IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 565 OF 2023

SWEETBERT MATHIAS KUTAGA
(Duly constituted Attorney of
Alizara Kasamali Rajani) ..... **APPELLANT**

VERSUS

EUGENIA RUTATORA .....**1ST RESPONDENT**

WILSON MUJWAHUZI RUTATORA .....**2ND RESPONDENT**

RAVJI CONSTRUCTION LIMITED .....**3RD RESPONDENT**

JOSHUA E. MWAITUKA
(t/a Fosters Auctioneers & General Traders) .....**4TH RESPONDENT**

(Appeal from the Ruling and Order of the High Court of Tanzania

(Land Division) at Dar es Salaam)

(Opiyo, J.)

dated 24th day of February, 2021

in

Land Case No. 72 of 2020

.....

JUDGMENT OF THE COURT

21st March & 12th April, 2024

ISMAIL, J.A.:

This appeal is a play out of an ownership wrangle over a piece of land registered as Plot No. 105 Mbezi Light Industrial Area, in Dar es Salaam, comprised in a Certificate of Title No. 44512 (the suit property). Distinctly, save for the 4th respondent, each of the remaining parties to this appeal

claim ownership of the suit property. It is because of that sense of ownership by each of the said parties that they found themselves embroiled in multi-pronged court proceedings. One of such proceedings relates to Land Case No. 72 of 2020 from which this appeal arises. In the said matter, the appellant, a loser in Miscellaneous Land Application No. 833 of 2016 (objection proceedings) sought to object to the 1st and 2nd respondents' quest for execution of a decree in Land Case No. 141 of 2012. The decree was issued in favour of 1st and 2nd respondents against the 3rd respondent, effectively placing ownership of the suit property in the former's ownership and control.

The objection proceedings fell through and, vide a ruling delivered by the High Court on 6th April, 2020, the appellant was advised to exercise his right under Order XXI rule 62 of the Civil Procedure Code (the CPC). It is in view thereof, that the appellant instituted Land Case No. 72 of 2020 whose trial was nipped in the bud, following a ruling on a point of law raised *suo motu* in respect of "attainability of the suit in terms of section 38 of the CPC and the *locus standi* of the plaintiff." The question was premised on a settlement of Land Case No. 95 of 2014 recorded between the appellant and the 3rd respondent, culminating in a settlement decree. In the end, the trial

court found that the appellant "lacked *locus standi* to stake a claim over property which is no longer his".

In brief terms, the facts constituting the parties' dispute are to the effect that, the 1st and 2nd respondents instituted Land Case No. 141 of 2012, claiming ownership of a 2 ½- acre piece of land situated at Salasala area, along Bagamoyo Road in Kinondoni Municipality, in Dar es Salaam. The defendants in the case were the 3rd respondent and two others, and the claim was that the disputed land had been encroached upon by the defendants who demolished the structure built thereon, in the process. In that case, the High Court ruled that the said 2 ½ - acre land belonged to the 1st and 2nd respondents.

During the pendency of Land Case No. 141 of 2012, Murtaza Alihussein Dewji, a duly constituted attorney of Aiiraza Kassamali Rajani, instituted Land Case No. 95 of 2014, impleading Govind Varsani Ravji and the 3rd respondent as joint defendants on an allegation of breach of a memorandum of understanding (MoU) for disposition of the suit property. The contention by Mr. Dewji, whose role was subsequently taken up by the present appellant, was that, owing to the defendants' failure to honour the terms of the sale of the said property, the contract of sale stood avoided. The court was also urged to order a forfeiture of US$ 600,000.00 paid in partial fulfilment of the

consideration that stood at US$ 1,200,000.00. These claims were initially resisted by the defendants (including the 3rd respondent), only to be acceded to, when the parties decided to reach a settlement which culminated in the issuance of a settlement decree. One of the terms in the decree was that transfer of the appellant's title to the suit property would only pass upon payment of the balance sum which stood at US$ 200,000.00.

Midway through the proceedings instituted by the appellant, the 1st and 2nd respondents, the decree holders in their own right, commenced execution proceedings which entailed eviction of the judgment debtors who included the 3rd respondent. This happened while the 3rd respondent was yet to settle the remainder of the purchase price, and it ruffled the appellant's 'feathers'. He came forward and challenged the execution through institution of Miscellaneous Land Application No. 833 of 2016, objecting to the execution on the reason that he retains interest in the suit property as the 3rd respondent was yet to fulfil her part of the bargain. The objection proceedings were dismissed by the High Court, meaning that the appellant had not satisfied the court that he had a right to protect over the suit property.

Feeling hard done by the dismissal of the objection proceedings, the appellant chose to institute a fresh suit as earlier stated, in terms of Order

XXI rule 62 of the CPC, christened as Land Case No. 72 of 2020, which, however, did not live to see the light of the day as it was struck out upon the trial court's conviction that the appellant did not have a *locus standi* to institute a claim on the property that had changed hands to the 3rd respondent. In the learned Judge's view, the appropriate course of action was to pursue the matter through execution of the consent decree under section 38 (1) of the CPC.

Perturbed by this decision, the appellant escalated his grievance to this Court. The memorandum of appeal which founded this appeal has raised four grounds of appeal which draw one broad point of dissatisfaction. This is to the effect that, the trial court erred in law in holding that the losing party's right o institute a civil action under Order XXI rule 62 of the CPC, upon dismissal of the objection proceedings is not automatic, and that it is dependent on attainability of other factors.

At the hearing of the appeal, the appellant enjoyed the services of Mr. Elisa Msuya, learned counsel, who was assisted by Mses. Zakia Riyaz Ally, Regina Kiumba and Neema Mahunga, all learned counsel. Appearing for the 1st and 2nd respondents was Mr. Emmanuel Nkoma, learned counsel, whereas Mr. Norbert Mlwale, learned advocate, represented the 3rd respondent. The 4th respondent was absent.

As we were satisfied that the 4th respondent was duly served, we granted Mr. Msuya's prayer to proceed in his absence under rule 112 (2) of the Tanzania Court of Appeal Rules, 2009.

With regard to the grounds of appeal, Mr. Msuya's approach was to argue the grounds of appeal in a combined fashion. Referring to Land Case No. 141 of 2012, his argument was that the appellant was not a party thereto. He contended that the objection proceedings which challenged the execution of the decree passed in the 1st and 2nd respondents' favour were in respect of Plot No. 105 instead of a 2 ½ - acre land. The learned counsel contended that, while dismissing the application, the High Court stated that aggrieved parties were at liberty to pursue an action under Order XXI rule 62 of the CPC. Mr. Msuya was unhappy with the decision that held that preference of a fresh suit was not an automatic right.

On the applicability of rule 62 of Order XXI of the CPC, the argument by Mr. Msuya was that the said provision is clear on its import and intent, in that an aggrieved party is free to institute a fresh suit and that there are no conditions attached to it. On the High Court's reasoning that a decreed party cannot institute a fresh suit, Mr. Msuya took the view that such decision is flawed.

Regarding transfer of the suit property to the 3rd respondent, his argument was that, payment of the balance sum of US$ 200,000.00 was to be made before the hand-over of the property on Plot No. 105 and execution of transfer documents. In the absence of evidence of payment of the said sum, he contended, the appellant's rights are not extinguished. On whether issues relating to execution of the decree in Land Case No. 95 of 2014 can be resolved through section 38 of the CPC, the argument by the learned counsel was that, that would not be possible where the 1st and 2nd respondents were not parties to Land Case No. 95 of 2014. On this, he referred us to Mulla, The Code of Civil Procedure, 16th Edition, Volume I.

Addressing us on the *locus standi*, the contention by Mr. Msuya was that such matter could only be resolved if the trial hearing was conducted. That would also include determination of issues relating to identity of the property in contention, including the size of the said property. He implored us to find fault in the High Court's decision and allow the appeal.

In his rebuttal address, Mr. Nkoma was in agreement that the remedy that is available to a party aggrieved by the ruling on objection proceedings is to institute a fresh suit. He argued, however, that, that right is not available on every occasion that objection proceedings are dismissed. The learned counsel was emphatic that the court has powers to cut short the proceedings

and that, in this case, the appellant had an alternative avenue under section 38 of the CPC.

Regarding the contention that the appellant had no *locus standi*, Mr. Nkoma leapt to the trial court's defence and argued that, having relinquished his right in the suit property, the appellant had no *locus standi,* and that this was discernible from the pleadings. In his contention the court became *functus officio,* the moment it decided that the appellant had no *locus standi.* He conceded, however, that the issue of *locus standi* was yet to be dealt with in substance.

Distinguishing the applicability of Mulla (supra), the contention by Mr. Nkoma was that, in the instant matter, the appellant did not have the *locus standi.*

For his part, Mr. Mlwale, who did not file written submissions, was in support of the appeal. While imploring the Court to allow it, he urged that there should be no order as to costs against the 3rd respondent, contending that, having paid so much since 2011 and yet to enjoy the fruits of the acquisition of the suit property, condemning her to costs would compound her woes. Probed on whether the consent decree effectively transferred title from the appellant to 3rd respondent, the response by Mr. Mlwale was that

payment of the balance sum ought to have come first before the handover of the title deed.

In rejoinder, Mr. Msuya maintained that one can only establish his right in a suit after the matter is heard. On the actual size of the disputed property, he contended that the area in the certificate of title is equal to 1.8 acres and not 2 ½ acres. He did not press for costs against the 3rd respondent.

As stated earlier on, the Court is called upon to pronounce itself on one singular issue. It is as to whether the trial court's decision to hold that preference of suit under Order XXI rule 62 of the CPC is subject to other conditions. As we delve into this discussion, it is desirable that the substance of the said provision be reproduced. It stipulates as hereunder:

> *"Where a claim or an objection is preferred, the party against whom an order In made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."*

What we deduce from the provision is that, the recourse that a loser of the objection proceedings has is to institute a suit through which the right he claims in the property may be established. Instructively, pursuit of this course of action is, in our considered view, out of the realization that the decision in the objection proceedings is final and conclusive, meaning that it

is not amenable to appeal or revisional proceedings. This position has been underscored by the Court in numerous decisions. In **Bank of Tanzania v. Devram P. Valambhia**, Civil Reference No. 4 of 2002 (unreported), this Court observed as follows:

> *"Our reading of the rule extracted above, makes it abundantly clear that if no suit is instituted by the party against whom the order is made under this rule, and subject to the result of the suit, the order is conclusive. In our view, in the course of the suit the party against whom the order was made can among others, challenge the validity or otherwise of garnishee order as well as establishing its rights. The decision from such a suit would, we venture to think, be open to appeal. On the other hand, if no suit is preferred, like the Single Judge, we are of the view that the order remains intact and conclusive. That in our view is the import of rule 62 of order 21."*

See also: **Khalid Hussein Muccadam v. Ngulo Mtiga (as legal personal representative of the Estate of Abubakar Said Mtiga & 2 Others**, Civil Application No. 405/17 of 2019; and **Sosthenes Bruno & Another v. Flora Shauri**, Civil Appeal No. 249 of 2020 (both unreported).

We gather from the record of appeal and the contending submissions that, the basis for the learned trial Judge's finding was that the appellant

had already passed on his ownership rights to the 3rd respondent, effectively extinguishing his interest in the suit property. Her finding was grounded on the settlement decree. While it is not our intention to get to the heart of what the parties agreed in the deed of settlement that resulted in the settlement decree, we hasten to hold that, in the absence of any testimony that would interpret the import of what was contained in the settlement decree, it was quite premature and, indeed difficult, to hold, with any semblance of precision, that, the appellant's rights were extinguished the moment the deed of settlement was penned or when the decree was issued. In our settled view, need would arise for making sense of what the parties intended and if each of them fulfilled their obligations. So premature was the question of transfer of rights or title to the disputed property from the appellant, that, as we shall see shortly, even the contention that the appellant had no *locus standi* fails to resonate, in the absence of a factual account that would leave no doubt that the 3rd respondent fulfilled her part of the bargain as well.

As unanimously submitted by counsel for the parties, the trial Judge was firmly of the view that the appropriate course of action available to the appellant was to invoke section 38 (1) of the CPC, primarily because the appellant was a holder of a consent decree arising from Land Case No. 95 of

2014 between him and the 3rd respondent. As we gauge the plausibility or otherwise of the learned trial Judge's finding, it is apt that the substance of section 38 (1) of the CPC be reproduced, as follows:

> *"All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."*

Whereas we clearly discern and are aware that the object of section 38 (1) is to prohibit the multiplication of proceedings when issues arising from execution can be decided by the executing court itself, we do not agree with the learned trial Judge's attempt to broaden the scope of application of the said provision by attempting to rope in the appellant, a stranger to the proceedings in Land Case No. 141 of 2012. Doing so is, in our considered view, amounted to travelling beyond the decree or order while she had no jurisdiction to do so. Thus, in an Indian case of **Kiran Singh v. Chaman Paswan** (1954) AIR 340, from which we take inspiration, the Supreme Court of India interpreted section 47 of the Indian Code of Civil Procedure, 1908 which is *in pari materia* with section 38 (1) of the CPC, and observed that a court executing a decree must execute it as it stands, and that it has no

power to entertain any objection as to the validity, legality or correctness of the decree.

Having ruled out the applicability, by the appellant, of section 38 (1) of the CPC in the execution of the decree in Land Case No. 141 of 2012, our settled position is that, such provision cannot be used in Land Case No. 95 of 2014 as questions relating to the appellant's alleged rights in the disputed property would involve the respondents herein the majority of whom are, as far as Land Case No. 95 of 2014 is concerned, strangers who featured nowhere in the trial proceedings. It is for that reason that we hold the view that the holding by the learned trial Judge was, with respect, specious.

As we have observed earlier on, the learned trial Judge's straw that broke the camel's back was that the appellant, the plaintiff in the struck-out suit, did not have a *locus standi* as title to the disputed land had already passed the moment he sold it to the 3rd respondent. She also held that, in view thereof, the court was also *functus officio*. Mr. Msuya has taken an exception to this contention, arguing that the decision by Maige, J (as he then was) did not discuss the competence or otherwise of the suit. In any case, the learned counsel argued, the talk of the court being *functus officio* was pre-mature as no determination was done on the question of the appellant's *locus standi*. Mr. Nkoma finds no fault in the trial Judge's finding,

and that the appellant's interest in the land ceased when he sold it to the 3rd respondent. We will revert to this argument shortly.

Having eliminated all the possibilities of applying section 38 (1) of the CPC, we are constrained to agree with Mr. Msuya, and hold that the exercise of the right accorded to a party under Order XXI rule 62 of the CPC is free from any conditions not stipulated in rule 62. We are satisfied that the only condition, an eligibility criterion, which we think was sufficiently fulfilled by the appellant is that he was an objector in the application that he lost, and that the result of such application was the issuance of an order which cannot be challenged in any other way than through commencement of a fresh suit for establishment or proof of his right. Nothing stood in the appellant's way after his application had fallen through, and that the question of whether the appellant's title passed with the passage of the decree are matters which could feature in the course of the trial proceedings of the suit that the learned trial Judge nipped in the bud.

Turning on to the question of *locus standi*, our analysis on this point may be prefaced by bringing an understanding of what a *locus standi* is in a case. While describing the principle, this Court did, in **The Registered Trustee of SOS Children's Villages Tanzania v. Igenge Charles & 9 Others**, Civil Application No. 426/08 of 2018 (unreported), borrow a leaf

from the Supreme Court of Malawi's decision in the case of **The Attorney General v. Malawi Congress Party & Another**, Civil Appeal No. 32 of 1996 and observed:

> *"Locus standi is a jurisdictional issue, it is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently close relation to it so as to give a right which requires prosecution of infringement of which he brings the action."*

The conclusion we draw from the foregoing excerpt is, as we observed in **The Registered Trustee of SOS Children's Villages Tanzania** (supra) that, for there to be a *locus standi*, *"a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with."*

Whilst it is not our intention to pronounce ourselves, at this juncture, on whether the appellant had *locus standi* in the matter he instituted, we are constrained to agree with Mr. Msuya that, the question of whether the appellant had right or interest in the matter and whether such right or interest had been breached were issues which would be navigated in the course of the trial and would most likely require leading evidence. It is crucial

to note that, in the course of his brief submissions, Mr. Mlwale was convinced that transfer of title to his client, the 3rd respondent, was subject to fulfilment of the latter's obligation which entailed payment of the sum due. As we hold the view that the learned counsel's argument is not an admission of his client's failure to perform her obligations, we are inclined to believe that, it helps to cement our view and agree with Mr. Msuya that passage of title to the 3rd respondent was a matter in contention and it would only be resolved in the course of the trial.

We are further constrained to hold that the contention that the appellant did not have a *locus standi* was, in our considered view, 'an idea whose time had not come', and the trial Judge's decision to determine it at the earliest stage of the proceedings was a little wayward.

It is in view of the foregoing, that we find the appeal meritorious and hold that the High Court erred when it struck out the suit on the ground that the appellant did not have what it takes to institute a suit for the claim of ownership. Accordingly, we allow the appeal and set aside the ruling and order of the High Court in Land Case No. 72 of 2020. Simultaneously, we quash all proceedings of the High Court ranging between 15th June 2020 and 24th February 2021. We also remit the original record to the trial court to

proceed with the case according to law. Costs of the matter shall be in the cause.

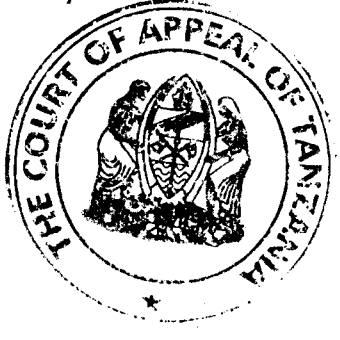
DATED at **DAR ES SALAAM** this 9th day of April, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

This Judgment delivered this 12th day of April, 2024, in the presence of Ms. Irene Mchau, learned counsel for the Appellant, Mr. Emmanuel Nkoma, learned counsel for the 1st & 2nd Respondents, Mr. Norbert Mlwale, learned counsel for th 3rd Respondent and in absent of the 4th Respondent is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL