IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 17 OF 2021

(Arising from the decision in Civil Application No. 19 of 2019 by Hon. Obasi S.J , RM in the District Court of Ilala at Kinyerezi, dated 25th October, 2019)

LUGANO ALFRED MWAKASUNGULA.....APPLICANT

VERSUS

STEPHANIA ROELEME RAMI.....1st RESPONDENT

FORTUNATA METHOD.....2nd RESPONDENT

KISHE AUCTION MART.....3rd RESPONDENT

RULING

14th December 2021 & 10th June, 2022

ITEMBA, J;

This is an application for revision of the ruling given by the District Court of Ilala at Kinyerezi in Civil Application No. 19 of 2019 dated 25th October, 2019. The chamber application is taken out under section 30 (1) (a), 31 (1) and 44 (1) (a) and (b) of the Magistrates Courts Act [Cap. 11 R. E. 2019]. The applicant seeks the Court to exercise it's revisional powers by calling the records of the District Court of Ilala and examine the legality and propriety of the so decision and revise, quash and set aside. The applicant has also applied for Costs of this application.

The application has been supported by an affidavit sworn by the applicant himself.

The major ground upon which the application is based can be perceived from the contents of paragraph 6 of the affidavit, in which the applicant complains that, he was not aware on the existence of the impugned proceedings before the District Court of Ilala which involved all the respondents herein as he had not been made a party thereto, and for that reason, he contends to have been denied a right to be heard despite being a necessary party.

Briefly, as per the records, the facts which gave raise to this application are that; the 1st respondent had previously been appointed as the administratix of the estate of the late Roleme Rami before the Primary Court of Buguruni Urban in Probate Cause no. 136 of 2017. It is apparent that, the trial Court was discontented with the conducts and reluctance made by the 1st respondent in administering the estate of the deceased for failure to file inventory and distribute rightful shares of the estate to the 2nd respondent who is among the beneficiaries. Eventually, the trial Court had ordered valuation and sale of the estate particularly, Plot No. 127 and 128 Block "D"

Part III Tabata Bima Area with CT. No. 27711. After the said valuation and sale, the 2nd respondent and the other beneficiaries were issued their share of the proceeds of the sale.

It appears the applicant herein was the one who purchased the said plot at public auction. Upon being disgruntled with the order of the trial Court, the 1st respondent instigated an application for revision indexed as Civil Application No. 19 of 2019 seeking the District Court of Ilala to revise the proceedings and the resulting orders. As depicted, the applicant was not a party in the so proceedings and the Court upon hearing the application, it came into conclusion of revising the whole proceedings which gave rise to the auction of the said plot basing on the ground that, the trial Court had acted in excess of it's powers to order the sale of the landed property forming part of the estate of the deceased, and thus it amounted to interference of the powers of the administrator contrary to the law.

The applicant protests that, he only came to know the existence of Civil Application No. 19 of 2019 at the point before the District Land and Housing Tribunal when appearing in the case involving his tenants, himself and the 1st respondent. Briskly, the applicant had decided to institute the instantaneously application for purpose to wit the revision of the so

proceedings for the exact ground that the matter was instituted by the 1st respondent against the 2nd and 3rd respondent and the Court issued an order that affects his ownership, without affording him a right to be heard.

When the application stood for determination by the court for hearing, Mr. Godwin Mwamponyo, learned counsel represented the applicant whilst the 1st respondent enjoyed the services of Mr. Kamalija Lucas, learned advocate and the rest fended for themselves. As the records depict, it was only the 1st respondent who was objecting the application. The matter was argued orally and for purpose of brevity, I will pick the arguments that I find to have substance connected to the application as submitted by the respective counsels.

Mr. Mwamponyo for the applicant, in the essence of his submission did accentuate that, the applicant was never a party in Civil Application No. 19 of 2019 but the decision of the District Court issued orders which affected him. He cemented as deponed in the applicant's affidavit, that the applicant is the owner of the Plot no. 127 & 128 Block D Tabata by purchase at the public auction. It was Mr. Mwamponyo's submission that, the attachments in the applicant's affidavit as portrayed includes, the certificate of sale

(Annexure L1), Notice on transmission by operation of law (Annexure L2), Certificate of Tittle in the name of the applicant (annexure L3). It was further succumbed that, the District Court had quashed the trial Court's decision which included the order of sale of the said plot without giving the applicant right to be heard. Mr. Mwamponyo further stressed that, the applicant was the necessary party and failure to afford him right to be heard, renders the said decision null and void. To bolster his preposition, he cited the cases of **National Housing Corporation Vs. Tanzania Shoe Company and Others** [1995] T.L.R No. 251, **Ndensamburo Vs. Attorney General** [1997] T.L.R 137 and **Bank Of Tanzania Vs. Said A. Marinda & Attorney General,** Civil Application No. 74 of 1998, CAT at Dar es Salaam (Unreported). From all the three cases, the stance of the upper bench was to the effect that, the proceedings which commences is the absence of the necessary party constitutes a major defect which goes to the root of the case and thus renders the proceedings null and void.

Mr. Mwamponyo then concluded that, there was court records which shows particulars of the applicant, agent and all the details, therefore, it was wrong for the Court to proceed in the absence of the applicant. He then prayed for the decision to be quashed for being null and void.

In rebuttal, Mr. Kamalija, contended that, the application is grossly misconceived. He contended that, in Civil Application no. 19 of 2019, the District Court of Ilala had quashed probate proceedings of Buguruni Primary Court. According to him, nothing portrays in the ruling in relation of Certificate of Title thus, the District Court did not nullify the orders relating to applicant's Certificate of Title. He then insisted that the dispute on land ownership are dealt with land courts and not Probate Courts.

It was further submitted that, the probate proceedings at Buguruni Primary Court do not show that 3rd respondent sold the plot to the applicant and hence the estate was never sold to him. Mr. Kamalija further argued that, there was neither proclamation of sale of the estate of the deceased, nor order for sale. To back up his argument, he said all this was contrary to rule 73 (1) (a)-(g) and 74 (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN. 310 of 1964. He further insisted that, the 1st respondent who is the administrator of the estate was not aware of the sale of the said plot by the 3rd respondent.

The 1st respondent's counsel further, eloquently discredited the correctness of the transfer process by pointing out that, Annexure L1 which

is the sale contract does not have the name of the owner but it only shows names of the seller and buyer, in addition, it has no title number. According to the learned brother, he argued that, based on such fortfalls, sale of the said plot was not lawfully effected. Furthermore, there is no affidavit to substantiate the change of ownership. For those reasons, he believed that the applicant could not been heard in the District Court because his claims are on ownership. He then prayed for the application to be dismissed with costs.

In his rejoinder, Mr. Mwamponyo persistently emphasised on what he had submitted prior in his submission in chief and he supplemented that, the Court should not consider issues which were never pleaded by the parties. That, before the Court is not how the auction was conducted but rather an important issue to be under consideration is whether the applicant had interest in the property and then, it follows, was the District Court correct? It was further his stance that it is not true that the 1st respondent was not aware of existence of the applicant. According to him, annexure S2 of the Counter affidavit reveals that the 1st respondent was aware of the existence of the applicant but he never bothered to join him as a party.

I have examined the court record and the rival submissions by the parties, the central issue of determination is *whether the application has merit.* I have enlightened the following observations which will assist me to easily determine the raised issue.

One, it is a well-known principle of Natural justice, that, no one should be condemned unheard. All the same, it is fair to stress here that this principle has been given constitutional recognition. It is encapsulated in Article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977 (as amended time to time).

Article 13(6)(a), of the Constitution provides as follows:-

> *"To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following principles; namely: -*
>
> *(a) when the rights and duties of any person are being determined by the Court or any other agency,* ***that person shall be entitled to a fair hearing*** *and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned, ..."* [Emphasis is added].

Expounding on the basic attributes of "a fair hearing," the Supreme Court of India, in the case of **Union Of India V. Tulsi Ram**, AIR 1985 S.C.1416 at page 1456, said:-

> *"The principles of natural justice constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair play and justice which is not the preserve of any particular race or country but is shared in common by all men."*

Addressing my mind to the right to be heard, which is the focus of the issue under scrutiny, I can put it as a proposition of law of universal application, that no decision must be made by any court of justice, body or authority, entrusted with the power to determine rights and duties, so as to adversely affect the interests of any person without first giving him a fair hearing according to the principles of natural justice.

In similar vein, the Supreme Court of Zimbabwe **in Holland Vs. Minister of Public Service, Labour And Social Welfare** [1998] ILRC 78, did not disguise its distaste for violations of the rules of natural justice. It said, at page 83, as follows: -

> *"It is settled law that where a statute empowers a public official or body to give a* ***decision which will prejudicially affect an individual in his liberty, property or existing***

rights, *the right to a fair hearing is to be given effect to unless the statute expressly or by implication indicates the contrary."*

Similar sentiments were echoed by the Supreme Court of South Africa (Appellate Division) in the case of **Du Preez and Another V. Truth and Reconciliation Commission** [1998] I LRC 86. Providing an answer to the question: what does the duty to act fairly demand?, the said Court sought useful guidance from the English case of **Doody V. Secretary of State for the Home Department** [1993] 3 LRC 428, wherein Lord Mustill, for the House of Lords said, at page 443:-

".....Fairness will very often require that a person ***who may be adversely affected by the decision will have an opportunity to make representations*** *on his own behalf either before the decision is taken, with a view to producing a favorable result, or after it is taken, with a view to procuring its modification or both...."*

The prevailing view, however, is that a hearing before a decision is taken is a ***sine qua non*** of any judicial proceeding. I subscribe wholly to this view. The *"hang him first and try him later"* syndrome mockingly spoken about by Mark Twain, is an affront to the rule of law and our fair senses for justice. It is a relic of the past which is relished no more.

In view of the above, I have found myself in full agreement with Justice Brandies, of the U.S. Supreme Court, who once aptly observed that:-

> *"A judge rarely performs his functions adequately unless the case before him is adequately presented," see: B. Donovan James's "Stranger's on a Bridge",* (1964).

To me, this cannot be accomplished unless and until all would be adversely affected parties in the proceedings have been given a reasonable opportunity to make their representations to the judge/magistrate before he decides. ***Ex post facto*** hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudices apart from being a negation of timely and inexpensive justice, which I all strive for.

Two; from the proceedings of the Buguruni Primary Court, it apparent that on 20th February, 2019 the applicant had appeared in Court and introduced himself as the buyer of Plot no. 127 & 128 Block D Tabata and requested the handing over of the same. I believe, the District Court Magistrate while exercising the revision jurisdiction, if he had keenly perused the file, he could have noticed the existence of the applicant's interest over the estate of which formed part of the subject in Civil Application No. 19 of

2019.

From what I have gathered from the record, the conclusive and fair determination of the dispute between the respondents in Civil Application No. 19 of 2019 could not be attained without impleading the applicant simply because, he had an interest over the estate to which whatever order that could have been made, it would likely to affect him in one way or another. It was incumbent on the District Court Magistrate to scrutinize the records in order to determine if at all there was a necessary party and to order for joinder if any. It is settled law that, once it is discovered that a necessary party has not been joined and neither party is ready to apply to have such party added, it is incumbent on the court to have such party added. See: **Tanga Gas Distributors Ltd Vs Mohamed Salim Said and Two Others,** Civil Revision No. 6 of 2011 (unreported).

As to the circumstances surrounding the case at hand, I have all reasons to believe that, the applicant was a necessary party to the proceedings before the District Court of Ilala since he was having interest over the property forming part of the estate of the deceased which he contends to have bought as a result of the Orders of the trial Court which were the subject of the revision at the District Court of Ilala.

In the premises, in view of the state of the records, it was obligatory on the District Court magistrate to be keen enough and require the parties to amend the application and join the applicant who was alleged to have purchased the property forming part of the estate. See: **Tanzania Railways Corporation (Trc) Vs Gbp (T) Limited,** Civil Appeal No. 218 of 2020 (unreported).

Three, the 1st respondent's counsel has contended that, this matter was supposed to be filed before the land Court and not the probate Court as the applicant claims over ownership of the landed property. Without prejudice, I hesitate to subscribe to such preposition, since it is the settled Principle of Law that, where there is a dispute over the estate of the deceased even if it is a landed property, only the probate and administration Court which is seized of the matter can decide on the ownership. See: **Mgeni Seifu Vs. Mohamed Yahaya Khalfani,** Civil Application No. 1 of 2009 (Unreported). It follows therefore, the applicant was justified to lodge the instantaneously application challenging the legitimacy of the orders so issued by the District Court of Ilala which affect his interest over the property.

Four, as alluded earlier, the right to be heard is a fundamental

principle which is enshrined under the Constitution and the Courts must jealously guard the same. See: **Mbeya Rukwa Auto Parts & Transport Ltd Vs. Jestina Mwakyoma** [2003] T.L.R 251, **Selcom Gaming Limited Vs. Gaming Management (T) And Gaming Board of Tanzania** [2006] T.L.R 2000, **Mire Artan Ismail and Another Vs Sofia Njati**, Civil Appeal No 75 of 2008 and **Nuta Press Limited Vs. Mac Holdings & Another**, Civil Appeal No. 80 2016 [3rd November, 2021] (both unreported). In view of the settled law on the right to be heard, I am of a serious considered view that, it will be absurd for this Court to sanctify the ruling of the District Court that made orders which affects the applicant's ownership's interest without availing him opportunity to be heard.

It is thus my considered view that, the non-joinder of the applicant in the Civil Application no. 19 of 2019 amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by this Court.

In the event, I declare the proceedings before the District Court of Ilala in Civil Application No. 19 of 2019 a nullity. Together with the ruling, orders and directions made therein, they are hereby revised, quashed and set aside.

I accordingly order a fresh hearing before another competent Magistrate in which joining of the applicant will have to be made accordingly. The matter being emanated from Probate cause, the hearing be conducted expeditiously. Each party bears its own costs.

It is ordered accordingly.

DATED at **DAR ES SALAAM** this 10th day of June, 2022.

J. Itemba
JUDGE