IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION NO. 8 OF 2021

(Originating from Civil Case No. 63 of 1997 in the Resident Magistrate's Court of Dar es Salaam at Kisutu)

GEOFFREY RAYMOND KASAMBULA ..... APPLICANT

VERSUS

ZILPA YOHANA LUKWARO ..... 1ST RESPONDENT

SOPHIA HASSANI as a legal representative of the late

ASHA ATHUMANI KALINGA (Deceased) ..... 2ND RESPONDENT

RULING

13th and 30th September, 2022

BANZI, J.:

The Applicant, Geoffrey Raymond Kasambula instituted these Revisional proceedings under section 44 (1) (a) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] ("the MCA") and section 79 (1) (c) of the Civil Procedure Code [Cap. 33 R.E. 2019] ("the CPC") seeking for the following orders: -

(i) That, the Honourable Court be pleased to call for and inspect the records of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 63 of 1997 and thereby revise the

decision of that court made on 30th July, 1997 and give such direction or orders as it considers necessary in the interests of justice;

(ii) Costs be provided;

(iii) Any further or other relief deemed fit.

The application is supported by an affidavit of the Applicant. Unlike the second Respondent, Sophia Hassani, the legal representative of Asha Athumani Kalinga who filed the notice of non-contention, the first Respondent, Zilpa Yohana Lukwaro filed a counter affidavit to oppose the application.

Before determining the merit of the application, it is pertinent to give a brief factual background of the matter gathered from the affidavits, pleadings and proceedings of the Civil Case No 63 of 1997 before the Resident Magistrate's of Dar es Salaam at Kisutu. The centre of the dispute between the parties revolves around a piece of land on Plot No. 248 Block G situated at Mbezi Dar es Salaam, ("the suit property). On 18th June, 1996, the first Respondent/Plaintiff purchased the suit property from Asha Athuman Kalinga (the Defendant) but the latter failed or refused to hand over the title deed to the former. Consequently, the first Respondent filed

the suit seeking court's intervention for the Defendant to produce the title deed. Despite being served with summons to defend herself, the Defendant failed to file written statement of defence, nor did she enter appearance. As a result, following a prayer from the first Respondent/Plaintiff, the case proceeded *ex-parte* where she was allowed to prove her case by affidavit. At the end, the trial court entered judgment in favour of the first Respondent.

Sometime in March 2012, the Applicant received a letter from the Commissioner for Lands concerning the suit property requiring him to demolish the house he had erected thereon following an order that arose from execution of the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No 63 of 1997, which had recognised the first Respondent as the lawful owner of suit property. The Applicant averred that, when the suit was instituted in the subordinate Court, he was already in ownership and had vested interest on the said land and therefore he was by law a necessary party. After learning about the existence of Civil Case No. 63 of 1997, the Applicant applied for extension of time to institute this application for revision which was granted on 17th November 2016 by the High Court of Tanzania (Dar es Salaam District Registry) in Miscellaneous Civil Application No. 273 of 2015 and hence this revision.

The application was argued by way of written submissions whereby both sides complied with the scheduled order of the Court. The Applicant was represented by Mr. Dennis Michael Msafiri, learned Advocate, whereas, the first Respondent was represented by Mr. Hosea Chamba learned Advocate while the second Respondent had the services of Mr. Edward Mollel, learned Advocate. As stated above, the second Respondent did not oppose the application.

Arguing in support of the application, Mr. Msafiri submitted that, the trial Court in the exercise of its jurisdiction had acted illegally and with material irregularity. He added that, at the time when the first Respondent/Plaintiff filed the suit, the Applicant had already purchased the same suit property and thus, he ought to have been made a party to the suit as necessary party otherwise his interest could have been affected by any decision made in favour of the Plaintiff. Since the Applicant was not made the party, he was denied the right to be heard and ultimately deprived of his right over the property. To cement his point, he cited the case of **Tanga Gas Distributors Limited v Mohamed Salim Said and 2 Others**, Civil Application for Revision No. 68 of 2011 CAT (unreported). He further

contended that, the judgment of the trial court was entered in favour of the Plaintiff without proof led by her as required by law.

Moreover, Mr. Msafiri submitted that, the case was transferred from one Magistrate to another without complying with Order XVIII Rule 10 of the CPC. Likewise, no order was issued either for summons to appear or summons to file written statement of defence which contravened the dictates of Order VIII Rule 1 and Order V Rule 1 of the CPC. It was also his contention that, it was not proper for the trial Magistrate to allow the suit to be proved by affidavit instead of oral testimony to be taken in an open court as directed under the provisions of Order XVIII Rule 4 of the CPC. To support his point, he cited the case of **Faizen Enterprises Limited v. Africarriers Limited,** Civil Appeal No. 38 of 1997 CAT (unreported). In that regard, he prayed that, this application be allowed by quashing all proceedings, setting aside the judgment and decree made on 30th July, 1997 and directing a proper procedure to be pursued after joining the Applicant as an interest party.

In his reply, Mr. Chamba at the outset referred this application as an abuse of court process manifested by forums shopping and was made in bad faith after the Applicant lost his claim in the Land Case No. 30 of 2017 at the High Court of Tanzania, (Dar es Salaam District Registry) whose judgment

was delivered on 22nd December, 2020 (annexure Z-3 of the counter affidavit) in favour of the first Respondent. In that case, the Applicant unsuccessfully defended his interest over the suit property, the same property in Civil Case No. 63 of 1997 upon which he seeks revision so that he can go back and defend his interest once again as necessary party. In addition, there is a pending appeal to the Court of Appeal over the decision in the Land Case No. 30 of 2017. He added that, having in place the judgment in Land Case No. 30 of 2017 and pending appeal between the same parties over the same subject matter intended to be prosecuted by the Applicant following this revision, pose a danger to the court for pronouncing two conflicting decisions over the same subject matter. To buttress his point, he cited the cases of **Attorney General v. Hammers Incorporation Co. Ltd and Another**, Civil Application No. 270 of 2015 CAT (unreported) and **Isidore Leka Shirima and Another v. The Public Service Social Security Fund (as successor of PSPF, PPF, LAPF and GEPF) and Three Others**, Civil Application No. 151 of 2016 CAT (unreported) which emphasised on the position against invoking two jurisdictions simultaneously.

It was further his submission that, despite the right of the Applicant to institute an application for revision to protect his interest, yet the jurisprudence demands that the said application should not cause confusion and must augur with good administration of justice. In his view, justice would be defeated in granting this application as there is already another avenue through this Court in which the rights of the parties have been conclusively achieved. He cited the case of **Yara Tanzania Limited v. DB Shapriya & Co. Limited**, Civil Appeal No. 244 of 2018 CAT (unreported) to support his point on not to cause confusion or not augur with good administration of justice.

Concerning irregularity on judgment of the trial court for want of proof, Mr. Chamba replied that, revisionary powers are limited and cannot go into the merit of the original case as provided for under sections 44 (1) (a) and 79 (1) (c) of the Magistrates Courts Act [Cap. 11 R.E. 2019] and the CPC, respectively. In respect of non-compliance with Order XVIII Rule 10, he submitted that, it was a new fact as the same is not reflected in the affidavit. Nevertheless, the said provision is inapplicable in the matter at hand because there was no change of Magistrates after receipt of evidence. Concerning failure to issue order for issuance of summons to the Defendant, he

submitted that, the summons to appear and file written statement of defence were issued and served accordingly. Furthermore, the affidavit of court process server was filed in court. If the summons was not properly served to the Defendant, she would have challenged the same but instead, she cooperated in execution process and subsequent grant of the title deed to the first Respondent/Defendant. Apart from that, on the issue of proof by affidavit, he stated that, an affidavit is allowed in court as a substitute of oral evidence as ruled in the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** [1966] 1 EA 514. Therefore, being a substitute of oral evidence, it was proper for the trial Magistrate to order proof of claim by affidavit. He added that the cited case of **Faizen Enterprises Limited** is distinguishable to the circumstances of this case because, unlike in the present case, in the cited case, the Defendant entered appearance and filed the written statement of defence. Also, in the cited case, an order to prove the case by affidavit was made on the date of hearing. Besides, Order VIII of the CPC does not bar proof by affidavit. In that regard, he prayed for application to be dismissed for want of merits because by allowing the same, the Court will pave the way for the Applicant to re-litigate over the same subject matter which he lost in Land Case No. 30 of 2017.

In his rejoinder, the Applicant submitted that, the argument by the first Respondent is untenable because Land Case No. 30 of 2017 is a completely separate proceeding as it was neither an appeal nor a revision arising from Civil Case No. 63 of 1997. What the Applicant is complaining about now is that, the Civil Case No. 63 of 1997 was decided without his involvement, while it concerned land in his possession and ownership. He added that, the principle concerning the position against invoking two jurisdictions simultaneously is inapplicable in the present matter. Had it been an appeal and revision before the Court of Appeal against the decision of High Court in Land Case No. 30 of 2017, that position would have applied. He further submitted that, the revision at hand is not an abuse of court process as it was initiated before institution of Land Case No. 30 of 2017. He reiterated that, the proceedings in the trial court were tainted with illegality and material irregularity because the trial court had failed to comply with procedural requirements in conducting trial. Therefore, he reiterated his prayer for application to be allowed.

Having carefully considered the affidavits, record of the trial Court and the submissions by both sides, the main issue for determination is whether the application is merited.

The Applicant is challenging the propriety of the proceedings in Civil Case No. 63 of 1997 basing on the following: one, he was a necessary party and thus, ought to have been joined in the suit in question; two, the case was transferred from one Magistrate to another without complying with Order XVIII Rule 10 of the CPC; three, summons was issued without order of the court and four, it was improper to allow the suit to be proved by affidavit.

I will begin with the issue concerning issuance of summons without order of the Court. Mr. Msafiri was of the view that, it was improper to issue summons to the Defendant without order of the Court and by doing so, the Court contravened the requirements of Order V Rule1 and Order VIII Rule 1 of the CPC. I have carefully perused Rule 1 of the Orders in question. Order V Rule 1 (a) and (b) of the CPC is about summons to appear and summons to file a defence respectively upon institution of the suit. Looking closely at the provisions of the rule in question, to issue summons either to appear or to file defence does not require order of the Court to be recorded in the proceedings but rather, it is an automatic action after institution of the suit. The record of the trial Court shows that, after institution of Civil Case No. 63 of 1997, through Initial Notice, on 18th February, 1997, the case was

assigned to Hon. Longway, PRM. Soon thereafter, on 20th February, 1997, a summons to file defence was issued to the Defendant pursuant to Order V Rule 1 (b) of the CPC. The same summons indicated the date and time when the Defendant was required to appear. The summons was duly served as the Defendant signed to acknowledge the service. It is therefore clear that, such summons was issued in accordance with the requirement of the law.

Reverting to the issue of transfer of Magistrates, Order XVIII Rule 10 provides as follows;

> *"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."*

What I gathered from the extract above is that, if for a reason of death, transfer or other cause, a Magistrate is prevented from concluding the trial, a successor Magistrate may deal with any evidence taken down by his predecessor and proceed with it to its finality. It is a settled principle that,

such reason must be recorded in the proceedings. In the present matter, the record shows that, the suit in question was assigned to Hon. Longway PRM. It is also clear that, it was the same Magistrate who had received evidence of the Plaintiff as the case proceeded *ex parte* and finalised it by composing the judgment on 17th June, 1997 which was delivered by another Magistrate on 30th July, 1997. Since it was the same Magistrate who received evidence and wrote judgment, the fact that it was delivered by another Magistrate without assigning any reason might be an irregularity but which does not vitiate the proceedings. Things could be different if the judgment was written by another Magistrate who did not receive the evidence.

Concerning proof of case by affidavit, Order XIX rule 1 of the CPC permits proof of facts by affidavit. Besides, it is common practice and procedure of our courts that, facts can be proved either orally or by affidavit. In that view, as stated in the case of **Uganda v. Commissioner of Prisons, Ex parte Matovu** [1966] 1 EA 514, an affidavit is a substitute of oral evidence. See also the case of **D.T. Dobie (Tanzania) Limited v. Phantom Modern Transport (1985) Ltd**, Civil Application No. 141 of 2001 CAT (unreported). In the instant matter, the Defendant failed to file written statement of defence despite being duly served and the Plaintiff was

allowed to proceed *ex parte* by proving her claim by affidavit. Whether she successfully proved her case or not is a matter subject of appeal and not revision. Moreover, it is important to note that, every case is be decided on its own merits based on particular circumstances. In the cited case of **Faizen Enterprises Limited** the Defendant after filing written statement of defence failed to appear and the order of proof by affidavit was made on the hearing date when the Plaintiff was before the court for his oral testimony. Apart from that, the said order was followed by several adjournments in disregard of the provisions of the CPC. However, in the present matter, such order was made when the matter was scheduled for mention and there was no adjournment before the date set for filing of affidavit which was filed within time. Thus, the case **Faizen Enterprises Limited** is distinguishable as its circumstances are different with the circumstances of this case.

Returning to the claim by the Applicant that, he ought to be made a party to Civil Case No. 63 of 1997, I am very much aware that, any person claiming interest in a suit property may be joined in that suit as a necessary party. However, in the present matter, there is nothing on record revealing the interest of third party over the suit property which would have led the Plaintiff to join the Applicant as a necessary party. Likewise, that fact was

not in the knowledge of the trial Court which could have led it to order the Applicant to be joined as necessary party. Besides, if the Applicant wants to exercise his right to be heard by defending his interest over the suit property in Civil Case No. 63 of 1997, his right is overtaken by the event because he had already been heard and defended his interest in the Land Case No. 30 of 2017. Both cases *i.e.*, Civil Case No. 63 of 1997 and Land Case No. 30 of 2017 concern the same subject matter, Plot No. 248 Block G Mbezi. Through Land Case No. 30 of 2017, the Applicant presented his evidence to establish his claim of ownership of the suit property which he also claimed to have been denied in the Civil Case No 63 of 1997. The fact that the Applicant was given a chance to defend his interest in Land Case No. 30 of 2017, allowing this application will pave way for him to re-litigate over the same matter which he lost in Land Case No. 30 of 2017. This will not only be an abuse of court process but also would result to endless litigations. As stated in the case **Tanganyika Land Agency Limited and 7 others v. Manohar Lal Aggrwal**, Civil Application No. 17 of 2008 CAT (unreported) that, like life, litigation must come to an end. Therefore, even if there were any material irregularity to the extent of vitiating the proceedings of the trial Court, yet still in the particular circumstances of this case, a retrial would not have been a proper recourse to take, as it could have resulted in justifying forums

shopping and risking of conflicting decisions over the same subject matter by different courts. Indeed, the Applicant had already defended his interest in the Land Case No. 30 of 2017. Besides, taking judicial notice of the change of subject matter jurisdiction of the Resident Magistrates' Courts, following the enactment and coming into force of the Land Acts of 1999 and the Land Disputes Courts Act, 2002, it would be nugatory of this Court to order retrial of the matter at the RM's Court of Dar es Salaam at Kisutu for the obvious reason of lack of jurisdiction to entertain land matters.

That being said, it is the finding of this Court that, this application for revision is unmerited and it is accordingly dismissed with costs.

I. K. BANZI
JUDGE
30/09/2022