IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 45 OF 2000

B E T W E E N

MBEYA-RUKWA AUTOPARTS &
TRANSPORT LTD. . . . . APPELLANT

A N D

JESTINA GEORGE MWAKYOMA . . . . . RESPONDENT

(Appeal from the Judgement of the
High Court of Tanzania at Mbeya)

(Mwipopo, J.)

dated the 16th day of December, 1999

in

Misc. Civil Application No. 3 of 1999

R U L I N G

LUGAKINGIRA, J.A.:

When this appeal came on for hearing, learned counsel for the respondent, Mr. Victor Mkumbe raised a preliminary objection to its competence. He put forward two grounds which may be rephrased thus:

(a) that the appellant has no legal standing in the proceeding as it was not a party to Misc. Civil Application No. 3 of 1995;

(b) that leave to appeal was not obtained although the decision of the High Court was not made under the Civil Procedure Code, 1966.

The appeal and the preliminary objection derive from a drawn out background which ought to be set out at length.

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The proceeding centres on a parcel of land comprised in Plot Nos. 1 and 2, Block "BB", Uyole Industrial Area, Mbeya Municipality. This land was first allocated on a right of occupancy to M/s Kagera Canning Industry Ltd. (hereinafter KAGERA) under an executed offer which was registered by the Assistant Registrar of Titles at Mbeya in October 1986. The land was then unsurveyed and known simply as Plot Nos. 1 and 2, Block "BB", Mbeya Municipality, that is, without the further reference to Uyole Industrial Area. In April 1989, and with the consent of the Regional Land Officer, KAGERA transferred the right of occupancy to the appellants, M/s Mbeya-Rukwa Autoparts & Transport Ltd. (referred to in the proceedings and this ruling by its acronym MRAPATA). The transfer was duly recorded by the Assistant Registrar of titles. Subsequently, the land was surveyed and given the description Plot Nos. 1 & 2, Block "BB", Uyole Industrial Area, Mbeya Municipality, and at some later stage MRAPATA took steps to acquire a certificate of occupancy in replacement to the offer.

Meanwhile, the surveyed land was allocated to the respondent, Jestina George Mwakyoma, on a 33-year right of occupancy commencing 1 October, 1991. The allocation was followed with the issuance of a certificate of occupancy by the Commissioner for Lands which was registered by the Assistant Registrar of Titles in August 1992 as Certificate of Title No. 3728-MBYLR. However, in December 1994 the Assistant Registrar of Titles received for registration another certificate of occupancy over the same land, this one in the name of MRAPATA. At this juncture the Assistant Registrar of Titles realised that Plot Nos. 1 and 2, Block "BB", Mbeya Municipality and Plot Nos. 1 and 2, Block "BB", Uyole Industrial Area, Mbeya Municipality were one and the same piece of land and that there

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had been a double allocation of same. Believing that the allocation to the respondent was invalid for being subsequent to MRAPATA's, the Assistant Registrar of Titles sent notices to the respondent under section 37 (1) of the Land Registration Ordinance (Cap. 334), requiring her to produce her certificate of title for cancellation. The respondent failed to comply. Accordingly, and pursuant to subsection (2) of section 37, the Assistant Registrar of Titles filed Misc. Civil Application No. 3 of 1995 in the High Court praying for the cancellation of the respondent's certificate.

The respondent never responded to the court summonses and her Dar es Salaam-based lawyers never showed up when directed to. The application was therefore heard and granted ex parte by Mwipopo, J. in a ruling delivered on 24 September, 1996. Interestingly, the respondent was for the first time present in person to take the ruling. The judge advised her to make an application to set aside the order, warned her on limitation and suo motu stayed execution of the order pending the respondent's application. It seems the application was presented in time and the ex parte order was set aside on 3 April, 1998. Hearing of the application inter partes took place on 4 November, 1998 and ruling was reserved to 15 December.

It transpired in the pleadings and counsel's submissions that the respondent had started building a fence around the plots and questions of compensation and alternative plots for her had become apparent. While the ruling was reserved it occurred to the judge that the application might succeed and this gave urgency to the two questions. The judge appears to have been concerned that the respondent should not suffer loss. Therefore, on 12 December he wrote and delivered an interim order in which he said, inter alia:

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> I therefore before a ruling is made in respect of this application require ... MRAPATA and Municipal Director/Land Officer of Mbeya Municipality to appear and show cause why, in case this application is granted, they should not be condemned to pay compensation and to give equivalent alternative plots for industrial development to the Respondent.
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> The proceeding of this application shall be served upon the same two new parties with this order for them to appear in court and be heard accordingly.

On 6 December, 1999 the Municipal Director and MRAPATA appeared through learned counsel Mr. Luanda and Mr. Mbise respectively. The record then goes thus:

> Court: Mr. Luanda Municipal Solicitor for Municipal Director and learned Mr. Mbise Advocate for MRAPATA are told the essence of their presence. The learned Mr. Mbise Advocate to start first for MRAPATA because he is the second counsel to the Municipal Solicitor.

This was an invitation to learned counsel to submit on the questions of compensation and alternative plots to the respondent. It is not disputed that the "new parties" were not required to file counter-affidavits in the application; they were also expressly barred from adducing any evidence. The learned judge stated:

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> For the time being I allow each side to submit any factual or legal points ... If this court finds it necessary to have evidence tendered ... in support of or to counter the factual submissions I will allow both sides to do so and make necessary directions accordingly.

This never happened but the court heard submissions only. Regarding the points on which reactions were solicited, Mr. Mbise stated that MRAPATA were not prepared to compensate the respondent. The reasons he gave are not relevant. Mr. Luanda, on the other hand, stated that the Municipal Director had no industrial plots then to offer to the respondent.

These reactions did not go well with the learned judge. He was manifestly anxious to assist the respondent and, seeing no possibility of realising compensation and allocation of alternative plots, he hit upon the idea of legalising the respondent's ownership of the land. In this strategy he took advantage of a letter by the Commissioner for Lands (later rescinded) addressed to the Regional Land Officer. The letter, prompted by the respondent's plea to the Commissioner, chastised the Regional Land Officer for the double allocation and for allowing the transfer between KAGERA and MRAPATA in the first place. The Commissioner suggested withdrawal of the application in court in order for his department to sort out the irregularities administratively and with a view to regularising the respondent's title. As indicated, the Commissioner rescinded the letter in a subsequent one, but the learned judge ridiculed and dismissed the rescission as unauthentic in a "judgment" where he held as follows:

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(1) I hold that the transfer of the plot from Kagera Canning Industry Ltd. to MRAPATA was illegal for being without any consideration proved and if there was such consideration it was for no developments never made by him.

(2) Jestina Mwakyoma got the land lawfully for she was an innocent third party who did not have to lift the veil to see whether the office which had the power and authority to grant him the land had done so lawfully.

(3) As between Mwakyoma and Kagera Canning Industry Ltd. the one who deserves retention of this plot now is Mwakyoma because she has interest in it and has developed it.

(4) There is no need of giving chance to Kagera Canning Industry Ltd. To be heard for he won't have any better claim over this plot than Mwakyoma.

The judge went on to state that it could not be left to the Regional Land Officer to revoke the subsisting right of occupancy or to the Municipal Director to regularise the respondent's position and proceeded to make the following orders:

(1) This court therefore hereby revokes the Offer of Right of Occupancy granted to Kagera Canning Industry Ltd. for it was illegal for him to transfer it to MRAPATA without following the procedures and laws referred to by the Commissioner ...

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(2) This court also revokes hereby the transfer of the 2 plots to MRAPATA for the same reason and for failure to develop it in between 1989 and 1991 or enter upon it or leave his mark upon the land in time.

(3) This court retains the offer of Right of Occupancy to Jestina George Mwakyoma as properly registered by the Assistant Registrar of Titles so far.

(4) Kagera Canning Industry Ltd. has no remedy or relief this court can grant him for he already got paid or freely gave it and transferred it to MRAPATA.

(5) As for the said transferee he is free to claim and sue for his costs incurred on this plot and to claim for alternative plots from the relevant authorities.

(6) This application is dismissed with costs.

These pronouncements generally make difficult reading but we may have to come to that later. Presently, it will be seen that these pronouncements and orders affected MRAPATA's interests considerably. It is on that account that MRAPATA brought this appeal. Without the necessity of setting out the grounds of appeal, which in a nutshell take issue with each and every item set out above, we will go straight to consider the preliminary objection.

The first ground was that MRAPATA had no right or locus standi to bring the appeal because they were not a party to the proceeding. Mr. Mkumbo submitted that MRAPATA were never joined as a party in as much as they were not required to file pleadings or to adduce evidence.

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The second ground related to want of leave to appeal. Mr. Mkumbe argued that the proceeding was determined under section 37 (2) of the Land Registration Ordinance rather than the Civil Procedure Code and that the provisions of section 5 (1) (c) of the Appellate Jurisdiction Act, 1979 came into play. In reply, Mr. Mbise started off by questioning the competence of the notice of preliminary objection. He contended that it did not comply with the law by omitting to cite the provision under which it was brought. He wondered whether it was brought under Rule 82, 100 or 106 of the Court Rules. He also pointed out that another objection brought by notice of motion was struck out the day before and submitted that the respondent should either have made another application or brought a reference under Rule 57.

Turning to the substance of the preliminary objection, Mr. Mbise contended that MRAPATA were joined in the proceeding because, (i) the judge directed the record to be served on the "new parties", (ii) it was recorded that the judgment was "delivered in the presence of all parties except the Municipal Director", and (iii) the right of appeal was explained in general terms. He was quick to add, however, that it was not MRAPATA's fault if the joinder was improper. Regarding leave to appeal, Mr. Mbise argued that MRAPATA were joined pursuant to the provisions of section 95 of the Civil Procedure Code, there being no provision for that purpose under section 37 of the Land Registration Ordinance. In the alternative, Mr. Mbise submitted that the proceedings were so chaotic and the decisions reached so contrary to law and justice that this was a proper case for the Court to step in and invoke its revisional powers under section 4 (3) of the Appellate Jurisdiction Act.

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To begin with, we think, with respect, Mr. Mbise's challenge to the notice of preliminary objection is untenable. Incidentally, the notice arose thus: In Civil Application No. MBY 7 of 2000 the respondent applied for the appeal to be struck out on the same grounds later given in the notice. That application was heard and struck out by a member of this panel the day before the appeal was to be heard because the affidavit accompanying the notice of motion was invalid. With less than twenty-four hours to the hearing of the appeal, Mr. Mkumbe determined that the better alternative was to give notice of preliminary objection. It does not appear to us that the omission to cite the provision under which it was brought was fatal. We say so because a notice of preliminary objection which, of course, falls under Rule 100, is not an application. It is simply a notice and is given just before hearing of the appeal begins. What is essential is reasonable notice both to the opposite side and the Court. If the Court does not consider the notice reasonable it may adjourn the hearing of the appeal in order for reasonable notice to be given. Rule 100 is procedural rather than substantive. It does not confer any right upon litigants nor does it bestow any power on the Court, it merely regulates the conduct of the business of the Court. Omission to cite a procedural rule does not [illegible] question the jurisdiction of the Court to hear and determine the matter before it and is therefore not fatal.

A different position obtains with applications. With these the applicant has to cite the relevant provision from which the Court derives the power to hear and determine the application. This may be illustrated with one or two decisions. N.B.C. v. Sadrudin Meghji, Civil Application No. 20 of 1997, was an application for revision which was

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expressed as brought under section 4 (2) of the Appellate Jurisdiction Act. The Court rejected the application observing that the power vested in the Court by subsection (2) is exercisable for the purpose of and incidental to the hearing and determination of an appeal, but no appeal had been instituted. The Court said:

> It follows therefore that the application has been filed by notice of motion under an inapplicable section of the law. Consequently, as the Court was not properly moved, the application is likewise incompetent.

The Court declined to proceed with revision suo motu under subsection (3) stating:

> ... the matter is already before the Court by notice of motion ... It has to be dealt with in the manner the Court was moved and not otherwise.

This decision was applied by Ramadhani, J.A. in Almas Iddie Mwinyi v. N.B.C. & Another, Civil Application No. 88 of 1998, an application for stay of execution where the provisions relied upon were not cited at all. It was argued that the Court had not been moved at all because of the omission. The learned judge upheld the argument and said that the practice of the Court has always been that the provision of law relied upon to move the Court be cited. Referring to Sadrudin Meghji he said that if a wrong citation of a law renders an application incompetence, "I have not a flicker of doubt in my mind that non-citation of law is worse and equally renders an application incompetent."

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It may well be that Mr. Mbise had such situations in mind. But as no doubt evident, both these cases involved an application by notice of motion and both cases involved non-citation of an enabling provision. Section 4 (3), which should have been cited in Sadrudin Meghji, and Rule 9 (2) (b), which should have been cited in Almas Iddie Mwinyi, are substantive provisions. The former vests the Court with power to revise High Court proceedings suo motu, the latter empowers the Court to stay execution in civil proceedings. In contrast, Rule 100 is not enabling, in other words, it is not a provision from which the Court derives power to transact anything but it regulates the manner of exercising a power granted elsewhere. As stated earlier, what matters under the rule is reasonable notice and Mr. Mbise did not complain about the reasonableness of the notice. The omission to cite the rule, although this is by no means encouraged, was therefore inconsequential.

Mr. Mbise's other argument that the respondent should have made another application or brought a reference following the striking out of Civil Application No. MBY 7 of 2000 has no merit, either. First, another application was impractical in point of time and could only have resulted in delaying the hearing of the appeal. We think, on the other hand, it was unnecessary to make such application because that was not the only or best option open to the respondent. She could give notice of preliminary objection, if it could be done reasonably, or she could sit back and wait for the hearing of the appeal at which she could have sought leave of the Court to raise the objection pursuant to Rule 106 (b). She took the former option and the reasonableness of the notice is not in question. Second, Rule 57 does not come into this. The rule provides for reference

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to the Court where a party to an application before a single judge is dissatisfied with the decision of the judge. The term "decision" in the rule is intended to refer to a decision on the merits of the application but not any decision. The rule cannot for that reason apply where an application is struck out without being heard as it was in the instant case. As Mr. Mkumbe rightly observed, when an application is struck out it ceases to exist and there is nothing to pursue on reference.

We are satisfied on the whole that Mr. Mbise's challenge to the notice of preliminary objection was not justified and we proceed to consider the grounds of the objection.

The first question is whether MRAPATA had the capacity to bring the appeal, and this turns on whether they were a party to the proceeding, Rule 76 (1) states:

> (1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.

In A.G. v. Maalim Kadau & Others [1997] TLR 69 the Court held that the words "any person" in the Rule refer to any of the parties involved in the original suit and not any other person. This position is also necessarily implied in section 5 of the Appellate Jurisdiction Act where subsection 2 (a) (i) and (b) specifically refer to "the parties" and "a party" respectively. The question therefore becomes whether MRAPATA were a party involved in the original application. We think, with respect, they were not; the fact that the trial judge referred to them and to the Municipal Director as "new parties" did not have

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the magic of making them parties in fact or in law. If the learned judge considered MRAPATA's presence before the court necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the application, he should have proceeded on the analogy of joinder of parties in civil suits to make MRAPATA a party to the application. To that end, the affidavits and counter-affidavits in the application should have been served on them and they should have been given the opportunity to file their own counter-affidavits. Assuming the documents were served as directed in the trial judge's interim order, it is clear from the proceedings of 6 December 1999, and not disputed, that opportunity to file such counter-affidavits was not given to them. That being the position, it is not correct to say that MRAPATA became a party to the application. Merely being required, as they were, to appear and show cause why they should not be condemned to compensate the respondent, did not make them a party in the original proceeding. It is clear to us that the whole purpose of summoning them before the court was to assist the court in its preoccupation with the respondent's rights. We hold that the company never became a party to the application and was incapable of bringing any appeal.

Having said so, it is not available, really, to consider the second ground of objection, namely whether the appeal required leave. Leave to appeal, where required, can only be applied for by and granted to a party entitled to appeal, but not strangers. As MRAPATA had no right of appeal, the question of leave becomes irrelevant. In view of the foregoing, we strike out the appeal.

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Mr. Mbise prayed the Court in the alternative to exercise its revisional jurisdiction suo motu. The prayer was based on what he termed the chaotic nature of the proceedings and the decisions made contrary to the principles of natural justice. In Halais Pro-Chemie v. Wella AG [1996] TLR 269, this Court held that it will revise suo motu the proceedings in the High Court where, for instance, the aggrieved party or person has no right of appeal; it will also do so where in the circumstances of any given case an injustice would otherwise be condoned.

The instant case is a typical example in which both these factors obtain. As just demonstrated MRAPATA had no right of appeal; on the other hand, the decision to declare illegal the transfer by KAGERA and to revoke the same as well as the right of occupancy was a grave one, yet it was taken without the parties concerned being heard. The learned judge took the decision on the basis of the respondent's counter-affidavit and her so-called supplementary counter-affidavit in which she claimed that KAGERA had in the first place breached the conditions of the right of occupancy and had therefore "not accepted the plots". On that basis she argued in the supplementary counter-affidavit that KAGERA had no title to pass on to MRAPATA. She further claimed that the transfer did not receive the consent of the Commissioner for Lands. In general the supplementary counter-affidavit is five pages of allegations, submissions and argumentation rather than facts, but what is worse is that MRAPATA had no opportunity to respond thereto.

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It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard: audi alteram partem. In Ridge v. Baldwin [1964] AC 40, the leading English case on the subject, it was held that a power which affects rights must be exercised judicially, i.e. fairly. We agree and therefore hold that it is not a fair and judicious exercise of power, but a negation of justice, where a party is denied a hearing before its rights are taken away. As similarly stated by Lord Morris in Furnell v. Whangarei High School Board [1973] AC 660, 679, "Natural justice is but fairness writ large and judicially." We wish to add that it made no difference that in the instant case counsel appeared for MRAPATA and addressed the court. What counsel was called upon to do was to address the court on why his client should not be condemned to pay compensation. He was not required or permitted to adduce evidence on the merits of his client's title to the suit land, but was expressly barred from doing so. Indeed hearing of the application had been concluded but the court was having problems reaching a decision favourable to the respondent in case she lost.

In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part -

> (a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu ...

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Under this paragraph of the Constitution MRAPATA had the right not only to be heard but to be heard fully. We hold that a decision reached without regard to the principles of natural justice and or in contravention of the Constitution is void and of no effect.

There is yet another ground for holding the High Court's decision unconstitutional and void. It violates the doctrine of separation of powers. The Constitution sets out in clear terms the spheres of the executive, the legislature and the judiciary, to the end that these organs will not unsurp or infringe on each other's powers. Although the judiciary may be said to exercise residual legislative powers when interpreting the law, in reality it does no more than give meaning to the intentions of the legislature. It is otherwise impermissible for the judiciary to intrude into the legislative or executive sphere. Under the Land Ordinance (Cap. 113) which was in force when this proceeding was decided and under the present law, the powers to grant and revoke rights of occupancy are vested in the President. They are executive powers. Such powers cannot be wielded by the courts, as was done in this case, without bringing the judiciary into contempt and ridicule. The learned judge, with respect, went terribly wrong when he purported to revoke the KAGERA-MRAPATA right of occupancy and when he purported to grant a right of occupancy to the respondent. These decisions were illegal, void and of no effect. Although, finally, KAGERA did not appear before us we are duty bound to remark that it was similarly contrary to fairness to condemn them without being heard. The learned judge's contention that there was no need of giving them a chance to be heard "because he won't have any better claim ... than Mwakyoma", was untenable. As stated by Chandrachud, C.J. in Tellis & Others v. Bombay Municipal Corporation [1987] LRC (Const) 351, 376,

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> The proposition that notice need not be given of a proposed action because there can possibly be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. The proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other.

This decision was applied by the High Court in this country in Sadiki Athumani v. Republic [1986] TLR 235 and we agree with the views expressed therein.

There is one final matter evident in the record which also requires remedy. We note that after the Assistant Registrar of Titles filed a reply to the respondent's counter-affidavits, the respondent replied to the reply in a rejoinder consisting of three affidavits: her own, dated 30 June, 1998, that of Alexander Fikiri Mwanshinga, dated 23 June, 1998 and that of Emmanuel Simon, dated 30 June, 1998. Such a procedure is uncommon but may in this case be further evidence of the chaotic nature of the proceedings. Pleadings by affidavits are supposed to be complete with the applicant's reply, if any, to the respondent's counter-affidavit. There should normally be no reply to a reply for the applicant, being entitled to the last word, would then have to reply to the reply to the reply. Moreover, the record does not show that leave was granted for presentation of these affidavits, hence it is curious how they got accommodated into the record. Finally, the three documents are expressed to be translations from Kiswahili by Mr. Mkumbe, but they do not bear Mr. Mkumbe's certificate as to their accuracy. These documents are therefore hearsay apart from having been improperly introduced into the record.

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In the light of the foregoing, we make the following orders. First, the three affidavits just referred to are expunged from and cease to be part of the record. Second, we set aside all the proceedings and decisions transacted and given after 4 November, 1998 when the High Court reserved its ruling. Third, the High Court is directed to decide the application by the Assistant Registrar of Titles on the basis of the proceedings transacted up to 4 November, 1998.

DATED at DAR ES SALAAM this 9th day of August, 2001.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR