IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., ISSA, J.A., And ISMAIL, J.A.)

CIVIL REVISION NO. 1 OF 2020

SAID ABDALLAH DOGA ..... APPLICANT

VERSUS

ROSE FRIDOLINE MWAPINGA ..... 1ST RESPONDENT

ALLY OMARY FUNGA ..... 2ND RESPONDENT

(Revision from the proceedings and judgment of the High Court of Tanzania at Dar es Salaam)

(Shaidi, J.)

dated 30th day of October, 2009

in

PC. Civil Appeal No. 28 of 2002

RULING OF THE COURT

7th & 28th November, 2023

ISMAIL J.A.:

These are revisional proceedings initiated *suo motu* by the Court on the directions of the Hon. Chief Justice, and consistent with the provisions of section 4 (3) of the Appellate Jurisdiction Act. Commencement of the proceedings was a response to complaints preferred by both sides in these proceedings on what they considered to be an undue delay in the settlement of the dispute relating to ownership of land. At stake in the proceedings is

the regularity or propriety or otherwise of the proceedings before the High Court, which sat to determine an appeal in PC. Civil Appeal No. 28 of 2002. Regularity or otherwise of the judgment delivered by the High Court on 30th October, 2009 is also on trial through these proceedings. The parties in these proceedings are Said Abdallah Doga, the appellant in the impugned proceedings, and Rose Fridoline Mwapinga and Ally Omary Funga, the latter of whom was the respondent in the said appeal proceedings.

The challenges that came with the parties' intentions to execute the decision of the High Court and that of the District Land and Housing Tribunal for Kilombero at Ifakara (DLHT) was brought to the attention of the High Court of Tanzania, Land Division. Vide a letter dated 24th November 2019, the Deputy Registrar of the High Court escalated the matter to this Court's Deputy Registrar the latter of whom sought the directive of the Honourable Chief Justice. Appreciating the seriousness of the problem, the Honourable Chief Justice directed that *suo motu* revisional proceedings be commenced with a view to rectifying the irregularities that are apparent in the said decisions. Particular attention was paid to the judgment of the High Court

(Shaidi, J) in PC. Civil Appeal No. 28 of 2009 whose manner of procurement and contents allegedly attracted some concerns.

In order to bring clarity to what will follow in these proceedings, we find it pertinent that the factual setting of what the parties haggle over be set out in some detail. In 2000, Said Abdallah Doga, instituted a civil case in the Primary Court of Kilombero District at Ifakara. The case, registered in court as Civil Case No. 54 of 2000, was filed against Ally Omari Funga, 2nd respondent in the instant proceedings and a certain Mr. John Kaganga who was dropped from the case midway through the trial proceedings. The claim in the suit was for a declaration that the land measuring 40 acres, located at Kisegese locality, Miwangani village in Kilombero District belongs to the applicant. He alleged that he acquired the said land on payment of TZS. 6,000/- in 1997 pursuant to which the village leadership, under the chairmanship of the 2nd respondent allocated it to him. The contention by the applicant is that he cleared the bush, tilled part of the land and constructed a makeshift house. At some point, he visited the place and found that a hut had been erected on his land. On enquiry, he was allegedly notified by 2nd respondent that the hut was built by a neighbour and that the same

would be removed after some time. Sensing that his land had been encroached, the applicant resorted to court action. The 2nd respondent was opposed to the contention raised by the applicant. His defence was that the house that the applicant stakes claims on is part of 250 acres that belonged to Capt. Fridolin Mwapinga, the 1st respondent's spouse who has since died.

The primary court partly allowed the claim by holding that, since the evidence revealed that the applicant had only cleared two acres from what he alleged to have acquired, then he is entitled to retain the cleared land.

The decision by the trial court did not resonate in the ears of the applicant. He preferred an appeal to the District Court of Kilombero at Ifakara. One of the grounds of appeal queried the trial court's failure to record evidence that what the applicant acquired was 66 acres out of which 12 acres were cleared and cultivated by the applicant. The District Court found fault in the trial court's decision and reversed it. In allowing the appeal, the District Court was of the view that, in the absence of evidence that the applicant was allocated the disputed land, award of two acres to the applicant was erroneous and undeserving.

Vide a memorandum of appeal filed on 11th February, 2002, the applicant took his battle to the High Court of Tanzania. This was through PC. Civil Appeal No. 28 of 2002 which contained five grounds of appeal. A glance at the proceedings (pages 21 and 22 of the record) reveals that this matter was assigned to Oriyo, J (as she then was) before whom the matter came for orders on 20th April, 2005. The presiding judge probed the applicant, the appellant then, on the competence of the appeal given that it was filed out of time. Despite the insistence by the applicant that the appeal was timeous, the learned High Court judge adjudged the appeal time barred. She struck it out.

The record is silent on what happened next but what is evident is that the same appeal found its way to the High Court, this time before Shaidi, J., whose decision is part of the reason as to why these revisional proceedings were initiated. It is gathered from the judgment that in the appeal purportedly placed before Shaidi, J., the grounds of appeal mysteriously rose from five to eight. The learned judge took the view that the applicant was the lawful owner of the suit land, having been allocated to him in 1997, and

that the village council did not have the power to re-allocate the same land to Captain Mwapinga. The learned judge's conclusion was as follows:

> *"I am therefore satisfied on the balance of probability that the land in issue is legally owned by the appellant. I therefore allow the appellant's appeal, quash the judgment of the District Court and restore the judgment of the Urban Primary Court of Ifakara. However unlike the Urban Primary Court of Ifakara, I find that the appellant is the owner of all the 250 acres of land allocated to him by the respondent."*

Inexplicably, long after the decision that went in his favour, the applicant came to this Court by way of an application seeking to extend time to file an application for revision against the very decision that handed him victory. On 29th May 2017, the application was dismissed with costs for want of merits. Prior to institution of the failed application, the applicant moved the primary court to issue an eviction notice in execution of decision of the High Court. Messrs. Majembe Auction Mart who were appointed to execute the decree issued the notice of eviction to the 2nd respondent.

Before this happened, the 1st respondent's husband commenced proceedings in the DLHT, moving it to declare him the lawful owner of the

250-acre farm located at Miwangani area, Idete village in Kilombero District. The respondents were the applicant and the 2nd respondent herein. In a judgment handed down on 28th June 2012, the 1st respondent was declared the lawful owner of that land. Subsequent appeal to the High Court Land Division (Land Appeal No. 78 of 2012) by the applicant did not alter the equation as it was nipped in the bud when the High Court (Land Division) dismissed it for lack of prosecution. Attempts to set aside the dismissal did not succeed as Misc. Land Application No. 135 of 2015 that sought to set aside the dismissal order was dismissed by Mutungi, J. on 30th September 2015.

As a result of the decision, the parties were left to grapple with two decisions, one by the High Court on appeal and the other by the DLHT, but in two different matters, seemingly giving rights to opposite parties, over the same parcel of land.

At the hearing of the matter, the applicant appeared in person, unrepresented, whilst the 1st respondent was represented by Mr. Barnaba Luguwa, learned advocate. As for the 2nd respondent who, in previous proceedings was reported dead, the Court took a stance that the matter

against him abated, in terms of rule 57 (4) of the Court of Appeal Rules, 2009 (the Rules). This came after it was reported that no personal legal representative had been appointed to slot in his position in the proceedings, after the lapse of twelve months.

The applicant's submission was, by and large, a trace of the genesis of the matter and how he felt that the Primary Court and District Court on appeal did not address the important question of 250-acre ownership which was raised in the Primary Court. He also expressed his displeasure with how the 1st respondent's husband featured as a witness for the 2nd respondent before the Primary Court and then switch into a party in the proceedings that he instituted over the same piece of land before the DLHT. He urged the Court to investigate the role played by the 1st respondent's husband.

With regards to the proceedings in PC. Civil Appeal No. 28 of 2002, the applicant's view is that he was granted an extension of time by Shaidi, J. while at the same time contending that he was not aware if the said appeal was struck out prior to being granted the extension of time. The applicant conceded to the fact that he, at one point, instituted an application for extension of time to apply for revision but the said application was dismissed

for want of merit. He implored the Court to revise the rival proceedings which were instituted by the 1st respondent, culminating into a declaration that the land in dispute belongs to the 1st respondent's late husband.

For his part, Mr. Luguwa insisted that after the decision to strike out the appeal on 20th April, 2005, there is neither an indication that there was any application for its reinstitution nor a ruling that restored the matter or for extension of time. Not even a petition of appeal was filed thereafter. Mr. Luguwa argued that if extension of time was granted the appeal would be a fresh one, with a different case number. He argued that what is available is the record of striking out the appeal and that it is unknown how the matter fell into the hands of Shaidi, J.

Regarding the grounds of appeal, Mr. Luguwa referred us to page 19 of the record of revision which shows that there were only five grounds of appeal, as filed on 1st February 2002, and not eight as held by Shaidi, J. In his contention, the change casts doubt on the authenticity of the decision by Shaidi, J., more so where there is no decree that emanated from the judgment shown to have been delivered on 30th October, 2009 long after Oriyo, J had struck out that appeal for being time barred.

On the award of 250 acres to the applicant, Mr. Luguwa's take is that the same is inconsistent with the proceedings. He made reference to page 4 of the record which shows that the applicant requested and was granted 40 acres and that that is what constituted his claim in the trial court. The learned advocate noted that at page 7 of the record, the land in dispute appears to be 66 acres and it is what featured in ground 4 of the grounds of appeal to the High Court.

Reverting to the proceedings and decision of the DLHT, Mr. Luguwa argued that, subsequent to the decision, the applicant attempted to reverse it but his appeal was dismissed for want of prosecution while attempts to restore it fell through because the application was time barred. He submitted that the decision of the DLHT is yet to be vacated and it represents the correct position as it involved both parties.

In rejoinder, the applicant leapt to the defence of the decision by Shaidi, J., while in the case of the decision of the DLHT the contention is that there was no visit to the *locus in quo* prior to making the decision. He maintained that the decision by the DLHT should be quashed and set aside.

Having dispassionately considered the parties' rival submissions we are now ready to pronounce ourselves on the areas of contention. It is common ground that the power of the Court to call for and examine record of proceedings before the High Court are enshrined in the provisions of section 4 (3) of the Appellate Jurisdiction Act (AJA). Under the cited provision, exercise of the Court's power may be at the instance of the parties or at the Court's own motion. For ease of reference, we find it apt to reproduce the said provision as hereunder:

> *"Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

From the submissions by both parties to this case, one thing is certain between them. That there is a serious disquiet on the manner in which the question of ownership of the disputed land between the parties was resolved. The difference, however, resides in the areas of consternation by the parties. Whilst the applicant has issues with the decision of the DLHT

that handed victory to the 1st respondent, the respondents' unhappiness is with the decision of Shaidi, J. Our review of the record does not convey any feeling that the proceedings of the DLHT in which the applicant was involved as a respondent are blemished. This means that our focus will be on the proceedings relating to PC. Civil Appeal No. 28 of 2002 from which this revision arises.

As stated earlier on, the judgment by Shaidi, J in PC. Civil Appeal No. 28 of 2002 is laden with a number of issues that raise eyebrows. The most dominant of the issues is the opacity that characterized the events subsequent to 20th April, 2005. Nothing explains how the case that had been struck out by Oriyo, J., (as she then was) came into being and whether there was a due process that was observed in bringing them back to the High Court. Not even the applicant was able to state, with any semblance of clarity, how he managed to put the matter back on track, besides stating, quite casually, that he thinks he was granted an extension of time to file the appeal after it had been struck out. Whether this is true or not is a matter which would be verified by glancing through the proceedings. Unfortunately, however, absence of proceedings of the matter before Shaidi, J., has denied

us the opportunity to gather as to what it took for the matter to be restored, and if, as contended by the applicant, time was extended to accommodate his appeal.

From what we know of the procedure as it currently obtains, the matter which was struck out for being time barred could only be revived through application for extension of time which would pave the way for filing a new appeal which would, most likely, bear a different number as submitted by Mr. Luguwa and filed in a different year. This process would not culminate in the restoration of PC. Civil Appeal No. 28 of 2002 which ceased to exist in the court register. Another intriguing fact is that there neither exists a ruling or order of the court to extend time nor are there proceedings for restoration of the appeal. No memorandum of appeal was located from the record, either.

But assuming, for the sake of argument, that the appeal struck out by Oriyo, J was restored and it maintained the same case number, several pertinent issues beg for answers. One, that the grounds of appeal considered by the learned judge of the High Court were eight as opposed to five which founded the appeal purported to have been restored; two, the judgment is

not related to claims raised by the applicant. This is specifically with regards to declaring that the applicant's ownership of land was for 250 acres and not 40 or 66 which were cited in the lower courts' proceedings; three, no service was effected on the 2nd respondent, a party to the proceedings in the Primary Court and District Court, inviting him to a hearing before Shaidi, J.; four, looking at the judgment further again, nothing conveys any feeling that hearing of the appeal was conducted, and that both parties or at least the 1st respondent against whom the appeal was preferred, fielded any representation and was allowed to speak in support or opposition of the appeal.

The anomalies enumerated above point to one irresistible conclusion which is that there is no proof that the purported judgment by Shaidi, J. arises from any valid appeal before the High Court.

Reverting to the substance of the judgment, we feel constrained to dig a little deeper into the High Court's expression of an unrivaled generosity by declaring that the applicant was the lawful owner of 250 acres of land allegedly allocated to him. So strange was the decision that we had to scrupulously review the record of proceedings in the trial court and the 1st

appellate court. What we gathered is that, at no point in time in the entirety of and at every stage the proceedings, did the applicant seek a declaration that he is the lawful owner of the suit land, measuring 250 acres. Instead, as alluded to above, the applicant is quoted at page 4 of the record, saying that his land measured 40 acres out of which he cleared two acres. The furthest that the applicant went in terms of staking a claim on the piece of land is contending that he was allocated 66 acres. This was testified by PW5 (page 7 of the record). While we take cognizance of the disparity in the size of land allegedly belonging to the applicant, as testified by him and PW5, we entertain no doubt that such disparity did not settle on 250 acres as the size of what is alleged to belong to the applicant.

If we assume that the appeal was properly placed before Shaidi, J., which is highly doubtful, it is evident that the learned High Court judge awarded a relief that was neither pleaded in the pleadings nor prayed by the applicant. This is, in our considered view, an irregularity and a deviation from the settled position of the law, underscored in many of our decisions, that reliefs must be founded on the prayers made by the parties. In **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161, we referred the

decision of the defunct East African Court of Appeal in **Nkulabo v. Kibirige** [1973] 1 E.A. 102, in which Spry V.P. observed that, the general rule is that a relief not founded on pleadings will not be given. The defunct court went ahead and reasoned as follows:

> *"I accept that as a general statement but I do not think it can be invoked to allow the introduction of what amounts to a new cause of action. If, in a defamation case, a suit were founded on the allegation that certain words were used and then, without any amendment of the pleadings, the plaintiff was awarded damages on evidence that substantially different words were used, no defendant would know how to prepare his case and injustice rather than justice would result."*

Noteworthy, the learned Vice President of the defunct Court was inspired in his decision by an English Court in **Blay v. Pollard and Morris** [l930] 1 KB 628, 634 wherein in Scrutton L.J. made the following observations:

> *"Cases must be decided on the issue on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided the case was raised by*

himself without amending the pleadings, and in my opinion he was not entitled to take such a course."

We are also constrained to hold with respect that the learned judge's conduct was a serious violation of the law and out of bounds. It constitutes a violation of the provisions of Article 13 (6) of the Constitution of the United Republic of Tanzania, 1977, as parties to the case, especially the respondents, were not afforded the right to be heard on this new finding which came as a revelation to them. It should not be lost on anybody that, the right to be heard is part of *audi alteram partem*, a Latin maxim which is described as a principle which protects against the arbitrary exercise of power by ensuring fair play. It literally means *"no one shall be condemned unheard"*.

Relevance of this constitutional dispensation relates to proceedings leading to award of 250 acres to the applicant, a one-sided affair that did not consider the rights that the respondents asserted in the subject matter of the appeal proceedings. It is an action that the Court has detested in many of its decisions. The situation in the instant matter is akin to what the Court grappled with in **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of

2009 [2009] TZCA 17 (9 April 2009; TANZLII), wherein the applicant in an application for administration was heard in the exclusion of other interested parties. They included the Provisional Liquidator who became aware of the administration order upon service thereof on him. This attracted a revision *suo motu* from which the following postulation was made:

> *".... 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."*

Needless to say, therefore, that in the proceedings that bred the impugned decision suffer from the same malaise as that diagnosed in the cited case and several others as enumerated herein. Undoubtedly, the prescription in this case ought to mirror that of the just cited decision.

In our considered view, the aggregate of the missteps found in the impugned judgment is too significant to cast a blind eye on. They render the judgment as if it never existed and turn the entire process a nullity. They call for invocation of the revisional powers of the Court under section 4 (3) of the AJA and right the wrongs committed by the High Court. We accordingly

nullify, quash and set aside the purported judgment by Shaidi, J. What survives the annulment is the order that struck out the appeal on 20th April, 2005. We order that, since the decision of the DLHT is the only executable decision then the parties should take steps to execute it.

Given the fact that the matter was commenced at the instance of the Court, we make no order as to costs.

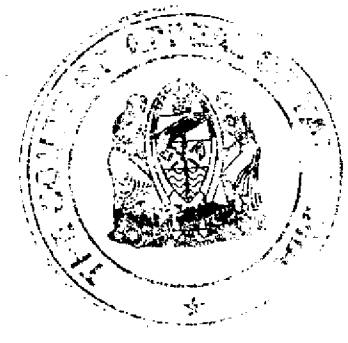
DATED at **DAR ES SALAAM** this 27th day of November, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

This Ruling delivered this 28th day of November, 2023, in the presence of the Appellant via video link facility, in the presence of Mr. Barnaba Luguwa, learned counsel for the 1st Respondent and in the absence of the 2nd Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL