IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KAIRO, J.A.)

CIVIL REVISION NO. 1 OF 2018

THE REGISTERED TRUSTEES OF MOVIMENTO POPULAR DE LIBERTACAO DE ANGOLA (MPLA) ..... APPLICANT

VERSUS

HAMISA MOHSIN..... FIRST RESPONDENT
OMAR SALUM MOHAMED MOHSIN ..... SECOND RESPONDENT
PETER KUMBUKA CHOKALA (As the administrator of the Estate of the late RITA KAMULI CHOKALA) ..... THIRD RESPONDENT
MOHAMED IKBAL HAJI..... FOURTH RESPONDENT
ABDALLAH THABIT HUWEL ..... FIFTH RESPONDENT
EDWARD PETER CHUWA ..... SIXTH RESPONDENT

(Revision from the proceedings and judgment of the High Court of Tanzania, Land Division at Dar es Salaam)
(Mgaya, J.)

Dated the 3rd day of September, 2015
in
Land Case No. 326 of 2009
.....

RULING OF THE COURT

8th & 30th November 2022

NDIKA, J.A.:

In this matter, the Court is acting *suo motu* pursuant to its revisional powers under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 ("the AJA").

The context in which this matter has arisen is, briefly stated, as follows: the Registered Trustees of Movimento Popular de Libertacao de Angola

(MPLA), the applicant herein, instituted Land Case No. 326 of 2009 in the trial court against the first respondent cited as the first defendant along with Mr. Omar Salum Hassan Mohamed Mohsin, Rita Kamuli Chokala and Mohamed Ikbal Haji as the second, third and fourth defendants respectively, now the second, third and fourth respondents correspondingly. The applicant principally sought a declaration that it was the lawful owner of landed property described as Plots Nos. 11, 12, 12A and 67Q located at Kurasini, Dar es Salaam held under Certificates of Title No. 186103/5, 186103/7, 186103/8 and 186103/9. Basically, the applicant asserted that it acquired the title to the land in dispute through a sale agreement executed in 1974 between it and one Mr. Mohamed El-Lemki, the administrator of the estate of the previous owner, the late Nassor El-Lemki and that it subsequently had its title duly registered.

According to a joint written statement of defence attributed to the first and second respondents, the two respondents denied the applicant's claim in no uncertain terms. At the core of their defence was a claim that the property in dispute, described as Plots Nos. 11, 12, 12A and 67Q located at Kurasini, Dar es Salaam, was held under Certificate of Title No. 186100/40 in the name of the late Hassan Mohsin since 1938 and that following his death, they (that is, the first and second respondents) managed the property as joint administrators of the deceased's estate. Overall, they maintained

that the alleged sale and transfer of the property to the applicant in 1974 was illegal.

In a similar vein, the third and fourth respondents, through their respective written statements of defence, rebuffed the applicant's claim and went on to raise separate rival claims of title to the property in dispute. For the third respondent, it was averred that the said Rita Kamuli Chokala was the lawful occupier of the property having bought it on 20th December, 2002 from its previous occupier, Mr. Salum Mohamed Hassan Mohsin, at the price of TZS. 69,000,000.00. On the other hand, the fourth respondent claimed that he purchased the property in dispute on 11th March, 2009 from the first respondent and Mr. Hemed Saleh Hassan Mohamed acting as joint administrators of the estate of the late Hassan Mohsin, the purchase price being TZS. 188,000,000.00.

Having tried the matter, the trial court (Mgaya, J.) entered judgment dated 29th December, 2015 dismissing the applicant's claim but pronouncing the fourth respondent the lawful owner of the property in dispute under Certificate of Title No. 186100/40. The court, then, ordered, in terms of sections of 71 and 99 (1) of the Land Registration Act, Cap. 334 R.E. 2002, that the register of titles be rectified accordingly to reflect the fourth respondent as the owner of the property.

It is certainly unclear as to what happened in the aftermath of the delivery of the aforesaid judgment. Nonetheless, it appears that the first respondent was bemused by the trial proceedings. She lodged a complaint in the Court vide a letter dated 9th February, 2018, which was brought to the attention of the Honourable Chief Justice. Briefly, she alleged in that letter that she was neither a party to the land suit in the trial court nor was she ever served with the applicant's plaint. Perhaps more tellingly, she denied having engaged an advocate named Mr. Edward P. Chuwa who purportedly represented her at the trial. She stated that she became aware of the existence of the case rather fortuitously when she heard her name called out on 22nd September, 2015 when she was in the trial court waiting to appear in a different matter. She allegedly drew the attention of the trial judge to her concerns, but the trial proceeded without her being called to adduce evidence on the matter. Apart from denying having sold the property in dispute to the fourth respondent, she bewailed that trial court acted on false evidence given on her behalf by her sister, Tafla Salum Mohamed Mohsin, as well as that of the fourth respondent. She claimed to have lodged a written complaint on the matter to the Deputy Registrar, High Court, Land Division and Tanganyika Law Society but to no avail.

Acting on the above complaint, the Honourable Chief Justice directed the opening of these *suo motu* revisional proceedings in terms of section 4

(3) of the AJA for the Court to examine the record of the trial proceedings to satisfy 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 trial court. On that basis, this matter, Civil Revision No. 1 of 2018 was opened on 12th July, 2018, the parties herein being cited either as "applicant" or "respondent" only for the sake of convenience.

We think it is crucial to place on record that initially Abdallah Thabit Huwel and Edward Peter Chuwa were not parties to this matter. They were subsequently added separately as the fifth and sixth respondents respectively upon their applications being granted by the Court. To be sure, the fifth respondent's application vide Civil Application No. 562/17 of 2018 was granted on 13th September, 2022 having established a sufficient interest in the proceedings through his claim that he acquired the property in dispute since 4th June, 2004 and has since then been occupying it. As for the sixth respondent, his motion for joinder as a respondent made vide Civil Application No. 684/01 of 2022 was granted unopposed to afford him an opportunity to be heard on the evidently scathing allegation made against him by the first respondent.

When this matter came up for hearing, Ms. Genoveva Kato and Mr. Thomas E. Rwebangira, both learned counsel, appeared for the applicant

whlle Mr. Abdul Aziz and Mr. Stephen Mosha, learned advocates, stood for the first and third respondents respectively. Besides, Messrs. Killey Mwitasi and John Laswai, learned advocates, teamed up to represent the fourth respondent whereas Mr. Mbuga Jonathan appeared for the fifth respondent and the sixth respondent appeared in person. The second respondent did not appear, but it is on record that he was served with the notice of hearing vide publication in the *Habari Leo* newspaper of 28th October, 2022 upon an order of the Court. Given his default, the hearing proceeded in his absence in terms of rule 63 (2) of the Tanzania Court of Appeal Rules, 2009.

Submitting for the applicant, Ms. Kato contended that the trial was conducted in the absence of the second respondent and that the first respondent was rather inexplicably not called to testify at the trial. She argued that in terms of Order IX, rule 8 of the Civil Procedure Code ("the CPC"), the absence of the second respondent throughout the trial should have been explained. She added that the first respondent had to testify on the claim that she was one of the persons who, acting as administrators of the estate of the late Hassan Mohsin, sold the property in dispute to the fourth respondent. It was not clear, she argued, why the first respondent's sister, Tafla Salum Mohamed Mohsin, was, instead, fielded as a witness (DW1) for the first and second respondents and that her evidence was acted

upon by the trial court to decide the case in favour of the fourth respondent. She urged us to find these circumstances an incurable material irregularity.

Mr. Rwebangira weighed in for the applicant calling for our intercession over a series of what he termed as egregious irregularities: **one**, that the initial presiding Judge (Nchimbi, J.) failed to give the reasons he reserved on 9th November, 2011 for sustaining Mr. Chuwa's preliminary objection against the applicant's motion for consolidation of Land Case No. 326 of 2009 with other four land suits before that court. **Two**, that the learned trial Judge (Mgaya, J.) unduly refused the prayer by Dr. Masumbuko Lamwai, learned counsel for the third respondent, for being discharged from the trial for not being fully instructed by his non-paying client. **Three**, that Kalombola, J. wrongly presided over the trial by recording the evidence of PW1 Mushtak Alli Shah having presided over the suit at the pre-trial stage as mediator judge. **Four**, that there was improper succession of trial judges from Kalombola, J. by Nchimbi, J. and finally from Nchimbi, J. by Mgaya, J. **Lastly**, that the trial court granted the fourth respondent declaratory and other reliefs which he neither pleaded nor prayed for at the trial having filed no counterclaim against the applicant. Based on these irregularities, Mr. Rwebangira beseeched us to nullify the trial proceedings and the judgment thereon and proceed to order the matter to be tried afresh. In support of his

submission, he referred us to a series of our decisions which we need not reproduce herein.

On his part, Mr. Aziz for the first respondent submitted that it was manifest on the record that his client was unaware of the trial proceedings until 22nd September, 2015 when she fortuitously became cognizant of the case while in court for a different case. He blamed the trial judge for refusing to hear her protestations and proceeding with the trial without having her take the stand. The learned counsel, then, associated himself with the applicant's submission that with no counterclaim filed by the fourth respondent the trial court had no legal foundation to grant the reliefs in his favour.

Both Mr. Mosha and Mr. Jonathan, for the third and fifth respondents respectively, also supported Mr. Rwebangira submissions fully. Mr. Jonathan went on referring us to our decision in **Abbas Ally Athuman Bantulaki & Another v. Kelvin Victor Mahity (Administrator of the Estate of the Late Peter Walcher)**, Civil Appeal No. 385 of 2019 (unreported) for the proposition that the trial court ought to have confined itself to the pleadings of the parties. He made further reference to **Melchiades John Mwenda v. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga – deceased)**, Civil Appeal No. 57 of 2018 (unreported) for the principle that

any defendant having a claim for relief against a plaintiff must raise it as a counterclaim in his written statement of defence by setting out all the material facts on which he relies in support thereof and that the failure to do so would disentitle the defendant from obtaining any relief on the claim. Mr. Jonathan also argued along the lines of Ms. Kato that the first and second respondents were material witnesses that should have been fielded as witnesses but wondered why they did not take the stand.

Mr. Mwitasi, for the fifth respondent, cautioned that any *suo motu* revision as the present one must be confined within the directive of the Chief Justice as the Court stated in **Abdallah Thabit Huwel v. The Registered Trustees of Movimento Popular De Libertacao De Angola (MPLA) & Four Others,** Civil Application No. 562/17 of 2018 (unreported) citing **Abdullatiff Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported). On that basis, he urged us to confine ourselves to the first respondent's complaint and ignore what he perceived to be "grounds of appeal" argued by his learned friends assailing the proceedings and the judgment thereon. We understood him to suggest that these revisional proceedings should be limited to the first respondent's complaint that her right to be heard was abrogated because she was unaware of the trial proceedings and that she did not engage the sixth respondent as her legal counsel. Furthermore, he contended that the first

respondent's claim as aforesaid was at war with the trial record, which, as held in **Halfani Sudi v. Abieza Chichili** [1998] T.L.R. 527, is sacred and cannot be impeached easily. Accordingly, Mr. Mwitasi moved us to decline revising the trial proceedings and the decision thereon.

Mr. Laswai took turn, mainly submitting that the complaint by the first respondent was unworthy of any consideration. He charged that the first respondent self-evidently lied that she and the second respondent did not engage Mr. Chuwa to represent them at the trial. He also wondered why the first respondent lodged her complaint after an appeal process against the impugned judgment ended in vain, which happened to be more than two years and eleven months after the impugned judgment was handed down. The complaint, he added, was a backdoor manouvre to pervert the course of justice. Relying on several decisions including **Golden Globe International Services Limited & Another v. Millicom Tanzania N.V. & Four Others**, Civil Revision No. 3 of 2017 (unreported), the learned counsel implored us to decline the application.

Finally, we heard the sixth respondent. He spent substantial time and argument to establish what he called logic and probability that the first respondent lied in her complaint against him. In doing so, he took us through the record to demonstrate the following: **one**, that the applicant pleaded in

its plaint that the sixth respondent's law firm would be the address for service of all court processes on the first and second respondents. **Two**, that the first and second respondents' joint written statement of defence was duly signed by the first respondent who did not disown the signature. **Three**, that the first and second respondents are shown at pages 110, 112, 129, 146, 169 and 180 of the record of revision to have appeared in court on numerous occasions. **Four**, that Ms. Kato and Mr. Rwebangira acknowledged in their written closing submissions to the trial court that the first and second respondents were aware of the case against them and that they sometimes attended court sessions but wondered why they refrained from testifying to their claim that they were joint administrator of the estate of the late Hassan Mohsin. **Five**, that he (Mr. Chuwa) was duly engaged and paid to represent the two respondents at the trial, meaning that the first respondent was fully heard through her legal counsel at all times of the trial. **Finally**, that the fielding of the first respondent's sister, Tafla Salum Mohamed Mohsin, as a witness instead of the first respondent was not an irregularity because she was conversant with facts of the alleged sale of the property in dispute to the fourth respondent.

We have dispassionately scrutinized the trial proceedings and the judgment thereon in the light of the contending submissions of the learned counsel for the parties. As we have pointed out, the learned advocates on

both sides spent considerable time and argument on a myriad of issues. Before resolving them, we must, at first, interrogate and determine the breadth of this matter. We do so in view of Mr. Mwitasi's concern that most of the arguments made by some of his learned friends in support of the revision went beyond the first respondent's quest to vindicate her right to be heard.

To begin with, we acknowledge the position stated by Mr. Mwitasi, on the authority of **Abdullatiff Mohamed Hamis** (*supra*) followed in **Abdallah Thabit Huwel** (*supra*), that any *suo motu* revision must be restricted to the four corners of the directive of the Chief Justice upon which it is commenced. In the instant matter, the essence of the first respondent's complaint as captured in the concluding part of her letter to the Honourable Chief Justice placed before him by the Registrar provides the context in which the directive was issued. It reads as follows:

> *"Mheshimiwa Jaji Mkuu, kwa kuzingatia ukweli kwamba kulikuwa na udanganyifu (fraud) mkubwa pamoja na ukiukwaji wa taratibu katika shauri hili na hata juhudi za kupata ruhusa kwa ajili ya kukata rufaa pia zimegubikwa na vikwazo visivyoeleweka, kwa heshima na unyenyekevu mkubwa na kwa mamlaka uliyonayo kikatiba, ombi langu kwako ni kukuomba uingilie kati suala hili ili nipate haki yangu ya kujitetea na kusafisha taswira yangu kwenye jamii inayoniona kama tapeli."*

The above text loosely translates into English thus:

> *"Honourable Chief Justice, considering the fact that the trial proceedings were tainted with serious fraud and procedural irregularities and that the quest for obtaining leave to appeal was blocked unfairly, I humbly request your intercession into the matter so that I be afforded an opportunity to be heard on the dispute so as to restore my reputation in the community, which now holds me as a scoundrel."*

The foregoing extract eminently suggests that while the first respondent's preoccupation was her pursuit to vindicate her right of hearing allegedly violated, she also protested that the trial proceedings were fraught with fraud and numerous procedural irregularities even though she did not specifically mention any. With respect, we do not accept Mr. Mwitasi's submission on the breadth of the complaint made. Limiting it to the first respondent's allegedly abrogated right of hearing is to take a very constricted view of the matter.

More importantly, it is noteworthy that in dictating the course of action after examining the first respondent's letter of complaint, the Honourable Chief Justice issued a somewhat unrestricted directive: *"I agree. Call the record of Land Case No. 326 of 2009 (Land Division) for the purposes of section 4 (3) of the AJA, Cap. 141."* We entertain no doubt that this edict enjoined us to examine the record of the trial proceedings to satisfy

ourselves as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any trial proceedings. The revision *suo motu* was not restricted to the main grievance centred on the alleged abrogation of the right of hearing.

Having disposed of the foregoing question, we now turn to the issues of contention canvassed by the learned counsel.

We need not travel a long distance over the main complaint that the trial proceedings were conducted without the first respondent's participation, either in person or through a duly appointed legal counsel. Having carefully scanned the record, we are decidedly of the view that the first respondent's accusation against the sixth respondent is nothing but a red herring. At first, it is on record, as rightly demonstrated by the sixth respondent, that the applicant pleaded in its plaint that the first and second respondents would be served with all court processes through the sixth respondent's law firm as their advocates. It is reasonably inferable from this pleading that the applicant must have been aware that the sixth respondent was the legal counsel for the two respondents. This inference dovetails with the sixth respondent's assertion that he had previously been engaged and retained by the two respondents to represent them in other matters.

More significantly, we wonder, as did the sixth respondent, why the first respondent, in her letter of complaint, did not specifically disown the signature on the joint written statement of defence attributed to her. The defence was drawn for the two respondents by the sixth respondent who also appended his signature as the legal counsel for the two respondents.

Likewise, we agree with the sixth respondent that the record is loud and clear that the first and second respondents occasionally attended the court sessions rendering the first respondent's complaint a figment of her imagination. Indeed, both appeared consecutively before Mgaya, J. on 7th, 8th, 16th, 22nd, 28th and 29th September, 2015. They were also in attendance on the last day of the trial, that is, on 6th October, 2015. As we held in **Halfani Sudi** (*supra*), a court record is a serious document that cannot be impeached lightly. For there is always a presumption of its sanctity to the effect that it accurately represents what happened in court. The bare submissions by Ms. Kato and Mr. Aziz hardly rebutted the said presumption.

To crown it all, we are at one with the sixth respondent that the applicant's advocates, Ms. Kato and Mr. Rwebangira, admitted in their written closing submissions to the trial court, as shown at page 545 of the record of revision, that the first and second respondents were aware of the

case against them and that they sometimes attended the trial court sessions. We wish to let that part of the record speak for itself:

> *"DW1 did not produce evidence to establish that the 1st and 2nd defendants [the first and second respondents herein] were administrators of the [estate of the] late Hassan Mohsin and Salum Mohsin. The 1st and 2nd defendants although they were aware of the case against them and sometime attended court sessions, refrained from testifying to prove that they were the administrators. Hence, the testimony of DW1 is hearsay."*

As for the course taken by the sixth respondent fielding the first respondent's sister, Tafla Salum Mohamed Mohsin, as a witness instead of either the first respondent or the second respondent, we would say that it was a rather inexplicable choice. Certainly, the two respondents, who allegedly being the joint administrators of the deceased's estate sold the property in dispute to the fourth respondent, were the material witnesses on the matter and should have been produced as witnesses. It is on record that they were in attendance when Tafla (DW1) was testifying. By every yardstick, Tafla was a stranger to the alleged transaction even though she might have been conversant with certain aspects of it. What we ask ourselves at this point, as we must, is whether the failure to produce the two

administrators as witnesses was an irregularity. We have no doubt that it was not.

One of the hallmarks of our adversarial system of adjudication is the principle of party autonomy. That the parties themselves are responsible for gathering and presenting evidence as well as arguments in support of their respective positions. Of course, the inherent danger in this system is that it gives an incentive to the parties to hide or distort evidence. The choice not to produce the two respondents as witnesses might have been actuated by a bid to hide evidence on the alleged sale but that course did not amount to a procedural indiscretion. The opposite party could still have invited the trial court to draw an appropriate inference from that fact.

Given the circumstances, we hold that the first respondent's main complaint is without any factual or legal foundation. It is firmly established that she was a party to the trial proceedings and that she was served with the plaint through the sixth respondent who was her advocate in the matter as well as other previous matters. Apart from being represented throughout the trial by the sixth respondent as her advocate, she occasionally appeared at the trial in person along with the second respondent. The claim that she was not heard in the matter is plainly farfetched.

We now turn to the procedural infractions pointed out by Mr. Rwebangira. Of these, we propose to consider, at first, the contention that Kalombola, J. wrongly presided over the trial by recording the evidence of PW1 Mushtak Alli Shah having presided over the suit at the pre-trial stage as mediator.

It is on record that the suit by the applicant was initially assigned to Nchimbi, J. as the trial judge after it was instituted on 8th December, 2009. Nchimbi, J. dealt with certain pre-trial matters until 21st February, 2013. When the matter came up in court the next time (that is, 13th June, 2013) Kalombola, J. presided over the matter and dealt with certain points of preliminary objection raised by the first, second and third respondents. Kalombola, J. dismissed the preliminary objection by her ruling handed down on 12th September, 2013. After a series of adjournments, the pleadings became complete. On 5th June, 2014, Kalombola, J. presided over the first pre-trial conference and made a scheduling order in terms of Order VIIIA, rule 3 (2) of the CPC by which the matter was set to come up for mediation on 18th June, 2014 before a mediator who was to be appointed by the Judge in Charge. When the matter came up for mediation on 18th June, 2014 as scheduled, it was Kalombola, J. who presided over as mediator. After conducting one session, she ruled that the attempted mediation failed. This is discernible at pages 68 and 69 of the record:

Date: 18/06/2014

Coram: Hon. H. Kalombola, J.

For Plaintiff: Ms. Kato present assisted by Mr. Rwebangira, advocates

For 1st Defendant: ┐ Mr. Mwarabu, adv. for Mr. E. Chuwa, advocate

For 2nd Defendant: ┘

For 3rd Defendant: Mr. Mwarabu, advocate

For 4th Defendant: Mr. Kishaluli present

C/C: Caroline Aloyce

Court: Having conducted one session of mediation, I take the view that this matter is not amenable to a mediated settlement and so it should proceed to trial.

Court:

1. Mediation marked failed.
2. Suit to come up for mention before the trial judge on 30/07/2014 for necessary orders.

Sgd. Hon. H. Kalombola

JUDGE

18/06/2014

After three adjournments, the suit came up before Kalombola, J. once again on 16th September, 2014. She conducted a final pre-trial settlement and scheduling conference in terms of Order VIIIB, rule 3 of the CPC. With the agreement of the parties, she framed two issues for trial and set 19th November, 2014 as the date for commencement of the trial. On the aforesaid scheduled date, the trial took off under Kalombola, J. who then heard and recorded the testimony of PW1 Mushtak Alli Shah. Thereafter, Nchimbi, J.

took over and recorded the testimony of PW2 Fidelis Ibrahim Biswako. Finally, Mgaya, J. succeeded Nchimbi, J. by recording the evidence of the last witness for the applicant as well as four witnesses produced by the respondents. What we are concerned with at this point is the propriety and regularity of Kalombola, J. acting initially as trial judge before serving as a mediator and later reverting to her previous role of the trial judge. While Mr. Rwebangira stoutly submitted, without citing any authority, that the course taken by Kalombola, J. was a fatal infraction, none of his learned friends canvassed the issue.

Admittedly, we have not laid our hands on any precedent that is on all fours with the issue at hand, but we think our decision in **Emmanuel R. Maira v. The District Executive Director of Bunda District Council**, Civil Appeal No. 96 of 2010 (unreported) is quite instructive. In that case, the Court dealt in detail with the provisions of Orders VIIIA, VIIIB and VIIIC of the CPC that in 1994 introduced, *inter alia*, the use of Alternative Dispute Resolution (ADR) mechanisms of negotiation, mediation, and arbitration for settling disputes lodged in court before the trial commences. The Court noted in that case that in terms of Order VIIIA, rule 3 (1) of the CPC the presiding Judge or Magistrate in every case was to conduct a scheduling and settlement conference with the parties within twenty-one days after the conclusion of the pleadings and make a scheduling order. The aforesaid

order would ascertain all the future events in the case and set out the dates or timeframes for them in accordance with Order VIIIA, rule 3 (2) of the CPC.

In **Emmanuel R. Maira** (*supra*), after the scheduling order was given, the dispute was handed over to Masanche, J. for mediation. When the matter came up for mention on 19th August, 2002 before Masanche, J. as mediator, the learned counsel for the defendant raised a preliminary objection contesting the jurisdiction of the High Court over the suit. The mediator judge heard the parties on the objection and reserved his decision to 27th August, 2002 when he delivered it sustaining the objection and consequently striking out the suit with costs. The issue before this Court was whether the mediator judge acted contrary to the law and practice and thus usurped the jurisdiction of the trial judge.

After analysing the rationale of mediation and adjudication as starkly different mechanisms for dispute resolution, the Court noted that adjudicating on the issue of jurisdiction of a court is a judicial process and that it does not fall within the province of the mediation process. The Court went on to observe that:

> *"... a mediator does not sit in a judicial capacity. He plays the role of a facilitator helping the parties reach*

an amicable lasting solution to their dispute. He advocates for a negotiated settlement of the dispute. In the instant case, Masanche, J. abdicated the role of a mediator on 19/8/2002."

The Court emphasized that since mediation is not the same as adjudication, the CPC made a distinct separation of the mediation and judicial processes as provided by Orders VIIIA, VIIIB and VIIIC of the CPC. More importantly, the Court recalled and followed its holding in its previous decision in **Abasi Salum Kichenje v. Shehe Mohamed Zayumba & Another**, Civil Appeal No. 49 of 2005, Tanga Registry (unreported) that:

"The judge or magistrate assigned to try a case cannot, in our view, be the mediator judge or magistrate. So, it was wrong in this case for the judge to assume the role of mediator judge and a trial judge in the same case."

Consequently, the Court in **Emmanuel R. Maira** (*supra*) nullified the trial proceedings in entirety and proceeded to quash and set aside the order made by Masanche, J.

Applying the above position to the instant case, we find no difficulty to hold that Kalombola, J., having been the presiding judge who conducted the first pre-trial scheduling and settlement conference, wrongly assumed, and discharged the position of mediator in the case. We do not understand why

she acted as such bearing in mind that in her scheduling order she had directed that the case file be remitted to the Judge in Charge for appointment of a mediator. It is also perplexing that having served as a mediator, she then re-assumed the role of the trial judge and proceeded to hear and record the testimony of PW1. Having conducted the mediation with the parties she might have heard certain confidential information from either side. It could not be guaranteed that as trial judge she could serve as an impartial arbiter without any prejudices. On the foregoing analysis, we are bound to do in the instant case what we did in **Emmanuel R. Maira** (*supra*).

We must remark that we are aware that the provisions of Orders VIIIA, VIIIB and VIIIC of the CPC were scrapped following the promulgation of the Civil Procedure Code (Amendment of the First Schedule) Rules, 2019, Government Notice No. 381 of 2019 published on 10th May, 2019. In the instant case, however, we are bound to apply the law as it was at the material time.

Since the foregoing determination is sufficient to dispose of this matter, we find no pressing need to consider and determine the rest of the complaints raised.

In the result, and for the reasons set out above, we hold that this is a proper case for the exercise of the Court's revisional powers under section

4(3) of the AJA. We accordingly nullify the trial proceedings from the mediation stage onwards and proceed to quash and set aside the judgment thereon. We order that the suit be remitted to the trial court for the first pre-trial processes to be done according to the law. For avoidance of doubt, we direct that the fifth respondent be joined as one of the defendants in view of his claimed interest in the property in dispute. Given that this matter was commenced by the Court on its own motion, we make no order as to costs.

DATED at **MWANZA** this 28th day of November, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered on 30th day of November, 2022 in the presence of the Mr. Abdul Azizi holding brief of Mrs. Kato, learned counsel for the applicant and Mr. Abdul Azizi, learned counsel for the 1st respondent, 2nd respondent absent and Mr. Steven Mosha, learned counsel for the 3rd respondent both via video link, and in absence of the 4th, 5th and 6th respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL