IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO.17 OF 2005

IN THE MATTER OF AN APPLCIATION FOR THE ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE RENT RESTRICTION ACT 1984

BETWEEN

EL-NASIR EXPORT-IMPORT CO. LTD.... APPLICANT

AND

1. **THE HOUSING APPEALS TRIBUNAL..... 1ST RESPONDENT**
2. **THE HON. ATTORNEY GENERAL..... 2ND RESPONDENT**

Date of last order: **22/9/2005**
Date of Ruling: **12/4/06**

RULING

MANENTO, JK:

The applicant was the owner of premises along Jamhuri street in the city of Dar es Salaam till sometimes in 1971 when the same was nationalized. Before its nationalization and therefrom, the respondent, now interested party was one of the tenants. He started occupying the suit in issue as a tenant sometimes in 1948. The house in issue is situated on plot No.716 along Jamhuri street. After nationalization which was done under the Acquisition of Building Act No.13/1971, the suit premises was put under

the management of the Registrar of Building and later to National Housing Corporation vide Act No.2/1990. Sometimes in 1975 the said suit premises was returned to the original owner, the applicant. The tenants in that house were then required and ordered to pay rents to the applicant. The tenants refused to pay the new rent to the applicant. In order that the applicant could enforce his rights for the rent, he filed an application to the Regional Housing Tribunal, application number 333/1996 for the assessment and recovery of arrears of rent. The application was not heard and determined immediately, until 21st August, 2002 when the standard rent was fixed and the third party and other tenants were ordered to pay the standard rent and the rental arrears to the applicant, plus costs. The tenants including the interested party felt aggrieved by that decision. They filed a notice of appeal against that decision, but they did not file any appeal. The applicant sought for an execution of the decree of the National Housing Tribunal. That was a miscellaneous civil case No.211 of 2002 in the Resident Magistrates court of Dar es Salaam at Kisutu on 19/12/2002. A court broker was appointed to execute the courts orders by attachment, eviction and recovery of the rent arrears. Then, that is where the present application starts.

Before that period, the third party questioned the legality of the return of the suit premises to the original owners, as if they had an interest in it.

They had raised the issue before the Regional Housing Tribunal. The Regional Housing Tribunal made a ruling about ownership of the suit premises but on appeal to Housing Appeal Tribunal, the decision of the Regional Housing Tribunal was quashed in that its jurisdiction was limited to matters relating to landlord and tenants and not ownership of property. By that ruling, the standard rent fixed by the Regional Housing Tribunal was left un altered. The interested party filed Miscellaneous Cause No.37/2000 to the High Court challenging the restoration of nationalised houses to private entitled owners prior to nationalization as unlawful and unconstitutional. The High Court have yet to decide on the issue.

After the interested party and other tenants had been served with the notice of execution, the interested party filed properly an application in the Regional Housing Tribunal of Dar es Salaam for stay of execution pending the determination of their constitutional petition by the High Court, an application they abandoned and filed thereafter another application for stay of execution of the Magistrates Court's orders in the Housing Appeals Tribunal. The Housing Appeal Tribunal issued an exparte interim order staying the orders of the magistrates Court dated 5th December, 2003. The applicant on being served with that exparte order, was aggrieved and hence this application for review.

The Chamber summons is made under section 2(2) of the Judicature and Application of Laws, Cap.453, section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act No.55/1968, sections 68 and 95 of the Civil Procedure Code, 1966 and any other enabling provisions of the law.

The chamber summons which is supported by both an affidavit and a statement is for the following orders:

1. That this honourable court be pleased to grant the orders of Certiorari and Mandamus against the Respondents, in terms of the reliefs sought in the statement accompanying the affidavit annexed to the application and
2. Costs be provided.

The reliefs sought are those of certiorari, so as to remove in this Court, and quash the order of the Housing Appeal Tribunal in Misc. Application No.27/2003 staying the eviction order dated 28/8/2003 issued by the Resident Magistrates Court which was made in pursuance of the execution of the decree of the Regional Housing Tribunal decision dated 21/8/2002.

Orders of mandamus so as to compel the 1st respondent to act within the limits of the laws it is supposed to administer and or apply.

Costs and any other reliefs the curt may deem just and equitable to grant.

The grounds upon which the above reliefs are sought are mainly two. That the Housing Appeal Tribunal acted without jurisdiction and secondly that it violated the law.

Upon application by the interested party to appear, the same was granted without objections and the learned counsel for the applicant and the 3rd party together with the Attorney General made written submissions. I am grateful for the exhausted submissions made by both the applicants counsel, one Kalolo Advocate and that of the interested party one Rwebangira Advocate while I am disappointed by the short submissions made by the Attorney General which were too general to believe that they were a reply to the applicants submissions. I doubt if the office of the Attorney General and in particular civil section, are serious and dedicated to their works. If this trend will go on unchecked, where a suit involves damages, the government will loose a lot of money by paying the decree holders even if such damages could not have been allowed by the court if seriousness were shown in the works before it.

The learned counsel for the applicant and that of the interested party exhausted relevant sections of the laws and had supported their arguments with decided case, which helped me in deciding this application for review.

The learned counsel for the applicant rightly submitted that this court can exercise its judicial powers of review of the Proceedings before the Housing Appeals Tribunal if the decision of the Tribunal or any Administrative body are done in their official capacities. Such decisions can be challenged on illegally, irrationally and procedural impropriety. Besides the decision in the case of **Lausa Alfan Salu and 116 others vs. Minister for Lands Housing and Urban Development** and **NHC (1992) T.L.R. 293** Halsbury's Laws of England vol. II page 72 paragraph 147 had this to say in issuance of the prerogative orders of certiorari:

> "Certiorari will be issued to quash a determination for excess or lack of jurisdiction or error of law on the fact of record or breach of rules of natural justice or where the determination was procured by fraud, collusion or perjury."

The learned counsel for the applicant urged that the Housing Appeals Tribunal lacked jurisdiction to hear and determine the matter exparte, by staying the proceedings and order of a Resident Magistrate. The learned counsel for the applicant submitted that under section 53 of the Courts (Land Dispute Settlements) Act No.2/2002 which came into force on 28/3/2002, the Housing Land Tribunal had no jurisdiction to hear and determine exparte the application for stay on 29/10/2003 because the Tribunal had been disestablished. Not only that, but the application was not pending before the Tribunal so that it could be served by section 54(1) of Act No.2/2002 which provides as follows:-

> "Not withstanding the provisions of section 55 proceedings or appeals commenced in the High Court, Magistrates courts, Regional Housing Tribunal, Housing Appeals, Tribunal, Customary Land, Land Tribunal and the Customary Land Appeals Tribunal which are pending on the date of commencement of this Act, shall be continued, concluded and decisions and orders made thereon shall be executed accordingly as if this Act had not been passed."

The operating words here are "pending" on the date of commencement of this Act, ... shall be executed as if this Act had not been

passed. The learned counsel for the applicant urged therefore that when the application for stay of execution was filed in the Housing Appeal Tribunal on 29/10/2003 the Tribunal had ceased to operate on new matters. The learned counsel for the interested party came with section 54(2) of the same Act, which deals with the execution and enforcement of the decisions or orders which not yet enforced before the commencement of the Act, be enforced after the commencement of the Act as if it had not been passed. Section 54(2) is hereby produced so that the differences or similarities could be noted.

> S.54(2) Every decision or order of the High Court, the Magistrate's Court Regional Housing, Tribunal, Housing Appeal Tribunal, or Customary Land Tribunal or Customary Land Appeal Tribunal, which shall not have been fully executed or enforced before that date of commencement of this Act, may be executed and enforced after that day as if this Act had not been passed."

On reading the two subsections of section 54, that is to say subsection (1) and (2), one can see clearly the difference, but all talking of the continuation of either the proceedings as per 54(1) or continuation of the execution of the

decision or order as per s.54(2) as if the Act had not been established. The question to be answered is whether there were proceedings or orders pending before the Housing Appeal Tribunal in regard to the application for stay or an order for execution of a decree in regard to the suit premises. The learned counsel for the applicant submitted that there were no proceedings pending before the Housing Appeal Tribunal on 28/3/2002 when the Act came into force, disestablishing the Housing Appeals Tribunal. On the other hand, the learned counsel for the 3rd party submitted that on the basis of section 54(2) of Act No.2/2002 there was an application filed and pending or rather an order for execution. She did not state as to when that application for stay was filed countrary to the submissions of the applicant that the application was filed on 29/10/2003, some months after the disestablishment of the Housing Appeal Tribunal. For those reasons, I agree with the learned counsel for the applicant that there were no proceedings or orders pending before the Housing Appeal Tribunal for continuation or execution. Therefore, the Housing Appeal Tribunal was ceased of powers to issue the interim order for stay as it never existed in regard to the application for stay of the order of the Magistrate for execution by operation of law.

The applicant also urged that the Housing Appeals Tribunal has no powers to vary the decisions by the Resident Magistrates courts. They can

only be challenged in the High Court as per Magistrates Courts Act, 1984 and the Civil Procedure Code, 1966 particularly order XL rule 1 and order xxxix rules 1 and 5 and section 74. That the Housing Appeals Tribunal has no appellate jurisdiction on matters originating from the Magistrates courts, then it did not have jurisdiction to stay the order of the Magistrates court. In doing so, it offended section 12 of the Rent Restriction Act which is hereby provided under;

> "there is hereby established a national tribunal to be known as the Housing Appeals Tribunal (hereinafter referred to as the Appeals Tribunal) which shall have jurisdiction to admit, consider and determine appeals originating from Regional Housing Tribunal".

And appeals originating from the Rent Restriction Act by an aggrieved party are to be referred to the Housing Appeals Tribunal. Section 41(1) of the Rent Restriction Act is relevant. It is not in dispute that there was no appeal to the Housing Appeals Tribunal against the decision of the Regional Housing Tribunal which determined the application for the standard rent applied by the applicant,. It was after the standard rent had been fixed and when the applicant wanted to execute it, the applicant filed and was granted interim order for the stay of the execution. The applicant urged that Housing

Appeals Tribunal wrongly assumed jurisdiction in matters which was not properly before it, for in order for the Tribunal to have jurisdiction to issue a stay or interlocutory orders, there has to be an appeal pending before it. The applicant further urged that the fact that the Housing Appeals Tribunal acted without jurisdiction, then the whole proceedings conducted while the court or the quasi judicial body lacked jurisdiction, then it is null and void. The case of John Agricola v. Rashdjama (1990) TLR1 was cited as authority. In that case, the court held, itnterlia that:

> "lack of jurisdiction in the presiding magistrate is a fundamental defect that is not curable at all in trial by a District Magistrate who lacked jurisdiction in a court he was presssiding, was a complete nullity"

In replying to the submissions by the applicant, the interested party replied that it was proper for 3rd party to apply for stay of execution to the Housing Appeals Tribunal because the court of Resident Magistrate had only limited powers on the issue. The case of **Seif Household Store Ltd v. New Mabai Store (1995) TLR 1995 (HC)** was cited as it held that:

> "The Resident Magistrates Courts' powers to entertain an application for stay of execution are limited to staying execution of a decree for only a reasonable time and for the

purpose of enabling the judgment debtor to make an application to either the Regional Housing Tribunal which passed the decree or to the Housing Appeals Tribunal having appellate jurisdiction in respect of the decree or the executing of it."

The first part of the holding of the case of **Seif Store** above talks of powers to entertain an application for stay of an execution for a reasonable time for the purpose of enabling the judgment debtor time to file application to either the Regional Housing Tribunal or to the a Housing Appeals Tribunal. To my understanding of the holding is that, first an application is to be made to the Resident Magistrate's Court, being a court which granted the orders for execution. Secondly that, the application for stay would be filed to the Regional Housing Tribunal, being the Tribunal which passed the decree and thirdly, if there is an appeal already filed to the Housing Appeals Tribunal, having the appellate jurisdiction, then to the Housing Appeals Tribunal. The fact that there was no appeal pending before the Housing Appeals Tribunal, then no application for stay of execution would be legally filed at the Housing Appeals Tribunal. Because, before the Housing Appeal Tribunal was nothing to stay. There was no decree to be stayed, so the application for stay at the Housing Appeals Tribunal was just hanging in the air. I agree with the applicants that the Housing Appeals Tribunal cited

wrongly to issue and interim order for stay of execution of the order of the Court of the Resident Magistrate, notwithstanding the holding of the High Court in the case of **Seif Household Store Ltd** (supra) for the reasons already stated.

The last part of the submissions are in relation to violation of the law. The learned counsel for the applicant submitted that the application for stay was heard exparte though the applicant's office is within the city centre. That since the issuance of the interim order on 29/10/2003 to the date when this application for review was filed on 18/3/2004 no notice of hearing was issued to the applicant for the determination of the application inter parties. That the delay in setting the hearing date for six months amounted to denial of justice. The counsel for the interested party urged on the contrary in that the term used unreasonable delay is not defined so she submitted that the application for stay to the Housing Appeals Tribunal or stay of execution was not delayed. Here, the learned counsel did not make a proper follow up for the submissions or she deliberately avoided it. The learned counsel for the applicant was referring to the time of the grant of the interim exparte order to the time when he filed this application for review. Now the issue before me is to state whether the time from 29/10/2003 to 18/3/2004 was unreasonable delay for the hearing of the application by the Housing

Appeals Tribunal reasonably long or was not reasonable. By hearing an application exparte and issuing of interim order presupposes that the matter is urgent. The application for stay of the execution of Magistrates court was filed on 29/10/2003 and was heard and granted on the same day. But no notice for hearing of the applicant and the interested party interparty, is pending todate. That was to be exact, four months and twenty days. It was above half period allowed for the existence of temporary injunction. The spirit of issuing an interim order exparte is to prevent an immediate damage which would occur to the respondent before the hearing of the parties interparties. But the other party has to be heard in the immediate possible time, so that the respondent is heard. On my part, four months and twenty days without even setting a date for the hearing of the application was unreasonable delay on the part of Housing Appeals Tribunal, which act denied the applicant the right to be heard, thus a violation of the rules of natural justice, a fact which calls for the review of the House Appeals Tribunal.

Though applicants had submitted at further length, yet leading to all what I have said, I think I need not go further than this. I have explained that the Housing Appeal Tribunal acted without jurisdiction because the application never existed before it was disestablished, and secondly that

there was no appeal before it originating from the Regional Housing Tribunal in which the application for stay of execution could be based, hence it acted on nothing. Secondly that it acted against the rules of natural justice, all reasons justifying this court to issue both the prayers for certiorari and mandamus as prayed. The prayers are therefore issued.

Before I pen off, I would like to agree with the applicants that the interested party is just using the courts machinery in abuse of the court process of law through delaying tactics. He is neither paying the house rent to National Housing Corporation or to the applicants. He has stayed without such payments over ten years now.

Finally, the orders sought by the applicant are granted with costs.

A.R. Manento

JAJI KIONGOZI.

12/4/2006

Coram: I.P. Kitusi, DR/HC

For the Applicant – Mr. Kalolo

For the 1st Respondent – Mr. Dida

For the 2nd Respondent – Miss Mrema

Cc: Komba.

Court: Ruling delivered in court in the presence of the advocates for the parties this 12th day of April, 2006.

I.P. Kitusi

DEPUTY REGISTRAR – HIGH COURT

12/4/2006