IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

LAND REVISION NO. 5 OF 2019

(Originating from Magulilwa Ward Tribunal and arising from the Land District and Housing Tribunal of Iringa Misc. Land Application No. 125 of 2017).

MARCUS KIHAGA (As Administrator of the Late LETUS KIHAGA) ..... APPLICANT

VERSUS

GODFREY KIBASA ..... RESPONDENT

RULING

MATOGOLO, J.

The applicant Marcus Kihaga filed an application for revision before this court. The application is by way of chamber summons made under section 43(1) (a) of the Land Dispute Court (Land Dispute Settlements) Act No. 2 of 2002.

The application is supported by an affidavit taken by Marcus Kihaga. It seeks revision by this Court to the following orders;

(1) *That, this honourable Court pleased to make revision to the ruling of the District Land and Housing Tribunal delivered on 28th day of December 2017 Miscellaneous Application No. 125 of 2017.*

(2) *Costs.*

(3) *Any other relief which this Honourable Court deems fit to grant.*

The brief backdrop of the dispute is that the applicant sued the respondent before the Ward tribunal of Luhota, claiming for the land which he said belonged to his late brother and sister-in-law but the respondent applied for the case to be transferred the Ward tribunal of Magulilwa where the case ended in favour of the respondent. The applicant was aggrieved with the decision of the Ward tribunal he appealed to the District land and Housing Tribunal of Iringa whereby the trial Chairman nullified the Ward tribunal judgment and ordered the applicant to pay the costs of the case. The respondent then filed before the District Land and Housing Tribunal an application for execution claiming for Tshs. 5,500,000/=. The Tribunal allowed payment of Tshs. 300,000/= as costs of the case at the Ward Tribunal, the applicant was aggrieved hence this application.

At the hearing of this revision the applicant was represented by Ms. Prisca Mtanga while the respondent was represented by Rehema Daffy the learned Advocate from Luke Law Chambers. The application was argued by way of written submissions.

Ms. Mtanga submitted that the applicant instituted a case at Luhota Ward at the original jurisdiction and the place where the disputed land is located, also the place where the parties live. The case was entertained and determined at Magulilwa Ward in favour of the respondent, there after the applicant appealed to the District Land and Housing Tribunal at Iringa, and the judgment of Magulilwa Ward was nullified and then ordered the applicant to pay the costs to the respondent those of Ward and District without bearing the one who transferred that case from Luhota Ward to Magulilwa Ward Tribunal.

Ms. Mtanga submitted further that on 14th day of February 2017 the Honourable Chairperson of the District Land and Housing Tribunal ordered the applicant to pay total of Tshs. 300,000/= to the respondent being costs Magulilwa Ward Tribunal while the applicant appealed against, and the District Land and Housing Tribunal ordered the case be tried de novo at Luhota Ward.

Ms. Mtanga stated further that the applicant was aggrieved by that decision of the Honourable Chairman of the District Land and Housing Tribunal on those irregularities, because he ordered the applicant to pay costs while he is not the one transferred that case, even the respondent himself did not tax thereof. She said, it is trite law that the one who asserts must prove it.

She submitted that in considering those contradictions the respondent did not prove his case on balance of probability. To buttress her argument

she referred this court to the case of ***Hemed Said versus Mohamed Mbilu [1984] TLR 113*** the Court held that;

"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of other is the one who must win"

Ms. Mtanga submitted further that the applicant evidence was heavier than that of the respondent; hence the applicant prays before this Court that the decisions of the Magulilwa Ward and of the District Land and Housing Tribunal of Iringa be set aside and this revision be allowed with costs.

In reply Ms. Rehema submitted that the applicant in this application after being aggrieved by the decision of District Land and Housing Tribunal as the Court of first appeal he filed revision to the High Court under Section 43(1) of the Court (Land Dispute Settlement) Act of 2002, praying this honourable Court to make a revision on the decision of the Tribunal.

Ms. Rehema submitted further that one point of revision is that it was wrong for the District Land and Housing Tribunal to order the applicant to pay 300,000/= to the respondent while he was not the one who transferred the case to another ward and the same was not taxed off.

It is the submission by the learned counsel for the respondent that the Chairman has such discretion to do so and the amount that the respondent awarded by the tribunal was reasonable due to the fact that

the respondent has been spent a lot of money and he wasted much of his time.

She contended that the applicant agreed with the position of the law by citing the case of ***Hemed Said Versus Mohamed Mbilu*** (supra) that in law both parties cannot tie, but the person whose evidence is heavier than the other is the one who must win the case, but the applicant failed to show how and who had the heavier evidence than the other.

Ms. Rehema went on and stated that the records of the Tribunals show very clear that the evidence of the respondent was heavier than of the applicant. The respondent proved ownership by showing the Customary Right of Occupancy No.86IRA9266 which he obtained even before the death of the applicant's brother.

Ms. Rehema submitted further that the late Letus Kihaga was still alive when the respondent processed and get right of occupancy, he never claimed that the disputed land to be his, but by surprise some years later after his demise, the applicant started to claim that the disputed land is of his late brother, due to that we believe that his claims were not genuine as for no one objected the respondent's process of acquiring his customary right of occupancy.

Ms. Rehema went on to state that the applicant failed to prove the ownership of the Late Letus Kihaga before the Ward Tribunal, and the District Land and Housing Tribunal acted reasonably on the evidence of

the respondent after he has proved his case on the balance of probability therefore awarding him 300,000/= was proper.

Ms. Rehema submitted further that it has been the position of the law that when a party who is aggrieved by the decision of the court or tribunal the only remedy available is to appeal to the higher Court against the decision or order, unless the right to appeal is not available, the aggrieved party may exercise the remedy of revision. To support her argument she referred this court to the case of ***Baghayo Gwadu versus Michael Ginyau*** Civil Application No. 568/17 of 2017 Court of Appeal (unreported) the court had this to say:-

> *"Is commonly knowledge that under section 4(2) and (3) of the Appellate jurisdiction Act (Cap. 141 R.E. 2002), the court is vested with power of revision. The court has always been unsympathetic to those who tried to move it to entertain any matter seeking to impugn the decision of the High Court by way of revision where the right of appeal is available".*

In case where any person is aggrieved by the decision of the lower court an appeal to the higher court against the order is the appropriate remedy.

In the light of the clear position of the law it is apparent that the applicant wrongly preferred the present application to this court instead of preferring an appeal.

Ms. Rehema also referred this court to the case of ***Attorney General versus Oysterbay Villas Limited and Kinondoni Municipal Council***, Civil Application No.168/16 of 2017 (unreported), The Court of Appeal when addressing the issue of revision was of the view that;

> *"The application for revision can be exercised by a party who has no right to appeal or the party who was not party to a case and he has no right to appeal".*

Ms. Rehema contended that the applicant was in a position to file appeal before the High Court but he opted a wrong choice by filing an application for revision and due to that makes this application incompetent. She argued that filing application for revision while there is a right to appeal is abuse of court process and makes the application incompetent thus the court has no any other option rather than to strike it out with costs. She prayed for this application to be dismissed with costs.

Having read the respective submissions from the learned counsel and having gone through the court records, the issue for determination by this court is whether this application has merit.

In this application the applicant complains that he was ordered to pay the costs of the case while the same was not taxed before the taxing master and the applicant was not a person who transferred the case from Luhota ward to Magulilwa ward.

Before discussing on the merit or otherwise I think it is important to put the record clear. In her written submission the counsel for the applicant contended that the District Land and Housing Tribunal ordered the applicant to pay to the respondent Tzs. 300,000/= being costs of the case in the Ward tribunal as well as in the District Land and Housing Tribunal. That is a misleading assertion. The truth is that the costs were of the Ward tribunal which the appellant did not dispute as clearly indicated in the order. The first appellate tribunal chairman clearly stated:-

> " *.....the claim of Tshs.5,500,000/= on the execution is not proper. The decree holder had to file bill of costs on the ended appeal so as to be taxed. The only known amount is Tshs. 300,000/= as awarded at the Ward tribunal The rest of the amount had to be claimed by filing bill of costs*
>
> *So the judgment debtor to pay the undisputed amount of Tshs.300,000/- within 14 days....*"

Now going to the merit of the application, it is trite law that revisional powers of the court can only be invoked where there is no right of appeal, the same as it was held in the case of ***Moses Mwakibete versus The Editor Uhuru Ltd [1995] TLR 134***, where by the Court of Appeal held that;

> *"(i) The revisional powers conferred by section 2(3) of the Appellate Jurisdiction Act of 1979 are not*

meant to be used as an alternative to the appellate jurisdiction of the court of Appeal, accordingly unless acting on its motion, the Court of Appeal cannot be moved to use its powers under section 2(3)of the Act in cases where the applicant has the right of appeal with or without leave and has not exercised that right"

The instant application originates from the District Land and Housing Tribunal exercising appellate jurisdiction. Section 38(1) of ***the Land Disputes Courts (Land Disputes Settlements)*** Act No. 2 of 2002 provides that;

"Any party who is aggrieved by a decision or order of Land and Housing Tribunal in the exercise of its appellate or revision may within sixty days after the date of the decision or order appeal to the High Court (Land Division)"

According to the above cited provision of the law it is clear that the applicant has a right of appeal against the decision or order made by the District Land and Housing Tribunal.

The applicant was supposed to appeal against the decision of the District Land and Housing Tribunal and not to file revision, as revision is not an alternative to appeal.

According to the above cited case, where there is a right of appeal, the powers of revision of this Court cannot be invoked. Such powers are exercised in exceptional circumstances, see the case of ***Felix Lendita versus Michael Long'idu***, Civil Application No. 312 of 2017 Court of Appeal of Tanzania at Arusha (unreported)

Basing on the above observation it is my considered opinion that the proper forum for the applicant, was to file an appeal and the reasons for revision he advanced would be grounds of appeal instead of filing an application for revision. I therefore agree with Ms. Rehema learned counsel that filing an application for revision while there is a right of appeal is the abuse of court process and hence makes this application incompetent before this court. This application has no merit the same is struck out with costs.

It is so ordered.

F.N. MATOGOLO

JUDGE

9/6/2020.

Date: 09/06/2020

Coram: Hon. F. N. Matogolo – Judge

L/A: B. Mwenda

Applicant: Present

Respondent: Present

C/C: Grace

Rehema Dafi - Advocate:

My Lord, I m appearing for the respondent. The matter is coming for ruling we are ready.

COURT:

Ruling delivered the 9th day of June, 2020, in the presence of the parties and in the presence of Miss Rehema Daffy learned advocate for the Respondent but in the absence of Prisca Mtanga learned advocate for the applicant.

F. N. MATOGOLO

JUDGE

09/06/2020