

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 154 OF 2015

(Originating from judgment and sentence of the District Court of Kibaha at Kibaha in
Criminal Case No. 132 of 2013 before Hon. S.A. Mshasha, SDRM)

RAPHAEL JAMES MWINUKA.....1ST APPLICANT

SOLOMON LUFUNDA.....2ND APPLICANT

MARIAM HAMIS MSANGI.....3RD APPLICANT

CHARLES MWAIPOPO.....4TH APPLICANT

MARY JABIR.....5TH APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

RULING

21 Febr. & 13 March, 2018

DYANSOBERA, J:

This is a ruling on an application for revision. The five applicants hereinabove are, in the chamber summons, seeking two main orders, that is calling for the records and revise the sentences of the District Court of Kibaha dated 19th day of August, 2015 in criminal case No. 132 of 2013 between the **Republic v. Longino Lazaro and 2 others** and this Hon. court to quash and set aside the sentence entered by the District Court of Kibaha at Kibaha in the said case ordering all the people

occupying the land known as Farm No. 487, Pangani, to vacate immediately for being made erroneously.

The application filed under sections 165 (1) and 372 (1) of the Criminal Procedure Act [Cap. 20 R.E.2002] and section 44 (1) (a) of the Magistrates' Courts Act [Cap. 11 R.E.2002] has not been resisted by the Republic as there is no filed counter affidavit.

At the hearing of this application, Mr. Tibanyendera, learned advocate represented the applicants while the Ms Nasua, learned State Attorney, stood for the respondent. The application is supported by the affidavit sworn by the applicants.

Supporting the application, counsel for the applicants submitted that the applicants are occupants of pieces of land at Pangani in Kibaha District titled Farm No. 487 which was legally allocated to them. It was counsel's further submission that in Criminal Case No. 132 of 2015 involved were Longino Lazaro, Issa Msuya and Hamza Saidi as the accused who were charged with criminal trespass c/s 199 of the Penal Code and malicious damage to property c/s 326 (1) of the same Code but the applicants were not parties to those proceedings as accused nor were they called to testify as witnesses. Unfortunately, the trial Magistrate under page 23 of the typed judgment made an order against the appellants of vacating immediately. Basing on that order, the Resident Magistrate in charge of Kibaha issued open letter dated 7.9.2015 addressed to '*Kwa yeyote anayehusika na Kiwanja Na. 487 Pangani*' and a copy served on the Ward Executive Officer ordering everyone, the applicants inclusive, who by then were occupying the said land forming part of Farm

No. 487 Pangani to give vacant possession immediately. Consequently, the police authority at Kibaha were move to issue threatening orders to the applicants and their family evicting them from the land and that the police may be engaged to demolish the houses to execute court's order. It is learned counsel's contention that all applicants claim to have legal rights over the land and that apart from the fact that they were not parties to the case, there was no pending or completed civil suit determining the rights of who was the proper owner. The execution against persons who were not parties to the case was illegal and unforceable.

Ms Nasua, learned State Attorney, in reply, stated that order of vacant possession against the applicants was properly given as they were trespassers. She argued that there is no dispute that the applicants are occupiers of the area which is subject to the court's decision and that therefore, all occupants have to comply with the court's order as the applicants have not stated how they are not related to the criminal case. Further that there is evidence that the Area Commissioner happened to reconcile the dispute. Learned State Attorney was told this court that it was not shown when the court's order will fail to be executed on the ground that the applicants were not parties to the criminal case. She prayed the court to dismiss the application.

Counsel for the applicants in rejoinder maintained that the applicants were denied the right of being heard, the issue of ownership had not been conclusively determined.

On 30th December, 2015 I observed that this application had a bearing on Criminal Appeal No. 164 of 2015 as both this appeal and this Criminal Application No. 154 of 2015 owe their origin in Criminal Case No.123 of 2013 of Kibaha District Court. I thus ordered these proceedings to be stayed pending the hearing and determination of the said Criminal Appeal.

I heard Criminal Appeal No. 164 of 2015 between Lazaro Longino who had been charged along with Issa Msuya and Hamza Saidi with criminal trespass and malicious damage to property.

Upon hearing of the appeal I found that the said Longino Lazaro who was the appellant before this court had been wrongly convicted and sentenced. I reversed the trial court's decision by quashing the conviction, setting aside the sentence and the attendant orders. In that case I was satisfied that the ownership of the land in dispute had not been determined by the proper forum and that a criminal court was not the right forum to determine the ownership of land.

In the instant case, it is true as contended by Mr. Tibanyendera, counsel for the applicants that the trial court at p. 23 of the typed judgment ordered:

“Order: All those who are still living in the said area, Farm No. 487, Pangani area to vacate immediately”.

Clearly, this order was wrong and illegal in many respects.

In the first place, the applicants who were among the persons affected by that order were not parties to that case that is they were neither the accused nor witnesses in Criminal Case No.

132 of 2015. In other words they were not heard. Ordering them to vacate was tantamount to condemning them unheard which is against the principle of natural justice and a fundamental right to be heard enshrined in the Constitution of the United Republic of Tanzania [Cap. 2 R.E.2002].

Second, judgment in criminal cases are judgment not *in personam* but *in rem*. Condemning the applicants who were not charged and convicted before a court of law was wrong.

Third, it is trite and authorities abound that criminal courts are not the proper forum to determine ownerships of land. This court has on numerous occasions insisted on this legal position. For instance in Silvery **Nkangaa v. Raphael Albertho**, [1992] TLR 110 whereby Hon. Mwalusanya, J. held:

- “...the charge of criminal trespass is not maintainable as the ownership of the land in dispute has not been resolved by a court of law in a civil suit. A criminal court is not the proper forum for determining the rights of those claiming ownership of land. Only a civil court via a civil suit can determine matters of land ownership.”

Also, Hon. Chipeta, J. in the case of **Ismail Bushaija v. R:** [1991] TLR 100, observed:

“...when, in a case of criminal trespass, a dispute arises as to the ownership of the land, the court should not proceed with the criminal charge and should advise the complainant to bring a civil action to determine the question of ownership.”

The next question to consider is whether this application for revision is properly before this court. As said before, the application has been filed, among others, under section 372 (1) of the Criminal Procedure Act which enacts as hereunder:

“372.

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.”

And the subsequent section 373 provides:

“373.

(1) In the case of any proceedings in a subordinate court, the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may–

(a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence; or

(b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal.”

The above provisions are clear that this court was properly moved under section 372 of the Criminal Procedure Act [Cap. 20 R.E.2002]. The above provisions empower the High Court to call for the records.

I therefore, invoke the provisions of paragraph (b) of subsection (1) of section 373 and reverse the trial court's order which directed all those who are still living in the said area, Farm No. 387, Pangani in Kibaha to vacate immediately.

Accordingly, I quash and set it aside.

W.P. Dyansobera

JUDGE

22.2.2018