

IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL APPEAL NO. 240 OF 2022

CLEMENCE O. MBOWE APPELLANT

VERSUS

DONALD A. KIMAMBO1ST RESPONDENT

DAVID A. KIMAMBO2ND RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Moshi
at Moshi)**

(Maziku, Ext Jur. J.)

dated the 30th day of March, 2020

in

Civil Appeal No. 35 of 2020

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JUDGMENT OF THE COURT

12th & 22nd March, 2024.

MAIGE, J.A.:

The appellant is in this case, represented by Messrs. Gwakisa Sambo and Patrick Paul, both learned advocates. He is appealing against the decision of the Resident Magistrate's Court of Moshi with extended jurisdiction (the first appellate court) on appeal against the decision of the District Land and Housing Tribunal for Moshi (the trial tribunal). In the memorandum of appeal, the appellant has raised 7 grounds which were well addressed in his submissions through his counsel both written and oral and the Court has been urged to allow the appeal with costs. For the

reasons which shall be apparent sooner than longer, we shall not mention the respective grounds of appeal.

On their part, the respondents are and they have been since trial, represented by Mr. Chiduo Zayumba, also learned advocate. He did not draw the pleadings, however. In his submission both oral and written, Mr. Zayumba vigorously contested the appeal and urged the Court to dismiss it with costs.

Before deciding the substance of the appeal, it may be necessary to narrate albeit briefly the basic facts from which this appeal emanates. The dispute revolves around a piece of land at Plots Nos 312,313 and 314 Block "F" with CT No. 266898 (the suit property). In accordance with the respondents, the suit property was inherited by their late father Ainea Kimambo (the deceased) from his father way back in 1965 and, after his demise in 2006, it passed to them by way of inheritance under Chaga customary law. They accused the appellant for trespassing onto the suit property in 2008 and subsequently, surveying and registering it in his name.

In his written statement of defence and evidence, the appellant denied the respondent's claim and asserted ownership of the suit property. On top of that, he questioned, by way of a notice of preliminary

objection, the maintainability of the suit for being *res-judicata*. In its decision, the trial tribunal framed the preliminary objection into an issue and determined it along with the substance of the suit. As can be seen at page 335 of the record, the trial court sustained the preliminary objection and held that the suit was *res-judicata* to the decision in Application No. 80 of 2009 which was dismissed by the trial tribunal in 2010. What appears to be unusual is that, after sustaining the preliminary objection, the trial tribunal proceeded to determine the suit on merit and, at the end, declared the appellant the lawful owners of the suit property.

Being unhappy with the decision, the respondents appealed to the High Court and the matter was transferred to the resident magistrate's court of Moshi to be dealt with by Maziku, a principal resident magistrate with extended jurisdiction. The memorandum of appeal before the resident magistrate's court comprised of ten grounds. With the exception of grounds 7 and 8 which were related to the issue of *res-judicata*, the remaining grounds sought to fault trial court's determination of the substance of the claim. In his judgment, the resident magistrate with extended jurisdiction, reversed the decision of the trial tribunal and declared the respondents the lawful owner of the suit property, the decision which was negatively received by the appellant and henceforth the instant appeal.

We noted from page 338 of the record that, in its decision, the trial tribunal relied on, among others, the *ex parte* judgment of the trial tribunal in Application No. 97 of 2012 which appears at page 241 of the record and the eviction order arising therefrom which appears at page 244 of the record. It was also relied upon by the appellate magistrate in deciding the appeal as can be seen at page 471 of the record. In the said *ex parte* judgment, the parties were the first respondent as an attorney of the administrator of the estate of his deceased father and Fuyael A. Kimambo from whom the appellant traces its root of title on the suit property. There is no dispute that, the said decision and the consequential eviction order was pronounced by the respondent's advocate in his previous capacity as the chairperson of the tribunal. As he was discharging judicial functions, his position by then could be equated with that of a judicial officer. We note that, in his evidence at page 173 of the record, the appellant stated:

"In this case on the hearing date Advocate Jonathan Mushy wrote a letter seeking adjournment as he was attending murder cases, I therefore appeared before Hon. Zayumba. But when I left Hon. Zayumba proceeded ex parte on the same date."

Again, as per page 181 of the record, the appellant expressed, in a layman language, how advocate Zayumba was in conflict of interest between his previous position as a judicial officer and his new position as an advocate. In particular, he said:

"Though I do not know the law but since advocate Zayumba is the one who gave decision, I cannot tell what the law says. I also met Adv. Zayumba at the suit land with Donald Kimambo. He had personal interest. "

The same issue was also raised in the submissions for the appellant before the first appellate court as reflected at page 468 of the record. It is surprising, however that, the two courts below proceeded to determine the matter on merit without addressing and resolving this very pertinent issue. To ensure that justice is seen to have been done, we asked the counsel to address us on that issue.

In response, Mr. Sambo contented that since he determined a case involving the parties and/or their privies in respect of the same subject matter of dispute, Mr. Zayumba had an apparent conflict of interest and it was fatally irregular for him to represent the respondents in this matter. He, therefore, urged us to invoke our revisional jurisdiction and quash the proceedings and decisions of both the trial tribunal and the first appellate court as they are a nullity in law.

On his part, Mr. Zayumba admitted to be the author of both the *ex parte* judgment and the eviction order but contended that he was not barred by any law from representing the respondents in this matter. He denied to have any conflict of interest in this matter because the decisions in question were made while he was a chairperson of the tribunal, the position which he is no longer holding. In any event, he further submitted, the piece of land, the subject of litigation in the said decision, was different from the one at issue. He prayed, therefore that, the complaint be dismissed.

It is common ground that, the *ex parte* judgment between the first respondent as an attorney of the administrator of the estate of his deceased father and the appellant's predecessor in title was decided by advocate Zayumba when he was the chairman of the trial tribunal. It is also clear from the record and parties are not in dispute that before the eviction was carried out, the appellant commenced objection proceedings wherein it was declared that he was not liable to be evicted in execution of the said decree. This is reflected in the decision of the trial tribunal as it appears at page 338 of the record. Mr. Zayumba submits that the property involved therein is different from the suit property. That was perhaps one of the respondents' argument in advance of their case. The respondent's defence, however, has been, right from the beginning that,

the property in the two cases is the same. The dispute, it would appear, has been whether the said land is what the appellant purchased from Fuyael. Commenting on this, the first appellate court said at page 482 of the record as follows:

"The appellants stated that the respondent invaded the suit land in 2017 while the respondent said that he bought the land in 2008 and started the construction. It is also likely that the respondent bought another land other than the suit property that is why the appellants raised an alarm in 2017 when they saw a fence and building materials in their land."

Therefore, without deciding whether what the appellant alleged to have purchased from the said Fuyael was part of the suit property or not, we are of the view that the dispute in the two cases were similar. The respondents, it would appear, instituted this case after the decision of the trial tribunal in objectional proceeding that the appellant is not liable for eviction in execution of the *ex parte* decree.

If we understood him well, Mr. Zayumba has suggested in his submission that, there is no law which bars an advocate to represent a client in respect of a matter he dealt with as he was a judicial officer. He was empathetic that since he is no longer a chairman of the tribunal, he was not in conflict of interest in representing the respondents. With

respect, we cannot agree with him. We shall make our reasons clear gradually as we go along.

In the first place, the law is not, as he claimed, silent on whether an advocate with a conflict of interest in the subject matter of dispute can take a conduct of the same. Regulation 35 of the Advocates (Professional Conduct and Etiquette) Regulations, GN No. 118 of 2018 expressly bars an advocate to take a conduct in a matter in which he has conflict of interest. Regulation 45(1) of the Regulations defines a conflict of interest in the following words:

"45-(1) A conflict of interest is one that would likely to affect adversely the advocate's judgment or advice on behalf of, or loyalty to a client or prospective client".

Regulation 46 (1) (b) bars an advocate to act in a matter he had previously acted as a mediator or arbitrator. This would syllogistically, in our view, apply in matters like this, where an advocate previously acted as an adjudicator. It would equally apply to a judicial officer in respect of a matter he acted upon when he was still an advocate. This is also stated in Halsbury's Laws of England (Simond's edition) Vol. 3 page 48 thereof, a statement which we subscribe to, as follows:

"If counsel who has advised on or been engaged in a case is raised to the Bench, and the same case

comes before him, the practice is for him to refuse to adjudicate it."

In this case, advocate Zayumba acted on the dispute when he was the chairman of the trial tribunal. By the advantage of being a judicial officer, he was able to procure information of the cases of both sides. Now that, he has been instructed and is representing one of the parties, it is a matter of common sense that he cannot strike a balance between his professional duty to uphold justice and his personal interest or interest of his client. In **UAP Insurance Tanzania Limited v. Akiba Commercial Bank PLC**, Civil Appeal No. 135 of 2022 (unreported), we observed:

"Conflict of interest would arise when the advocate is required to uphold justice but his personal interest or interest of his client reveals a contrary intention".

In our view, by representing a client in a matter he previously acted as a judicial officer, an advocate breaches his duty to provide his client with complete and undivided loyalty, dedication, full disclosure and good faith and the duty to uphold justice and importantly, a duty to preserve confidence in the administration of justice. We think, justice will not be seen to have been done and members of the public will lose confidence with the administration of justice if a person who acted on a matter as a

judicial officer is subsequently allowed to act in the same matter as an advocate. In the English case of **Oceanic Life Limited v. HIH Casualty @ General Insurance Limited** [1931] KB 38 which was referred in **UAP Insurance Tanzania Limited** (supra), it was observed:

"In the realm of conflicts of interest and conflicts of duty, the lawyers' duty to the court may not be much different from his or her fiduciary duties to former and present clients. However, the duty to the court tends to be expressed in such a way as to emphasise the public interest in preserving confidence in the administration of justice .."

In our view, as a final appellate court, this Court has a duty to correct errors which seriously affect fairness, integrity and reputation of judicial proceedings. We have no doubt that if what transpired at the tribunal and the first appellate court is left to stand, it will diminish public confidence in the administration of justice which is not expected from a country which is governed by rule of law and constitutionalism. As we are about to wind up, we find it desirable to repeat the wise statement of the Supreme Court of USA in **Offutt v. United States**, 348 U.S. 11,14 [1954] that, *"Justice must satisfy the appearance of justice."*

Having said that, we conclude that, the two courts below were wrong in allowing advocate Zayumba to take the conduct of this matter

despite the fact that he acted on it when he was a judicial officer. The effect of the said irregularity, we held in **UAP Insurance Tanzania Limited** (supra), is to render the all the proceedings involved a nullity. Invoking our revisional powers under section 4(2) of the Appellate Jurisdiction Act, therefore, we quash the proceedings of the first appellate court and the tribunal with the exception of the pleadings and set aside judgments and decrees thereof. Consequently, we remit the record to the trial tribunal to be dealt with by another chairperson. Costs in the present appeal shall abide the outcome of the application.

DATED at **MOSHI** this 21st day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL



The Judgment delivered this 22nd day of March, 2024 in the presence of Mr. Patrick Paul, learned advocate for the appellant, Mr. Chiduo Zayumba, learned advocate for the respondents and both parties in persons; is hereby certified as a true copy of the original.

A handwritten signature in blue ink, appearing to be "W. A. Hamza", is written over the printed name and title.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL