IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

CIVIL APPEAL NO. 22 OF 2020
(Originating from the Resident Magistrate's Court of Arusha, Misc. Civil Application No. 90 of 2018, Original Civil Case No. 89 of 2017)

ADOLF ANTHONY MSELLE ..... 1ST APPELLANT

ADELINA ADOLF MSELLE ..... 2ND APPELLANT

Versus

JANETH FRANCIS MCHALLO ..... 1ST RESPONDENT

LAWRENCE SIMON MCHALLO ..... 2ND RESPONDENT

VICKY LAWRENCE MCHALLO ..... 3RD RESPONDENT

FIRST WORLD INVESTMENT COURT BROKER ..... 4TH RESPONDENT

JUDGMENT

27th May & 15th July 2022

Masara, J.

1. INTRODUCTION

Before the Resident Magistrate's Court of Arusha (hereinafter "the trial court"), the 1st Respondent instituted Objection Proceedings against the Appellants. Her objection was in relation to the sale of two residential houses (hereinafter "the attached property") located at Kambi ya Fisi, Ngarenaro Ward within Arusha city. The two houses border Febronia Kimaro to the North and East, Sofia Okashi to the South and Wes Mambo to the East. The 1st Respondent, the Applicant at the trial court, claimed

that she has interest in the attached property as it was a matrimonial property jointly acquired during subsistence of the marriage with her deceased husband, the late Francis Mchallo. After hearing evidence from both parties, the trial court allowed the application and ordered release of the attached property from attachment.

That decision did not please the Appellants. They preferred this Appeal on the following grounds, reproduced verbatim:

a) *That, the Trial Magistrate erred in law and in fact by holding that the disputed property be released from attachment without taking into consideration the evidence adduced by the Appellants herein:*
b) *That, the Trial Magistrate erred in law and in fact by holding that the attached property was not in the name of the 3rd Respondent;*
c) *That, the Honourable Trial Magistrate grossly erred in law and in fact by stating that the 3rd Respondent failed to prove in Court on how he acquired the said disputed property in his ownership while the objection proceeding went ex-parte against him; and*
d) *That, the Honourable Trial Magistrate erred in law for allowing the Objection Application without any evidence by the 1st Respondent to prove that she has interest over the attached property.*

At the hearing, the Appellants were represented by Mr Qamara Valerian, learned Advocate. Mr George Stephen Njooka, learned Advocate, appeared on behalf of the 1st Respondent. Pursuant to the Order of this

Court dated 8th November, 2021, hearing of the Appeal proceeded *ex parte* against the other Respondents.

2. BACKGROUND TO THE APPEAL

On 24/06/2017, the Appellants advanced a loan amounting to TZS 152,800,000/= to the 2nd and 3rd Respondents. The loan was to be repaid in two instalments. The first instalment totalling TZS 76,400,000/= was to be repaid on 10/07/2017 while the remaining balance of TZS 76,400,000/= was to be repaid subject to a date that would be fixed on 10/07/2017, the date of repaying the 1st instalment. In the loan agreement, the 2nd and 3rd Respondents pledged as security a plot measuring 950sqm, located at Kambi ya Fisi, Ngarenaro which had a house built thereon ("the attached property"). The 2nd and 3rd Respondents also agreed that the security pledged would be sold to recover the full loan in the event the loan was not paid to its satisfaction.

The agreement was not honoured. According to the available records, the Applicants took various efforts to ensure that the money is paid back, including serving demand notices to the 2nd and 3rd Respondents. The 2nd Respondent did issue cheques which were declined by the paying bank due to insufficient funds in the accounts.

On 21/09/2017, the Appellants instituted a Summary suit against the 2nd and 3rd Respondents at the trial court, vide Civil Case No. 89 of 2017. Subsequently, the 2nd and 3rd Respondents filed Misc. Civil Application No. 68 of 2017 seeking leave to defend the Summary suit. When the Application was fixed for hearing, both the 2nd and 3rd Respondents defaulted appearance despite being dully served. Their application was consequently dismissed. The main case proceeded and a summary judgment was entered against the 2nd and 3rd Respondents on 17/03/2018. The 2nd and 3rd Respondents were ordered to pay to the Appellants the following: TZS 152,800,000/= as the principal sum, TZS 10,000,000/= as general damages, interest of 7% of the principal sum from the date when the cause of action arose to the date of judgment and interest of 11% of the decretal sum from the date of judgment to full satisfaction. The Appellants were also awarded costs of the suit.

The Appellants attempted to execute the decree of the trial court in respect of the aforesaid suit. In so doing, the trial court ordered the 4th Respondent to attach the attached property in satisfaction of the court's decree. The 4th Respondent attached the property. While waiting for the sale order, on 26/10/2018 Janeth Francis Mchallo (the 1st Respondent), filed Misc Civil Application No. 90 of 2018 under a certificate of urgency,

objecting attachment and sale of the attached property as hereinabove stated.

The record shows that Mrs Janeth Francis Mchallo, who was the 1st Respondent, died on 16/03/2021. One Elimeleck Francis Mchalo was appointed as administrator of her Estate and later stepped in as the 1st Respondent in this Appeal.

3. COURT'S DETERMINATION OF THE APPEAL

Hearing of the Appeal proceeded by way of written submissions. After the Advocates filed the same, I realised that a point of law that needed to be addressed by this Court had not been canvassed. In compliance with the rules of natural justice, I summoned the advocates for the parties on 23/05/2022 and asked them to address this Court in terms of Order XXI Rule 62 of the Civil Procedure Code, Cap. 33 [R.E 2019] (hereinafter "the CPC"), on the competence of the appeal as the same arises from a decision made in an Objection proceeding. Both advocates requested that they address the Court in writing. That prayer was granted. Both advocates complied by filing their respective submissions.

On his part, Mr. Njooka for the 1st Respondent submitted that the right of appeal is curtailed to a party who is aggrieved by a decision made in an

objection proceeding. He maintained that the decision in objection proceeding is conclusive; therefore, any aggrieved party has no right of appeal. That the recourse available for that party is to institute a fresh suit to establish the right or interest in the disputed/attached property. He referred this Court to Court of Appeal decisions to support his assertion. These are: **Katibu Mkuu Amani Fresh Sports Club vs Dodo Ubwa Mamboya and Khamis Machano Keis**, **Civil Appeal No. 88 of 2002** and **Amour Habib Salum vs Hussein Bafagi, Civil Application No. 76 of 2010** (both unreported). It was Mr Njooka's submission that at the trial court, the inquiry regarding ownership of the attached property was dully conducted and both parties adduced evidence. That the trial court decided in favour of the Objector, the 1st Respondent herein. He concluded that the Appellants ought to have instituted a fresh suit challenging the decision in a court of competent jurisdiction instead of lodging an appeal to this Court.

Mr. Qamara, on the other hand, likewise agreed with what was submitted by Mr Njooka regarding challenging decisions made in objection proceedings. He conceded that there is no right of appeal against such decision. However, he argued that the appeal was filed in good faith so as to invite this Court to inspect the correctness of the proceedings and

the decision of the trial court and ascertain whether the rights of the parties were fairly determined. He faulted the trial court's decision stating that it did not determine the rights of the parties conclusively as provided for under Order XXI Rule 62 of the CPC. He substantiated that the trial court failed to determine the issue raised as to who is the lawful owner of the attached property. In his view, failure to determine that issue connotes that the Appellants' right to institute a fresh suit was curtailed.

Mr. Qamara also contended that the proceedings of the trial court subject of this Appeal are marred with a procedural irregularity which should not be left to stand. The anomaly, in his view, relates to changing of the presiding magistrates without assigning reasons for such change. That Order XVII Rule 10 of the CPC provides the procedure of changing from one magistrate to another in the course of hearing a suit. He also relied on the decisions of **M/S George Centre Limited vs The Honourable Attorney General and M/S Tanzania National Road Agency, Civil Appeal No. 29 of 2019** and **Hatwibu Salim vs Republic, Criminal Appeal No. 372 of 2016** (both unreported) to support his contention that reasons for change from one magistrate to another must be reflected in the proceedings: He maintained that Honourable Mahumbuga, RM, who took over the case to its completion had no privilege of observing

important witnesses, hence she made the decision without analysing evidence adduced by parties. It was Mr. Qamara's further submission that despite the right to appeal being barred by the law, this Court in the exercise of its revisional powers under section 44(1)(b) of the Magistrate Courts Act and section 79 of the CPC should revise the proceedings and decision of the trial court so as to ascertain their correctness and legality.

Mr. Qamara urged the Court to adopt various previous circumstances when both the Court of Appeal and this Court invoked revisional powers *suo motu* so as to have the record of the trial court corrected and cleared even where there is no right to appeal. To support his submission, he relied on the decisions in **Commissioner General Tanzania Revenue Authority vs JSC Atomredtzoloto (ARMZ), Consolidated Civil Appeals No. 78 and 79 of 2018** (unreported) and **Marwa Mahende vs Republic [1998] TLR 249**. He fortified that since this Court has supervisory powers over subordinate courts, it should invoke its revisional powers *suo motu* and re-consider the trial court proceedings so that the vivid and apparent illegalities pointed out are not left unattended. Alternatively, it was Mr. Qamara's submission that since the legal issue called to be addressed was raised by the Court *suo motu*, this Court should refrain from making orders as to costs.

I have carefully considered the record of appeal and the submissions by the counsel for the parties in respect of the point of law raised by the Court. I am of the considered view that whether this Appeal is competent is the crux issue for determination.

It is beyond dispute that this Appeal emanates from Misc. Civil Application No. 90 of 2018, the objection proceedings, filed by the late Janeth Francis Mchallo, objecting attachment and sale of the attached property. It is also undisputed that an appeal cannot lie against an order made in objection proceedings. Any decision in objection proceedings is conclusive. The remedy available to an aggrieved party is institution of a fresh suit to establish the right that party claims in the attached property. Order XXI Rule 62 of the CPC speaks in clear and unambiguous terms. It provides:

> *"Where a claim or an objection is preferred, the party against whom an order in made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive"*

Mr Njooka invited the Court to dismiss the appeal with costs having found that an appeal cannot lie against the impugned decision. Conversely, Mr Qamara invited the Court to invoke its revisional powers under section 79(1) (a) to (c) of the CPC so as to rectify the irregularities he considered grave in the proceedings and decision of the trial court.

I took time to gauge the rival position of the learned counsel. I asked myself whether it is appropriate in the circumstances of this case to invoke this Court's revisional powers in order to ensure propriety of the record of the trial court, despite the fact that the current Appeal is otherwise barred by law. The answer to this question can be deduced from the decision relied upon by Mr. Qamara; namely, **Commissioner General Tanzania Revenue Authority vs JSC Atomredmetzoloto (ARMZ)** (supra), where the Court of Appeal had the following to say when faced with a similar scenario:

> *"On account of the said infractions, normally having ruled that the appeal is incompetent we would have proceeded to strike it out. However, in view of what will be unveiled in due course we shall refrain from following that path for a purpose and in order to remain seized with the record of the Board and the Tribunal* ***so as to intervene by way of revision and rectify the revise illegalities prevalent in the proceedings of both the Tribunal and the Board otherwise the decisions of the Board and the Tribunal will remain intact perpetuating the illegalities.*** *This approach was followed by the Court in* ***Tanzania Heart Institute vs The Board of Trustees of NSSF****, Civil Application No. 109 of 2008,* ***Chama Cha Walimu Tanzania vs The Attorney General,*** *Civil Application No. 151 of 2008 and the* ***The Director of Public Prosecutions vs Elizabeth Michael Kimemeta @Lulu****, Criminal Application No. 6 of 2012 (all unreported)"* (Emphasis added).

The Court proceeded to state:

> *"In the light of the settled position of the law as propounded in case law,* ***the Court has jurisdiction to raise the matter suo motu and where possible invoke revisional jurisdiction to correct anomalies in decisions of the courts below or tribunals in order to avert perpetuating illegalities.*** *"*(Emphasis added)

Guided by the above, I am in agreement with the Appellants' advocate that revisional powers of this Court can be invoked so as to correct anomalies in decisions of the courts below so as to avoid perpetuating illegalities. Revisional powers of this Court are provided under section 79 (1) of the CPC, which provides:

> *"79- (1) The High Court may call for the record of any case which* ***has been decided by any court subordinate to it and in which no appeal lies thereto****, and if such subordinate court appears:-*
>
> *a) to have exercised jurisdiction not vested in it by law;*
>
> *b) to have failed to exercise jurisdiction so vested; or*
>
> *c) to have acted in the exercise of its jurisdiction illegally or* ***with material irregularity,***
>
> *the High Court may make such order in the case as it thinks fit ..."*
> (Emphasis added)

From the wording of the above provision of the law, this Court can invoke its revisional powers even where there is no right of appeal. That position notwithstanding, such powers cannot be used unreservedly. For the court

to do so, the irregularity in question should be one that is substantially material that leaving the same to prevail would occasion a traverse of justice.

The question confronting me is whether there are apparent illegalities in the record of the trial court worth intervention and revision of this Court. According to Mr Qamara, the illegalities prevalent in the trial court record is that there was change of magistrates without assigning reasons. I have revisited the record of the trial court which shows that from 26/10/2018 when the Application was filed in the trial court, it was presided over by Hon. N. W. Mwakatobe SRM. She presided over the Application till 24/09/2019, when she completed hearing of four witnesses from the Applicant's side and the 1st witness from the Respondents' side. The record further reveals that Hon. M. J. Mahumbumba, RM, stepped in for the first time on 26/02/2020, when she adjourned the case remarking: *"Hearing be on 24/03/2020 before trial Magistrate."*

However, on 24/03/2020, the said Mahumbuga, RM, proceeded with hearing of the case by recording the evidence of the 2nd witness (DW2) from the Respondents. Thereafter the evidence was marked closed. She prepared and delivered the ruling thereof. There were no reasons assigned for such change from Hon. Mwakatobe, SRM to Mahumbuga,

RM. According to the settled tenets of the law, once a case is presided over by one judicial officer such judicial officer has to bring that suit to its completion unless for some understandable reasons he or she is prevented to do so. Order XVIII, Rule 10 (1) of the CPC provides:

> *"(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.*
>
> *(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 21."*

The Court of Appeal and this Court have consistently held that failure to state reasons for the change from one magistrate or judge to another at the hearing of the case, renders the proceedings of the successor magistrate or judge a nullity. The rationale of the above provision was underscored by the Court of Appeal in the case of **M/S Georges Centre Limited vs The Honourable Attorney General and Another, Civil Appeal No. 29 of 2016** (unreported), where it was held that:

> *"The general premise that can be gathered from the above provision is that once the trial of a case has begun before one judicial officer that*

judicial officer has to bring it to completion ***unless for some reason, he/she is unable to do that. The provision cited above imposes upon a successor judge or magistrate an obligation to put on record why he/she has to take up a case that is partly heard by another.*** "[Emphasis added]

The Court observed further:

"There are a number of reasons why it is important that a trial started by one judicial officer be completed by the same judicial officer unless it is not practicable to do so. ***For one thing, as suggested by Mr. Maro, the one who sees and hears the witness is in the best position to assess the witness's credibility. Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law. Furthermore, integrity of judicial proceedings hinges on transparency. Where there is no transparency justice may be compromised."*** (Emphasis added)

Similarly, in the case of **Kinondoni Municipal Council vs Q Consult Limited, Civil Appeal No. 70 of 2016**, the Court of Appeal held:

"Referring to ***Priscus Kimaro vs The Republic****, Criminal Appeal No. 301 of 2103 and* ***Abdi Masoud @Iboma and Others vs The Republic****, Criminal Appeal No. 116 of 2015 (both unreported), the Court held that* ***in the absence of any reason on the record for the succession by a judicial officer in partly heard case, the succeeding judicial officer lacks jurisdiction to proceed with the trial and consequently all proceedings pertaining to the***

takeover of the partly heard case become a nullity. Without much ado, we wish to state that we wholly subscribe to that position." (Emphasis added)

The matter at hand falls within the ambits of the dictates of the law and authorities cited. As pointed out above, I agree with Mr Qamara that the takeover of the partly heard case by Mahumbuga, RM, was highly irregular as no reasons for the succession were assigned on record. I entertain no doubt that the successor magistrate erred in proceeding with the hearing and determination of the suit before her without disclosing grounds of her take over. In that case, the entire proceedings before her, after her takeover, as well as the decision and drawn order that followed, are a nullity.

Having so concluded, I will not venture in the realm of other anomalies pointed out or on the grounds of appeal preferred by Mr Qamara. This conclusion, however, is without prejudice to the conclusion I earlier made regarding the competence of the Appeal whose genesis is a decision made in an objection proceeding.

4. CONCLUSION

In the upshot, in the exercise of revisional powers bestowed on me by section 79 of the CPC, I hereby quash and set aside the proceedings before the trial Court including the ruling and drawn order dated 20th

April, 2020. I would have just limited my decision to the proceedings and ruling of Honourable Mahumbuga, RM, but considering that the Applicant at the trial court, Janeth Francis Mchallo, died after giving her testimony, it would not be in the interest of justice to deny the person who took over from her the opportunity to testify and present the case before the trial court as he deems appropriate. It is on that ground that I find it imperative to quash and set aside the trial court proceedings before Mwakatobe, SRM, as well, which include the recorded evidence of the already testified witnesses so that the matter starts afresh. I remit the matter to the trial court for a fresh trial before another Magistrate. Since none of the parties is to blame for the illegality above stated, I direct that each party bears their own costs.

Y. B. Masara
JUDGE

15th July 2022