

IN THE HIGH COURT OF TANZANIA

DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

LAND CASE REVISION NO 13/2018

(Arising from DLHT at Karagwe Land Case No. 45/2016)

CHAMA CHA MSINGI KAMAGAMBO ----- APPELLANT

VERSUS

1. CHARLES DOMICIAN

2. HAKIMU MOHAMED

3. CHAMA CHA MSINGI AHAMULAMA

}----- **RESPONDENTS**

RULING

30/11/2018 & 11/01/2019

Kairo, J.

This ruling emanates from the application for revision filed by the Applicant under certificate of urgency.

The application has been preferred under section 43 (a) (b) of the Land Disputes Court Act, Cap 216 RE 2002. The chamber application is supported

by an affidavit sworn by one Majid Hussein, an authorized officer of the Applicant. The prayers sought in this application are:

1. That this court be pleased to revise orders of the Chairman; Hon. Assey of 13/07/2018 on refusal to withdraw from presiding over as a chairman in Land Application No. 45/2018,
2. That this court be pleased to revise an order of 26/07/18 which was reached with no interpartes hearing,
3. Cost for this application
4. Any other relief which this court may find equitable to grant.

Briefly the facts that resulted to this application was that the Applicant instituted land application No. 45/2018 at Karagwe District Land and Housing Tribunal seeking for an injunctive order against the Respondents pending hearing of the application interpartes. The sought prayer was granted on 10/7/2018 and the matter was scheduled for mention on 10/08/2018. However before the mention date, the application file was called by the Tribunal Chairman on 13/7/2018 for what was explained to be the complaint of the injunctive order from the Respondent, but the Respondents didn't appear and the Advocate for the Applicant, Mr. Angelo appeared. Following the said circumstance, Advocate Angelo requested the Chairman; Hon. Assey to disqualify himself alleging him to be biased. The Chairman overruled the recusal prayer and maintained his former/ earlier orders of 10/7/2018.

On 26/7/2018, the Chairman scheduled the case again and during this time, neither the Applicant nor its Advocate appeared. However the 2nd and 3rd Respondents appeared. According to record, the Respondents were praying from the Tribunal to waive the orders given on 10/7/2018 and uplift the injunction order which prayer was granted. It was from this background that the Applicant is praying for the above listed prayes. The Applicant is represented by Advocate Samwel Angelo.

According to records, none of the Respondents has filed his counter affidavit nor appeared. The record further reveals that, the 1st and 2nd Respondents were duly served, and that the 2nd Respondent is also representing the 3rd Respondent as per proceedings page six (6). Following the said circumstances the court on 13/8/2018 ordered the hearing of the application exparte.

In the affidavit filed to support the chamber application which was amplified by Advocate Angelo during the oral submission, it was submitted that the Applicant prayed the chairman to disqualify himself from presiding over the case but refused. Advocate Angelo went on submitting that the Applicant reached to such decision as he was surprised that on 13/7/2018, they were summoned through a phone call and when arrived at the court, the chairman told them that the Respondents have complained on the injunction granted on 10/7/2018 pending hearing interpartes, but the Respondents weren't in court to air the said complaint. That in those circumstances, the Applicant assumed that the Chairman was a mouth piece

of the Respondents and that the said conduct shows biasness. The Advocate also stated that it was un-procedural for the chairman to speak on behalf of the Respondents who weren't in court. He added that on the same date (13/7/2018) at the District Land and Housing Tribunal premises, DAS who the Applicant suspects to be behind the matter had a meeting before the session. He concluded that to be the reason why they requested him to disqualify himself as his conduct shows to have developed an interest over the matter.

Regarding the prayer for revision of the order of the Tribunal dated 26/7/2018, Advocate Angelo submitted that there were shortfalls on the said order. He went on that, the chairman called the file at the presence of the Respondents alone so as to uplift the previous order of 10/7/2018 which he argued to be un-procedural. He further stated that before the hearing interpartes, the Respondents must have filed counter affidavits as per Reg. 7 (1) (b) of GN 174/2003 but the said requirement was not met. Besides, even the Advocate for the Applicant wasn't informed that the Respondents will be heard. He went on that, they noted that the Respondents opened the godown, the subject of injunction order and start using it and on making a follow up, that's when, it comes to his knowledge that there was an order of 26/7/2018 allowing the Respondents to use it. Advocate Angelo argued that it wasn't proper on the part of the Chairman to uplift the order of 10/7/2018 without the presence of the Applicant. He concluded by praying the court to give necessary orders as prayed in the chamber summons.

The main issue to be determined by this court is whether or not the application for revision should be allowed.

The Applicant has prayed the court to exercise its revisionary powers under section 43 1 (a) (b) of Cap 216.

Going through the said provision, the High court can assume or exercise revisional jurisdiction in a case where it appears that there has been an error material to the merits of the case involving injustice. [Refer also the case of **Zabron Pangalameza vrs Joachim Kiwaraka [1987] TLR 140.**

The wanting question therefore is whether there is an error material to the merits of the case involving injustice committed by the District Land and Housing Tribunal.

I will be traversing on both orders complained of; that is of 13/7/2018 and that of 26/7/2018.

It is on record that the chairman granted the Applicant an interlocutory order of injunction on 13/7/2018 pending the hearing of the application interpartes. The chairman further scheduled the mention date to be 10/8/2018. Procedurally the parties were to appear on the scheduled date and ordered to file the counter affidavits if they wish to contest the application as per Regulation 7/(1) (b) of GN 174/2003. According to Advocate Angelo which submission is also supported by the record, the Chairman summoned him through the phone to appear on 13/7/2018. He was informed on the complaints of the Respondents concerning the

injunction order granted on 10/7/2018, surprisingly those who complained didn't appear, the action which made the Applicant to request the recusal of the chairman. But the Chairman refused and ordered the status quo of his orders of 10/7/2018. It should be noted that it is the discretion of the presiding Chairman to concede to the recusal prayer or not. In that respect therefore, it was correct for him to exercise his discretion by rejecting the said prayer. Further to that the Chairman resolution to maintain the previous orders was also proper in my view. However I am of different views for what followed as I will demonstrate shortly. The chairman again on 26/7/2018 called the file following the complaints from the Respondents. According to record, the Chairman summoned the Applicant's Advocate through a phone call but refused which contention was refuted by Advocate Angelo in his oral submission. The Chairman went further and uplifted the orders he gave on 10/7/2018 in the absence of the Applicant. I paused to ask whether it was proper. As earlier stated the Respondents were required legally to file their counter affidavits before start addressing the court as correctly stated/ argued by Advocate Angelo. This requirement is provided in Regulation 7/(1) (b) of GN 174/2003. With due respect to the Chairman, to allow them to address the court on the subject matter in dispute before filing of their counter affidavit was not correct in the first place, in my view. If at all was necessary to call the parties before the scheduled date, then the DLHT was to guide them and order the Respondents to file the counter affidavits.

But further to that the Applicant wasn't present. Yet the DLHT went on to uplift the injunction orders already given in his favor. The action which to say the least amounts to condemn him unheard. Though the record suggest that the Applicant was summoned by phone, but in my view that was insufficient having in mind that the date when the matter was called (of 26/7/2018) wasn't the date previously fixed for the case, as such the Tribunal ought to give the benefit of doubt to the Applicant when observed not to be present.

Legally to deny one the right to be heard renders the whole proceedings and decision thereon a nullity. In the matter at hand the applicant would have been afforded with the opportunity to be heard even if appears that he would have nothing to say or that what he might say would have no substance. In the case of **Abbas Sherally and Another vs Abdul S.H.M. Fazalboy – Civil Application No. 33/2002 (unreported)** the Court of Appeal held as follows in a similar circumstance;-

“The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. The right is so basic that a decision which is arrived at, in violation of it will be nullified, even if the same decision will have been reached had the party been heard, because the violation is considered to be a breach of natural justice”.

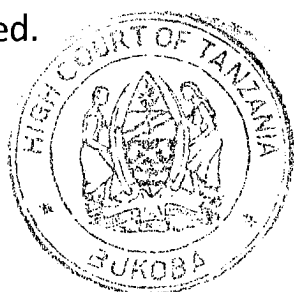
Analyzing the above flaws in handling this matter at the Tribunal level, I am satisfied that uplifting the orders of 10/7/2018 on the date not scheduled for the case, hearing or entertaining the Respondents before filing their counter affidavits and further the said uplifting of the order in the absence of the Applicant, are errors material to the merits of the case which involve injustice since the Applicant was condemned unheard, the omission which attracts nullification of the proceedings and its orders.

In order to correct the observed errors, the prayer for revision is hereby granted. The proceedings and orders after 10/7/2018 are hereby quashed and set aside.

It is further ordered that the file be reverted to the District Land and Housing Tribunal for hearing continuation before another chairman and set of assessors. For avoidance of doubt, the court hasn't tempered with the injunctive order of 10/7/2018.

Cost to be in the course.

It is so ordered.




L.G. Kairo

Judge

11/1/2019

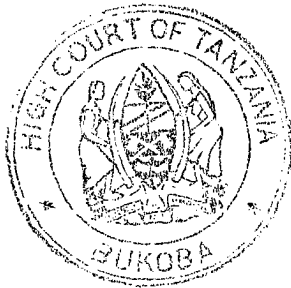
Date: 11/01/2019


Coram: Hon. L.G. Kairo, J.

Applicant:	}	Absent
1 st Respondent:		
2 nd Respondent		
3 rd Respondent		

B/C: R. Bamporiki

Court: The matter is for ruling. The same is ready and is read over at the absence of what the parties as per above quorum.




L.G. Kairo
Judge
11/1/2019