 of 2021 (2022) TZCA 618 (October, 2023), where it was emphasized that the remedy for a matter which is incompetent is striking it out and not dismissing.

He was, therefore, of the view that this matter having not determined, it ought to have been struck out.

Alternatively, Mr. Shayo argued that this Court is empowered under section 4 (3) of the AJA to look at propriety of the High Court's proceedings if it complied with the law despite the existence of Order XXI rule 61 and 62 of the CPC.

Having examined the notice of motion, supporting affidavit and oral submissions from either side, we find that the issue for this Court's determination is whether the PO raised is sustainable.

Order XXI rule 62 of the CPC guides the situations where the objection proceedings have been dismissed by the Court. It states as hereunder: -

> *"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he*

claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Our understanding of this provision is that, once a decision in an objection proceeding has been made by the court, the resultant order would be final and conclusive and that no right of appeal against such order would exist. However, the only available remedy for an aggrieved party, is to file a suit. Thus, in the case of **Kezia Violet Mato** (supra), when the Court was confronted with an akin scenario in which the applicant lodged an application for revision of the resulting order in an objection proceedings, it stated as follows:

"In the instant case, it is common ground that the applicant has no right of appeal. But notwithstanding lack of right of appeal, she has an alternative remedy provided by law, that is, to institute a suit to establish the right she claims to the house in dispute as per Order XXI rule 62 of CPC. It is our considered view that, ***where a party has no right of appeal but there is an alternative remedy provided by law, he cannot properly move the Court to use its revisional jurisdiction.*** *He must first exhaust all remedies provided by law before invoking the revisional jurisdiction of the Court. The applicant who has not yet exhausted all remedies provided*

by law cannot invoke the revisional jurisdiction of the Court. This application is incompetent". [Emphasis added].

Also, the Court took a similar stance in the case of **National Housing Corporation v. Peter Kassidi and 4 others,** Civil Application No, 294/16 of 2017 (unreported) where it stated as follows:

"We take to be firmly established law that, pursuant to Order XX1 Rule 57 (1) of the CPC, where an objection is preferred and an order determining that objection is subsequently made, in terms of rule 62 of the same Order, the only remedy available to the party against whom that order is made is to institute a regular suit to prove his claim. Put it in other words, after the decision on objection proceedings has been made by a competent court, there is no remedy for appeal or revision."

It is notable that the applicant seems to concede to the preliminary objection. We hold such view because in his written submission that was lodged on 11/8/2022 against the PO raised, he agreed to the settled position of the law in respect of a party aggrieved by a decision on objection proceedings. In particular, he admits that a decision arising from objection proceedings is not appealable in Tanzania Mainland, unlike the position in Zanzibar, where such orders

are appealable citing the decision in **Katibu Mkuu, Amani Fresh Sports Club** (supra), where the Court made it clear that a decision on objection proceedings in Zanzibar is appealable but not in Tanzania Mainland. We have no qualms with that because that is the position of the law.

The learned counsel, however, went on inviting this Court to depart from its previous decisions in relation to appeals and revisions in objection proceedings and borrow a leaf from the position in Zanzibar. We, think, such proposition, though may seem to be attractive cannot stand since in Zanzibar, the position is provided for under the law unlike in Tanzania mainland where it is prohibited by law as alluded earlier on.

In this case, the applicant filed objection proceedings following the demolition order that was brought to him but was dismissed by the High Court for lack of merit. The learned counsel for the applicant assailed the High Court Judge for dismissing the application for objection proceedings instead of striking out, as in his view, the High Court judge did not determine it on its merit for being incompetent.

At this juncture, we find that the issue for our determination is whether the objection proceedings were heard and determined in

accordance with the law. However, before dealing with such issue, we need to explore a bit as to what entails dismissal and striking out.

It is a settled principle of law that orders of dismissal and striking out a matter have different legal consequences. Dismissal connotes that the matter has been heard on merit and determined to its finality. This has the effect of barring the party from pursuing the matter before the same court. On the other hand, striking out connotes that the matter has not been heard on merit for being incompetent - See **The National Insurance Corporation (T) Ltd v. Shengena Limited,** Civil Application No 230 of 2015 (unreported). Also, in the case of **Ngoni Matengo Co-operative Marketing Union Ltd v. Ali Mohamed Osman** [1959] EA 577, the Court elaborated the distinction between the two orders and stated thus:

> *"...In the present case therefore... when the appeal came before this court, it was incompetent for lack of the necessary decree...this Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this Court ought to have done in each case was to strike out the appeal as being incompetent, rather than to have*

dismissed it; for the later 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."

See also **Said Thomas Mhombe v. Republic,** Criminal Appeal No 472 of 2019 (unreported).

In this case, as alluded to earlier on, the applicant filed objection proceedings following the demolition order that was brought to him. Though the applicant is of the view that the objection proceedings were not determined we have a different view. We are of a considered view that application was heard and determined. We say so because, **one,** both parties paraded witnesses to testify for and against the objection proceedings. **Two,** they filed written submissions in support and against the same. **Three,** the learned Judge made her determination. Although the learned Judge in her decision observed or used the phrase that *"the application was not maintainable,"* looking at the context, we find that it did not imply incompetency of the application. Neither did she mention anything relating to the incompetency of the application. In her determination, the learned Judge was of the view that she could do nothing since the issue of ownership on the same plot between the parties had been already determined in Land Case No.184 of 2016.

Then, she dismissed the application for lack of merit. In the circumstances, since there was determination on the matter the remedy was to dismiss the application and not to strike it out. Therefore, we do not agree with Mr. Shayo that the High Court Judge ought to have struck out the application for being incompetent since the matter was not determined on the basis of incompetency. The High Court was right to dismiss it after having heard it on its merit.

The applicant lodged this application inviting us to call for and examine the record with a view to revise the decision of the High Court. However, going by authorities of **Sosthenes Bruno and Another** (supra), **Kezia Violet Mato** (supra) and **National Housing Corporation** (supra) this is not allowed. Since the application for objection proceedings was dismissed, it means that its determination was final and conclusive in the sense that the applicant was prohibited to bring the application at hand. Filing of this application was wrong as it is prohibited by law. Under rule 62 of Order XX1 of CPC, the applicant ought to have filed a civil suit to establish his interest in the suit property. Put it in other words, the present application for revision of the order emanating from the objection proceedings is incompetent before the Court since it is barred by Order XX1 rule 62 of the CPC. In this

regard, we find that the PO raised by the respondent is merited and we sustain it.

In the event, in light of what we have endeavored to explain above, we sustain the PO and proceed to strike out the application for being incompetent before the Court with costs.

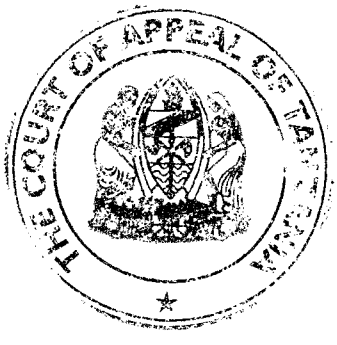
DATED at **DAR ES SALAAM** this 10th of August, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 11th day of August, 2023 in the presence of Mr. Bivery Lyabonga holding brief of Mr. Silvesta Shayo, learned advocate for the Applicant and also for Ms. Anna Mdia, learned advocate for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL