**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**CIVIL APPLICATION NO. 523/06 OF 2019**

**ESTER CHAKUPEWA ..... APPLICANT**

**VERSUS**

**AMASHA MPENZI.....1ST RESPONDENT**

**JOHN CHAKUPEWA.....2ND RESPONDENT**

**(Application for revision from the decision of the High Court of Tanzania at Mbeya**

**(Mkaramba, J)**

**dated the 15th day of February, 2019**

**in**

**Misc. Civil Application No. 10 of 2013**

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## RULING OF THE COURT

11th & 15th December, 2023

**MWANDAMBO, J.A.:**

This is an application for Revision, focus being on the decision of the High Court of Tanzania at Mbeya dated 15 February 2019 in Misc. Civil Application No. 10 of 2013.

The applicant, Ester Chakupewa and the second respondent, John Chakupewa were husband and wife residing in Mkwajuni township in Chunya District where they had properties including a house on plot No.

7 Block which is the center of dispute in this application. In 1995, the couple rented the said house to the first respondent Amasha Mpenzi. In the year that followed, that is, 1996, the second respondent sold the said house to the first respondent without the applicant's consent, thus forcing the latter to challenge the sale in a suit before the Resident Magistrate's Court at Mbeya. That court found that the said house was not a matrimonial house and so, it dismissed the suit. The dissatisfied applicant appealed to the High Court which allowed the appeal, but directed that the buyer (the first respondent), was entitled to unexhausted improvements effected on the said house.

After a prolonged journey of twists and turns, on 19 February, 2009, the Deputy Registrar of the High Court wrote to the District Executive Director, Chunya District Council to appoint a valuer to conduct a valuation of the disputed house. Accordingly, a valuation was conducted showing the replacement value of the house to be TZS 20,400,000.00; an amount which was to be payable to the first respondent by the applicant and the second respondent. The Deputy Registrar's order for the valuation of the house became a subject of another litigation in Misc. Civil Application No. 10 of 2013 seeking two orders; extension of time to apply for review and the review itself. That application was met by a notice of preliminary

objection predicated upon failure to cite a proper enabling provisions and for being omnibus. Ngwala, J overruled the preliminary objections in a ruling delivered on 21 November 2016 paving way for the determination of the application on merit. However, hearing could not take place earlier than 28 November 2018 by way of written submissions before Makaramba, J. On 15 February 2019, the learned judge dismissed the application.

Aggrieved, the applicant lodged the instant application for revision. Initially, the applicant had sought to quash the decision of the High Court dated 15 February 2019 and an order giving effect to the decision of the High Court in DC. Civil Appeal No. 16 of 1998 dated 27 October 2000. The two orders were predicated upon three grounds set out in the notice of motion. However, at the commencement of the hearing, Mr. Boniface A. K. Mwabukusi, learned advocate, representing the applicant abandoned the second prayer and addressed the Court on the first prayer predicated on the ground that the impugned decision was inconsistent with the earlier decision dated 21 November 2016 which overruled an objection based on time limitation.

Although the first respondent was duly served by publication in Mwananchi Newspaper on 29 November 2023, he did not enter

appearance at the hearing of the application. The second respondent appeared in person, unrepresented. Upon a prayer by Mr. Mwabukusi, the Court proceeded with hearing of the application in the absence of the first respondent in terms of rule 63 (2) of the Court of Appeal Rules 2009 (the Rules).

In his brief oral submissions, Mr. Mwabukusi attacked the order of the High Court made on 15 February 2019 for being illegal. According to him, that decision had the effect of setting aside an earlier decision by the same Court (Ngwala,J) made on 21 November 2016 in the same application. The learned advocate impressed upon us that Makaramba,J trampled upon the principle on **functus officio** discussed by the Court in its previous decisions, in particular, **Mohamed Enterprises (T) Ltd v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 and **Tanzania Telecommunication Company Limited & 2 Others v. TRI Telecommunications Tanzania Limited**, Civil Application No. 62 of 2006 (both unreported). According to the learned advocate, that was an irregularity rendering the decision a nullity and liable to be quashed by way of revision.

Not surprisingly, the second respondent did not have anything else to say than supporting the application.

Having examined the decision of the High Court now under our consideration against Ngwala, J's ruling made on 21 November 2016 in the light of the record in the revision, it is glaring that the two decisions are not free from difficulties. However, that is not necessarily the same thing saying that Makaramba,J's decision was, *ipso facto*, functus officio. This is so considering the meaning and intent behind the principle *functus officio* expressed by the defunct Court of Appeal of Eastern Africa in **Kamundi v. R** [1972] EA 540 cited in **John Mgaya & 4 Others,** Criminal Appeal 8 (A) of 1997 (unreported). The principle derived from the above cases has it that, the court becomes *functus officio* where it disposes of a case by a verdict of guilty or not guilty or by passing a sentence or making some orders finally disposing of the case.

It is plain from the record of revision that, Ngwala,J dealt with Miscellaneous Civil Application No. 10 of 2013 which sought to extend time to apply for review along with the substantive application for review. That application was met by a preliminary objection touching on its competence. The preliminary objection was couched thus:

> "*(a) This application is bad in law in that there is in the first place, no* ***DECREE*** *or* ***ORDER*** *at all issued by the High Court on*

*19/02/2009 capable of being* ***REVIEWED***

*through an application under* ***ORDER XLII***

*Rule 1 of the Civil Procedure Code, Cap.*

*33 R.E. 2002."*

Although Ngwala, J's ruling is not free from difficulties, what emerges from it is that, the learned judge found the application to be in order and overruled the preliminary objection. That paved way for the hearing of the application on merit this time around before Makaramba, J by way of written submissions. But, alas, instead of addressing the court on the merits, the learned advocate for the first respondent attacked the competence of the application on several fronts, that is, it was omnibus; supported by a defective affidavit; preferred by a chamber summons rather than a memorandum of review; and time bar.

In his ruling, the learned Judge was satisfied that, the application suffered from two procedural hitches; for being omnibus and being supported by a defective affidavit and proceeded to strike it out. However, he took a step further by determining other aspects that is to say; mode of preferring the review and time bar which he found to be meritorious and in the end, he dismissed the application.

It will be recalled that, the issue involving the mode of preferring an application for review had been dealt with by Ngwala, J and so, it could not have been taken up again in determining its merits. We respectfully agree that, to that extent, the High Court was *functus officio* by determining an issue which it had already been dealt with albeit by a different judge. On the other hand, since the learned judge had already found the application incompetent and effectively struck it out, it was not open for him to proceed to determine it as he did. With respect, that was irregular. But what is more is the fact that, after the ruling by Ngwala,J on preliminary objections the High Court embarked on determining preliminary objections, which were not raised as such at the time it made a schedule for filing written submissions as evident at page 158 of the supplementary record of revision.

In the absence of any notice of such preliminary objections baptized as procedural hitches in the ruling followed by an order for their disposal, the learned judge strayed into an error which was prone, as it were, to creating confusion in the proceedings.

The cumulative effect of the foregoing warrants the exercise of the Court's power of revision under section 4 (3) of the AJA resulting into quashing the decision of the High Court in Misc. Civil Application No. 10

of 2013 by Makaramba, J which were hereby do to the extent it relates to dismissing the application after striking it out for being incompetent.

In the event, the application succeeds to the extent indicated. Given the nature of the application, we make no order as to costs.

Order accordingly.

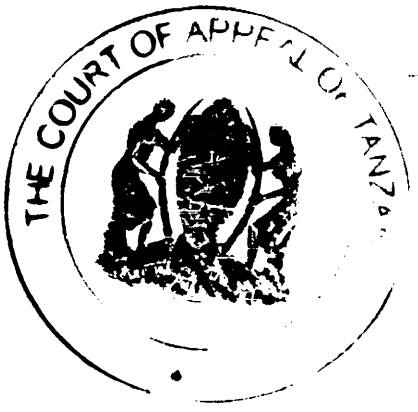
**DATED** at **MBEYA** this 14th day of December, 2023.

L. J. S. MWANDAMBO
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. E. MGONYA
**JUSTICE OF APPEAL**

The Ruling delivered this 15th day of December, 2023 in the presence of applicant in person, and 2nd respondent in person, both unrepresented, and in the absence of the 1st respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
**DEPUTY REGISTRAR**
**COURT OF APPEAL**