

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM: JUMA, Ag. C.J. .. MBAROUK, J.A. And MWANGESI, J.A.) CIVIL APPEAL NO 198 OF 2016 MAULID

JUMA APPLICANT VERSUS ISMAIL MRINDOKO RESPONDENT (Appeal from the Ruling of the High Court of Tanzania at Arusha) (Hon. Maghimbi, J) dated the 31 st day of August, 2016 in Land Revision No. 09 of 2015 JUDGMENT OF THE COURT 31 st July & 7 th August, 2017 JUMA, Ag. C.J.: This matter was brought to Court as a "reference" from the High Court at Arusha to seek "directives and necessary orders". It follows up on a Ruling of the High Court at Arusha in Land Revision No. 198 qf 2016 which Maghimbi, J. handed down on 31 st August, 2016. The learned Judge was faced with two different judgments, of the Makuyuni. Ward 1 Tribunal, and that of Mto wa Mbu Ward . Tribunal requiring her "directives" to the District Land and Housing Tribunal (DLHT) of Arusha. Each of these two Ward Tribunals at different dates gave one parcel of land in Makuyuni Ward to MAULID JUMA and ISMAIL MRINDOKO. On its face, the citation of the instant matter as CIVIL APPEAL NO 198 OF 2016, pitting on one hand MAULID JUMA as the appellant, and on the other hand ISMAIL MRINDOKO as the respondent is deceptive, to say the least. The matter is neither an appeal nor is it a revision or review envisaged under the provisions of the Appellate Jurisdiction Act, Cap. 141 (hereinafter referred to as "the AJA"). The dispute between MAULID JUMA and ISMAIL MRINDOKO, who we shall refer to in their own names, can be traced back to 13/03/2010 when Maulid Juma initiated a suit (Application No. 01 of 2010) against Ismail Mrindoko at Makuyuni Ward Tribunal. He claimed .that Ismail Mrindoko had encroached onto his land, which the village government of Makuyuni had earlier in 1994 allocated to him. On 09/06/2010 the Makuyuni Ward Tribunal delivered its decision which was in favour of Maulid Juma. The 2 Makuyuni Ward Tribunal made it a point of explaining to the parties their right of appeal within forty-five days of that decision. After he had defended and lost the suit at Makuyuni Ward Tribunal, Ismail Mrindoko next moved to the neighbouring Mto wa Mbu Ward Tribunal where he initiated his own suit (Application No. 8 of 2010) claiming the same land which Makuyuni Ward Tribunal had declared as belonging to Maulid Juma. This second suit at Mto wa Mbu Ward Tribunal was heard ex-parte because Maulid Juma did not attend. On 06/07/2010 the Mto wa Mbu Ward Tribunal delivered its decision in favour of the plaintiff, Ismail Mrindoko. It turned out that Maulid Juma was aggrieved with the ex parte judgment of the Mto wa Mbu Ward Tribunal. He lodged an appeal, Land Appeal No. 67 of 2010, in the District Land and Housing Tribunal ("the DLHT") at Arusha contending that the Ward Tribunal of Mto wa Mbu should not

have accepted a dispute over a parcel of land that was situated in the neighbouring Makuyuni Ward. In opposing the appeal at DLHT, Ismail Mrindoko claimed that he preferred to file his case at Mto wa Mbu 3 Ward Tribunal because he had no confidence with the Ward Secretary of Mto-wa Mbu Ward Tribunal with whom he was not on speaking terms. Luck was not on Maulid Juma's side when, on 17/5/2011 the DLHT dismissed his appeal. In dismissing the appeal against the decision of the Mto wa Mbu Ward Tribunal, D.W. Mungure-Chairman of the DLHT observed that Maulid Juma had failed to prove that the land dispute which Ismail Mrindoko filed at Mto wa Mbu Tribunal, had earlier been heard and determined by Makuyuni Ward Tribunal. Undaunted, Maulid Juma appealed to the High Court (Misc. Land Appeal No. 36 of 2011). He met yet another setback when his second appeal was dismissed by Mugasha, J. (as she then was) for being time barred. His attempt to seek an extension of time to lodge a proper appeal in the High Court failed when Massengi, J. dismissed his application for extension of time to appeal. After failing in his bid to appeal in the High Court against the decision of the Mto wa Mbu Tribunal, it dawned on Maulid Juma that he still had the Judgment of the Makuyuni Ward Tribunal in his favour, so, he engaged the services of a learned counsel, Dr. Ronlick Mchami to initiate the execution proceedings at the DLHT of Arusha. As fate would have it, Chairman 4 Mungure who had earlier on dismissed an appeal against the decision of Mto Wa Mbu Ward Tribunal, presided the execution proceedings (Misc. Application No. 105 of 2013) in the DLHT of Arusha. It was at this point also when it dawned upon Chairman D.W. Mungure that there are two decisions of Ward Tribunal of Makuyuni and Ward Tribunal of Mto wa Mbu conferring same parcel of land to two different people. He felt his hands tied and decided to refer the entire record of the proceedings to the High Court to seek "further directives of the High Court". The Chairman reasoned out that since the same parties (Maulid Juma and Ismail Mrindoko) featured in Land Appeal No. 67 of 2010 at the DLHT over the same land which was subject of execution proceedings in Misc. Application No. 105/2013, the DLHT cannot sit to review its earlier decision on the matter where an appeal against the decision of the Mto wa Mbu Ward Tribunal was dismissed both by the DH LT and later by the High Court. DLHT Chairman (D.W. Mungure) wrote a letter to draw the attention of the High Court to the existence of conflicting decisions of the Ward 5 Tribunal of Makuyuni and Ward Tribunal of Mto wa Mbu both giving exclusive rights over same parcel of land to two different people: "... Hivyo kuna hukumu mbili ambazo zinawapa wadaawa wote haki ya umiliki wa eneo hilo hilo na kwa sababu hiyo/ . . . Ndipo nilipolileta shauri hi/i kwa mapitio... "[Emphasis added]. When the legal dilemma regarding two trial Tribunals each vesting disputed parcel of land to different litigants reached the High Court, Maghimbi, J. determined that because the High Court had already dismissed (Mugasha, J. and Massengi, J.) appeal and application for extension of time to appeal which arose from the decision from Mto wa Mbu Ward Tribunal in Application No 8 of 2010, she could not be called upon to decide which, between the decision of the Ward Tribunal of Makuyuni, · and that of the Mto wa Mbu, should stand. The learned Judge reasoned that: '~ .. As I have pointed out earlier/ the record is clear that the applicant herein had appealed against the decision of Mto wa Mbu Ward Tribuna[Application No. 08/2010 twice, first appeal vide the Land Appeal No. 67/2010 6 at the Arusha District Land and Housing Tribunal which was dismissed and subsequent appeal vide High Court Misc. Land Appeal No. 36/2011 also dismissed for being time barred. Therefore as far as Mto wa Mbu Ward

Tribunal decision is concerned, this Court is functus officio as it had determined the matter to its finality. The available remedy to the applicant was to appeal against the High Court decision to the Court of Appeal. My hands are therefore tied.hence if my hands are tied on one decision, the Mto wa Mbu Ward Tribunal Application No. 08/2010; I cannot proceed to determine the validity of the other decision, the Makuyuni Ward Tribunal Application No. 01/2010 in exclusivity. I hereby further refer the file to the Court of Appeal for directives and necessary orders." [Emphasis added]. When the matter came up for hearing on 31 July 2017, learned counsel, Dr. Ronlick Mchami appeared for the applicant Maulid Juma, Ismail Mrindoko who appeared in person as a respondent, had little to say except he stoutly insisted that he filed his Application No. 08 of 2010 at Mto wa Mbu well before Maulid Juma filed his Application No. 1 of 2010 at Makuyuni Ward Tribunal. 7 On his part, Dr. Mchami readily conceded that there is no provision under the AJA which allows the High Court judges to refer matters pending in the High Court to the Court of Appeal to seek directives and necessary orders. The learned counsel was, however, quick to urge the Court to exercise its power of revision and chart the way forward under Section 4(3) of the AJA because the Court is already seized with the record, and is now aware of the legal stalemate caused by the existence of two judgments of the two different Ward Tribunals, both conferring land ownership to two different litigants. Dr. Mchami went ahead to highlight errors in the decision of the Ward Tribunal which, solely out of inadvertence, escaped the attention of the learned Judge. And that, had the learned judge been aware of these errors, she would not have felt bound by decisions of the fellow judges who had dismissed appeal originating from Mto wa Mbu Ward Tribunal. Citing Section 10 (1) of the Land Courts Dispute Settlement Act No. 2 of 2002 (herein referred to as "the Land Courts Act") as his starting point, the learned counsel submitted that the Ward Tribunal of Mto wa Mbu had no jurisdiction to take up the suit over land which is situated in the area of jurisdiction of another Ward Tribunal. Section 10 states: "10 (1).-Each Ward Tribunal established under the Ward Tribunals Act 1985 shall be a Court for the purposes of this Act the Land AcC 1999 and shall have jurisdiction and powers in relation to the area of a District Council in which it is established. " He also submitted that, while a Primary Court which is established under Section 3 (1) of the Magistrates Courts Act, Cap. 11 is vested with jurisdiction over the entire district within which it is established, Ward Tribunals as Land Courts established under Section 10 (1) of the Land Courts Act are restricted within the area of the Ward where it was established. The learned counsel submitted further that had Maghimbi, J. known that Mto wa Mbu Ward Tribunal had exercised jurisdiction over land which was situated in another Ward (Makuyuni Ward) in violation of section 10 (1) of the Land Courts Act; she would not have referred the matter to this Court for directives. Instead, the learned judge would have nullified the 9 /j proceedings in Application No. 8 of 2010 at the Ward Tribunal of Mto wa Mbu. We think, the stance taken by Mr. Ismail Mrindoko that he filed his Application No 8 of 2010 at Mto wa Mbu Ward Tribunal well before Maulid Juma filed his Application No. 1 of 2010 at Makuyuni Ward Tribunal, is not borne out of the record before us. The record in fact shows that the decision of the Makuyuni Ward Tribunal where Ismail Mrindoko took part and fended off the suit, was handed down earlier on 09/06/2010 than the Mto wa Mbu decision which was delivered almost a month later, on 06/07/2010. We also think Dr. Mchami is correct to submit that the jurisdiction of Ward Tribunals when sitting as Land Courts is restricted to within their respective

Wards where they were established. This legal position is made clear by Section 10 (1) of the Land Courts Act which Dr. Mchami cited to us. It also seems to us that the legal position that jurisdiction of Ward Tribunals when sitting as Land Courts is confined strictly within the geographical area of the Ward's establishment is reinforced by Section 3 of the Ward Tribunals Act, Cap. 206 which establishes Ward Tribunals which 10 are envisaged as Land Courts under Section 10 (1) of the Land Courts Act. Section 3 of Cap 206 states:

3. -There is hereby established a tribunal For every 11 Ward in Tanzania to be known as the Ward Tribunal For the ward For which it is established. Provided that the Minister may, by notice published in the Gazette/ establish two tribunals for a ward if he is of the opinion that there are special circumstances which make it necessary or desirable to do so. [Emphasis added]. We note that Dr. Mchami has conceded his failure to draw the attention of Maghimbi, J. of the existence of section 10 (1) of the Land Courts Act. Had he done so, the learned Judge would most probably be alerted that the Mto wa Mbu Ward Tribunal should not have exercised jurisdiction of a Land Court over land situated in another Ward, i.e. Makuyuni Ward. Further, although the learned counsel for the applicant also conceded that there is no avenue through the provisions of the AJA which_ allow judges of the High Court to refer to the Court of Appeal matters of law or fact, for "directives and necessary orders", he was quick to submit that he has demonstrated the illegality of the act of the Mto wa 11 Mbu Ward Tribunal to extend its jurisdiction beyond its area of establishment. This illegality, he submitted, warrants an intervention by the Court by way of revision. Although under the circumstances of the matter before us, Dr. Mchami is right to invite us to exercise our power of revision under Section 4 (3) of the AJA, we cannot help but point out the fact that this Court has on several occasions discouraged the worrisome trend of High Court casually sending matters before that court to the Court of Appeal, under the cover of seeking directives of the ~ourt of Appeal. For instance, in SHARRIF .· ABDALLAH SALIM AND ANOTHER VS MAHSEN ABDALLAH SALIM, CIVIL REVISION NO. 11 OF 2016 (Unreported) the High Court, while in the preparation of its judgment, discovered that there was a point of law to the effect that a District Court had usurped the jurisdiction which is vested in the Land Courts. Instead of addressing that legal issue headlong and correct that jurisdictional error, the High Court ordered the placement of the matter before this Court: "The District Registrar to prepare the court record to be placed before the Court of Appeal for direction and guidance. " This Court seized that moment to discourage that trend, stating: 12 ~· ..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... /√ With due respect, we expect the High Court to work out challenging legal issues on their own. It is not appropriate for the High Court to expect the Court of Appeal to be an extension of research facility at its disposal. It is axiomatic to say that, when hearing and determining matters before them judges must look up to all the statutes and regulations that apply to the matters before them. For example, in the Ruling which led to the matter before us, there was no reference to any of the provisions of the Land Courts Act which governs land cases in Land Courts, i.e. Ward Tribunals, District Land

and Housing Tribunals and the High Court when determining land disputes. In the instant matter, had learned judge consulted laws governing land matters, in this case, section 10(1) of the Land Courts Act and section 3 of the Ward Tribunal Act, she would readily have found that geographical jurisdictions of Ward Tribunals when sitting as Land Courts, is confined within the area of a Ward. The learned judge should also have known that in case the High Court faces any procedural gap while determining land disputes, there is the Civil Procedure Code, Cap. 33 and the Evidence Act, Cap. 6 to fall back to as section 51 (1) of the Land Courts Act provides: "51 (1) In the exercise of the respective Jurisdictions, the High Court and District Land and Housing Tribunals shall apply the Civil Procedure Code, 1966 and the Evidence Act; 1967:-// All in all, we are not in any doubt that it was legally wrong for the Ward Tribunal of Mto wa Mbu to extend its reach onto the land dispute situated in the area where the Makuyuni Ward was by law established to operate. This created the impropriety and room for the two Ward Tribunals, to deliver two conflicting decisions over a disputed parcel of land. This illegality and resulting impropriety inevitably calls for our intervention by way of revision under sub-section (3) of section 4 of the AJA. We therefore quash and set aside all the proceedings and the resulting Ruling of the Mto wa Mbu Ward Tribunal in Application No. 8 of 2010. 14 We similarly quash and set aside subsequent appeal from the Mto wa Mbu Ward Tribunal to the District Land and Housing Tribunal of Arusha in Land Appeal No. 67 of 2010. We also quash and set aside a further appeal by Maulid Juma to the High Court in Misc. Land Appeal No. 36 of 2011 which was dismissed by Mugasha, J. (as she then was). Further, the decision of the Makuyuni Ward Tribunal in Application No. 1 of 2010 shall remain valid. In case Ismail Mrindoko is still aggrieved with the decision of the Makuyuni Ward Tribunal in Application No. 1 of 2010, he can within forty-five days of delivery of this Ruling, lodge his appeal to the District Land and Housing Tribunal having jurisdiction over the Makuyuni Ward Tribunal as it is provided under section 20 (1) of the Land Courts Act, which states: '5. 20 (1) Every appeal to a District Land and Housing Tribunal shall be filed in the District Land and Housing Tribunal within forty-five days after the date of the decision or order which the appeal is brought. " 15 In the upshot of our exercise of the Court's power of revision, we make no order regarding the costs. DATED at ARUSHA this 3rd day of August, 2017 I. H. JUMA AG. CHIEF JUSTICE M.S.MBAROUK JUSTICE OF APPEAL S. S. MWANGESI JUSTICE OF APPEAL I certify that this is a true copy of the original. A.H. M UMI DEPUTY REGISTRAR COURT OF APPEAL 16

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