

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

(PC) CIVIL APPEAL No. 38 OF 2021

*(Arising from the District Court of Musoma at Musoma in Civil
Revision No. 1 of 2021 Originating from Musoma Urban Primary
Court in Objection Proceedings & Probate and Administration
Cause No. 33 of 2003)*

MOHAMED SAID HERSY APPELLANT

Versus

ALLY HERSY RESPONDENT

JUDGMENT

14.07.2022 & 14.07.2022

Mtulya, J.:

The **Musoma Urban Primary Court based at Musoma** (the primary court) in the **Objection Proceedings Cause No. 33 of 2003** (the application) on 28th December 2020 delivered its decision in favour of Mohamed Said Hersy (the appellant) against Ally Hersy (the respondent). The primary court at page 2 of the decision reasoned that:

*Kitendo cha Mjibu Pingamizi kushindwa kuithibitishia
Mahakama kama alipewa ardhi na Marehemu enzi za
uhai wake, Mahakama imefikia uhamuzi kuwa
pingamizi limethibitika.*

This statement of the primary court aggrieved the respondent hence preferred **Application for Revision No. 1 of 2021** (the revision) at the **District Court of Musoma at Musoma**

(the district court). The district court, after hearing of the parties, nullified both the decision and proceedings of the primary court. The reasoning of the district court is found at page 5 of the decision:

...looking at the trial court's record, it was apparent that there was an issue that needed to be determined by a separate court on whether the land in Plot No. 258 Block D is truly owned by the applicant [the respondent]. The respondent and the applicant both [informed] the court that there was a criminal case on the same subject matter, which was still pending at the police [for investigation on the matter].

Finally, the district court invited section 22 (1) of the **Magistrates' Courts Act** [Cap. 11 R.E. 2019] (the Magistrates' Courts Act) and the precedent in **Israel Mwakalabeya v. Ibrahim Mwayamba**, Misc. Civil Application No. 21 of 1991 and held that there is irregularity in the proceedings of the primary court and accordingly nullified the decision and proceedings of the primary court in favour of either criminal trial or land dispute in an appropriate forum.

This decision dissatisfied the appellant hence approached this court and filed three (3) complaints in **(PC) Civil Appeal No. 38 of**

2021 (the appeal). The reasons of appeal as displayed in the Petition of Appeal shows that the appellant complains on: first, failure of the district court to determine points of preliminary objection registered in the revision; second, the district court failure to afford the parties the right to be heard; and finally, the court raised and determined facts and issues *suo moto*.

When the appeal was scheduled today evening hours for hearing in this court, the parties invited learned minds of Mr. Christopher Waikama for the appellant and Mr. Daud Mahemba for the respondent to contest the appeal. However, the learned minds declined the contest in favour of perusal of the record of appeal. The idea was to see what transpired in the primary and district courts. After the perusal of the record of appeal and brief conversations of the learned minds, they agreed that there is no need to contest. The reasons of declining the contest was based on two (2) faults found in the record of appeal which were caused by the lower courts. In their opinions, the faults render both the proceedings and decisions of the lower courts to a nullity.

According to Mr. Waikama, the primary court had resolved a land dispute without mandate and the district court determined the merit of the case before determining the raised points of preliminary objection registered in the revision. From the two (2)

faults, Mr. Waikama prayed before this court to invite the provision of section 31 (2) of the Magistrates' Courts Act and nullify the proceedings and decisions of the lower courts. The submission received a positive reply from Mr. Mahemba who conceded the points. On his part, Mr. Mahemba submitted that the primary court in the application determined ownership of land located at Plot No. 258 Block D Karume Area in Musoma Municipality in Mara Region, without any mandate.

In order to bolster his argument on the point, Mr. Mahemba cited section 3 (1) of the **Land Disputes Courts Act** [Cap. 216 R.E. 2019] (the Act) and contended that the primary court is not one of the courts cited in the section. Similarly, Mr. Mahemba submitted that the district court received points of preliminary objection in the revision and ordered the parties to argue the same by way of written submissions and the parties complied with the order, but finally it declined to determine the points.

According to Mr. Mahemba, the district court declined determination of the points and that is against the law in section 22 (3) of the Magistrates' Courts Act. In his opinion, the law was cited by the district court but in the end the court declined to apply the same hence the right to be heard by the parties on merit of the revision was curtailed. Finally, Mr. Mahemba

submitted that he has no any problem for this court in inviting the provisions of section 31 (2) of the Magistrates' Courts Act to revise the proceeding and came up with its own conclusion.

I have perused the record of this appeal and found that the present appeal originated in **Probate and Administrate Cause No. 33 of 2003** which granted the letters of administration of the estates of the deceased Said Hersy to the respondent. In the letters several properties were identified. However, the dispute arose in the Objection Proceedings at the primary court as to: *whether the land in Plot No. 258 Block D Karume Area in Musoma Municipality in Mara Region is part of deceased estates.*

The issue of ownership in land is vividly displayed on the record of appeal hence land disputes resolving forum was necessary to be invited in the contest. However, the parties declined to approach appropriate forums enacted by the law in resolving land disputes (see: section 3 (1) of the Act; of section 62 (1) of the **Village Land Act** [Cap 114 R.E 2019] (the Village Land Act); and section 167 (1) of the **Land Act** [Cap 113 R.E 2019] (the Land Act). Instead, the parties opted for the primary court and the primary court did not hesitate to resolve the matter without noting the prohibition enacted under section 4 (1) of the Act.

The respondent was dissatisfied with the decision of the primary court hence had preferred the revision at the district court. At the district court four (4) points of preliminary objecting resisting the jurisdiction of the court were raised. The district court then ordered for written submissions for and against the points. The materials were registered in favour and against the points. However, on 30th September 2021, the district court declined to determine the points and *suo moto* moved into the merit of the revision and determined the revision without involving the parties. This is a breach of the law in section 22 (1) of the Magistrates' Courts Act; article 13(6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and guidance of the Court of Appeal (the Court) in the precedents of **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44 and **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018.

The practice of this court and the Court shows that when a point of law resisting competence of appeal or revision is raised, at any stage of proceedings, it has to be determined to the finality before the hearing of the dispute on merit, as the point of law may end the dispute (see: **Rubango Mfungo v. Nyafuru Andrea**, Land Appeal Case No. 95 of 2021; **Shahida Abdul Hassanali**

Kassam v. Mahedi Mohamed Gulamali Kanji, Civil Application No. 42 of 1999; **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai**, Civil Appeal No. 179 of 2016; and **Director of Public Prosecution v. Labda Jumaa Bakari**, Criminal Appeal No. 45 of 2021). This is obvious from the practice of courts in our jurisdiction that the raised points may go to the root of the matter and end disputes between the parties (see: **R.S.A. Limited v. HansPaul Automechs Limited & Govinderajan Senthil Kumai** (supra); and **Director of Public Prosecution v. Labda Jumaa Bakari** (supra).

From the record, it is apparent that the two decisions of the lower courts cannot remain on record for want of proper application of laws (see: **Joseph Siagi Singwe v. Boniphace Marwa Wang'anyi**, Misc. Land Appeal Case No. 111 of 2021; **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017; and **Hassan Rashidi Kingazi & Another v. Halmashauri ya Kijiji Cha Viti**, Land Case Appeal No. 12 of 2021). This court being custodian of proper application of laws, it will not close its eyes to let the present appeal proceed with defective record.

Having said so and considering the records of the lower courts are at faults, I have decided to invite section 31 (2) of the

Magistrates' Courts Act and accordingly quash the proceedings and decisions of the lower courts for want of proper record. I do so without any order as to costs as the learned counsels assisted the parties and this court in arriving at justice. Any of the parties who is still interested in land dispute may follow the proper course by filling fresh and proper land matter in an appropriate forum in accordance to the current laws regulating land disputes.

Ordered accordingly.

A blue ink signature of F. H. Mtulya, written in a cursive style with a long horizontal stroke extending to the right.

F. H. Mtulya

Judge

14.07.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Mohamed Said Hersy and his learned counsel, Mr. Christopher Waikama and in the presence of the respondent, Mr. Ally Hersy and his learned counsel Mr. Daud Mahemba.

A blue ink signature of F. H. Mtulya, written in a cursive style with a long horizontal stroke extending to the right.

F. H. Mtulya

Judge

14.07.2022