IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 388 OF 2022

ABUBAKAR KHALID HAJI..... FIRST APPELLANT
GEMACO AUCTION MART INTERNATIONAL LTD..... SECOND APPELLANT
VERSUS
ZAMZAM YUSUF MUSHI..... FIRST RESPONDENT
YUSUF HAMIS MUSHI.....SECOND RESPONDENT
FRANK LIONEL MARIALLE..... THIRD RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Maghimbi, J.)

dated the 24th day of September, 2019
in
Misc. Land Application No. 472 of 2019

.....

JUDGMENT OF THE COURT

7th & 14th June, 2024

KIHWELO, J.A.:

The genesis of the instant appeal is Land Case No. 142 of 2016 ("the suit") which was filed in the High Court of Tanzania, Land Division at Dar es Salaam by the first and second respondents against the appellants and the third respondent. The suit was in relation to recovery of the matrimonial property situated at Plot No. 139, Migombani Street, Regent Estate, Kinondoni Municipality, Dar es Salaam comprised under the Certificate of Title No. 186152/69. We shall henceforth refer to the described premises simply as "the suit property."

The factual background of this matter that are germane to the instant appeal may be recapitulated briefly as follows: The first and the second respondents who are spouses, lodged the aforementioned suit seeking to nullify a sale by public auction of the suit property which took place on 22nd April, 2012. More precise, the sale of the suit property was made to the first appellant as the highest bidder in satisfaction of the judgment and decree of the High Court in Consolidated Land Cases Nos. 76 & 91 of 2004 in which the first appellant was awarded general damages to the tune of TZS.150,000,000.00 as against the second respondent, Merchant Venture (T) Ltd and Agro Import (T) Ltd. Consequently, the first and second respondents were commanded by the second appellant to vacate the suit property to pave way for the first appellant take possession of it.

It occurred that, the first and second respondents were not amused by the auction and sale of the suit property, they approached the High Court as alluded to above seeking to nullify the sale and transfer of the suit property to the first appellant, on account that, the auction was fraudulently conducted owing to the fact that the first and second respondents were not made aware of any execution proceedings and the said public auction could not have been conducted while there was a valid

order of the High Court dated 20th April, 2012 restraining the sale of the suit property.

The appellants and the third respondent lodged written statements of defence sturdily contesting the claim by the first and the second respondents. In the course of the trial the appellants and the third respondent raised a preliminary objection that, the suit was instituted out of the time prescribed by law. At the height of the determination of the preliminary objection which was disposed through written submission, on 21st August, 2019, the High Court (Kairo, J., as she then was), was satisfied that the suit was barred by the Law of Limitation Act, Cap 89 (the Limitation Act) and therefore dismissed it with costs.

Sequel to that, the first respondent on 22nd August, 2019 lodged Miscellaneous Land Application No. 472 of 2019 in terms of Section 78 (1) (a) and (b) and Order XLII Rule 1 (1) (a) and (b) of the Civil Procedure Code, Cap 33 (the CPC) with one ground seeking to review the decision of the High Court that dismissed the suit under section 3 of the Limitation Act on account that it was lodged out of the time prescribed by law and without leave of the court. Later on, the first respondent through the services of Mr. Salim Mushi, learned counsel prayed and was granted leave to lodged in court supplementary memorandum of review containing

two additional grounds for review which essentially faulted the High Court among other things, for dismissing the suit in total disregard of the fact that the first respondent was not a party to the execution proceedings which led to the sale of the suit property and therefore was not barred by the law of limitation. It is noteworthy that, the determination of the review was entirely based upon this ground of review as the presiding Judge (Maghimbi, J.) found it that the other two grounds were suited for the appellate court and not a review court.

On 24th September, 2019, the High Court (Maghimbi, J.) upon considering the written submissions that were lodged by the parties, found it proven that there was an error apparent on the face of record which merited the application and consequently, she allowed the application, set aside the order dismissing the suit and ordered the suit to proceed with the hearing of the defence on a date to be scheduled by the Judge who will be assigned to proceed with the matter. The first respondent was awarded costs of the application.

Feeling that justice was not rendered, and in further quest for justice, the appellants sought to impugn the verdict of the review Judge (Maghimbi, J.), and on 2nd September, 2022 they lodged the present appeal through the joint services of Mr. George Kato Mushumba learned

counsel of George Kato Mushumba (Advocates) and Mr. Derrick Paschal Kahigi, learned counsel of Curia Attorneys. Initially, the appeal was premised on four grounds which for reasons to be apparent shortly we shall not take the pain to reproduce them at this juncture.

Before us, the appellants were represented Mr. George Kato Mushumba who teamed up with Mr. Derrick Paschal Kahigi, both learned counsel, the first respondent was represented by Mr. Salim Juma Mushi, learned counsel, whereas Ms. Agnes Dominic, learned counsel appeared for the second respondent and the third respondent was represented by Ms. Rita Odunga Chihoma, learned counsel.

At the outset, before hearing of the appeal could commence in earnest, Mr. Mushi conceded, with remarkable forthrightness, that looking at the additional ground of appeal, the appeal has merit and urged us to allow it, on the basis of the sole additional ground of appeal. However, he hastened to say that the respondents should not be condemned to costs. On their part, Ms. Dominic and Ms. Chihoma wholeheartedly stood by Mr. Mushi's concession and prayer without more which concession was welcomed by Mr. Kahigi who urged us to allow the appeal, quash the proceedings and set aside the subsequent orders thereof and direct the matter to remain with the decision of Kairo, J (as she then was). He

further prayed that the appellants should have their costs. Mr. Mushi had an opposing view on the way forward, for in his view, the remedy is to nullify the proceedings of the review Judge, set aside her decision and the subsequent orders and direct the matter to proceed for hearing and determination of the review before another Judge. The view by Mr. Mushi was shared with Ms. Dominic and Ms. Chihoma.

Speaking of the additional ground of appeal, the appellants' counsel sought leave of the Court to introduce it, in terms of rule 106 (2) (b) (ii) of the Tanzania Court of Appeal Rules, 2009, which was to the effect that; the review Judge erred to entertain the application for review in contravention of Order XLII rule 5 (1) and (2) of the CPC.

In their written submissions in support of the additional ground, the appellants' counsel were fairly brief, but straight to the point, and contended that, a cursory perusal of the proceedings of the review application, more precisely pages 271 to 274 they are conspicuously silent on why the review application was not heard and determined by the very Judge who determined the suit and dismissed it. The counsel for the appellants referred us to rule 5 (1) of Order XLII of the CPC to support their proposition.

In the light of the foregoing submission, the vexing issue which stands for our determination is whether or not it was proper for the review Judge to entertain and determine the application for review.

Our starting point in the deliberation of this appeal which stands uncontested, we think, should involve reproduction of the relevant provisions of section 78 and Order XLII rules 1 and 5 of the CPC that governs applications for review. Section 78 (1) provides as follows:

> *"78-(1) Subject to any conditions and limitations prescribed under section 77, any person considering himself aggrieved-*
>
> *(a) by a decree or any order from which an appeal is allowed by this Code but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed by this Code,*
>
> ***may apply for review of judgment to the court which passed the decree or made the order**, and the court may make such order thereon as it thinks fit.*
>
> *(2) N/A*
>
> *(3) N/A"*

Furthermore, Order XLII rules 1 and 5 provides that:

> *"1.-(1) Any person considering himself aggrieved-*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

(b) by a decree or order from which no appeal is allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, ***may apply for review of judgment to the court which passed the decree or made the order.***

(2) N/A

2. N/A

3. N/A

4. N/A

5. - (1) Where the judge or judges, or any one of the judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the court at the time when the application for review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, ***such judge or judges or any of them shall hear the application, and no other judge or judges of the court shall hear the same.***

(2) For the purposes of this rule and rule 6, "judge" includes a magistrate".

We have emboldened the excerpts of the provisions above to exemplify that, an application for review under section 78 and Order XLII rule 1 is required to be made to the same court and by the same judge or magistrate in that matter, who passed the decree or made the order subject of review. It is instructive to recapitulate that the provisions above make it mandatory for the application for review to be determined by the same court and by the same judge or magistrate who passed the decree or order, save for the exceptions listed therein and the rationale is not far-fetched, for having himself passed the decree or issued an order sought to be revised, he is considered to be the best person positioned to appreciate, consider and answer the said application.

We take inspiration from the Erstwhile East Africa Court of Appeal in **Shyam Thanki and Others v. NED Palace Hotel (1964) Limited** (1971) 1 E.A 199 in which confronted with an akin situation the Court held that:

> *"The combined effect of section 78 and Order 42 rules 1 and 5 is to give entitlement to an aggrieved person to apply to the judge, who passed the decree or made the order, for a review of judgment. ...In other words, an application for review under section 78 and Order*

42 rule 1 is required to be made to the judge who passed the decree or made the order".

We subscribe wholly to the above holding to be the correct position of the law.

Now, coming back to the instant appeal before us, as rightly argued by the learned counsel for the appellants, and conceded to by the learned counsel for the respondents, Kairo, J., (as she then was), as a trial Judge in the suit was satisfied that the suit was barred by the Law of Limitation Act and went ahead to dismiss it with costs. Consequently, the first respondent unamused lodged the impugned application for review seeking to revise the decision of the High Court that dismissed the suit. Quite unfortunate, and for an obscure cause, the application for review though rightly lodged before the High Court which is the court which made an order, was heard and determined by Maghimbi, J. and without assigning any reasons as to why the application for review could not be heard and determined by Kairo, J., who made the order of dismissal subject of review in terms of the express and mandatory provisions of section 78 and Order XLII rule 5 (1) of the CPC.

In our respectful opinion, we think that, since the application for review was not heard and determined by Kairo, J., who made the order of dismissal subject of review, and instead was heard and determined by

Maghimbi, J. contrary to the dictates of the law and without assigning any reasons, we are constrained to agree with the unanimous position taken by the learned counsel for the appellants and the respondents that the learned Judge who determined the review embarked on an irregularity in procedure, and unfortunately, that was improper. It bears reaffirming that, the general principle, for very good reason, is that a review under Section 78 (1) (a) and (b) and Order XLII Rule 1 (1) (a) and (b) of the CPC must always be heard and determined by the same court and the same Judge or Magistrate as the case may be.

However, the exception is where that presiding Judge or Magistrate is precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers in which case a review can be heard and determined by a successor Judge or Magistrate.

In the appeal before us, records are conspicuously silent as to why the review application was heard and determined by review Judge who was not the Judge who dismissed the suit and issued the order subject of review. It seems to us beyond argument, that was irregular and both the counsel for the appellants and the respondents were profoundly

concerned about it when addressing us. We thus find that the sole additional ground of appeal has merit.

For the sake of completeness, and not that it is essential to this judgment, we wish to comment on the prayer by the counsel for the appellants that, the respondents should be condemned to costs.

It bears reaffirming that, in civil litigation, the general rule is that costs must follow the event. Costs are a panacea that soothes the souls of litigants that, in the absence of sound reasons, the Court will not be prepared to deprive the successful litigant of. These are the usual consequences of litigation to which the appellant is not exempt. In **Waljee's (Uganda) Ltd v. Ramji Punjabhai Bugerere Tea Estates Ltd** [1971] EA 188; a decision of the High Court of Uganda, Sheridan, J. (then Chief Justice of Uganda) referred to the passage in an old English case of **Cropper v. Smith** (1884), 26 Ch. D. 700 in which Bowen, L.J. had this to say at page 711 which, in our considered view, holds true today regarding costs:

> *"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a party had made a mistake in his pleadings which has put the*

other side to such a disadvantage or that it cannot be cured by the application of that healing medicine".

In this jurisdiction, Othman, J. (as he then was- later Chief Justice of Tanzania) echoed that statement of the law in **Kenedy Kamwela v. Sophia Mwangulangu & Another**, Miscellaneous Civil Application No. 31 of 2004 (unreported) which decision, like **Waljee's (Uganda)**, being one of the High Court, does not bind us. However, we find both decisions as highly persuasive and depicting the correct principle regarding costs. His Lordship observed:

"Costs are one panacea that no doubt heals such sore in litigations."

In the instant appeal before us we take into consideration that, parties were not responsible for hearing and determination of the review by the review Judge instead of the Judge who issued the order subject of review. However, we also consider the fact that, the hearing of the application was completed without objection by either side.

It follows therefore, that, the totality of the above disquieting aspects of the review application we are inclined to allow the appeal for the reasons stated above. The review proceedings are hereby nullified, the decision of the review and the subsequent orders are set aside. We

remit the record to the High Court for fresh hearing and determination of the application for review. For avoidance of doubts, the said application shall be heard and determined by a Successor Judge. In fairness to the parties and equity as explained above, we make no order as to costs considering that none of the parties were responsible for what happened.

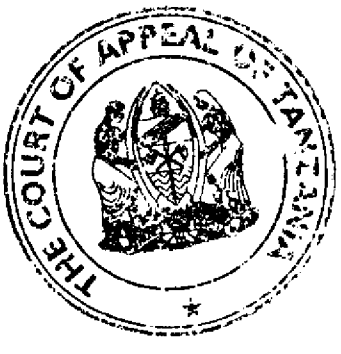
DATED at **DAR ES SALAAM** this 13th day of June, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 14th day of June, 2024 in the presence of Mr. Leobinus Mwebesa Leonidas, learned counsel for the Appellants also holding brief for Mr. Salim Juma Mushi, learned counsel for the 1st Respondents, Ms. Agnes Dominic, learned counsel for the 2nd Respondent and Ms. Rita Odunga Chihoma, learned counsel for the 3rd Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL