

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J. A., SEHEL, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO.247/08 of 2022

LIVINGSTONE MICHAEL MUSHI.....APPLICANT

VERSUS

1. **ASHA MAGOTI MAGERE** (The administratrix of
The estates of the late **HAMISI ASILI**)**1ST RESPONDENT**
2. **HASSAN KAPULI****2ND RESPONDENT**
3. **KARAMA SALEHE MANSOOR****3RD RESPONDENT**
4. **ROCKY TAKERS LTD****4TH RESPONDENT**

**(Revision application from the decision of the High Court of
Tanzania at Mwanza)**

(Rumanyika, J.)

Dated the 30th day of September, 2021

in

Miscellaneous Land Application No. 30 of 2021

RULING OF THE COURT

30th October & 9th November, 2023

LILA, J.A:

This is an application for revision. It is made under the provisions of section 4(3) of the Appellate Jurisdiction Act, (the AJA) by way of a notice of motion and is supported by the affidavit of the applicant. Through it, the applicant has moved the Court to call for and examine the record of Miscellaneous Land Application No. 30 of 2021 of the High Court of Tanzania sitting at Mwanza with the view of satisfying itself as to the propriety, correctness and legality of the decision thereon and to the regularity of the

proceedings thereto and eventually quash and set aside the said order and the ruling.

On the rival side, only the 1st respondent contested the grant of the application by lodging an affidavit in reply. The 2nd and 3rd respondents, through their respective learned counsel, Mr. Emmanuel John and Steven Makwega, did not contest it. The 4th respondent did not lodge an affidavit in reply to oppose the application.

Although the facts may appear offensive to the holy guidance proclaimed in our Holy Books, the Quran and the Bible, that *'mpende jirani yako kama unavyojipenda'* which may literally be translated to mean *'love your neighbour to the same extent you love yourself'*, we cannot avoid telling these background facts which triggered the institution of this revision application. The late Hamisi Asili who was in the proceedings before the Ward Tribunal of Pansiasi (the Tribunal) referred to as Hamisi Hasili and in Misc. Land Application No. 30 of 2021 referred to as Hamisi Asilio and Hassan Kapuli (the 2nd respondent) were neighbours sometime in the year 2009. Their neighbourhood faced a challenge when the 2nd respondent instituted a suit before the Tribunal claiming that, by digging a pit close to his house, the late Hamisi Asili had caused cracks and continuous damage to his house. The trial Tribunal decided in favour of the 2nd respondent and awarded him compensation at the tune of TZS 2,032,000.00 (Say shillings two million and thirty-two thousand) only.

The 2nd respondent (decree holder) then initiated execution proceedings against the late Hamisi Asili (Judgment debtor) in the District Land and Housing Tribunal for Mwanza (the DLHT) vide Miscellaneous Application No.54B of 2009 and Agatta Auction Mart and Court Broker was assigned the duty to execute the decree. The landed property described as Squatter House No.015/053, located at Msumbiji Kawekamo "B" area in Mwanza City (the suit property) was subsequently attached and sold in a public auction conducted on 13th September, 2009 to satisfy the decreed amount in which Karama Saleh Mansoor, the 3rd respondent herein, emerged the highest bidder.

The 3rd respondent's occupation of the suit property was short-lived as in March 2021, he sold it to Livingstone Michael Mushi, the applicant herein, who later successfully processed for a Certificate of Title and the property was later surveyed and described as Plot No. 87, Block "J", Nyasaka "A" Ilemela Municipality.

Upon death of Hamisi Asili on 8/3/2019, Asha Magoti Magere, the 1st respondent herein, was granted letters of administration of the estate of Hamisi Asili who was her husband and, acting in her capacity as an administratrix of the estate of the late Hamisi Asili, successfully challenged the purported sale of the suit property in the High Court by way of a revision application registered as Miscellaneous Land Application No. 30 of 2021. Consequently, both the execution proceedings of the DLHT and those of the trial ward tribunal were,

on 30th September, 2021, nullified and quashed. The High Court, further, ordered that a party wishing to institute a case should do so in the court of competent jurisdiction. This decision had the effect of reverting the house to Hamisi Asili hence making it part of the estate to be administered by the 1st respondent. That was when the 3rd respondent informed the applicant that the house (suit property) he sold to him was subject to court proceedings and the decision rendered declared the 1st respondent as the rightful owner of it. The decision aggrieved the applicant who bought the house from the 3rd respondent. To have an opportunity to defend his interests, preferred this application seeking for revision of the proceedings and judgment of the High Court on the following grounds.

- (i) That the applicant was not given an opportunity to be heard despite of having interest in the dispute property.*
- (ii) That the High Court lacked jurisdiction to revise the proceedings of the Ward Tribunal in place of the District Land and Housing Tribunal.*
- (iii) That the High Court improperly exercised her discretion on granting the 1st respondent herein extension of time to lodge revision application.*

Save for the 1st respondent who appeared in person and unrepresented, the rest of the parties were duly represented by learned advocates before us. Mr. Andrew Luhigo, Mr. Emmanuel John and Mr. Steven Makwega appeared, respectively, for the applicant, 2nd respondent and 3rd respondent. As earlier on hinted, the learned advocates were in agreement that the proceedings and

decision of the High Court be revised. The 1st respondent resisted the application through a reply affidavit. Consequently, we proceeded to hear the application between the applicant and the 1st respondent. The 4th respondent abstained from appearance despite being duly notified on 20/10/2023 to appear for the hearing of the application. In terms of Rule 63(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), hearing proceeded in his absence.

Mr. Luhigo, exercising the right of the applicant to be heard first, began with a prayer to argue only one ground, that is ground one (1) of the application, and to abandon the rest. Having narrowed the scope of the application to that extent, his submissions turned out to be very brief. He, at first, adopted the notice of motion and the averments in the supporting affidavit and written submission earlier on 20/1/2022 lodged in respect of ground one to be part of his arguments before us. Next, he referred the Court to paragraph 6(a) of the supporting affidavit arguing that it reflects the mainstay of this application and paragraphs 2, 3 and 4 of the supporting affidavit constitutes sufficient elaboration of the applicant's interests in the case subject of revision in that he bought the house from the 3rd respondent and successfully processed for grant of title but later on to be informed by the 3rd respondent that such house was a subject of litigation in the High Court in Miscellaneous Land Application No. 30 of 2021 between Asha Magoti Magere (Administratrix of the estate of the late Hamisi Asili) and Hassan Kapuli, Karama Salehe Mansoor and Rock City

Takers Ltd and that the decision was rendered on 30/9/2021 after he had already bought the house in March, 2021 as Squatter House No. 015/053 from the 3rd respondent. The said decision declared the 1st respondent as being the rightful owner. He referred the Court to the High Court decision and extracted order in Miscellaneous Land Application No. 30 of 2021 between Asha Magoti Magere (Administratrix of the estate of the late Hamisi Asili) and Hassan Kapuli, Karama Salehe Mansoor and Rock City Takers Ltd, High Court Ruling in Miscellaneous Land Case Application No. 69 of 2016 which was between the late Hamisi Asili, on the one hand, and Hassan Kapuli, Karama salehe Mansoor and Agatha Auction Mart on the other hand in which cases the applicant was not a party. He submitted that, the applicant being a purchaser of the house and having a title deed over it had interests in the suit property which necessitated him being joined in the cases so as to defend his interests. It was his contention that failure by the 3rd respondent to inform him of the existence of the cases over that house and failure to join him as a party denied him the right to be heard hence a violation of one of the basic principles of natural justice citing the cases of **M/S Flycatcher Safaris Ltd vs Hon. Minister for Lands and Human Settlement Development and Another**, Civil Appeal No. 142 OF 2017 (unreported), **Mbeya-Rukwa Auto Parts and Transport Ltd vs Jestina George Mwakyoma** [2003] TLR 251, **Ridge vs Baldwin** [1964] AC 40 and **Claude Roman Shikonyi vs Estomy A. Baraka and Four Others**, Civil Revision No. 4 OF 2012 (unreported) to augment his

arguments. So as to preserve and uphold the applicant's right to be heard, he urged the Court to grant the application, revise and nullify the High Court decision in Miscellaneous Land Application No. 30 of 2021 dated 30/9/2021 declaring the 1st respondent the owner of the suit property and order that the record be remitted for re-hearing of Miscellaneous Land Application No. 30 of 2021 in which the applicant should be made a party.

In turn, the respondent adopted her affidavit in reply as part of her submission and had very little to elaborate. Beginning with the averments in the affidavit in reply, she essentially disputed all the applicant's assertions in the supporting affidavit. It was her assertion that the late Hamisi Asili was first to process for title over the suit land and was, on 16/1/2018, informed by a letter to settle final fees so that title deed could be issued to him and she annexed various payment receipts and the said letter. Further to that, she discounted other claims as being known to the applicant only and others were nothing but an afterthought.

Besides acknowledging the fact that she did not see the applicant before the High Court during the conduct of the case referred to the Court by Mr. Luhigo, in her oral elaboration before us, she insisted that she knows nothing about the applicant's interests over the suit property and that if he had any such interests, he should have applied to be joined as a party in such cases. She beseeched the Court not to grant the application.

With these submissions by Mr. Luhigo and the 1st respondent, it is now obvious that the applicant was not a party to the cases tried by the High Court and particularly in Miscellaneous Land Application No. 30 of 2021 which vested ownership of the suit property to the 1st respondent. We too, upon perusal of the record and the cases referred to us, are satisfied that such was the situation. In essence, this is sufficient confirmation and concession by the respondent of the applicant's averments in the supporting affidavit that he (the applicant) was not a party to any of the cases tried in the High Court in respect of the suit property. More so, the 1st respondent did not dispute the applicant having processed to have and being granted title over the suit property annexed in the supporting affidavit as STONE -2 but her assertion was that the deceased was first to apply for title deed but did not complete the process and she assigned no reasons. That said, as matters now stand, it is the applicant whose name appears in the title deed to the suit property as vividly reflected in annexure STONE – 2. Settled law is to the effect that a Certificate of Title is conclusive proof of ownership of land (See **Leopold Mutembei vs Principal Assistant Registrar of Tittles and Two Others**, Civil Appeal No. 57 of 2017 (unreported). In that decision the Court quoted with approval an excerpt at page 330 of the book titled "**Conveyancing and Disposition of Land in Tanzania**" by Dr. R. W. Tenga and Dr. S. J. Mramba, Law Africa, Dar es Salaam, 2017 that:

*"...the registration under a land titles system is more than mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. **The act of registration confirms transaction that confer, affect or terminate that ownership or interest.** Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive of proof of title."*

(Emphasis added)

This Court, however, cautioned that despite possessing a title deed, ownership of land may be challenged if the same was obtained illegally in the case of **Amina Maulid Ambali & 2 Others vs Ramadhani Juma**, Civil Appeal No. 35 of 2019, where it observed as follows:

"... when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained."

We, however, by quoting these expositions of the law, do not intend to hold that the applicant is the rightful owner of the suit property which is a matter to be determined in another forum as shall be told later in this ruling, but rather to show that a successful registration of that suit property in his name, created a legal interest over the property on the applicant. That said, it is now obvious that the applicant had interests over the suit property and was not a party to the proceedings before the High Court in respect of its ownership

in Miscellaneous Land Application No.30 of 2021 which decision adversely affected his interests (title) to the suit property by declaring the 1st respondent the rightful owner. His involvement in the case was necessary in order to enable the court to effectually determine the rights of the parties and, in terms of the provisions of Order I Rule 10(2) of the Civil Procedure Act (the CPC) which applies for both necessary and proper party, it was necessary for him to be made a party. That Rule provides:

"(2) The Court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

In essence, this provision provides for an opportunity to the court on its own motion and or on application by the parties to add or remove a party from the proceedings regard being on whether the presence or absence of such person is indispensable in enabling the court to fully and justly determine the matter or dispute. Key, in considering this, is the nature and extent of interests such person has in the case and the need to avail him an opportunity to defend his interests. In the event a decision is passed without his involvement and he

affected as a necessary party. There is a fine distinction between a necessary party and a proper party to the case which we find it necessary to make it clear. A clear elastration is given by C. K. Takwani in his book **CIVIL PROCEDURE**, Fifth Edition at page 116 that: -

"There is an essential distinction between a necessary party and a proper party to a suit. A necessary party is one whose presence is indispensable to the constitution of the suit, against whom the relief is sought and without whom no effective order can be passed. A proper party is one in whose absence an effective order can be passed, but whose presence is necessary for a complete and final decision on the question involved in the proceeding. In other words, In absence of a necessary party no decree can be passed, while in absence of a proper party a decree can be passed so far as it relates to the parties before the court. His presence, however, enables the court to adjudicate more "effectually and completely."

In the present case, the proceedings in Miscellaneous Land Application No. 30 of 2021 were conducted and a decision rendered in the absence of the applicant which, on the face of it, adversely affected his interest in respect of his ownership of the landed property. He was not a party as rightly argued by Mr. Luhigo. As we have endeavoured to show above, that case was between Asha Magoti Magere (Administrator of the late Hamisi Asili) and Hassan Kapuli, Karama Salehe Mansoor and Rock City Takers Ltd. It is therefore plain that the

applicant, being a proper party, was not accorded the right to be heard. Quite in line with the provisions of Article 13(6) of the Constitution of the United Republic of Tanzania of 1977 (as amended) which obligates courts to avail an opportunity to be heard to persons when their rights are being adjudicated before pronouncing the verdict. We are satisfied that the omission to join the applicant in the proceedings was a fundamental error which denied him the right to be heard which is a violation of a fundamental principle of natural justice as the court lucidly explained in the case of **21st Century Food and Packaging Ltd vs Tanzania Sugar Producers Association and Two Others**, Civil Appeal No. 91 of 2003 (unreported) that:-

"There is no gainsaying that it is an aspect which directly affect the interests of the appellant. In that situation, we think it would be in the interest of justice that the appellant is given an opportunity of being heard in order to enable the court to settle the issues raised in the suit. To do so, we also think that not only would this accord with the spirit of the provisions of Rule 10 (2) of Order 1 of the Civil Procedure Code but would also be in conformity with the principles of natural justice i.e. according an opportunity to a party to be heard in a matter which directly affects the party."

The effect of such violation is to vitiate both the proceedings and decision rendered (See **Tang Gas Distributors Ltd vs Mohamed Salim Said and**

Two Others, Civil Application No. 68 of 2011 (unreported) cited in **Claude Roman Shikonyi vs Estomy A. Baraka and Four Others** (supra).

All said, we grant the application and, invoking our revisional powers bestowed under section 4(2) of the Appellate Jurisdiction Act, we nullify both the proceedings and the decision of the High Court in Miscellaneous Land Application No. 30 of 2021 and the consequential orders thereof and we order the record be remitted to the High Court for it to re-hear it upon the 1st respondent amending the pleadings so as to join the applicant as a party in the application. Costs be in the course.

DATED at **MWANZA** this 7th day of November, 2023.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 9th day of November, 2023 in the presence of Mr. Andrew Luhigo, learned counsel for the Applicant and 1st Respondent appeared in person unrepresented, Mr. Steven Makwega, learned counsel for the 2nd and 3rd Respondents and in absence of 4th respondent who was duly served, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL