

**IN THE COURT OF APPEAL OF TANZANIA**

**AT SONGEA**

**(CORAM: NDIKA, J.A., KEREFU, J.A., And RUMANYIKA, J.A.)**

**CIVIL APPLICATION NO. 609/10 OF 2021**

**EFRASIA MFUGALE .....APPLICANT**

**VERSUS**

**ANDREW J. NDIMBO..... 1<sup>ST</sup> RESPONDENT**

**VALERIANA NDIMBO..... 2<sup>ND</sup> RESPONDENT**

**(Application for Revision of the decision of the High Court of Tanzania  
at Songea)**

**(Kalombola, J.)**

**dated the 19<sup>th</sup> day of July, 2011**

**in**

**Land Appeal No. 9 of 2008**

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**RULING OF THE COURT**

23<sup>rd</sup> August, & 8<sup>th</sup> September, 2023

**RUMANYIKA, J.A.:**

By a notice of motion made under Section 4 (3) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA), read together with Rule 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules), Efrasia Mfugale, the applicant, is moving the Court to call for and examine the proceedings of the High Court in Land Case No. 9 of 2008, for the purposes of satisfying itself on the correctness, legality or propriety of the decision and orders thereon. She has two grounds which are paraphrased as follows;

- 1. That, the applicant was condemned unheard thus, deprived of her property in violation of the rules of natural justice.*
- 2. That, the High Court misconstrued the meaning and scope of Order I Rule 9 of the Civil Procedure Code Act, Cap. 33.*

The application is supported by an affidavit of the applicant. The 1<sup>st</sup> respondent vehemently contested it by filing an affidavit in reply. The 2<sup>nd</sup> respondent did not file any affidavit in reply.

The sequence of events leading to this application is albeit briefly thus: All began with Land Application No. 10 of 2007 before Kilimani Ward Tribunal which was successfully filed by the 1<sup>st</sup> respondent against the 2<sup>nd</sup> respondent. The dispute between them involved a house on plot No. 1044 Block 'C' Mbinga Urban (the house). Although, the proceedings of the first two tribunals below reflected also the applicant's title to the house, she was not impleaded or joined as a party.

Aggrieved with that decision where she was ordered to return TZS. 400,000.00 as purchase price to the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent successfully appealed to Songea District Land and Housing Tribunal (the DLHT). Aggrieved, the 1<sup>st</sup> respondent unsuccessfully appealed to the High Court of

Songea, vide Land Appeal No. 9 of 2008. He faulted the DLHT for having not ordered a retrial and joinder of the applicant.

From the record it is also clear to us that, the foregoing apart, at times, the applicant filed objection proceedings, Land Application No.115/2016 and subsequently, Land Application No. 11/ 2017 in the DLHT claiming a title to the house, both in vain. The house was reverted to the 2<sup>nd</sup> respondent, despite the first respondent's pressing for the joinder of the applicant in the proceedings, all in vain.

The applicant is aggrieved by the decision of the High Court. However, knowing that she is a stranger to the respective proceedings and therefore, could not appeal against the judgment thereon, she has preferred the present application.

For the applicant, Mr. Edson Mbogoro learned counsel, contended that, the High Court judges' refusal to order the joinder of the applicant to the proceedings amounted to depriving her of the right to own the house. Since she was condemned unheard, he argued, that omission contravened Article 13(6) (a) of the Constitution of the United Republic of Tanzania. Hence, the decision was a nullity and which cannot be left to stand. To support his proposition, he cited our decisions in **M.B Business Ltd v. Amos David Kasanda And Two**

**Others**, Civil Application No. 429/17 of 2019 [2023] TZCA 17405 (13 July 2023: TanzLII), **Juliana Francis Mkwabi v. Canrent Chimwaga**, Civil Appeal No. 531 of 2020 [2021] TZCA 645 (4 November 2021: TanzLII) and **Mohamed Masoud Abdallah And 42 Others v. Tanzania Road Haulege (1980)**, Consolidated Civil Appeal Numbers 150 & 158 of 2019 (unreported).

Further, Mr. Mbogoro argued that, by so deciding, the High Court judge also contravened the provisions of Order I Rule 9 of the CPC which do not allow suits to be defeated for the reason of misjoinder or non-joinder of the parties, without resolving the matters in controversy. He said, that considering the applicant's claim of title to the house and for the purpose of execution of the resultant decision and orders, she becomes a necessary party hence a need for her joinder. He cited our decisions in **Juliana Francis Mkwabi** (supra) and **Mohamed Masoud Abdallah** (supra) to fortify his point.

Additionally, Mr. Mbogoro asserted that, the applicant had exhausted all the means available pursuing her rights on the house. Since the applicant was not a party in the two tribunals below, he argued, she preferred objection proceedings through Miscellaneous Land Application No. 115 of 2016 and later a suit vide Land Application No. 11 of 2017 to recover the house in vain.

Replying for the 1<sup>st</sup> respondent, Mr. Kitara Mugwe, learned counsel, contended that, the applicant's complaint of a denial of a right to be heard is unfounded because she was heard vide objection proceedings in Land Application No. 115/2016 and subsequently, in Land Application No. 11/ 2017 in the DLHT both in vain. However, Mr. Mugwe argued that, after losing the said two battles, the applicant sat back. She did not assail the latter decision, after her claim of title to the house was dismissed.

The 2<sup>nd</sup> respondent appeared in person. She reviewed the facts of the case and absolved herself of any liability in the matter.

In his rejoinder, Mr. Mbogoro asserted that, had the High Court judge considered the applicant's right and interest in the house as shown in the Certificate of Title, and presented by the 1<sup>st</sup> respondent, she would have not dismissed Land Appeal No. 09 of 2008.

More importantly, as highlighted above, our reading of paragraphs 7 and 8 of the 1<sup>st</sup> respondent's affidavit in reply however, has drawn to our attention two undisputed crucial facts namely: **One**, during the pendency of the dispute between the respondents, the applicant unsuccessfully filed objection proceedings vide Miscellaneous Land Application No. 115/2016 in the DLHT to show her right and interest in the house, as a third party and **two**, as required

by law. Upon losing the said objection proceedings, she sued the respondents and another together and jointly vide Land Application No. 11 of 2017 in the DLHT but her action was fruitless.

It is therefore clear to us that, the instant application is an abuse of the Court process. Put in other words, the applicant's action is a manifestation of forum shopping. She is attempting to ride two horses at the same time which is not permitted. In other words, coming to the Court without first of all having the dismissal of her suit reversed, the applicant's action is improper.

Also, it should be noted that, the said decision of the DLHT in the said Land Application No 11/2017 where the 2<sup>nd</sup> respondent was declared the lawful owner of the house still stands and legally binds upon the parties. This may include any other person privy claiming under the applicant much as the parties and the subject matter (the house) remain the same substantially. It follows therefore, that, should the instant application be granted, in terms of section 9 of the Civil Procedure Code Cap. 33, any suit subsequently filed by the applicant will be *res judicata*. Since we are settled in our mind that, except the incoming applicant whose rights and interest have been protected by the 1<sup>st</sup> respondent, as observed above, any suit subsequently filed by the applicant will involve the same subject matter and the parties substantially.

In the result, we dismiss the application with costs for being a result of the applicant's misapprehension of the facts and evidence on record.

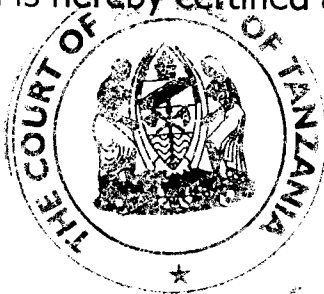
**DATED at DAR ES SALAAM this 6<sup>th</sup> September, 2023.**


G. A. M. NDIKA  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 8<sup>th</sup> day of September, 2023 via video conference from Mbinga District Court in the presence of Ms. Efrasia Mfugale, the Appellant present in person and Ms. Valeriana Ndimbo 2<sup>nd</sup> Respondent also appeared presence in person and in the absence of 1<sup>st</sup> Respondent though duly notified is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**