IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MWAMBEGELE, J.A., RUMANYIKA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 140/12 OF 2023

RAMADHANI OMARY MBUGUNI (A Legal representative of the late **RUKIA NDARO**) ..... **APPLICANT**

VERSUS

ALLY RAMADHANI ..... **1ST RESPONDENT**

ASIA RAMADHANI ..... **2ND RESPONDENT**

(Application for revision from the judgment of the High Court of Tanzania at Tanga)

(Msuya, J.)

dated the 12th day of December, 2014

in

Civil Appeal No. 8 of 2012

RULING OF THE COURT

30th April & 9th May, 2024

ISMAIL J.A.:

This is an application for revision, instituted under the provisions of section 4 (3) of the Appellate Jurisdiction Act (AJA) and rule 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It seeks to move the Court to call for and examine the judgment and proceedings of the High Court at Tanga, in Civil Appeal No. 8 of 2012, with a view to satisfying itself as to their correctness, legality and validity. Supporting the application is the affidavit affirmed by Ramadhani Omary Mbuguni, the applicant, and it sets out grounds on which the revision is based. The

grounds for the applicant's challenge are; one, that he was condemned unheard by the High Court as the applicant's ownership over the house on Plot No. 11 Block 'I' Usagara area was revoked. Two, that the decision is tainted with illegality as the 1st respondent was allowed to appeal against his co-administrator who did not have a title over the disputed property.

Through an affidavit in reply, affirmed by Ally Ramadhani, the 1st respondent, the respondents have valiantly disputed that the impugned decision revoked ownership of the disputed property. On the alleged illegality, the respondents' averment was that such illegality, if any, is also prevalent in the proceedings of the District Court against which the applicant did not take action.

The brief background to the matter is to the effect that, the respondents are joint administrators of the estate of the late Ramadhani Mwinjaa who, besides leaving behind several children, he was also survived by two wives one of whom is the late Rukia Ndaro, the applicant's mother. He also left two houses. One of the houses, the subject matter of the disputation by the parties herein, is located at Usagara area within Tanga City (the suit property). Following the demise of the late Mwinjaa, the respondents applied for joint administration of the estate, through Probate and Administration Cause No. 9 of 2011. The Primary Court of

Tanga at Mwang'ombe in which the petition was preferred granted the letters of administration. Besides the grant of letters of administration, the court ordered that the house at Usagara be allocated to the late Rukia Ndaro while the remaining house would be inherited by the rest of the beneficiaries, including the respondents. The basis for the decision was that the suit property was lawfully hers, meaning that it was not part of the deceased's estate.

In a dramatic turn of events and rather uncharacteristically, the 1st respondent, who was rattled by the decision of the court, instituted an appeal (Civil Appeal No. 5 of 2012) against the respondent, his co-administrator. The District Court of Tanga at Tanga, before which the parties appeared on appeal upheld the decision of the trial court. The quest for better justice took the 1st respondent to the High Court, this time against the decision of the District Court. The High Court found merit in the appeal and it reversed the concurrent findings of the lower courts. It ordered that the administrators should proceed with distribution of the estate of the deceased to its beneficiaries. It is the propriety or otherwise of this decision which is now on the line, through the instant revisional proceedings.

Ahead of the hearing, the parties preferred written submissions whose filing conformed to the requirements of rule 106 (1) and (2) of the

Rules. At the hearing of the application, the parties appeared in person and enjoyed no legal representation. Both sets of the rival parties prayed that their written submissions be adopted with nothing to add.

In his submissions, the applicant was unhappy that the proceedings in the High Court did not involve the late Rukia Ndaro as it revoked her ownership of the suit property. This, in the applicant's contention, was an act of condemning her unheard and it was incorrect. He buttressed his contention by citing several decisions of this Court. These are: **Shomary Abdallah v. Hussein & Another** [1991] T.L.R. 135; **National Housing Corporation v. Tanzania Shoes Company & Others** [1995] T.L.R. 251; and **Mire Artan Ismail & Another v. Sofia Njati**, Civil Appeal No. 75 of 2008 (unreported) in which the principle of *audi alteran paterm* was underscored and the resultant consequence of its violation stated. The applicant urged us to hold that the proceedings in the High Court were discrepant and that the same should be declared null and void.

Submitting on illegality, the applicant contended that the illegality is apparent as stated in the grounds of the application, and that the affidavit in support made sufficient disclosure of what the illegality is. He implored us to grant the application with costs.

The respondents' submissions began by stating that Rukia Ndaro was one of the widows of the late Ramadhani Mwinjaa who was also survived by six children and that the suit property was one of the assets constituting the deceased's estate. They argued that Rukia Ndaro moved to the Primary Court to claim a stake in the suit property when the court had already appointed the respondents as joint administrators but before they performed their duties. They contended that the import of the decision of the High Court was to order the administrators to distribute the estate according to law.

On the contention that Rukia Ndaro was condemned unheard, the respondents' take was that the late Rukia Ndaro could not be impleaded as a party in the High Court because she never featured as one in any of the proceedings of the lower courts. In any case, they contended, she could still seek to be joined in the proceedings, if she so wished. Regarding division of matrimonial assets, the contention by the respondents was that the Primary Court was not empowered to do so, while with regard to distribution of the estate amongst the heirs, the respondents were adamant that the said court did not enjoy such powers or powers to deal with land issues. They sought to distinguish the cited cases, including **Mire Artan Ismail** (supra) from the present case as circumstances are

different. The respondents were of the contention that the application is lacking in merit and that the same should be dismissed with costs.

In rejoinder, the applicant was insistent that it was not proper to leave Rukia Ndaro out of the equation after the Primary Court had declared her to be the owner of the suit property.

Regarding the Court's exercise of revisional powers, the applicant argued that these are powers bestowed on it under section 4 (3) of the AJA and rule 65 of the Rules, contending further that invocation of such powers will see the decisions of the High Court and the District Court quashed, leaving the decision of the Primary Court which may be challenged in a proper forum. The applicant refuted the contention that the Primary Court distributed the estate of the deceased. On the contrary, he argued, the court excluded the suit property from the estate of the late Ramadhani Mwinjaa.

The rival submissions by the parties breed one singular issue for our determination. It is whether the application is meritorious.

As rightly contended by the applicant, this Court is vested with revisional powers which, if moved by a party, are exercised in terms of section 4 (3) of the AJA, which stipulates as follows:

> *"Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court."*

Noteworthy, the procedural aspects in pursuit of this remedy are governed by rule 65 of the Rules. Crucially, exercise of these powers is done where no right of appeal exists or, if it does, then such right has been blocked by a judicial process – see: **Moses J. Mwakibete v. The Editor, Uhuru, Shirika la Magazeti ya Chama & Another** [1995] T.L.R. 134 and **Transport Equipment Limited v. Devram Valambhia** [1995] T.L.R. 161). Nevertheless, the right of appeal would not exist where the party who has preferred the revisional proceedings was not a party to the proceedings against which revision is contemplated.

As clearly stipulated in section 4 (3) of the AJA, grounds on which revisional proceedings may be instituted, may range from the allegations of illegality, correctness and propriety of any finding, order or decision of the High Court, to irregularities that may have marred the proceedings which bred the impugned decision. They would include, as imputed by the applicant, denial of the right to be heard or any form of illegality.

Regarding the right to be heard, the settled principle is that denial of the right to be heard, which is anchored in the phrase "justice should not only be done, but also manifestly and undoubtedly seen to be done" is derived from the Latin maxim: *qui aliquid statuerit parte inaudita altera, aequum licet dixerit, haud aequum facerit* (he who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right) – see: Ata Ur, a Pakistani scholar, in an article titled: "**Principle of Natural Justice "Audi Alteram Partem**", published in a journal called Pakistan Lawyer, March, 2021.

Thus, where proceedings are conducted in exclusion of a party who should have taken part, such proceedings are considered to be flawed and therefore a nullity. They are amenable to scrutiny through revision. We underscored this position in **Bank of Tanzania v. Saidi A. Marinda & 30 Others & the Attorney General**, Civil Application No. 74 of 1998 (unreported) in which we held as follows:

> *"We are in agreement with Dr. Tenga's submission that failure to afford an opportunity to the applicant to be heard as a necessary party to the proceedings seriously affected the proceedings. This is so, because, it violates the basic fundamental principle of natural justice – Audi alteram partem. That is, before a decision affecting an individual is made such an individual*

shall be afforded an opportunity of being heard. The rationale behind this principle is not far to seek, that is, after hearing both parties involved, then on balance, upon consideration of both sides, a fair decision is made either way."

See also: **National Housing Corporation** (supra); and **Independent Power Tanzania Limited v. Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 [2009] TZCA 17 (9 April 2009; TANZLII).

We have scrupulously glanced through the proceedings of the matter, right from their inception in the Primary Court and all other subsequent fora, including the High Court. The common denominator or constant feature in all the proceedings is that the disputants were Ally Ramadhani and Asia Ramadhani, the respondents herein, who are also joint administrators of the estate of the late Ramadhani Mwinjaa. At no point in time was the late Rukia Ndaro impleaded as a party. She did not seek to join the 'fray' as a party thereto, either, and we venture to think that, looking at the nature of the proceedings, the respondents were not under any obligation to take the late Rukia Ndaro on board. She was, as far as the probate and administration cause is concerned, one of the beneficiaries who did not have any qualms with the appointment of the respondents as administrators.

It should be pointed out, yet again, that the proceedings before Msuya, J were an escalation of what began in the Primary Court and scaled up to the District Court as an appeal. The appeal was purely an affair between the respondents. If the late Rukia Ndaro was under any impression that the outcome of the appeal process to the District Court and to the High Court would have any adverse consequence, the choice was hers to seek to be joined. This, she did not do, and for this reason, it cannot be said that she was excluded or denied the right to be heard. It is simply that she was not interested, or she found nothing untoward in what was decided by the two appeal courts. We do not think that non-participation by the late Rukia Ndaro or the administrator of her estate was, by any stretch of imagination, a denial of the right to be heard. It was partly an exclusion by choice and our view that this should not be blamed on the courts or the respondents.

We, therefore, entertain no doubt that nothing exists to infer that there was a denial of the right to be heard when the High Court entertained the appeal without involvement of the late Rukia Ndaro or her legal representative. It is the height of misconception, we think, to invoke the remedy of revisional powers of the Court and revise the proceedings whose conduct is, as far as right to be heard is concerned, flawless.

The applicant's other limb of contention is that an illegality exists in the decision of the 1st respondent to institute an appeal against the co-administrator who derived no title from the suit property. We will address this limb by first bringing an understanding of what illegality is. An illegality is defined by Black's Law Dictionary, 8th Edition, page 763 to mean:

> *"an act that is not authorized by law. The state of not being legally authorized."*

A more elaborate description of when an illegality may be committed and have an impact in determining jurisdiction of a court was given in **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported). In that case, the Court extracted an excerpt from Mulla's Code of Civil Procedure at page 1381, in which he stated that:-

> *"It is settled law that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity, merely because it has come to an erroneous decision on a question of fact or even of law."*

It is worthwhile that, in accentuating this position in **Charles Richard Kombe** (supra), the Court quoted an excerpt from a persuasive

decision of the Supreme Court of India in **Chunila Dahyabhai v. Dharamshi Nanji and Others**, AIR 1969 Guj 213 (1969) GLR 734, from which the following observation was drawn:

> *"From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred... the court went on to state that: "It is clear from these observations that a mere error of law in the exercise of jurisdiction is not enough" ... we are of the opinion that Mr. Madibi's suggestion that we should treat the alleged failure to evaluate evidence as constituting illegality is far off the mark and we dismiss it..."*

In this case, the illegality imputed by the applicant allegedly resides in the decision by the 1st respondent to initiate appeal proceedings to two of the lower appellate courts. The proceedings were against the 2nd respondent. While a few eyebrows may be raised on the 1st respondent's decision, and it is probably a step out of the ordinary, we ask ourselves whether that was an illegality. In our unflustered view, the answer to this question is an emphatic No! As much as the step taken by the 1st respondent appears to be in poor taste for the applicant, we are hardly convinced that the 1st respondent's action falls in the ambit of illegality as

we know it. We, in consequence, hold the firm view that the illegality cited by the applicant is nothing short of illusory and a mere figment of imagination. As such, it cannot be the basis for founding revisional proceedings.

As we pen off, we feel constrained to give a remark or two on the import of the decision of Msuya, J. which is now under the cosh. While the applicant considers reversal of the lower courts' decisions the gloomy side of the decision, there is a brighter side of it that is spoken in a muted voice. This is to the effect that the administrators of the estate should be left to assume office and distribute the estate to the beneficiaries. The applicant has expressed fears that the distribution may not be effected and he has cited the bickering between the administrators as the source of his fears. We are of the view that these fears are unfounded, and we are unable to give them any credence. It is why the rest of the beneficiaries have waited patiently and without any sense of panic or worry that they may be short-changed by the respondents. In view thereof, we find that learned Judge's directive is valid and one that has to be implemented lest the stalemate that has marred administration of the deceased's estate continues unabated. This is what we consider to be in the best interest of the parties and beneficiaries who have had to wait with bated breath, for in excess of a decade, to see what happens next

as the disputants tussle in what appears to be an endless litigation over the estate.

In the upshot of all this, we find the application unmeritorious and, accordingly, the same is dismissed. This being a matter arising out of probate and administration of the deceased's estate, we make no order as to costs.

It is ordered.

DATED at **TANGA** this 8th day of May, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 9th day of May, 2024 in the presence of the Applicant and 1st Respondent, the 2nd Respondent was absent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL