IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LUANDA, J.A, MWARIJA, J.A AND MWAMBEGELE, J.A.)

CIVIL REVISION NO. 11 OF 2016

SHARRIF ABDALLAH SALIM
HASSAN ABDALLAH SALIM .....**APPLICANTS**

VERSUS

MAHSEN ABDALLAH SALIM ..... RESPONDENT
(Revision of the Proceedings of the High Court of Tanzania at Dodoma)

(Mkuye, J.)

Dated the 13th day of February, 2015
in
DC Civil Appeal No 6 of 2011

RULING OF THE COURT

24th & 25th May, 2017

MWAMBEGELE, J. A.:

These revisional proceedings have been instigated by an order of the High Court [Mkuye, J. (as she then was)] dated 13.02.2015 in DC Civil Appeal No 6 of 2011. That order reads:

> *"... the District Registrar to prepare the Court record to be placed before the Court of Appeal for direction and guidance.*

Given under my hand and seal of this court this

13th day of February. 2015

Sgd.

Mkuye, J.

Successor in Office"

Before we delve into the nitty gritty of the matter, we find it apt to narrate, albeit briefly, the relevant material background facts leading to the High Court order and these revisional proceedings. They go thus: The applicants Sharrif Abdallah Salim and Hassan Abdallah Salim, on 14.09.2004, instituted a suit against the respondent in the District Court of Dodoma at Dodoma seeking several orders which may not be relevant in this ruling. The suit went past several preliminary objections including one on lack of jurisdiction. Those preliminary objections were overruled and the suit, eventually, proceeded to hearing. The District Court heard the suit *exparte* and decided for the respondent. Dissatisfied, the applicants appealed to the High Court.

In the High Court, the appeal was heard by way of written submissions the court having slated the submissions dates on 18.03.2014. The judgment was slated to be pronounced on 21.08.2014, the High Court having satisfied itself on 09.06.2014 that the submissions of the parties were in place. However, judgment was not delivered on that date. On 21.08.2014, after subsequent adjournments, the court ordered a hearing on 17.03.2014.

But before that date; that is on 13.02.2015 to be particular, the High Court referred the case to this Court stating as follows:

> *"... After having given the background of the matter my opinion is that the issue of jurisdiction was first raised at the District Court which ruled that it had jurisdiction under section 54 (1) of the Land Disputes Courts Act. It would appear that the learned Judge inadvertently thought that the issue came for the first time on appeal to the High Court. The second limb of my opinion is that so long as the matter at hand was filed on*

14/9/2004 after the Land Disputes Courts Act had already come into force since 1/10/2003, the District Court did not have any jurisdiction to entertain it or to try it.

These are the reasons why I did not deal with the appeal on it merits so that I could seek the direction and guidance of the Court of Appeal as to whether or not the District Court had jurisdiction to handle land matters after 1/10/2003 when the Land Disputes Courts Act was operationalized.

In the circumstances, I direct the District Registrar to prepare the court record to be placed before the Court of Appeal for direction and guidance."

At the hearing of this reference, the applicants and the respondent were, respectively, represented by Mr Cheapson Kidumage and Mr. Juvenalis Motete, both learned counsel.

What transpired in the arguments of the learned counsel for the parties is that both are of the view that the Court has no such powers as to give directions on the High Court. It was Mr. Kidumage's submission that the Court of Appeal is guided by the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") in its functions. His search in the Rules, he said, has not revealed anything regarding such powers as to give directions on the High Court. In the circumstances of the present matter, he argued, the learned judge could have asked the parties to address her on the question of jurisdiction after which she could decide accordingly. The learned counsel beckoned upon us to strike out the reference and direct the High Court to decide on the matter before it.

Likewise, Mr. Motete, conceding to what was stated by Mr. Kidumage, added that reading section 77 together with Order XLI of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 and section 4 of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 as well as rule 65 of the Rules, it would appear that the powers to give directions are vested in the High Court over subordinate courts and not in the Court of Appeal over the High Court. To buttress his argument, the learned

counsel cited and supplied to us the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) & another**, Civil Revision No. 2 of 2014 (unreported) which, he stated, falls in all fours with the present matter.

We have dispassionately considered the arguments by the learned counsel for the parties appearing. As already alluded to above, it is the order of the High Court which has prompted these revisional proceedings. It is important to note that the High Court did not decide on the appeal which was before it. As already said, in the course of preparing the judgment, the court discovered that there was a point of law concerning illegality or otherwise of the proceedings of the District Court. Instead of the High Court deciding on that aspect, it proceeded to forward the record of the matter to this court for "direction and guidance".

We find it compelling to state at the very outset that the jurisdiction of the Court is mandated by law. The Court derives its powers under the Constitution of the United Republic of Tanzania, 1977, the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (henceforth "the AJA") as well as the Rules. Under these laws, the Court has, jurisdiction to determine appeals from the High Court as well as to call and examine all

proceedings before the High Court for purposed of satisfying itself as to the correctness, legality or propriety of any finding order or any other decision made thereon and as to the regularity of any proceedings of the High Court. This is the tenor and import of section 4 of the AJA as amended by the Written Laws (Miscellaneous Amendments) Act, 2016 – Act No. 3 of 2016. For easy reference, we hereby reproduce the section:

> *"(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction.*
>
> *(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.*

(3) Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.

"(4) The Court of Appeal shall have the power to review its own decisions.

(5) The Court of Appeal may in accordance with this Act, the Tanzania Court of Appeal Rules or any other law for the time being in force providing for appeals to the Court summarily reject any appeal.

(6) The power conferred upon the court by subsection (2) and (4) of this section and the power to examine the records of any proceedings

pursuant to subsection (3), shall not be exercised by a single judge of the court."

In the case at hand, there is no decision that has been made by the High Court. It is our considered view that the High Court was supposed to make a decision on whether or not the District Court had jurisdiction. Having discovered that ailment, the proper course to take was what the High Court did; to summon the parties and require them to address the court on that point. The learned counsel for the parties addressed the court and were of the view that what was done was more practical than legal. What the court did was quite appropriate. The course taken was to accede to the principle articulated in several decisions of the Court in which we have insisted on the stance that where a court or tribunal discovers an issue of law after the closure of evidence and submissions which might be decisive of the case, the interest of justice demands that parties must be given opportunity to air their views before making a decision on the point – see: **Ibrahim Omary (Ex. D 2323 Ibrahim) v. The Inspector General of police and 2 others,** Civil Appeal No. 20 of 2009, **Mire Artan Ismail & Another v. Sofia Njati,** DAR Civil Appeal No. 75 of

2008, **John Morris Mpaki v. The NBC Ltd & Ngalagila Ngonyani**, MBY Civil Appeal No. 95 of 2013, and **Tanzania Breweries Ltd v. Antony Nyingi,** Civil Appeal No. 119 of 2014 (all unreported) as well as **Tanzania China Friendship Textiles Co Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70.

In **John Morris Mpaki**, for instance, we reiterated the position that it is trite law that any decision affecting the rights or interests of a party is a nullity even if the same decision would have been arrived at had the affected party been heard. We stated:

> *"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard."*

In the case at hand, having heard the parties, the High Court did not proceed to decide on that aspect but in its stead went on to forward the

matter to this Court for directions. We are of the considered view that that was not the appropriate step to take. We think, having heard the parties on the question of jurisdiction of the District Court over land matters, it was incumbent upon the court to proceed to decide on that point. And we think, without deciding, that could have been stated in the body of the judgment that was pending before it having heard the parties through written submissions. We find comfort on this stance in the case of **Celestine Maagi** (supra); a case cited and supplied by Mr. Motete, learned counsel for the respondent.

As correctly stated by Mr. Motete, learned counsel for the respondent, **Celestine Maagi** (supra) falls in all fours with the present case. In that case, the High Court (Utamwa, J.), like in the present case, had realized in the course of composing the judgment that he had no jurisdiction to entertain an application for extension of time to file an appeal in a matter which stemmed from the Industrial Court. It was his view that under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 read together with section 27 (1C) of the Industrial Court Act, Cap. 60 (now repealed), the matter ought

to have been entertained by a panel of three High Court Judges. The High Court thus felt appropriate to forward the record of the matter to this Court for directions. Having considered the matter in depth, we held at p. 5 of the typed judgment:

> *"We wish to point out that the learned judge is yet to make a decision on the issue of jurisdiction. He merely expressed his sentiments that he had no jurisdiction to adjudicate the application, hence the forwarding of the record for directions. But the judge did not cite or quote any enabling provision of the law which empowered him to do so. Likewise he did not tell us under which law which empowered us to deal with the matter. This is a Court of law it must always function within the legal frame – work it was established and not whim."*

And we went on to articulate at p. 8 thereof:

"... it is clear that this court has no such powers to make directions or order to an issue which is yet to be decided akin to the powers of the High Court as we have explained above. So, we cannot exercise our revisional powers under those circumstances. We decline to do so as there is nothing to revise. We remit the record to the High Court so that it composes a Ruling on the strength of the submissions of the parties already made."

In the case at hand, like in **Celestine Maagi**, the High Court did not make any verdict on the matter that was before it. It is our view, but without deciding, that the High Court, having found that the District Court entertained and heard the matter which it was according to it, a land case, without jurisdiction, ought to have accordingly made that decision in the judgment that was pending before it. In the premises, we remit the record to the High Court so that it deals with the matter according to law; that is,

to deal with the matter from the stage at which it adjourned it for judgment.

In the upshot, we strike out these revisional proceedings. As the revisional proceedings were instigated by the court *suo motu*, we make no order as to costs.

Order accordingly.

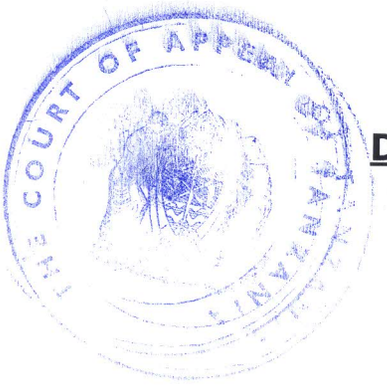
DATED at **DODOMA** this 25th day of May, 2017.

B.M. LUANDA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E. F. FUSSI.
DEPUTY REGISTRAR
COURT OF APPEAL