IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 640/06 OF 2021

BETWEEN

PETRO ROBERT MYAVILWA (Administrator of the Estate of the Late **Robert Petro Myavilwa**).....**APPLICANT**

VERSUS

ABEL MWALIBETI..... **1ST RESPONDENT**

ERICA MYAVILWA.....**2ND RESPONDENT**

ZERA MYAVILWA.....**3RD RESPONDENT**

RAHIM A. MCHALIKWAO.....**4TH RESPONDENT**

FAGIO AUCTIONEER CO. LTD..... **5TH RESPONDENT**

(Application for Revision of the Judgment of the High Court of Tanzania, at Mbeya)

(Ndunguru, J.)

dated 5th day of October, 2021

in

Land Case No. 05 of 2020

.....

RULING OF THE COURT

20th & 23rd February, 2024

RUMANYIKA, J.A.:

The applicant, Petro Robert Myavilwa (Administrator of the Estate of the Late Robert Petro Myavilwa) seeks the indulgence of the Court to

revise the decision of the High Court of Tanzania at Mbeya ("the High Court"), dated 18th August, 2015, in Land Case No. 50 of 2014. The application is by way of a Notice of Motion predicated on section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 ("the AJA") and Rule 65(1) and (4) of the Tanzania Court of Appeal Rules, 2009 ("the Rules"). The Notice of Motion is supported by an affidavit sworn by Petro Robert Myavilwa. The respondents filed an affidavit in reply to oppose the application.

The background from which this application arises albeit briefly, tells that, before the High Court of Tanzania in Land Case No. 05 of 2020, the applicant sued Abel Mwalibeti, Erika Myavilwa, Zera Myavilwa, Rahim A. Mchalikwao and Fagio Auctioneer Co. Ltd., ("the 1st, 2nd, 3rd ,4th, and 5th respondents"), respectively, with respect to a house at Chimala village in Mbarali district ("the property"). The applicant prayed for, among other reliefs, the declaratory order that, at the time of the alleged sale of the property to the 4th respondent by the 1st respondent, it belonged to the deceased's estate under the applicant as administrator. And that, the sale is illegal. It is also noteworthy that, the applicant, the 2nd and 3rd respondents shared father, the late Robert Petro Myavilwa.

The record of application also reveals that, after the court heard the parties to the case, it transpired to the court that the appointment of the 1st respondent and that of the applicant as administrators of the same estate ran parallel, in two different probate proceedings before Chimala Primary Court. The 1st respondent was appointed first in the year 2014 and in that capacity, he sold the property, whereas the applicant was appointed long later on 04th April, 2017.

Upon receiving such serious contending averments by the parties and their witnesses, while composing his judgment, the learned Judge found the matter so contentious in that, only the probate court is seized with jurisdiction. Because of lack of jurisdiction therefore, he struck out the case directing the parties to refer it to the probate court, with a view to establishing who, between the applicant and the 1st respondent really is the administrator of that estate. For clarity, at pages 20 and 23 of the judgment, the trial learned Judge found and ordered thus:

> *"The above being a contentious matter, the question is whether this court has jurisdiction to entertain it. It is trite law that, when the claim of ownership or title stemming from the right of inheritance or purchase for value arises while the probate and administration and*

administration court is still seized with the matter, in such cases the probate administration court must determine whether title properly passed through the administrator of [the] estate.....

.....In the premises, I find this court [having] no jurisdiction to entertain this case the way it has been filed..."

Aggrieved by the decision above, the applicant filed this application, seeking a revision order, with two grounds:

1. *That the learned trial Judge erred in law for striking out the case on a jurisdictional point without hearing the parties.*
2. *That the learned trial Judge erred in law for striking out the suit without determining the issues framed.*

The applicant was represented by Mr. Mashaka Ngole, learned counsel whereas the respondents had the services of Mr. Alfred Chapa, also learned counsel, at the hearing.

At the outset, we heard both learned counsel on a preliminary objection ("the objection") which was formerly raised by the respondent's counsel. Mr. Chapa attacked the application for a revision being preferred instead of an appeal. He abandoned the other limb of the objection.

Arguing the remaining limb of the objection, Mr. Chapa contended that the application was wrongly preferred contravening the legal principle, that revision is not alternative of appeal. He therefore, urged the Court to strike out the application with costs. Since, he added, the impugned order did not dispose of the matter on merits whereas the applicant did not show that the appeal process was by any means blocked. To support his point, he cited our decisions in **Halais Pro-Chemie v. Wella A. G** [1996] TLR 269 and **Eqbal Ebrahim v. Yesseh K. Wahyungi** (Civil Application No. 202 of 2022) [2023] TZCA 17859 (21 November 2023; TanzLII).

Replying, Mr. Ngole contended that, the objection is unfortunate thus, liable to be dismissed. For, he asserted, very often than not has the Court tested rule section 4(3) of the Appellate Jurisdiction Cap. 141 R.E 2019, for instance in **Kulwa Salumu Kanjovu And Another v. Yusufu Shabani Matimbwa** (Civil Application No. 182 of 2015) [2018] TZCA 566 (9 November 2018; TanzLII), in which the Court followed its stance in **Halais Pro-Chemie case** (supra).

However, in demonstrating that, to the Court, categories of the factors to be considered for filing revision are never closed, Mr. Ngole cited **Said Nassoro Zhor And 3 Others v. Nassoro Zahor Abdula El Nabahany**

And Another, Civil Application No. 167/17 of 2017 (unreported) where the we set the three grounds. But, while being confronted with the similar problem in **Geita Gold Mine v. Truway Mumeth And Another** (Civil Appeal No. 66 of 2020) [2023] TZCA 17407 (13 July 2023; TanzLII), the learned counsel argued, the Court introduced yet a new ground for revision making four grounds in the list. That ground, he asserted, concerns an improper succession of cases amongst magistrates and it is so because the anomaly contravened the internally arranged Individual Calendar System, which constitutes a serious procedural irregularity, impropriety and incorrectness, thus a fit case for revision, and not appeal. He cited another Court's decision in **Stanbic Bank Tanzania Ltd. V. Kagera Sugar Ltd.,** Civil Application No. 57 of 2007 (unreported) to reinforce his point.

In the present case, Mr. Ngole added, pressing is the issue of denial of a right to be heard which is a glaring procedural error, as it seriously went to the root of the impugned decision thus, calling for revision. He cited Court's **Blue Rock Ltd. And Another v. Unyagala Auction Mart Ltd Court Broker And Another, Civil Application No. 69/2 of 2023** (unreported) where the Court faced the similar issue.

The learned counsel added that, the interest of justice demands that, the objection be dismissed and the Court proceed to determine on merits, to avoid further unnecessary delays and costs to the parties.

In rejoinder, Mr. Chapa reiterated his earlier submission much as he appreciated the Court's powers of revision. However, he asserted that the cases of **Kulwa Salumu Kanjovu And Another** (supra) and **Geita Gold Mine** (supra) are distinguishable with the instant application because, in the present case the issue is denial of a right of hearing whereas in the former case the issue was improper succession of the case between magistrates.

We have anxiously given due consideration to the contending submissions of the learned counsel for the parties on the preliminary objection. Having done so, we are persuaded by Mr. Ngole that the present matter raises exceptional circumstances that render it amenable to revisional intervention by the Court as opposed to appellate correction. For the argument before us is that the learned High Court judge acted irregularly and illegally by raising an issue while composing his judgment and decided the matter against the applicant by issuing an order that abruptly terminated the trial proceedings. With respect, we think that what

happened before the trial court is a matter is the realm of what we referred to as "exceptional circumstances" in **Stanbic Bank Tanzania Limited** (supra). In that case, we accepted the applicant's invitation to invoke our revisional jurisdiction as we were satisfied that there were glaring errors on the part of the High Court that called for the invocation of the more appropriate and expeditious remedy of revision as opposed to the appeal process. Accordingly, we overrule the preliminary objection.

We now turn to the merits of the application. At least the learned counsel for the parties agree on the following three vital facts: **One**, that the said Land Case No. 05 of 2020 was terminated by an order striking it out and not on the merits **two**, that the court struck out the case for want of jurisdiction. And **three**, that, in striking it out, the court did not afford the parties a hearing.

Reading it from page 70 of the record of revision, it is clear to us that hearing and recording the testimonies of ten witnesses in total for both sides, the learned High Court judge retired to compose his judgment. In the course of it, he raised the issue of jurisdiction and went on to terminate the trial proceedings without hearing the parties. He struck out the case and ordered the parties to pursue the matter before a probate court of

competent jurisdiction should they be minded doing so. This approach was plainly improper and illegal.

As regards the issue of denial of a right to be heard raised by the applicant herein, we recall the stance which has been taken several times and repeatedly by the Court in a plethora of its decisions. We stress that courts cannot have any excuse to decide matters that adversely affect the rights of the subjects without affording them a hearing. For, the omission abrogates principles of natural justice. See-for instance, **Transport Equipment v. Devram Valambhia** [1998] TLR 89 and **Mbeya – Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR 251. In the latter case the Court held that:

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

Similarly, but this time around strictly re-stating on the seriousness of the effect of the violation in issue, in **Abas Sherally and Another v.**

Abdul Sultan Haji Mohamed Fazalboy, Civil Application No. 33 of 2002 (unreported), the Court pronounced itself as follows:

> *"The right of a party to be heard before adverse action is taken against [him] has been stated and emphasized by 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 light of the authorities cited herein which we follow, we are satisfied that not only the said violation prejudiced the parties on the issue raised *suo motu* by the High Court, but also, with respect, that violation rendered the subsequent decision and orders inconsequential.

Consequently, in terms of rule 4(3) of the AJA, we nullify the High Court's proceedings which appear at page 67 of the record of revision, immediately after the closure of the defendants' case. We also quash the court's decision and set aside the subsequent order remitting the record to the probate court. We remit the record to the High Court for the parties to be heard on the issue of jurisdiction before the same learned judge who found the issue pertinent. Then, the learned judge shall compose his ruling

or judgment, as the case may be, in accordance with the law, at the earliest possible opportunity.

The application is granted. We make no order as to costs considering that the issue involved in this matter was erroneously raised and dealt with by the High Court.

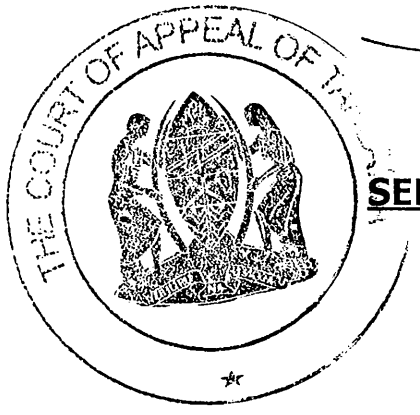
DATED at **MBEYA** this 23rd day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Applicant in person and in absence of the Respondents, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL