IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUSSA, J.A., MKUYE, J.A., And KOROSSO, J.A.)

CIVIL APPEAL NO. 134 OF 2016

1. MITALAMI LANG'ASANI
2. HASSAN LANG'ASANI .....APPELLANTS
3. ESTA LANG'ASANI

VERSUS

SAADA IDDI .....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha

(Sambo, J.)

dated the 10th day of April,2013
in
Misc. Land Appeal No. 26 of 2012

RULING OF THE COURT

25th November & 3rd December, 2019

MUSSA, J.A.:

This appeal is founded upon the following background:-

On the 9th July, 2009 the respondent herein instituted Land Claim No. 11 of 2009 in the Mateves Ward Tribunal through which she sought to recover a parcel of Land (hereinafter called "the suit land") which is situate at Ngorbob Village in Mateves Ward. From a special power of attorney which is appended to the record of appeal (page 9) it is quite apparent that the respondent instituted the claim on behalf of a certain Hawa Issa, albeit,

in her own name. At some stage in the course of hearing some witnesses expressed lack of faith in the Tribunal and consequently the hearing of the matter was transferred to Kisongo Ward Tribunal.

The record of proceedings of the latter Tribunal is not contained in the record of the appeal and, for that matter, it is not discernible as to exactly when and how the Kisongo Ward Tribunal became seized of the matter. But, rather obscurely, the claim was similarly captioned as No. 11 of 2009. At the height of the proceeding, the respondent emerged successful in a judgment that was pronounced by the Tribunal on the 6th May, 2011.

Dissatisfied the appellants preferred an appeal to the Arusha District Land and Housing Tribunal which reversed the decision of the Ward Tribunal in a judgment and decree that were pronounced on the 1st day of June, 2012. Accordingly, the appellants were declared by the District Tribunal to be the lawful owners of the suit land.

Thereafter, it was the turn of the respondent to lock horns with the decision of the District Tribunal which she did by instituting the High Court Miscellaneous Land Case Appeal No. 26 of 2012. As it were, at the end of the hearing, the respondent turned the table on the appellants, as the High

Court (Sambo, J.) allowed her appeal and resurrected the decision of the trial Tribunal in a judgment and decree that were pronounced on the 1st day of April, 2013.

The appellants were discontented and, on the 10th day of April, 2013 they requested, to be supplied with the proceedings, judgment and decree of the High Court for appeal purposes. A little later, on the 15th day of April, 2013 they formally lodged a Notice of Appeal under the provisions of Rule 83 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter called "the Rules.").

Soon after, on the 23rd day of April, 2013 the appellants instituted a Miscellaneous Civil Application No. 50 of 2013 through which they sought the indulgence of the High Court to certify four grounds which they perceived were fit for consideration and determination by the Court of Appeal. The grounds raised were:-

> *"(i) That the judge erred in law and in fact when he held that the doctrine of adverse possession was not applicable;*
>
> *(ii) That the judge erred both in law and in fact when he confirmed the defective decision of*

the ward tribunal which allowed the respondent to sue in her own name;

(iii) That the judge erred both in law and in fact when held (sic) that the respondent was having locus standi by virtual of power of attorney purportedly issued by Hawa Issa the purportedly (sic) administratrix of Makau;

(iv) The judge erred in law fact when held (sic) that the applicants did not acquire the disputed land during operation vijiji."

Having heard the parties from either side on the 5th day of November, 2013 the High Court (Mwaimu, J.) certified that ground (i) and (iii) which we have extracted above are fit for the consideration and determination by the Court of Appeal. Ironically though, in the Drawn Order, the Judge enlisted all the four grounds as having been certified for consideration and determination by the Court of Appeal (see page 246 of the record of appeal).

A good deal later, the appellants apparently realized that they had not sought the requisite leave to appeal to the Court of Appeal. Thus, on

the 23rd day of December, 2014 they preferred an application, in the High Court, seeking extension of time within which to belatedly lodge an application for the requisite leave. On the 26th day of June, 2015 the High Court (Mwaimu, J.) granted the extension and, subsequently, on the 22nd day of September, 2015 the desired leave was granted (Massengi, J.).

Earlier, on the 8th July, 2016 the Deputy Registrar of the High Court, Arusha had supplied the appellants the proceedings, judgment and decree which were requested through the already referred letter dated the 10th day of April, 2013. The documents were supplied against a certificate of delay into which the Deputy Registrar excluded 1184 days from the date of the request to the date of delivery which were required for the preparation of the documents.

In the final event, the appellants lodged the record and memorandum of appeal to institute the appeal at hand on the 28th day of July, 2016. To buttress their grounds of appeal the appellants additionally lodged written submissions, ostensibly, under the provisions of Rule 106 (1) of the Rules. The appeal is being resisted by the respondent who has just as well filed written submissions in reply.

At the hearing before us, the appellants were represented by Mr. John Materu, learned Advocate, whereas the respondent had the services of Mr. Alute Mughwai, also learned Advocate. Both counsel informed us that they were ready to proceed but, from the very outset, we expressed our concern about two disquieting factors apparent on the record of appeal and invited both of them to comment. The first relates to the apparent omission to include on the record of appeal the proceedings of the Kisongo Ward Tribunal. In the result, we do not actually have the benefit of a record of the evidence which was adduced before the Tribunal. Secondly, as we have hinted upon, the Drawn Order resulting from the Miscellaneous Civil Application No. 50 of 2013 is seemingly faulty in that the same does not match with the decision of the High Court.

In response, Mr. Materu readily conceded that the proceedings of the trial Tribunal are, indeed, not contained in the record of appeal just as he also admitted that the drawn order resulting from the referred application does not match with the decision from which it was drawn.

On account of the shortcomings, he further conceded, the appeal has been rendered incompetent. The learned counsel for the appellant did not, however, seek to cure the defects by way of supplementary record.

Instead, Mr. Materu deplored the trial Tribunal, more particularly, for entertaining the respondent's claim which was instituted in her own name instead of the name of the donor of the power of attorney. For that reason, he further submitted, the proceedings before the trial Tribunal were vitiated and Mr. Materu, thus, urged us to intervene by invoking our revisional powers and nullify the trial proceedings and its accompanying decision as well as those before the District Tribunal and the High Court which resulted from the trial Tribunal's decision. To fortify his stance, the learned counsel for the appellant referred us to the unreported Civil Appeal No. 35 of 2013 – **Editor Majira Newspapers and Three Others v. Rev. Fr. Riccardo Erico Riccion and 26 others**.

In reply, Mr. Mughwai strenuously resisted the quest for the Court's intervention in revision with respect to the trial Tribunal's proceedings which are, after all, not before the Court. The learned counsel for the respondent re-collected that the issue that the respondent lacks *locus standi* was raised, deliberated and discounted at the level of the first appeal. As it turned out, he further submitted, the appellants did not raise the issue in the second appeal and, for that matter, they should be estopped for reviving the issue in the third appeal at hand. In sum, Mr.

Mughwai submitted that the appellants have not made up any exceptional case to deserve the intervention of the Court and, as the matter presently stands, it is incompetent and should, on that score, be struck out.

On our part, we passionately weighed and considered the lucid submissions from both learned counsel. Having heard the submissions, we are constrained to confirm our concern that the record of appeal is, indeed, fraught by incompleteness and a defective drawn order.

Addressing now Mr. Materu's prayer for our intervention in revision, we are obliged to remark that, admittedly, on certain rare occasions, this Court has been constrained to intervene in revision even in situations where the matter before it is incompetent. Apart from **Editor Majira Newspapers** (supra) which was referred by Mr. Materu, the Court summed it all in the unreported Criminal Application No. 6 of 2012 – **Director of Public Prosecutions v. Elizabeth Michael Kimemeta @ Lulu** where it was confronted with an incompetent application:-

> *"Before we discuss what should be done, we wish to point out that up to now we have yet to strike out the application. We did so with a purpose. The purpose is that we remain seized with the High*

Court's record so as to enable us intervene on our own and revise the illegalities pointed out by invoking section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, otherwise the High Court decision will remain intact. This approach is now gaining momentum as per decisions of the Court in ***Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund*** *Civil Application No. 10 of 2008 (unreported);* ***Chama cha Walimu Tanzania v. Attorney General,*** *Civil Application No. 151 of 2008 (unreported)."*

In all the referred cases, the Court intervened to prevent the perpetuation of an illegality. But, we have also relentlessly cautioned that such intervention should not avail, as a matter of course, each time a proceeding before the Court is adjudged incompetent. It is a rare intervention which should be reserved for peculiar circumstances of a given case (see, for instance, our observation in the unreported Civil Appeal No. 171 of 2017 – **Goodhope Hance Mkaro v. TPB Bank PLC and Another.)**

The question which looms large is this: Does the appeal under our consideration admit to such exceptional circumstances? We think not. The revisionary powers are a sacrosanct weapon of supervisory intervention of the decisions below and, for that matter, as we have said, unless there are compelling peculiar circumstances, the revisional jurisdiction of the Court cannot be invoked to circumvent the clear and imperative provisions of the Rules.

In the matter at hand, had the learned Advocate for appellants exercised diligence, he would have discovered that the trial proceedings were amiss and that the referred drawn order was faulty ahead of certifying, as he did, that the record of appeal is correct. To this end, we have not found any good cause, let alone peculiar circumstances for us to revise the proceedings below in revision.

As we have already intimated, the appellants did not seek to remedy the defects by way of a supplementary record of appeal and we will be loath to have to grant a remedy which was not prayed for. In the end result, we entirely subscribe to Mr. Mughwai's prayer that on account of the referred shortcomings, this appeal stands to be struck out and, it is so

ordered. Since, however, the ailments which undermined the appeal were raised by the Court *suo motu,* we give no order as to costs.

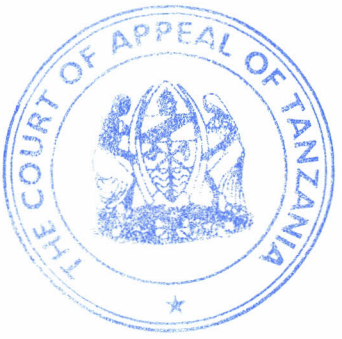
DATED at **ARUSHA** this 2nd day of December, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Ruling delivered this 3rd day of December, 2019 in the presence of the Mr. Alute Mughwai holding brief of John Materu, counsel for the Appellant's Alute Mughwai counsel for the Respondent is hereby certified as a true copy of the original.



G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL