IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 71 OF 2020

(Originating from the District Land & Housing Tribunal for Morogoro in Land Application No. 189 of 2019)

NELSON MAYOMBO (Administrator of
The Estate of the Late WOLFRAM ALEXANDER NGONYANI).....**1ST APPELLANT**
JENIFA MAYOMBO(Administrator of
The Estate of the Late WOLFRAM ALEXANDER NGONYANI).....**2ND APPELLANT**

VERSUS

HALIMA YASINI MASANJA.....RESPONDENT

Date of Last Order: 14.12.2020
Date of Ruling: 18.12.2020

JUDGMENT

V.L. MAKANI, J

The appellants herein namely, NELSON MAYOMBO and JENIFA MAYOMBO (being Administrator and Administratix of the Estate of the late WOLFRAM ALEXANDER NGONYANI) have filed this appeal against the decision of the District Land and Housing Tribunal (the **Tribunal**) in Misc. Application No. 189 of 2019 (Hon. M. Khasim, Chairman).

The decision by the Tribunal was in view of the application for review that was filed by the appellant herein which application was struck out with costs.

Being dissatisfied with the said decision the appellants have filed this appeal with four grounds as follows:

1. *That the Hon. Chairman erred in law and in fact by failure to interpret the law which requires the application for review to be filed by using Memorandum of Review.*

2. *That the hon. Chairman erred in law and in fact for failure to note that we do not cite provisions of law in the Memorandum of Review.*

3. *That the hon. Chairman erred in law and in fact for failure to note that the form of preferring appeal shall apply mutate mutandis, to applications for review.*

4. *That the Hon. Chairman erred in law and in fact to raise a new issue on point of law and deciding to deliver the ruling on the raised preliminary objection without affording parties to be heard.*

The appellants prayed for:

a) *The appeal to be allowed and the decision of the trial Tribunal be quashed and set aside;*

b) *This honourable Court be pleased to order the Chairman to deliver the ruling of the said application for review;*

c) Costs of this appeal be provided for.

With leave of the court the appeal was argued by way of written submissions. The submissions on behalf of the appellants was drawn and filed by Mr. Kasaizi A. Kasaizi, Advocate; while the submissions on behalf of the respondent was drawn and filed by Mr. Ezekiel Joel Ngwatu, Advocate.

Submitting in support of the appeal, Mr. Kasaizi consolidated the first, second and third grounds of appeal. He said there is no need to cite provisions of law in a Memorandum of Review as the form of preferring appeal applies mutatis mutandis in an application for review and that is according to Order XLII Rule 3 of the Civil Procedure Code CAP 33 RE 2019 (the **CPC**). He said the Chairman ought to have known that an application for review is different from other applications which are preferred by way of a Chamber Summons supported by an affidavit. He cited the case of **Ramadhani Mbegu vs, Kijakzai Mbegu & 5 Others Civil Application No. 46 of 1999 (CAT-DSM)** (unreported). He thus emphasized that the decision of the trial Chairman was illegal and erroneous. He further argued the court to allow the appeal and order the Tribunal to continue with the

matter at the stage where the application for review ended and deliver the ruling as submitted by the parties.

As for the second ground, Mr. Kasaizi submitted that the Chairman raised a preliminary objection and did not afford parties an opportunity to submit on the said objection. He relied on the case of **Samwel Munisro vs. Chacha Mwikabe, Cuvil Application NO. 539/08 of 2019 (CAT-Mwanza)** (unreported).

In response Mr. Ngwatu submitted that the court cannot be invited to review its own decision without being invited by the party who makes the application under section 78 (1)(b) read together with Order XLII Rule 1(1) (a)(b) of the CPC. He relied upon the case of **Tanzacoal East Africa Mining Limited vs. Minister for Energy and Minerals [2016] TLSLR 152**. He further submitted that a court of law can raise an issue that involves a point of law *suo mottu* as long as it involves a point of law. He said non citing of enabling provision of the law was a matter that was properly raised by the Chairman to satisfy himself if the Tribunal was properly moved. The case of **Moses J. Mwakibete vs. The Editorial Uhuru, Shirika la Magazeti ya Chama & National Printing Co. Limited [1995] TLR 134.** He

went on saying that the Chairman in exercising his discretion judiciously found that the Tribunal was not properly moved by the appellants herein simply because there was no provision of the law that was preferred and there was no preliminary objection that was raised by the Tribunal.

As for the second ground, Mr. Ngwatu said in reaching its fair decision the Chairman moved *suo mottu* to see if the Tribunal was properly moved and there is no law that restricted him from doing so. He said the case cited in this aspect is irrelevant as the facts are different. He argued the court to dismiss the appeal with costs for want of merit.

In rejoinder Mr. Kasaizi reiterated the main submissions and insisted that an application for review has to comply with the form under Order XLII Rule 3 of the CPC. He further said that Mr. Ngwatu has admitted that the court raised the preliminary objection *suo mottu* and that the Tribunal did not afford parties to address it on the matter that was raised and thus curtailed the parties including the respondents their rights to being heard. He prayed for the decision of the Tribunal to be quashed and set aside and the Tribunal be ordered to proceed where it ended.

I have gone through the rival submissions by Counsel for the parties. It is without dispute that at the Tribunal the application for review was filed by way of a Memorandum of Review and that the decision was based on the form of the filing of the application for review. The issue is therefore whether the application was properly before the Tribunal and whether the Tribunal was right in raising this issue suo mottu without allowing parties to address the said issue.

The Land Disputes Courts Act CAP 216 RE 2019 and its subsequent regulations are silent on the issue of applications for review. In such circumstances the court has to fall back to the CPC by virtue of section 51 of the Land Disputes Courts Act. Review applications are governed by Order XLII of the CPC and Rule 3 provides for the form in which a review is ought to be filed. The said provision states:

Order XLII Rule 3:

> *The provisions as to the form of preferring appeal shall apply, mutatis mutandis, to applications for review.*

And Order XXXIX Rule 1(1) and (2) of the CPC states:

> *"1(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate*

and presented to the High Court (hereinafter in this Order referred
to as "the Court") or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively."

It is apparent from the above provisions that an application for review is a peculiar application as opposed to the ordinary application which is in the form of a Chamber Summons supported by an affidavit. An application for review is in a form of a Memorandum which sets out the grounds for review. This was emphasized in the case of **Ramadhani Mbegu** (supra), where it was stated that Order XLII Rule 3 is restricted to matters of form, that is to say, the structure, such as, the title, name of parties date of decree, number of suit, and the numbering of paragraphs. It is my understanding therefore that, where a Memorandum of Appeal is filed, there is no need to cite enabling provisions of the law. The Chairman therefore erred in law to dismiss the application on the basis of non-citing of enabling provision of the law while the application before him was by way of a Memorandum for Review.

Mr. Ngwatu argued that the Order XLII 1(1) of the CPC cannot be read in isolation of section 78(1)(a) and (b) of the CPC. Indeed, all these provisions provide for the general conditions required for application for review. However, Order XLII Rule 3 provides for the form in which an application for review can be preferred which is the subject of controversy of this appeal. The arguments by Mr. Ngwata are thus misplaced.

As for the second ground of appeal, I duly agree with Mr. Kasikazi that where the court discovers that it is confronted with a new matter of law or fact before it, parties have to be given an opportunity to address it. In the present instance, the Chairman raised an issue which was not pleaded or addressed by the parties and went on to rely upon it totally. This creates doubt as to the legality of the ruling itself. I thus subscribe to the case of **Samwel Munsiro** (supra). Though this case is founded on extension of time, but the principle remains that the court cannot raise and rely upon an issue which has not been pleaded or canvassed by the parties as it was in the case at the Tribunal.

In the result and for the reasons above, I find merit in this appeal and it is allowed. The ruling of the Tribunal is quashed and set aside. The file is returned to the Tribunal before another Chairman for composing a ruling on the basis of the written submissions filed by the parties herein. The appellants will also have their costs.

It is so ordered.

V.L. MAKANI
JUDGE
18/12/2020