IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 193/01 OF 2021

SIMON HAMIS SANGA..... APPLICANT

VERSUS

STEPHEN MAFIMBO MADWARY.....1ST RESPONDENT

UDUGU HAMIDU UMGENI.....2ND RESPONDENT

(Application for revision from the Decision of the High Court of Tanzania, at Dar es Salaam)

(Rwizile, J.)

dated 5th day of March, 2021
in
Civil Application No. 107 of 2016

.....

RULING OF THE COURT

27th March & 5th April 2023

KITUSI, J.A.:

We are being moved to revise certain orders of the High Court made in relation to ownership of a house on Plot No. 39 Block 73 Michikichini Street within Kariakoo area in Dar es Salaam. The original owner of that house, one Hamidu Mgeni died intestate and thereafter all has never been well.

Although the decision we are going to render does not require telling of the details of the long background of the matter, we desire to do so for the proper appreciation of our pronouncement.

Vide Probate and Administration Cause No. 6 of 1989, the Resident Magistrates' Court of Dar es Salaam at Kisutu appointed Mwinyihamisi Hamidu Mgeni administrator of the estate. Later in Civil Appeal No. 7 of 1992 the High Court (Rubama, J.), ordered sale of the house. The relevant part of the order reads: -

> *"I accordingly order that the administrator of the estate proceed to sell the house by public auction and then divide what is obtained in accordance with the dictates of the Holy Quran. Any of the inheritors of the estate could take part in the bidding should he so find himself in that position."*

That was on 2nd July 1992. Later in Civil Revision No. 49 of 1998, Ihema, J. reiterated that order. It is common ground that in both Civil Appeal No. 7 of 1992 before Rubama, J. and in Civil Revision No. 49 of 1998 before Ihema, J. the second respondent is the one who was the complainant.

The house was sold to the first respondent in 1993. Before us, this sale is being challenged for having been made through private arrangement rather than by public auction as ordered.

Subsequently on the second respondent's application in Misc. Cause No. 209 of 2003, he was appointed by Kisutu Resident

Magistrates' Court, administrator of the same estate. In exercise of his powers as administrator, the second respondent sold the house to the applicant. It is contended that this second sale was lawful and valid having been conducted by public auction.

It is important to note that this is the third time this matter comes to us by way of revision. The first was Civil Application No. 186 of 2008 in which on 22nd December, 2015 the Court ordered the record to be remitted to the High Court for it to investigate into the matter and make appropriate orders. The second was Civil Application No. 402/01 of 2017. Incidentally, after the order of the Court in Civil Application No. 186 of 2008 directing the High Court to conduct an investigation into the matter, the High Court (Mkasimongwa, J.) entertained Misc. Civil Application No. 107 of 2016 preferred by the first respondent and declared him and his wife lawful purchasers and ordered them to be restored into the suit house. However, this was done without hearing the applicant who was not joined as a party.

In Civil Application No. 402/01 of 2017, the Court considered whether the orders of Mkasimongwa, J. were in compliance with the previous order directing investigation. Satisfied that the learned Judge embarked on proceedings other than investigation and without hearing the present applicant, the Court reiterated the order of conducting

investigation, and remitted the record back to the High Court with direction that it should conduct investigation by involving the two buyers, the applicant and the first respondent. This time around the High Court, Rwezile J. made orders which are now before us. These are the orders we are being asked to revise under section 4 (3) of the Appellate Jurisdiction Act (the AJA) and rule 65 of the Tanzania Court of Appeal Rules, (the Rules).

To begin with, in discharging the task of investigation, the learned High Court Judge raised one issue: -

> *"Having considered the rival submissions of the parties and gone through the records of this application, the issue to be determined is who is the rightful purchaser/buyer of the suit property."*

In the end, he concluded as follows: -

> *"It is my considered view that the second sale of the house on Plot 39 Block 73 Mchikichi Street Kariakoo was unlawful. It is therefore, the applicant [now the first respondent] who rightfully purchased the suit property."*

The applicant has raised four grounds to justify us revising that decision. Not in the order as presented by him in the notice of motion, the grounds are: **One** that the learned Judge erred in concluding that the house was properly sold as per the orders of Rubama, J. and Ihema,

J. while the sale was not in a public auction as directed. **Two**, the learned Judge misinterpreted the orders of Rubama, J. and Ihema, J. by reading in conditions that were not in the said orders. **Three**, the learned Judge improperly dispossessed the applicant ownership of the house while he was a bona fide purchaser of the same in a court auction vide RM Misc. Cause No. 209 of 2003. **Four**, the decision is not appealable.

Mr. Samson Mbamba, learned advocate appeared for the applicant to argue the application. Aware of the settled law that revision is not an alternative to appeal (See; **Moses J. Mwakibete v. The Editor Uhuru Shirika la Magazeti ya Chama & National Printing Co. Ltd** [1995] TLR 134) we asked Mr. Mbamba to begin with the fourth ground, that is by first justifying his choice of this application for revision, instead of an appeal. In the written submissions, Mr. Mbamba simply stated that the orders of Rwezile, J. are not appealable in terms of what has been held in numerous decisions which insist that appeals are statutory creatures, and that there would be no appeal unless expressly provided by law.

Mr. Mbamba addressed us on what he considers to be a dilemma in the relevant law, arguing that there are two positions on the right to appeal to the Court and he has invited us to harmonize them. According to the learned counsel, there are orders that are appealable with leave

under section 5 (1) (c) of the AJA but some are just not appealable with or without leave. He referred us to decisions of the Court which, he suggests, demonstrate the conflicting positions caused by section 5 (1) (c) of the AJA. These are: **CRDB Bank Limited v. M. George Kilindu and Hon. Attorney General**, Civil Appeal No. 137 of 2008; **Paul A. Kweka and Hillary P. Kweka v. Ngorika Bus Services and Transport Company Limited,** Civil Appeal No. 129 of 2002; **East African Development Bank v. Khalfan Transport Co. Limited,** Civil Appeal No. 68 of 2003 and lastly; **The Director of Public Prosecutions v. ACP Abdallah Zombe & 8 others,** Criminal Appeal No. 254 of 2009 (all unreported).

The first respondent was represented by Messrs. Issa Juma Mganga and Jovin Manyama, learned advocates. They had also filed written submissions well ahead and proceeded to highlight on some points by addressing us orally. Mr. Manyama maintained that the application for revision is misconceived arguing that the mere fact that a matter is not appealable does not ipso facto make it revisable. He cited to us the case of **SGS Societe Generale De Surveillance S.A v. VIP Engineering and Marketing Ltd** [2004] T.L.R 135. Referring to the same case, Mr. Manyama submitted that the applicant is not challenging

the correctness, legality or regularity of the proceedings in the High Court, so he cannot come by way of this revision.

Mr. Mohamed Mkali for the second respondent did not oppose the application.

We have read the decisions cited to us by Mr. Mbamba and identified some common denominators in them. **One**, appeals are a creature of statutes. **Two**, in civil cases, appeals are regulated by Section 5 of the AJA. **Three**, in some cases the right to appeal is automatic, but in others it is subject to fulfilling certain conditions stipulated by the AJA or other laws. It is common ground that appeals from some decrees or orders lie with leave and others upon a certificate on point of law being granted.

We therefore agree with Mr. Manyama to the extent that not every non - appealable order is revisable. For instance, appeals or revision against interlocutory orders are barred by Act No. 25 of 2002. See **Jitesh Jayantilal Ladwa & Another v. Dhirajlal Walji Ladwa & 2 Others**, Civil Application No. 154 of 2020 (unreported). In the case of **East African Development Bank** (supra), the Court identified other instances of orders that are not appealable: -

> *"The CPC for instance, provides for the right of appeal against an order refusing to set aside an ex-parte Judgment under rule 13 Order IX. It*

does not however, provide for a right of appeal against an order setting aside an ex-parte judgment."

In **Paul A. Kweka & Another v. Ngorika Bus Services and Transport Company Limited** (supra), the Court provided a rationale for the bar: -

"The rationale for making the orders non-appealable is not hard to find. Firstly, it promotes an expeditious administration of justice that is, it ensures timely justice, at the same time making access to justice affordable, that is less costly. Secondly, and more importantly, it affords both parties in the case equal opportunity to be heard at the full trial."

To link the cited cases further, in **CRDB Bank Limited v. George M. Kilindu & Another** (supra) the Court agreed with its earlier decision in **Paul Kweka** by stating: -

"KWEKA's case is also an authority for the position that as far as civil proceedings were concerned the term "written laws" referred to in S. 5 (1) of the Appellate Jurisdiction Act, must mean, among others, the Civil Procedure Code Act, (Cap 33 R.E.2002). This means that in the case at hand we have to read S. 5 (1) of the Appellate Jurisdiction Act together with the Civil

Procedure Code to see if the order under scrutiny is appealable."

From the above, we are able to observe that the perceived conflict in the law governing appeals to the Court has not been established by the applicant, nor is there any argument justifying the applicant's choice of revision to that of appeal. Apart from the simple assertion in the fourth ground of revision, and an equally short statement in the written submissions on that, the applicant has not demonstrated through section 5 of the AJA or any other written law that the order of Rwezile, J declaring the first respondent the rightful buyer of the house, is not appealable. We have also not been able to see any conflict in the decisions that Mr. Mbamba cited to us rather we have identified common threads in them as shown earlier in this ruling.

Contrary to Mr. Mbamba's suggestion that we need to harmonize the position of the law as regards the right of appeal under section 5 of the AJA, we hold the view that the Court has been consistent, since **Paul A. Kweka and Another v. Ngorika Bus Services** (supra) decided in 2006; **East African Development Bank v. Khalfan Transport Co. Limited** (supra) decided in 2008; and **CRDB Bank Limited v. George M. Kilindu and Another** (supra) decided in 2009. We wish to add that in **Eustace Kubalyenda v. Venancia Daud,** Civil

Appeal No. 70 of 2011 (unreported) decided in 2012, the Court reaffirmed the same position when it held in part:

> *"Furthermore, it is in section 5 of the Act where we find the right of appeal to this Court by a person aggrieved by a decision of the High Court in the exercise of its various jurisdictions."*

Recently, that is in September, 2022, in **Fes Enterprises Company Limited v. Serengeti Breweries Ltd,** Civil Application No. 364 of 2020 (unreported) in which Mr. Mbamba graciously appeared for the applicant, the previous position was still maintained. What is clear to us is that when applied in different scenarios, section 5 of the AJA may give different results and this is what the learned counsel appears to have mistaken for conflicting positions.

Mr. Mbamba made two more attempts to persuade us that he was entitled to have the decision revised. The first was that Mkasimongwa, J. considered an old chamber summons which was no longer part of the record after the amended one had been filed. He raised this fact to establish that the proceedings were not proper and cited the case of **Ashraf Akber Khan v. Ravji Govind Varsan**, Civil Appeal No. 5 of 2017 (unreported), in support.

The second attempt was a plea that, should we be inclined to find that this application is misconceived and that the decision complained of is appealable, we should not make adverse orders but should proceed to invoke our revisional powers as it was done in **Chama cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008 (unreported). The learned advocate submitted that although the facts of the cases are different, we should proceed to act similarly by applying the principle in that case.

To begin with the first attempt and with respect to the learned counsel, what transpired in the case before Mkasimongwa, J. is only part of the background and after the proceedings and orders were quashed by the Court vide Civil Application No. 402/01 of 2017, whatever impropriety or irregularity in those proceedings no longer existed to affect the decision of Rwezile, J. Even assuming that what Mr. Mbamba refers to as an irregularity was indeed committed by the High Court (Mkasimongwa, J.), the same would be inconsequential, in our view. This is because there is no suggestion from Mr. Mbamba that the alleged irregularity in anyway affected the judge (Rwizile, J.) in dealing with the issue that he raised, nor in the conclusion which he finally reached. We wish to emphasize here that the Court's revisional powers under section 4 (3) of the AJA are designed to examine the record with the view to

being satisfied with the correctness, legality or propriety of *"any finding, order or any decision made thereon..."* It is our finding that the applicant has not established any such defects in the decision but has only shown his grievances, which calls for an appeal.

Secondly, regarding the principle in the case of **Chama cha Walimu** (supra), the Court invoked revisional powers so as to remedy a nullity in the decision of the High Court. The following paragraph from that case illustrates our point: -

> *"In this particular case we are strictly enjoined by law to do what the learned trial judge in the Labour Court failed to do. Failure to do so would be tantamount to perpetuating illegalities, and in particular the injunction order which is admittedly a nullity".*

There is no nullity in this case and we find no justification for acting the way we acted in the case above. As we held in **Shaban Fundi v. Leonard Clement**, Civil Appeal No. 38 of 2011 (unreported), *"...each case is determined by taking into consideration all the circumstances obtaining in each particular case".* In the **Chama Cha Walimu** (supra) case the issues involved were of public importance in a tense situation and there was a nullity to be corrected in the decision of

the High Court. Nothing of that sort exists in this case. Accordingly, we decline Mr. Mbamba's invitation.

Consequently, it is our finding that this application for revision has wrongly been preferred as an alternative to an appeal, which renders it misconceived. We accordingly strike it out with costs.

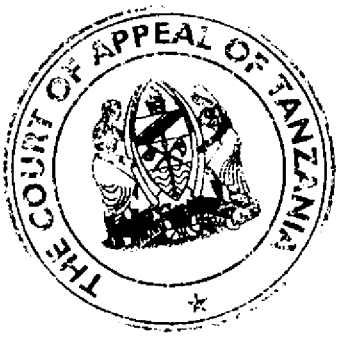
DATED at **DAR ES SALAAM** this 5th day of April, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 5th day of April, 2023 in the presence of Mr. Issa Juma Mganga, learned counsel for the 1st Respondent also holding brief for Mr. Simon Mbamba learned counsel for the Applicant and Mr. Mohamed Mkali, learned counsel for the 2nd Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL