

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI SUB-REGISTRY
AT MOSHI**

MISC. LAND APPLICATION No. 2569 OF 2024

(Arising from Land Case No. 16 of 2015 of the High Court of Tanzania, Moshi Sub-Registry at Moshi and the Decision of the Court of Appeal of Tanzania in Civil Appeal No. 231 of 2020)

JOYCE CHRISTOPHER MASAWE (*Legal Representative
of the Late FRIDA WARASKAWA KIMARO*).....**APPLICANT**

VERSUS

AMPHARES GEOFREY NABURI (*Legal Representative
of the Late ODILIA WARASKAWA KIMARO*)..... **RESPONDENT**

RULING

10th June & 1st July, 2024

A.P. KILIMI, J.:

The respondent hereinabove initiated a land case no.16 of 2015 in this court against the applicant mentioned above praying to be declared the owner of a parcel of land measuring approximately three (3) acres (the suit land), situated at Dipu area, Kwasadala Village within Hai District in Kilimanjaro Region. Upon being heard on merit this court decided in favour of the respondent and declared her the lawful owner of the suit land.

Unsatisfied with this court decision, the applicant moved to the court of appeal vide Civil Appeal No. 231 of 2020 to challenge the said decision.

It was on 12th December, 2023 the court of appeal found the proceeding at the trial was vitiated in respect of legal requirements of assessors and visiting *locus in quo*, consequently, the court nullify the entire proceedings and quash the judgment and orders thereto of this court. Further ordered the case file be remitted to this court to conduct an expedited trial before another Judge in accordance with the law.

When the matter was in the preliminaries for re-trial as ordered by the court above, the applicant moved this court by way of application under section 91(1) of the Civil Procedure Code Act Cap 33 R.E.2019 hereinafter 'CPC' praying this court to order restoration of the ownership and possession of the Suitland stated above to the applicant. She further claimed costs for the reconstruction, restoration and rehabilitation of the demolished properties which were attached thereon.

In reply to this application, the respondent emerged with the following preliminary objection on the points of law as follows;

1. That the application filed is unmaintainable as the same has been filed without this Honorable court order /leave to depart from scheduling conference order.
2. That the application is unmaintainable as the same has been filed contrary to lawful orders of the Court of Appeal of Tanzania in Civil Appeal No. 231 of 2015 of retrial not re pleading without order of the court.
3. That the application is incompetent before this court as this Honorable court has no jurisdiction to challenge the decision of the Court of Appeal of Tanzania in Civil Appeal No. 231 of 2015 of restoring ownership and possession of land without first declaring whether the Applicant is the lawful owner or not of the land in dispute in Land Case No. 16 of 2015 which is pending for determination in this honorable court.
4. That the application filed is premature as the interest of parties are still pending for determination in this honorable court in Land Case No. 16 of 2015 and the execution was never completed in Application for Execution No. 02/2018 as the Applicant never vacated the suit premises.
5. That the application is incurably defective for failure to join the court broker one Ms. Newton G. Makwale trading as Independent Agencies & Court Broker Limited who was appointed in Application for Execution No. 02/2018 to execute the decree hence denying him right to be heard per Article 13(6) of the Constitution of the United Republic of Tanzania 1977 as amended.

When the matter was placed before me for hearing, the applicant had the service of Ms. Joan Peter learned advocate holding brief for Ms. Jackline Rweyongeza with instruction to proceed, whereas the respondent was represented by Mr. Faraji Mangula learned advocate. With the leave of this court, the said objections were argued by way of written submissions. I

applaud their timely compliance and researched submissions; however, I will refer to them in due cause when the need arises.

I have considered the above objections and the judgment of the court of appeal in Civil Appeal No. 231 of 2020, I find myself constrained to start with objection number 2 and 3 which in fact question the jurisdiction of this court to entertain this application. I have then taken regard that, it is a trite law that, the jurisdiction of any Court is basic, it goes to very root of the authority of the court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts as a matter of practice on the face of it, be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case. (See **Faniel Mantiri Ng'unda versus Herman Mantiri Ng'unda** [1995] TLR 159.

In my view the above two objections challenges the jurisdiction of this court in accordance to the order of the court of appeal in Civil Appeal No. 231 Of 2020, and from them, the general issue is whether this court after

the court of appeal instructions has jurisdiction to entertain this kind of matter.

Mr. Mangula submitting to these objections argued that, the Order of The Court of Appeal acts as a scheduling order which has to be abided by the parties, thus the applicant was required to seek leave to vacate the order. Further the counsel urged this court not to accept this application for restoration and compensation as the interest of the parties were still in dispute as who is the lawful owner of the land in dispute. Hence restoring as alleged by the applicant and compensating her would amount to chaos as no one can predict the outcome of the case. He then asked what if the Respondent is declared the lawful owner, mean there will be an endless litigation as she will also claim compensation and restoring in her original position.

The counsel for respondent further submitted that, the Court of Appeal did not vary the decree but ordered retrial. He then said there is a difference of varying and retrial. In varying the person to apply for compensation and restoration first must be declared a lawful owner. The counsel also said the rationale of such is to ensure that litigation must come to an end. To buttress

his position, he referred the case of **Jackson Godwin vs. Republic** Criminal Application NO. 68/04 OF 2016 (unreported).

Mr. Mangula submitting in respect to ground number 3 argued that this application is incompetent as this court has no jurisdiction to challenge decision of the Court of Appeal of Tanzania in Civil Appeal No. 231 of 2020 of restoring ownership of the land without first declaring whether plaintiff is the lawful owner in Land Case No. 16/2015 which is pending in this court, therefore he asserted that application raised is premature as the interest of the parties are still pending for determination in this court in Land Case No. 16/2015, and execution was not completed in application for execution 02/2018 as the Plaintiff therein never vacate the premises. Thus, prayed this application to be seen is the abuse of court process thus should be dismissed for being frivolous and vexatious.

Responding to the above argument Ms. Joan Peter contended that the order of retrial does not amount to scheduling order under any circumstance rather new trial which now require plaint and written statement of defense as ordered by this court for amendment. Therefore no need to obtain leave of this court, thus she said each case should be treated different and refer

the case of **Elia John vs Republic** [2019] TZCA 303 (TANZLII). Ms. Joan added that the act of nullifying the entire proceedings and quashing the judgment and the subsequent orders thereto by the Court of Appeal puts the parties to this case to their original situation before prosecuting and determination of Land Case no 16 of 2015 in this court.

In respect to restoration, the counsel Ms. Joan argued that retrying Land Case no 16 of 2015 without restoring parties physically on their original situation and compensate the party which has suffered due to the reckless action done by other party will lead to unjust litigation. Therefore, this court is vested with jurisdiction to make sure the parties are restored into their original status and compensate any or either party due to the reckless actions done before retrying the case. Thus, this court has a duty to see that the applicant does not continue to suffer from the wrong decision previously done by the court. To bolster her point, she referred the case of **Fraid F.Mbaraka & Another vs Domina Kagaruki & Another** [2023] TZCA 17597 (TANZLII) and **Tanzania Sewing Machine Company Ltd v. Njake enterprises Ltd** Civil Appeal No. 52 of 2011 (unreported).

I have considered the above submission, now responding to issue posed above, I find apposite to start by extracting the order of the court of

appeal in **Joyce Christopher Masawe vs Amphares Geoffrey Naburi** (Civil Appeal No. 231 of 2020) [2023] TZCA 17930 (TANZLII) for purpose of reference as found at page 14 of the typed judgment of the court;

"...we are satisfied that the pointed-out omissions and irregularities amounted to fundamental procedural errors which have occasioned a miscarriage of justice to the parties and had vitiated the proceedings and entire trial before the High Court,

*In the event, we hereby **nullify the entire proceedings and quash the judgment and the subsequent orders thereto. We remit the case file to the High Court for it to conduct an expedited trial** before another Judge in accordance with the law."*

[Emphasis added]

First, in view of the above order of the court, I am entirely in agreement with the counsel for the applicant when he argued that Decree extracted from the judgment and once the judgment is quashed then its decree cannot stand to enforce anything. Therefore, the action of the Court of Appeal to

quash the entire proceedings, judgment and the subsequent orders thereto and order retrial automatically varied the decree of the High Court. Therefore, the argument of the respondent that the Court of Appeal did not vary the decree but only order re-trial was misplaced.

Second, as rightly argued by the counsel for the applicant that each case should be decided according to its circumstances. In this matter, when the court nullified the proceeding, judgment and orders thereto, did not end there, but continued to order retrial for the reasons alluded above. I have asked myself what does this means to this court. According to the record, the dispute between the parties prior to court decision was struggle for who own a parcel of land measuring approximately three (3) acres. Issues therein were only two, first, who is the owner of the suit land? And second, what are the reliefs entitled to the parties.

In my considered opinion the said dispute is still existing after the court of appeal decision, that is why despite of irregularities found therein, the court of appeal did order re-trial of the matter to be done by this court. I think the situation would have been different had the court of appeal nullified only the decision of this court without further order of re-hearing. Therefore,

it is my view this court cannot do anything in respect to the said suit land in the first instant before rehearing the main case which was nullified by the Court of Appeal. And this is for the sake of determination of the rightful owner of the said suit land as Mr. Mangula endeavored to depict.

In that regard, it is my observation under the circumstances of this matter, this court jurisdiction in respect to the parties in this matter has been limited by the court of Appeal for re-trial only in order to settle first who is the owner of the suit land, then after that next applications as the case may be shall follow.

I am aware the applicant might have suffered a lot due to the decision of this court which has been nullified, but I am in the same position as Mr. Mangula rightly argued that the interest of the parties which is in dispute is who is the lawful owner of the said suit land since the outcome of the case ordered to be retried currently is unknown to parties. Therefore, in my settled view whatever has been done in respect to the said suit land should remain as it is, and should wait for the determination of this court to declare who is the owner of the suit land. In simple logic anticipation, prayers by applicant in this application actually depends the outcomes of re-hearing of their case

as ordered by the Court of Appeal. Thus, under the circumstances of this matter cases referred by the applicant's counsel are completely distinguished.

In conclusion thereof, it is my considered opinion through Civil Appeal No. 231 of 2020 of the Court of Appeal, this court have been conferred jurisdiction to make re-trial of the Land Case No. 16 of 2015 in order to ascertain who is the owner of the suit land, therefore, from the above order, this court cannot do anything in respect to said suit land including restoration or compensation to anything attached to the said land without knowing who is the owner of it, and this is because currently, each of them above are still in dispute as per the order of the court of appeal. Thus, I am settled to do otherwise it will be a mockery of justice.

On the circumstances, I find the two preliminary objections discussed above are meritorious and are accordingly upheld and sustained. Furthermore, I find that the determination of these objections is sufficient to dispose of this application and find no need to consider and determine the remaining objections. In the premises and from the foregoing reasons, this application is hereby struck out with costs.

It is so ordered.

DATED at **MOSHI** this day of 1st July, 2024.



A.P.K.
A.P. KILIMI
JUDGE

Court: Ruling delivered today on 1st day of July, 2024 in the presence Ms. Joan Peter and Mr. Gwakisa Sambo learned advocates for Applicant. Mr. Faraji Mangula for Respondent. Applicant and Respondent also present.

Sgd: A. P. KILIMI
JUDGE
1/07/2024

Court: Right of Appeal explained.

Sgd: A. P. KILIMI
JUDGE
1/07/2024