IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: SEHEL, J.A., FIKIRINI, J.A, And ISSA, J.A.)

CIVIL REVISION NO. 583 OF 2022

BHOKE KITANG'ITA CHOTA..... APPLICANT

VERSUS

DANIEL MSETI..... 1ST RESPONDENT
CHACHA WAMBURA NYAKAHO..... 2ND RESPONDENT

(Revision from the Judgment of the High Court of Tanzania at Musoma)

(Mbagwa, J.)

dated the 19th day of September, 2022
in
Land Appeal No. 134 of 2020

.....

RULING OF THE COURT

3rd & 7th May, 2024.

FIKIRINI, J.A.:

This application seeks the Court's revision of the judgment rendered by the High Court of Tanzania at Musoma in Land Appeal No. 134 of 2021 on 19th September, 2022. The judgment originated from Land Application No. 62 of 2020 in the District Land and Housing Tribunal (DLHT) for Tarime at Tarime.

The application is made under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA) and rule 65(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by the

applicant's affidavit, written submission, and two additional affidavits: one from Maghabe Mseti, the 1st respondent's brother, and the other from Ghati Mtari. These affidavits attest that they witnessed Mseti Chobaka, the 1st respondent's father and the applicant's father-in-law, gifting the 1st respondent and the applicant who are a husband and wife a piece of land (the "suit land") in 1993, before his passing in 1998.

The 2nd respondent, Chacha Wambura Nyakaho, contested the application and all associated affidavits, in his affidavit in reply filed on 13th February, 2023, along with subsequent written submissions opposing the application. His primary argument is, on the one hand the 1st respondent possessed all legal rights to sell the suit land and on the other that during the transaction, did not disclose if he had a wife. Furthermore, he claims that had the 1st respondent been married, the Street Chairman would have inquired about spousal consent. Additionally, the 2nd respondent challenged the applicant's purported lack of knowledge regarding a sale transaction that occurred on 26th February, 2019, as the applicant and the 1st respondent were living under the same roof.

Moreover, he refuted the affidavits of Maghabe Mseti and Ghati Mtari, asserting that they did not witness Mseti Chobaka gifting a five-acre piece of land to the applicant and the 1st respondent.

Although the 1st respondent did not file an affidavit in reply, he appeared before the Court on the hearing date.

Before dwelling into the determination of the merit of this application, it is crucial to provide a brief summary which narrates as follows: the applicant and the 1st respondent entered into a customary marriage in 1987 and had four children, as garnered from her affidavit in support of the application. Throughout their marriage, they acquired various properties, including a five-acre piece of land situated at Kitare Street, Magena area in Tarime District. This land was given to them as a gift by Mseti Chobaka, who was the 1st respondent's father, and also the applicant's father-in-law.

However, in 1999, the 1st respondent entered into another marriage with Happiness Lucas Wambura, becoming his second wife. Despite this, things remained relatively calm until 19th October, 2022, when the applicant visited the aforementioned land. It was during this visit that she discovered the property had been sold to the 2nd respondent, Chacha Wambura Nyakaho, through a sale agreement

executed on 26th February, 2019. Furthermore, the applicant learnt that the 2nd respondent had initiated legal proceedings before the DLHT regarding the disputed land. Although the 1st respondent was unsuccessful in the appeal he lodged to the High Court challenging the Tribunal's decision in favour of the 2nd respondent, the matter remains unresolved.

From her discoveries, the applicant was deeply dismayed by the events that transpired. Her discontent stemmed from several factors: ***firstly***, her vested interest in the suit land; ***secondly,*** her exclusion from consultation regarding the sale; and ***thirdly,*** her lack of consent to the transaction that occurred on 26th February, 2019. Against this backdrop, the applicant challenges the entirety of the proceedings, judgment and decree before both the Tribunal and subsequently the High Court on appeal.

The essence of the current application is to implore the Court to invalidate those proceedings in which she was not a party, and has never consented to the executed sale agreement. In the notice of motion, the applicant raised three grounds of complaint as follows:

1. *The decision of the High Court of Tanzania at Musoma is based on nullity decision of the DLHT which failed to*

consider that the sale agreement lacked consent of the other owner of the suit land.

2. *The High Court of Tanzania at Musoma in Land Appeal No. 134 of 2021, failed to consider her interest in the land in dispute as she was not made a party to the case which proceeded before it.*
3. *The High Court of Tanzania at Musoma failed to consider that she had a right to be heard regarding the land which was sold without her knowledge and consent.*

When this application was called for a hearing on 3rd May, 2024, the applicant, along with the 1st and 2nd respondents, were all in attendance, unrepresented.

Beginning with the applicant, she stated that she had been utilizing the suit land until she experienced health issues, which necessitated visits to various hospitals, including Muhimbili National Hospital – Mlonganzila. Upon her return, she discovered the sale agreement executed between the 1st and 2nd respondents. When she confronted her husband, the 1st respondent, his, response was dismissive, indicating that she could lodge her complaint wherever she pleased. Emphasizing the significance of the suit land for their own use and that of their four children, the applicant, who acknowledged residing

with her husband in the Tarime, Sabasaba area, urged the Court to grant her application.

In response to the applicant's submission, the 1st respondent admitted selling the five-acre suit land, which was initially gifted to the couple during the 1st respondent's absence due to mining activities. The decision to sell the land arose from the 1st respondent's financial obligations, prompting him to seek permission from his second wife. However, the sale transaction soured when a dispute arose between the 1st and 2nd respondents over unpaid balances, which eventually reached the applicant's ears, revealing the sale without her consent.

The 2nd respondent admitted ignorance of the 1st respondent's marital status and questioned the applicant's claim to the land without tangible evidence. He expressed disbelief that the applicant, living in the same household, was unaware of the events transpiring. He further disclosed that the suit land was sold to another buyer amidst the ongoing dispute.

In response, the applicant affirmed her living under the same roof with the 1st respondent and questioned the 2nd respondent's demand for proof of land ownership, given his lack of familial ties. She emphasized

that the sale involved her property, irrespective of the 1st respondent's introduction of his second wife.

Having reviewed the notice of motion, affidavits, and submissions, our task is to determine whether the applicant was denied her right to be heard regarding her vested interest in the property.

A denial of the right to be heard in any proceedings would vitiate the entire proceedings. This principle was stressed in the case of **Abbas Sherally & Ano. v. Abdul S. H. M. Fazalboy**, Civil Application No. 33 of 2002, in which the Court observed that:

> "*The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*"

The violation of the right to be heard is not only a breach of the cardinal principle of natural justice but an abrogation of the constitutional guarantee of the basic right to be heard which has been enshrined under Article 13(6)(a) of the Constitution, of the United

Republic of Tanzania, 1977. The provision of Article 13 (6) (a) of the Constitution states thus:

> *"When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."*

See also: **Margwe Erro & Two Others v. Moshi Bahalulu**, (Civil Appeal No. 111 of 2014) [2015] TZCA 282 (25th February, 2015; TANZLII); **Director of Public Prosecutions v. Yassin Hassan @ Mrope,** (Criminal Appeal No. 202 of 2019) [2020] TZCA 1733 (19th August, 2020;TANZLII); **Samwel Gitau Saitoti @ Saimoo @ Jose & 2 Others v. The Director of Public Prosecutions**, (Criminal Application No. 73 of 2020) [2021] TZCA 554 (1st October, 2021; TANZLII) and **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma** [2003] T.L.R. 251.

After thorough examination, we have taken into account the 1st respondent's failure to submit an affidavit in reply, which implies an admission of the applicant's claim of spousal status and vested interest in the suit land. Despite not disclosing the existence of his wife to the

2nd respondent, it is evident from the admission and revelation that the second wife was introduced to the 2nd respondent, indicating a high likelihood that the applicant was excluded from the transaction.

From the account it is clear that the suit land was not bestowed upon the second wife, as her father-in-law, who gifted the land to the applicant and the 1st respondent, had passed away before her marriage. The 2nd respondent, in his affidavit, did not provide any reason for challenging the assertions made by Maghabe Mseti and Ghati Mtari, leaving no grounds to doubt the veracity of their affidavits.

Also the 2nd respondent's argument that the applicant must have been aware of the transaction due to living together with the 1st respondent is undermined by the applicant's assertion of her health issues, which remained uncontested. Additionally, the 2nd respondent admitted that the 1st respondent had brought his second wife to witness the sale agreement, but this does not imply the applicant's awareness, as evidenced by her affidavit.

Considering these points, it is evident that the applicant was never included in any proceedings concerning the suit land, thereby infringing upon her right to be heard regarding her vested interest.

Therefore, it is our conclusion that the proceedings at the DLHT in Land Application No. 62 of 2020 and the subsequent appeal in the High Court in Land Appeal No. 134 of 2021 are nullity. In accordance with section 4(2) of the AJA, we hereby exercise our revisional powers to nullify, quash, and set aside all proceedings, judgments, and decrees related to the suit land. Any interested party may file a suit pertaining to the suit land if they wish to do so, subject to the law of limitation.

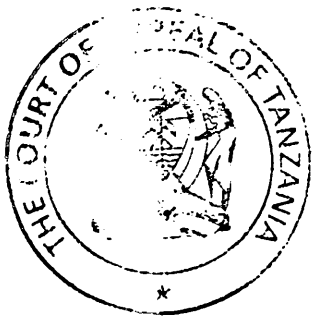
DATED at **MUSOMA** this 6th day of May, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 7th day of May, 2024 in the presence of both the Applicant and 1st and 2nd Respondents in persons, unrepresented, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL