IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

LAND REVISION NO. 30 OF 2019

CONSENSA BONEVENTULA ..... APPLICANT

VERSUS

ABDALLAH MLAMA ..... RESPONDENT

RULING

19th November, 2019; 30th June, & 29th July, 2020

ISMAIL, J.

In this application, the Court is called upon to grant the following substantive orders:

1. *That this Honourable Court be pleased to call for and inspect as to the correctness, legality or propriety of proceedings, decision and orders thereof of the District Land and Housing Tribunal for Mwanza at Mwanza in Appeal No. 36 of 2018 and that of Mahina Ward Tribunal in Land Dispute No. 111 of 2018;This is a ruling in respect of a point of law raised by the Court, suo moto, on the propriety of the pending application, in view of the fact that some of the cited the provisions of the law are irrelevant in the circumstances of the matter;*

2. *That this Honourable court be pleased to revise the appeal proceedings, decision, and orders thereof of the District Land and Housing Tribunal for*

Mwanza at Mwanza in Appeal No. 36 of 2018 dated 4th October, 2018 and that of Mahina Ward Tribunal in Land Dispute No. 111 of 2018.

The application has been preferred under the provisions of Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019); section 43 (1) a, b, (2), and section 44 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. Supporting the application is an affidavit sworn by Consesa Bonaventula, the applicant herein, and it sets out grounds on which the application is based. The averment by the applicant is that the District Land and Housing Tribunal (DLHT) committed an irregularity when it acceded to the counsel's prayer for quashing and setting aside the appeal and proceedings of the Ward Tribunal, and have the matter tried de novo. Instead, the DLHT withdrew the appeal. The applicant views this as an irregularity and a failure to exercise its powers which would see two defective decisions of the Ward Tribunal quashed as they were illegally procured.

In the counter-affidavit affirmed in response to the application, the respondent has disputed the applicant's contention. He holds the view that after discovering that the trial tribunal's judgment was defective, the appellant's counsel prayed for withdrawal of the appeal and nothing else. He averred that nullification of the proceedings was never a prayer made

by any of the parties, and he thinks that such decision was not tainted with any irregularities, incorrectness or illegalities. It was his deposition that the decision sought to be impugned was arrived at after hearing *inter-partes*.

Hearing of the application pitted Mr. Eric Katemi, learned counsel who represented the applicant, against Mr. Mwita Emmanuel, learned advocate whose services were enlisted by the respondent. Kicking off the matter was Mr. Katemi who submitted that the prayers made are predicated on what is stated in paragraph 5 of the affidavit which is to the effect that the DLHT failed to quash the proceedings and two decisions of the Ward Tribunal at Mahina. Mr. Katemi further argued that existence of two decisions was revealed by the DLHT and that, subsequent thereto, on 9th August, 2018, the DLHT summoned the parties with a view to addressing the DLHT on the existence of two unsigned decisions of the Ward Tribunal. The learned counsel further argued that on 4th October, 2018, the applicant's counsel addressed the DLHT that indeed there were two decisions, one of which was typed but signed by a few members, and that he prayed that the proceedings which bred the defective decisions be quashed and the matter tried *de novo*. Mr. Katemi further contended that this prayer was not opposed by the respondent. It was his submission that despite this plea, the DLHT ordered that the appeal be withdrawn, which

conduct was, in the counsel's view, irregular, adding that if the Ward Tribunal's decisions are left to stand, they are likely to prejudice the applicant. He contended that the DLHT's stance means that neither section 79 of the CPC nor section 36 (1) of Cap. 216 was applied in making the decision. He urged the Court to revise the decision made on 4th October, 2018, and compel that the appeal be heard *de novo* before a different chairperson.

Mr. Mwita began his rebuttal submission by adopting the contents of the counter-affidavit. While admitting that errors were spotted on the decisions of the Ward Tribunal, the parties were of the view that the appeal was incompetent, and that it was at that point that the appellant opted to withdraw the appeal with a prayer that the DLHT quashes both of the irregular decisions. While admitting that the appellant's prayers were partially granted, Mr. Mwita's contention is that the applicant ought to have exhausted all the available remedies before she chose to come to this Court by way of revision. He contended that revisional powers ought to be exercised sparingly and they cannot be used where an appeal or a review is available. Citing the decision of the Court of Appeal in ***Karim Kiara v. Republic***, CAT-Criminal Appeal No. 4 of 2007 (unreported), the learned counsel argued that the instant application fits into the category of errors

which can be rectified by way of review. He took the view that failure by the DLHT to record reliefs prayed was an inadvertency which would be better dealt with through a review. He held the view that, in view of insufficiency of the reasons for revision the instant application is misconceived and it ought to be dismissed.

In rejoinder, Mr. Katemi held the view that the respondent's contention on the appropriate course of action is flawed. He maintained that the preferred route is proper, arguing that the **Kiara case** is distinguishable as it spoke about appeals to the Court of Appeal using the Court of Appeal Rules. The Counsel contended that Cap. 216 does not provide for review as a remedy. He urged the Court to hold that since there are irregularities, a concern which is also shared by the respondent, then revision is the only feasible remedy.

The singular question that arises from the parties' contending submissions is whether the course of action taken by applicant is appropriate.

As I tackle this, let me acknowledge the fact that both counsel are unanimous that the decision of the Ward Tribunal is shrouded in serious legal deficiencies. The most prominent is the fact that there exists two

decisions of the Ward Tribunal and none of which was signed and certified. It is accepted by the counsel, as well, that in view of the fact that the appeal was predicated on the faulty decision, it is clear that the same was as good as no appeal and it was proper that the same was withdrawn. Where the divergence arises is on whether the chair of the DLHT ought to have gone further and quashed and set aside the two problematic decisions of the Ward Tribunal. They are also at variance on whether the recourse was to come to this Court by way of revision. Whereas the counsel for the applicant holds the view that revision is the way to go, the respondent's counsel is routing for review.

Let me begin by stating that the review is not a remedy that is available to the DLHT, meaning that it is not provided for in Cap. 216. This means that any errors which would be committed by the DLHT while exercising its appellate powers would not be corrected through a review process. But even assuming that review was possible through a different channel, then the same would be governed by ***Order LXII Rule 1 (1) (a)*** and ***(b)*** of the CPC, which provides as hereunder:

"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 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 record****, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."*

While it is incontrovertible that the impugned ruling is fraught with some issues that reveal impropriety, the pertinent question is, would the cited impropriety be sufficiently cured by a review? The quest for a plausible answer to this question takes me to a number of judicial pronouncements on the review, and scope it ought to cover in rectifying a decision that has been adjudged improper. One of the pronouncements is in the case of

James Kabalo Mapalala v. British Broadcasting Corporation [2004] TLR 143, wherein the Court of Appeal of Tanzania incisively held as follows:

> *"... in an application for review, the judge is not sitting as an appellate court. In that situation, if the judge is satisfied that the tests for review laid down under Order XLII, rule 1 are met,* ***it is expected of him to grant the application by effecting the relevant and necessary rectification and corrections sought in the judgment which in***

warranting circumstances, may be varied as a result of the new and important matters discovered. *Otherwise,* ***the judgment is not quashed in a review application.*** *On the other hand, if the judge is satisfied that there is no sufficient ground to justify a review, the application is rejected by dismissing it."*

The decision in ***Mapalala's case*** (supra) was followed by another priceless and fabulously elaborate holding in ***Karim Kiara v. Republic***, (supra), in which the superior Court scoped the law on review and came up with the following observation:

"The law on applications for review is now well settled. ***A review is by no means an appeal in disguise whereby erroneous decision is reheard and corrected*** *(see* ***Thungabhadra Industries v. Andhra Pradesh*** *(1964) SC 1372 ... In a proper functioning legal system, litigation must have finality, thus the Latin Maxim "debet esse finis litium".... The principle underlying the review is that the court would have not acted as it had if all the circumstances had been known. Therefore, review would be carried out when and where it is apparent that-*

First, *there is a manifest error on the face of the record which resulted in a miscarriage of justice. The applicant would therefore be required to prove very clearly that there is a manifest error apparent on the face of the record. He will have to prove further, that such an error resulted in injustice (see* ***Dr. Aman Walid Kaborou v. Attorney General & Another*** *– Civil Application No. 70 of 1999 – unreported).*

Second, *the decision was obtained by fraud.*

Third, *the applicant was wrongly deprived the opportunity to be heard.*

Fourth, *the court acted without jurisdiction (se* ***C.J. Patel v. Republic,*** *Criminal Application No. 80 of 2002).*

Although this Court held in ***Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd*** *(Civil Application No. 62 of 1996) that the list of grounds for review is not exhaustive, it did observe further in the same case, that-*

> *"We need emphasize however, that the court will not readily extend the list of circumstances for review, the idea being that the court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of public policy for finality of litigation and for certainty of the law as declared by the highest Court of the land"*

In the instant application, as stated earlier, the applicant has not shown, in our view, any of the four grounds for review enumerated above. His nine grounds presented before this Court are nothing but grounds of what would appear to be another appeal against the decision of this Court delivered on 22nd June 2007. This should not be allowed since it amounts to an appeal in disguise...."

It is worth of note that in ***Karim Kiara's case,*** the Court of Appeal was inspired by the decision of the Court of Appeal of East Africa in ***Lakhamshi Brothers v. R. Raja*** – Civil Application No. 6 of 1966 in which it was held that-

> *"In a review the court does not sit on appeal against its own judgment in the same proceedings. In a review, the Court has inherent jurisdiction to recall its judgment in order to give effect to its manifest intention on to what clearly would have been the intention of the Court had some matter not been inadvertently omitted."*

Reverting back to the instant matter, there is no denying that the DLHT's decision carries some serious errors and that the error manifest on the face of the record, so much so that it has occasioned a miscarriage of justice. The error is premised on the fact that the DLHT has not recorded what it acceded to do. It did not quash and set aside the proceedings and the resultant decisions. While these grounds meet the threshold set for triggering the review button, my conviction is that the outcome and the scope it will carry in the process will leave nothing in the current order as such process will substantially, if not wholly, change the fabric that the current order is. Nothing will be left of the current order, if the respondent's contention is acceded to and a review is effected. The DLHT would have admitted ***an appeal in disguise whereby erroneous decision would be reheard and corrected***. The DLHT will have sat and determined an appeal against its own decision, far too wide a scope that a review cannot handle.

I am not convinced that this would be a route that would address challenges posed by the DLHT's order. In view of the foregoing, I am not persuaded that review is a plausible option in the circumstances of this case.

Having ruled out review as an option, the only other way remains to be a revision. This is so because the challenge here is not intended to address the decisional error which is normally the domain of appeals. Rather, it is an irregularity which is at stake, and this can only be addressed by a wider scope of remedial action which is revisional powers of the Court under section 44 of Cap. 216. These are the powers which enable the Court to audit actions of the DLHT and assess the correctness, legality or propriety of the order passed on 4th October, 2018.

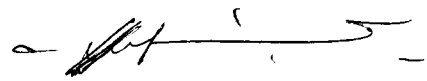
As stated earlier on, withdrawal of the appeal was prompted by the unanimous view of the parties and the DLHT that the decision sought to be appealed against had not been signed and certified by the members of the Ward Tribunal. Most seriously, yet again, is the fact that two decisions with varying reasoning were issued by the same Tribunal and both were allowed to run or exist concurrently. Without any doubt, these two were serious deficiencies which were a serious travesty of justice. No appeal would be founded on a faulty decision. By allowing the appellant, now the applicant, to withdraw the appeal and leave the malignant decisions unscathed, the DLHT was perpetuating confusion which would be a serious recipe for disaster.

I am overly convinced by the counsel for the applicant that the DLHT strayed into a wanton irregularity which can only be addressed through the powers conferred upon this Court under section 44 (1) of Cap. 216. Consequently, I grant the application by revising the proceedings of the DLHT and quash the proceedings, set aside the order passed by the DLHT on 4th October, 2018. Similarly, I quash the proceedings of the Ward Tribunal, set aside all its decisions and order that the complaint filed by the applicant be immediately heard and determined afresh.

I make no order as to costs.

It is so ordered.

DATED at **MWANZA** this 29th day of July, 2020.



M.K. ISMAIL

JUDGE

Date: 29/07/2020

Coram: Hon. M. K. Ismail, J

Applicant: Mr. Katemi Erick, Advocate

Respondent: Mr. Mwita Emmanuel, Advocate

B/C: B. France

Court:

Ruling delivered in chamber, in the presence of Messrs Katemi Eric and Mwita Emmanuel, learned Counsel for the applicant and respondent, respectively, and in the presence of Ms. Beatrice B/C, this 29th July, 2020.

M. K. Ismail

JUDGE

At Mwanza

29th July, 2020