IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND REVISION NO. 4 OF 2020

(Arising from the Ruling and Order of the District Land and Hosing Tribunal for Tanga in Land Application No. 68 of 2009)

FATUMA JOHN----------1ST APPLICANT

MONICA GERALD MBONI----------2ND APPLICANT

GEORGE KILUMBI----------3RD APPLICANT

TATU ALLY KIBWANA----------4TH APPLICANT

SAMWEL GERALD MSAKA----------5TH APPLICANT

MOHAMED TENEGEZA @RASHID MOHAMED TENGEZA----------6TH APPLICANT

CHARLES GERALD KIBAJA----------7TH APPLICANT

AYUBU MKONO/MARTHA MKONO---------- --------8TH APPLICANT

NG'AZI R SHEMBILU----------9TH APPLICANT

TATU OMAR HALFAN----------10TH APPLICANT

YUSUF ABBRAHAM MBONELA----------11TH APPLICANT

SALIM RIDHWA SALIM----------12TH APPLICANT

MWALIMU HAJI MAALIM----------13TH APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF

EVANGELICAL LUTHERAN CHURCH

IN TANZANIA- NORTHEAST DIOCESE---------- RESPONDENT

JUDGEMENT ON REVISION

Mansoor, J.

07TH OCTOBER, 2022

The Applicants have applied for Revision of the proceedings, Ruling and orders passed by the District Land and Housing Tribunal for Tanga, in Land Application No. 68 of 2009, by the Ruling of Hon. F Mdachi passed on 16th February 2016. They made the application under Section 41 (1) of the Land Disputes Courts Act, Cap 216 R: E 2019, requesting this Court to revise the proceedings, the Ruling and Orders emanated therein and correct the errors since the Chairperson has acted with material irregularities.

Brief background of the matter is, the respondent in which shall be referred to as "the Church" initiated Land Application No. 68 of 2009 suing the applicants herein for a declaratory order that the Church is the lawful owner of the land measuring 6,242 square meters which is part of the land registered under CT No. 12313. The Church also applied for eviction order to evict these appellants/applicants plus one more person who is not a party in this Revision. The Church also applied for a demolition of the appellants/applicants' houses built on the land. The Church applied

for general damages and costs. The land in dispute is located at Plot 110 Block J, Usagara Area in Tanga Municipality. The Church was willing to bear the replacement costs and to give them alternative plots in Magaoni Area, Block C, within Tanga City. The applicants herein refused to accept the monetary replacement costs and refused to vacate their respective houses.

Land Application No. 68 of 2009 was determined exparte, in the exparte judgement delivered by Hon Richard Giray on 27 June 2011, the applicants herein were declared as squatters, and the land in dispute was declared to be the property of the Church. The applicants herein were ordered to demolish their houses and yield vacant possession to the Church.

Aggrieved by the decision of the District Land and Housing Tribunal which was delivered on 27th June 2011, the applicants herein filed an appeal before the High Court, Land Appeal No. 23 of 2011 which was dismissed on 3/12/2013 by Hon Judge Mgeta, for being time barred, also for the reason that the appeal was filed prematurely.

Then, the applicants herein together with Peter Raphael Shembilu went back to the District Land and Housing Tribunal for Tanga to

apply for extension of time to be able to apply to set aside the exparte judgement. The application was denied as the Chairperson did not find any good cause for granting them the extension. The decision was given on 16th February 2016 by Hon F Mdachi, the Chairman.

The applicants applied for extension of time to appeal against the Ruling and Order of the District Land and Housing Tribunal of refusal of extension time, this was Misc. Land Application No. 119 of 2016, the application was heard and determined by Hon Judge Amour J, he granted the application. The applicants were given 21 days from 29th September 2017 to file the appeal against the decision of Hon F Mdachi, the Chairman of the District Land and Housing Tribunal. The Church was aggrieved by the decision of Hon Amour J, they applied for leave to appeal to the Court of Appeal, this was Misc. Land Application No. 102 of 2017, this application was dismissed by Judge Amour J on 08th June 2018, for want of prosecution.

The applicants herein filed Misc. Land Application No. 51 of 2018 seeking for enlargement of time earlier given in Misc. Land

Application No. 119 of 2016. This application was determined by Hon. Judge Mkasimongwa, and the application was struck out by Hon. Judge Mkasimongwa on 16 April 2019. The Applicants were not given any further extension.

After all these, the applicants are coming back to Court by way of Revision seeking to revise the decision of Hon. Mdachi, the Chairman of the District Land and Housing Tribunal which was delivered on 16th February 2016. This application was filed in Court on 30th November 2020, almost four years later without seeking for an extension to file it outside the prescribed time. Not only that there was no extension of time sought and granted to the applicants to file the Revision out of time, the extension granted to them by Hon. Judge Amour was to file an appeal, and the time given by Hon Judge Amour also expired. Despite all these, the Learned Advocate Grace Elias Ntambi of Divine Law Chambers decided to ignore all the procedures and filed the present application in court way out of time without the leave of the Court.

Advocate Ezra Mwaluko who is representing the Church took an objection on points of law that the parties opted an appeal, and

they cannot file an application for Revision, and that the Court is functus officio. The other objection is that the order of refusal to set aside the dismissal order is an appealable order under Order XL (1) (d) of the Civil Procedure Code, and parties are precluded from filing the Revision. The Counsel for the Church referred this Court to the case of **the Trustees of Tanzania National Parks vs Awadhi Seif, Civil Appeal No. 6 of 2010**, in which it was held that *"...in this regard, an aggrieved party does not appeal against an exparte judgement/decree as a matter of first instance, rather she may only proceed on appeal in terms of Order XL(1) (d) upon rejection of her/his application to set aside the exparte judgement/decree."*

From the outset, and with due respect to the Advocate for the Church, the objection that the applicants ought to have filed an appeal against the order of refusal to set aside an exparte judgement is misconceived, as what was refused by Hon F Mdachi, the Chairperson of the District Land and Housing Tribunal was not to set aside the exparte judgement, the applicants were denied an extension of time to file an application for setting aside the exparte

judgement. Thus, the arguments regarding Order XL (1) (d) are totally misplaced.

Regarding the objection that the applicants had already preferred an appeal, and the appeal was dismissed, and that they cannot come back to Court by way of Revision, the Counsel referred this Court to the case of **Malik Hassan Suleiman vs SMZ (2005) TLR 236,** in which the Court held that, " *a court becomes functus officio when it disposes of a case by a verdict of guilty or by passing a sentence or making orders finally disposing of the case; in this case the learned judge becomes functus officio when he passed the judgement of 19 February 1998 and he was not clothed jurisdiction subsequently."*

The respondents filed the reply submissions and argued that the objections raised are not pure points of law and cannot be determined without production of evidence as they are matters of facts, but the applicants does not dispute that they filed an appeal before this same court and the appeal was dismissed before they applied at the District Land and Housing Tribunal to have an

extension of time to file an application to set aside the exparte decree.

The objection raised by the respondents are pure points of law, they touch the jurisdiction of this Court to entertain the Revision, and it was correct for the Counsel for the respondent to raise them at the earliest stage, and this court is justified to determine them points at the earliest before determining the application for Revision on merits.

Regarding the application to set aside the dismissal order which was never applied to the Tribunal by the applicant, it is true as submitted by the counsel for the respondent that under O. XL, r. 1 (d) of the CPC that an appeal lies not against orders setting aside a decree passed ex parte but against orders rejecting such an application. So far as the case before this Court is concerned the order under revision cannot be sustained as the applicants herein had first preferred an appeal before they resorted to apply to set aside the decree passed exparte as the application to set aside the decree passed exparte would operate as res judicata as the same question of fact was raised in an appeal which was dismissed, then

subsequent applications or revisions to set aside an ex parte decree under O. IX, r. 13 or by way of revision is obviously res judicata and this Court is functus officio to entertain an application to set aside the decree passed exparte or an application for revision. This is because it is not disputed that to operate as res judicata, the court dealing with the first matter must have had jurisdiction and competency to entertain and decide the issue. Adverting to the facts of the present Revision, it is undisputed that the parties herein filed an appeal No. 23 of 2011, The High was vested with jurisdiction to entertain the appeal, and this appeal was dismissed for it was time barred, it was preferred by way of petition instead of a memorandum, and that the appeal was filed prematurely. The key word therein in the decision of the High Court is that the appeal was dismissed, parties are barred from re-opening any other proceedings before the District Land and Housing Tribunal and before the High Court. The only remedy to parties is to appeal to the Court of Appeal against the decision of the High Court in Land Appeal No. 23 of 2011.

It is common ground that the inherent power of the Court cannot override the express provisions of the law. In other words, if there are specific provisions of the Civil Procedure Code or the Land Disputes Courts Act dealing with a Particular topic and they expressly or by necessary implication exhaust the scope of the powers of the Court or the jurisdiction that may be exercised in relation to a matter, the inherent power of the Court cannot be invoked to cut across the powers conferred by the Law. The applications by the applicants to set aside ex parte orders or decree passed against them and reopen the proceedings which had been conducted in their absence is barred once they preferred an appeal. It is correct that the suit at the District Land and Housing Tribunal was heard and decreed exparte. The applicants had two options, one to file an appeal and two, the applicant had recourse to an application under O. IX, r. 6 to set aside the ex parte decree. But they cannot pursue the two remedies at once. If they chose to pursue the appeal, and the appeal fails, they cannot go back to the District Land and Housing Tribunal to have the decree passed exparte be set aside. Similarly, when the court has heard and determined the appeal, the same court cannot determine the

revision on the same subject matter, the court become functus officio and the matter becomes res judicata.

It is true as argued by the Counsel for the applicants that it is not mandatory for the aggrieved person to move an application before the Magistrate or the Chairman of the District Land and Housing Tribunal under Order IX Rule 6 for setting aside of the ex parte decree and such an aggrieved person can move the High Court by filing an appeal or revision. Nowhere it has been provided in Civil Procedure Code that unless the aggrieved party to an exparte decree takes recourse to first apply for setting aside the exparte decree, the second remedy, that is of an appeal or revision is not available to him according to law. This is a case in which after an ex parte decree was passed against the applicants herein, they did not opt to move the Tribunal for setting aside an ex parte decree, but they decided to invoke the jurisdiction of the appellate court itself and preferred an appeal. Once the party prefers an appeal, and the appeal fails, he is precluded to go back to the Tribunal to have the exparte decree

passed be set aside. The remedy available to such applicant is to appeal to the Court of Appeal.

A party must stick to one or other option of electing either of the two remedies. Once a party has preferred an appeal; he cannot apply to invoke the provisions of Order IX of the CPC. The application to set aside the exparte decree and appeal cannot go together, they cannot run parallel. Similarly, where an order or a decree is appealable, no revision lies. Party is not at liberty to invoke Revision and Appeal at the same time. Having filed the appeal and having failed in the appeal, it was not open to the applicant to prefer an application for setting aside the exparte order and then come to court under the disguise of Revising the order of refusal to extend time to do an action which is not available to them, decree, as the exparte decree or decree was already adjudicated by the Court in Appeal No. 23 of 2011, whereby the appeal in its entirety was dismissed.

It will be noticed that it is open under the Civil Procedure Code or Land Disputes Courts Act to a person considering himself aggrieved by a decree made exparte to appeal or to apply to have it set aside.

It will be noticed that one of the conditions laid down for an application for setting aside exparte decree is that it must be filed before an appeal has been preferred. In this case the appeal was filed against the exparte decree, it was appeal No. 23 of 2011. The question was whether the application to set aside the exparte decree was filed at a time when no appeal had been preferred. It is on record that the application to set aside the exparte decree had been filed after the appeal was preferred. Since the appeal was filed and determined before the application to set aside the exparte decree was initiated, the Court and the Tribunal is not vested with jurisdiction to entertain the application for setting aside an exparte decree on the ground that when the application came on to be dealt with an appeal was already determined by a superior court. If the application to set aside the exparte decree was preferred first, before filing an appeal, the applications would have been competent, and applicants would have been correct to appeal or apply for revision before this Court after the District Land Housing Tribunal had refused them to set aside the exparte decree. The power to entertain an application to set aside the exparte judgement remained in existence only if there was no appeal filed

and determined. After the appeal has been heard and a decree passed by the appellate Court, it is not open to the Court before whom the application for setting aside the exparte decree was presented to proceed with its hearing. But where an application for setting aside the exparte decree comes to be heard and decided after the appeal is heard and finally disposed of, the position is that it is incompetent for the Tribunal to entertain such an application.

An application for setting aside exparte decree lies by any person aggrieved by a decree "from which an appeal is allowed but from which no appeal has been preferred". This means , firstly that if before making of an application to set aside the exparte decree, an appeal has already been filed and dismissed, then the Court has no jurisdiction to entertain the application, secondly where the application for setting aside the exparte decree is first made and thereafter an appeal is preferred, the application can be disposed of provided the appellate Court has not disposed of the appeal before the application is taken up for disposal. The present case falls within the first principle and the objection raised by the Counsel for the respondent are maintainable and are upheld.

Consequently, based on the above discussions, the application for revision is dismissed with costs.

DATED AND DELIVERED AT TANGA ON 7TH OCTOBER 2022

L. Mansoor,

JUDGE

07/10/2022