IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: JUMA, C.J., MKUYE, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 40 OF 2020

ADROFU FULGENSI MFUNYA.....APPELLANT

VERSUS

1. JUMA HEREYE
2. SOSPITA MPOMA } **..... RESPONDENTS**
3. MBEZI AUCTION MART & CO LTD

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 18th day of October, 2019

in

Miscellaneous Land Application No. 9A of 2019

.....

JUDGMENT OF THE COURT

29th June & 2nd July, 2021

GALEBA, J.A.:

The appellant, Adolf Fulgensi Mfunya successfully sued Juma Hereye and Sospita Mpoma, the first and second respondents respectively, in the District Land and Housing Tribunal for Kigoma at Kigoma (the DLHT) in Land Application No. 59 of 2017. He was declared the lawful owner of a disputed piece of land located at Muganza Village within Kasulu District in Kigoma Region and was awarded TZS. 15,000,000.00 in general damages.

Consequent to the judgement of DLHT, the first respondent paid TZS 7,500,000.00 to the appellant as his share of the decretal sum, but the second respondent did not settle his part. That prompted the appellant to file an Application for Execution No. 59 of 2013 in the DLHT, which led to attachment of a motor truck make Fuso with registration no. T728 CXV, registered in the name of the first respondent, who however, had settled his part of the decree earlier on. Objection proceedings to sale of the vehicle in Miscellaneous Land Application No. 19 of 2015 were dismissed and an order for the vehicle's immediate sale was made by the DLHT in its ruling dated 01.04.2015. Following that order, Mbezi Auction Mart & Co Ltd, the third respondent sold the motor vehicle, settled the second half of the decretal amount of TZS 7,500,000.00 and deposited the balance with the DLHT.

Aggrieved with sale of his motor vehicle, the first respondent filed Application for Review No. 59 of 2016 seeking to rectify an order that was made in respect of sale of his vehicle while he had settled his part of the decree. Nonetheless, by a ruling dated 05.09.2016, that application was dismissed on grounds that the application was filed out of time and the

same had been initiated by way of a Memorandum of Review instead of the chamber summons supported by an affidavit.

That decision aggrieved the first respondent, who, this time decided to approach the High Court and filed Miscellaneous Land Application No. 9A of 2019 moving the court to call for and examine the record of the DLHT and revise the review proceedings.

When that application came up for hearing before the High Court on 18.10.2019, the appellant and the third respondent were present although they were represented by Mr. Michael Mwangati learned advocate and the first respondent who was the applicant in that application had the services of Mr. Kelvin Kayaga also learned counsel. The second appellant appeared in person.

After almost a day long of protracted dialogue between parties in court, on 18.10.2019, a common position was reached and the application for revision was amicably settled and marked closed with, among other orders, an order that each party bears his own costs.

Although Miscellaneous Land Application No. 9A of 2019, was settled amicably with consent of the parties, the appellant was aggrieved by the

order, hence the present appeal. The appeal is predicated on six (6) grounds of appeal, which for reasons that will become clear shortly, we have opted not to reproduce them in this judgement.

When this appeal was lodged and the record served on the respondents, the first respondent lodged, among other documents, a notice of preliminary objection based on points of law, **firstly,** that the appeal is incompetent on account that the same was lodged without first seeking and obtaining leave of the High Court or of this Court and **secondly**, that the order sought to be challenged by way of appeal is not appealable. The points of law were preferred, one in alternative for the other.

At the hearing of the appeal on 29.06.2021, Ms. Stella Thomas Nyakyi, learned advocate appeared for the appellant and the first respondent had the services of Mr. Kelvin Kayaga also learned advocate. The second and third respondents, each appeared in person.

As per the practise of disposing of issues of law first before embarking on substantive or factual matters of controversy raised in the appeal, obtaining in this jurisdiction, we followed our previous decisions in **Thabit Ramadhani Maziku and Another v. Amina Khamisi Tyela**

and Another, Civil Appeal No 98 of 2011, **Shahida Abdul Hassanali v. Mahed MG Karji,** Civil Appeal No 42 of 1999 and **Ms. Safia Ahmed Okash (As administratrix of the Estate of the Late Ahmed Okash) v. Ms. Sikudhani Amiri and 82 Others**, Civil Appeal No. 138 of 2016 (all unreported) and permitted Mr. Kayaga to argue his preliminary points, before getting to the substantive grounds of appeal raised.

In supporting the first point of objection, Mr. Kayaga submitted that as in Miscellaneous Land Application No. 9A of 2019, the High Court was dealing with an application for revision, an appeal from its order lies with leave of the High Court or of this Court. Short of that, he contended, the appeal is incompetent for offending the provisions of section 47 (2) of the Land Disputes Courts Act [Cap 216 RE 2019] (LDC Act). To support his position, he relied on the cases of **Yakobo Magoiga Gichere v. Peninah Yusuph,** Civil Appeal No. 55 of 2017 and **Dorina N. Mkumwa v. Edwin David Hamis,** Civil Appeal No. 53 of 2017 (both unreported). Without arguing the alternative point of law, Mr. Kayaga implored us to strike out the appeal with costs.

The second respondent supported Mr. Kayaga's position but the third respondent had no comment on the points raised and argued.

In reply, Ms. Nyakyi submitted that leave to appeal was not necessary in the circumstances, although Miscellaneous Land Application No. 9A of 2019, was an application for revision and the High Court in disposing of it was exercising revisional jurisdiction. She beseeched us to invoke this Court's powers under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA) and Rule 4(2) (c) of the Tanzania Court of Appeal Rules (the Rules) and permit her to argue the appeal. Counsel had no authority to back the proposition she advanced, nor were we able to trace any.

In rejoinder, Mr. Kayaga argued that counsel for the appellant misunderstood the proceedings in the High Court adding that, once a matter starts anywhere below the High Court then, before an appeal can be preferred to this Court leave or a certificate on a point of law is necessary in land matters like the one at hand. As for the provisions of the AJA and of the Rules cited by Ms. Nyakyi, he submitted that those provisions may only be invoked where there is a competent appeal before the Court.

At the outset, on our part, there are a few points we wish to make clear. **First,** the matter from which this appeal arises was an application for

revision because it was predicated on section 43(1)(b) of the LDC Act and sections 79(1)(a)(b) and (c) and 95 of the Civil Procedure Code [Cap 33 RE 2019] (the CPC). **Secondly** this appeal traces origin from a dispute on ownership of a piece of land located at Muganza Village within Kasulu District, that is to say the matter before the High Court was a land matter and **thirdly**, the basic procedural law applicable in land dispute resolution are mainly the LDC Act and the CPC as per section 51 of the former Act. With that understanding, we will now proceed to the law providing for appeals arising from orders of the High Court exercising revisional jurisdiction in land matters. The relevant law is section 47(2) of the LDC Act, which provides that;

> *"A person who is aggrieved by the decision of the High Court in the exercise of its revisional or appellate jurisdiction may,* ***with leave of the High Court or Court of Appeal,*** *appeal to the Court of Appeal."* [Emphasis added]

We observed a while ago that the application before the High Court was preferred under section 43(1)(b) of the LDC Act and sections 79(1)(a)(b) and (c) and 95 of the Civil Procedure Code [Cap 33 RE 2019]

(the CPC). For purposes of completeness, we take liberty to quote those provisions. Section 43(1)(b) of the LDC Act provides as follows;

> *"43-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-*
>
> *(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice,* ***revise the proceedings and make such decision or order therein as it may think fit****."* [Emphasis added].

Section 79(1)(a)(b) and (c) of the CPC with side notes **"Revision"** also quoted in the chamber summons that initiated proceedings in the High Court, provides as follows: -

> *"79-(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-*

(a) to have exercised jurisdiction not vested in it by law;

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity;

the High Court may make such order in the case as it thinks fit." [Emphasis added].

In our view, the application before the High Court was indeed an application for revision for the same was predicated on the above provisions of law, which are exclusively meant to move the High Court to revise orders of courts subordinate to it. That was the position of Mr. Kayaga and the fact was not seriously contested by Ms. Nyakyi.

As the revision proceedings in the High Court had origins from a land dispute, we are of a firm position that any party aggrieved by any order of that court was duty bound to seek and obtain leave of that court and if it refused to grant it, an application for a second bite ought to have been lodged in this Court in terms of Rule 45(b) of the Rules. This, the appellant did not do before he could lodge this appeal. It is this Court's position that where leave is required to be in place before an appeal can be lodged, the

said leave becomes an essential requirement to be fulfilled without which a competent appeal cannot be lodged.

Underscoring the importance of seeking and procuring leave to appeal or a certificate on point of law, before an appeal can actually be lodged to challenge orders of the High Court in land matters, this Court in **Dorina N. Mkumwa v. Edwin David Hamis** (supra), stated that:

> *"In land disputes, the High Court is the final court on matters of fact. The legislature has taken this finality so seriously that it has, under subsection (1) and (2) of section 47 of Cap 216 [as amended by the Written Laws (Miscellaneous Amendments) Act (No. 3) Act, 2018 Act No. 8 of 2018] imposed on the intending appellant the statutory duty to obtain either leave or a certificate on point of law before appealing to this Court."*

Other decisions of the Court on the same aspect of leave to appeal include, **Baghayo Gwandu v. Michael Ginyau**, Civil Application No. 568/17 of 2017, **Azaram Mohamed Dadi v. Abilah Mfaume,** Civil Appeal No. 74 of 2016 and **Palumbo Reef Limited v. Jambo Rafiki Bungalow**, Civil Appeal No. 226 of 2020 (all unreported).

We subscribe to the above view, that is to say appeals from orders of the High Court exercising revisional and appellate jurisdiction are not automatic or appealable as of right, they lie with leave of the High Court or of this Court without exception.

Ms. Nyakyi, invited us to invoke this Court's powers of revision under section 4(2) of the AJA and Rule 4(2) (a) of the Rules in order to permit her to argue the appeal, despite the absence of the requisite leave to appeal. Alternatively, she beseeched the Court not to condemn his client to costs in case we agree with Mr. Kayaga and strike out the appeal. Respectfully, we are unable to accept the learned advocate's invitation. We decline Ms. Nyakyi's prayers, first because this Court can only exercise any of its powers under section 4(2) of the AJA in respect of matters that are properly before it. As for this appeal, we already indicated that it was lodged unlawfully without leave as required by section 47(2) of the LDC Act. Secondly, in respect of costs, Ms. Nyakyi did not advance any reasons for the waiver she prayed for.

That said and done, as to the way forward on this matter, the position is settled as to the legal remedy available where an appeal that required leave is lodged in this Court without it. The appropriate remedy is

to strike out the appeal as per this Court's decisions in **Ghati Methusela v. Matiko Marwa Mariba**, Civil Application No. 6 of 2006 (unreported) and **Palumbo Reef Limited** case (supra).

In the upshot and for the foregoing reasons, we agree with Mr. Kayaga that indeed the appeal is incompetent and we strike it out with costs.

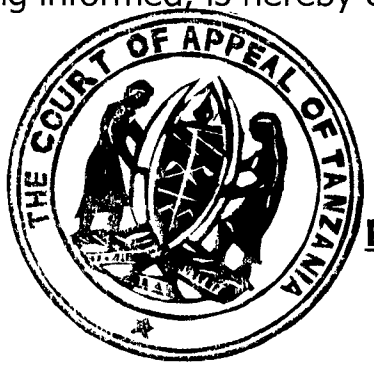
DATED at **KIGOMA**, this 1st day of July, 2021.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This judgment delivered this 2nd day of July, 2021 in the presence of the Appellant in person and Mr. Dennis Katambo Kayaga, learned counsel for the 1st Respondent, and in absence of 2nd and 3rd respondents despite being informed, is hereby certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL