

TANZANIA / JUDGMENT

Amosi Nyambi

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DODOMA SUB REGISTRY AT
DODOMA MISCELLANEOUS LAND APPEAL NO. 09/2023 (Arising from the Misc. Land
Application No. 86 of 2019 before the District Land and Housing Tribunal for Singida at Singida
vide which it reviewed its decision in Land Appeal No. 15 of 2018). AMOSI
NYAMBI..... APPELLANT VERSUS SAIDI
ABDALLAH..... RESPONDENT

JUDGMENT

Date of Last Order: 21/6/2024 Date of Judgment: 02/8/2024 MASABO, J:- Amosi Nyambi, the appellant herein, was the plaintiff in Madai (Civil Case) No. 88 of 2018 before Mwasauya Ward Tribunal (the trial tribunal). He was suing the respondent for trespassing on his land. After the hearing of the matter, the trial tribunal found him to have proved his claim and it declared him the owner of the suit land. The respondent was aggrieved. He appealed before the District Land and Housing Tribunal of Singida (the appellate tribunal or the DLHT) vide Land Appeal No. 15 of 2018. The appeal ended in his disfavor as the decision of the trial tribunal was upheld. The respondent was still aggrieved but he did not appeal to this court. Rather, he went back to the DLHT and filed a review which was admitted Page 1 of 12 and registered as Miscellaneous Land Application No. 86 of 2019. In the said review, he beseeched the tribunal to reverse its decision on the ground that he had found the evidence that had been "unreasonably removed malafidely" from the case file and hence was neither seen nor considered in the appeal. This time, he won. The DLHT reversed its judgment and decree. The appellant was aggrieved by the reversal. He has come to this court armed with an appeal based on three grounds of appeal as follows:

1. That, the presiding chairman of the District Land and Housing Tribunal erred in law and fact to entertain the chamber application which resulted into the impugned decision knowingly that he was functus officio.
2. That, the presiding chairman of the District Land and Housing Tribunal, erred in law and fact to entertain the chamber application contrary to the provisions of Order XLII, rule 1(a) & (b) of the Civil Procedure Code, Cap 33 R.E 2019.

3. That, the presiding chairman of the District Land and Housing Tribunal, erred in law and fact to entertain the chamber application which resulted in the impugned decision and made it conclusive contrary to provisions of Order XLII, rule 8 of Civil Procedure Code Cap 33 R.E 2019. The appeal was heard *viva voce*. The appellant was represented by Mr. Raymond Joachim Kim, learned counsel whereas the respondent appeared in person, unrepresented. Page 2 of 12 Supporting the appeal Mr. Kim submitted that the DLHT ought not to have entertained the review as he was *functus officio*. By entertaining it, he revised his own decision in the name of review. This, he argued, was wrong as the evidence of sale was considered in Land Appeal No. 15 of 2018 and he, personally, decided that the sale agreement was legally perfect. Later on, he reversed the decision holding that the sale agreement was improper. He argued that this was legally wrong. The respondent alleged that there was a discovery of evidence but there was none. He argued further that, even if there was such a discovery, the appellate tribunal could not have entertained the application as such evidence could only be entertained by the trial tribunal. It was contended further that the review is invoked only where there is no appeal, or where there is an apparent error on the face of the record or discovery of new evidence which is not the case here as the respondent had the right to appeal but he forfeited it. Moreover, it was submitted by Mr. Kim that the discovery of new evidence can only be entertained in the trial stage. He argued further that even though there was new evidence, the chairman was required to issue a date for a hearing but this was not done. By way of conclusion, Mr. Kim prayed that the review and its subsequent decision be quashed and set aside with costs. In reply, the respondent submitted that the chairman did not anyhow err. He did what was required to be done in a review and exercised his role in supervising ward tribunals. He argued that the appeal has no merits because the trial tribunal had no jurisdiction to hear the case as there was already a decision on the disputed land by this court. The decision was tendered before Page 3 of 12 the trial tribunal but it was not considered. When he appealed to the first trial tribunal, the documents were nowhere to be found as they had been removed from the case file by a registry officer. He argued that had the documents not been maliciously removed from the case file, the appellate court could have seen them and it could have decided in his favour as it did in the review by declaring him the owner of the suit land. Mr. Kim rejoined by reiterating his submission in chief. I have considered the submission by the parties and thoroughly read and considered the trial tribunal's records alongside the grounds of appeal. The sole issue for determination is whether the DLHT tribunal properly exercised its powers for review. The Land Disputes Courts Act which establishes and clothes the DLHT with jurisdiction over land matters is silent on review and the procedure thereto. Thus, recourse must be sought from Section 78 and Order XLII of the Civil Procedure Code, Cap 33 R.E 2019, which regulates review proceedings in ordinary courts. Section 78 gives the power of review and Order XLII sets out the rules. Its Rule 1 (a) and (b) state as follows: 1.-(1) any person considering himself aggrieved- fa) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

- (b) by a decree or order from which no appeal is allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was Page 4 of 12 passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree [the emphasis is added]. These rules specifically lay down the parameters under which the review jurisdiction can be exercised. As per these rules, the powers for review can only be exercised if there is a discovery of new and important matter or * evidence; where there are some mistakes or errors apparent on the face of the record and for other sufficient reason. The powers for review are, sparingly, exercised only on deserving cases based on the above grounds. As stated by the Court of Appeal in the case of Tanzania Transcontinental Co. Ltd v Design Partnership Ltd, Civil Application. No.762 of 1996 (unreported):- "... the Court's power of review ought to be exercised sparingly and only in the most deserving cases, bearing in mind the demand of the public policy for the finality of litigation and for the certainty of the law as declared by the highest court of the land." Cementing this rule in Rizali Rajabu vs Republic, Criminal Application No. 4 of 2011[2013] TZCA 452 TanzLII the Court stated that:- "First, we wish to point out that the purpose of review is to re-examine the judgment with a view to amending or correcting an error which had been inadvertently committed which if it is not reconsidered will result into a miscarriage of justice. We are alive to a well-known principle that a review Page 5 of 12 is by no means an appeal in disguise. To put it differently, in a review the Court should not sit on appeal against its own judgment in the same proceedings. We are also mindful of the fact that as a matter of public policy litigation must come to an end hence the Latin Maxim- *Interest rei publicae ut finis sit litium*. Also, in Hassan Ng'anzi Khalfan vs Njama Juma Mbega & Another (Civil Application 336 of 2020) [2021] TZCA TanzLII, the Court of Appeal while citing C. K. Takwani Civil Procedure, 5th Edn page 400 held that:- "..... powers of the Court to review its decision constitutes an exception to the general rule that once a decision is composed, signed and pronounced by the Court, the Court becomes *functus officio* in that it ceases to have control over the matter and has no jurisdiction to alter or change it. Needless to overemphasize that a review is called for only where there is a glaring and patent mistake or grave error which has crept in the earlier decision by judicial fallibility. Simply stated, the finality of the decision should not be reopened or reconsidered so as to let the aggrieved party fight over again the same battle which has been fought and lost. It is obvious therefore that the court's power of review is limited." In the light of these authorities, I am fortified that the argument that the DLHT ought not to have reviewed its decision as it was *functus officio*, is misdirected as the review proceedings are an exception to the rule on *functus officio*. As regards the grounds of review, further to the principles above stated, the Court of Appeal has in numerous decisions underscored that review should Page 6 of 12 not be regarded as a substitute for an appeal or an appeal in disguise. In its landmark decision in Chandrakant Joshubhai Patel vs Republic (Criminal Application 8 of 2002) [2003] TZCA 37 (29 April 2003) TanzLII, the Court of Appeal while citing its previous decisions in Transport

Equipment Ltd vs. Devram Valambhia, Civil Application No. 18 of 1998 (unreported) and persuasive authority of the Supreme Court of India in Thungabhadra Industries Ltd v. State of Andhra Pradesh, (1964) SC 1372 and of the High Court of Uganda in Balinda v. Kangwamu [1963] EA 55 it instructively held that: "..... a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error..... a point which may be a good ground of appeal may not be a good ground for review although it may be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for an appeal.... an error which will ground a review, whether it be one of fact or one of law, will be an error over which there should be no dispute and which results in a judgment which ought to be corrected as a matter of justice. A court invited to review its decision must, therefore, be properly guided by the principles enunciated in the above authority and a plethora of other authorities. It must be certain that the grounds set out in the memorandum of review fall under the scope of Order XLII rule 1(a) and (b) of the Civil Procedure Code and the authorities above cited else it would risk reconstituting itself into an appellate court for its own decision. Mr. Kim's submission suggests that the DLHT did not fall under the scheme of Order XLII rule 1(a) and (b) of the Civil Procedure Code and the authorities above Page 7 of 12 cited henceforth it traversed beyond its jurisdiction. To appreciate his argument, I have scanned through the grounds for review as set out in the memorandum of review. It states: "the appellant erred on law and fact to uphold the decision of the trial ward tribunal which unreasonably removed malafidely the applicant's strong and reliable evidences which if the tribunal had received would decide in his favour." Although not specifically stated, it would appear to me that, the applicant's memorandum of review impliedly suggests that it was based on the discovery of evidence that was lost. He beseeched the tribunal to reverse its decision on the ground that he had found the evidence that had been "unreasonably removed malafidely" from the case file and hence was neither seen nor considered by the tribunal. He appended to his memorandum for review a bundle of documents comprising of the judgment of this court in Civil Appeal No. 28 of 1993; a letter from the DLHT for Singida dated 13/4/2011, a letter by one Said Abdallah Nkundwa dated 11th January 2018; and summons issued by Ngamu police post. While pondering what amounts to discovery of new evidence in the context of review, I was attracted to a decision of the High Court of Uganda (Commercial Division) in Ojijo Pascal vs Eseza Catherine Byakika Miscellaneous Application No. 1028 of 2020 that dealt extensively with reviews predicated on discovery of new evidence. I will extensively quote the relevant part of this decision which I find to be highly persuasive. The court stated thus: Page 8 of 12 There is an expectation imposed upon litigating parties to place the whole of their case before the court at the time of the initial hearing..... review is not designed for the purpose of allowing the parties to remedy their own failings or oversights during trial. In all such cases, the test for review of the matter and permitting the calling of new evidence is the same. An unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he or she was content to have the trial judge deliver judgment based on the evidence produced at a trial in which that litigant actively participated. Therefore, the

applicant must satisfy the Court that the proposed evidence would probably change the result, and that it could not have been discovered by the exercise of due diligence. The unavailability of the "new evidence" must not result from the lack of due diligence on the part of the applicants or their counsel. The new and important matter of evidence discovered must be one which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by the applicant at the time when the order was made. The evidence upon which the review is sought must be relevant and of such a character that if it would have been brought into the notice of the court, it might have possibly altered the judgment. Since review of the judgment is neither an appeal nor a second inning to the party who has lost the case because of his negligence or indifference, the party seeking review on this ground must show that there was no failure on his or her part in adducing all possible evidence at the trial. The party seeking review must show that he or she exercised the greatest care in adducing all possible Page 9 of 12 evidence and that the new evidence is relevant and that if it had been given in the suit it might possibly have altered the judgment. This provision applies to evidence that existed at the time of a motion or trial but that could not have been discovered with reasonable diligence prior to a court ruling upon the motion or the trial's completion. [The emphasis is mine]. What I decipher from this decision which I fully subscribe, to benefit from the ground of discovery of new evidence, the applicant must demonstrate that, one, the evidence is relevant and would probably change the result and two, that, the failure to produce the said evidence during the trial did not result from his negligence or lack of due diligence. In other words, he must demonstrate that, even though he exercised due diligence in search and producing all the relevant evidence in support of his case, the discovered evidence was not in his knowledge or he could not produce it for reasons other than his own negligence or apathy in the pursuit of his right. Therefore, for the respondent's review to succeed, he had to demonstrate these two things. The record shows that the respondent was invited to address the court during the hearing of the review held on 3rd December

2019. From his submission reflected on page 6 of the typed proceedings of the DLHT, it appears that the documents introduced were not new as they were known to him. His sole task was to demonstrate that he was diligent. He had to demonstrate that he exercised due diligence in obtaining and tendering them before the tribunal but he could not do so for reasons other than his negligence, apathy or lack of diligence but he miserably failed. Page 10 of 12 Although he alleged that he previously tendered the documents before the ward tribunal, the record from the ward tribunal does not show so. All it shows is that when testifying before the ward tribunal as DW1, the respondent told it that in 1992 one Emannuel Nyambi trespassed into the suit land and that, they litigated over the suit land before Ilongero Primary Court in Case No. 77 of 1992 where he emerged successful but the said Emannuel Nyambi appealed to the district court. There was no mention of the decision of this court let alone tendering of the decision of this court which was produced in the review. As per the record, the only evidence tendered before the ward tribunal was a contract for sale of the suit land which was tendered and admitted by the ward tribunal on 23.01.2018. The

lamentation that the documents were in the court file but malafidely removed by registry officers was with no merit. It would appear that the chairperson did not address his mind to this issue. Had he properly directed his mind to this issue, he would found that there was nothing on the record to support the blanket accusations made by the respondent. He would have found the application for review unmeritorious and a mere attempt by him to remedy his negligence or lack of diligence as manifested by his failure to produce the said documents during trial although he had full knowledge of their existence. For reasons above demonstrated, I am satisfied that, the tribunal materially erred in entertaining the review as it was outside the scope of Order XLII rules 1 (a) and (b) of the Civil Procedure Code. Page 11 of 12 Accordingly, the appeal succeeds. The ruling of the DLHT in Miscellaneous Land Application No. 86 of 2019 is quashed and set aside. The costs shall follow the event. DATED and DELIVERED at DODOMA this 2nd day of August 2024. J. L. MASABO JUDGE Page 12 of 12

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