

**THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA**

LAND REVISION NO. 05 OF 2020

(Arising from Misc. Land Application No. 219B of 2020, originating from land application No. 219 of 2020 in the District Land and Housing Tribunal for Mwanza at Mwanza)

BISANGA AHMED BISANGA APPLICANT

VERSUS

1. ZAITUNI MUSSETI NG'ARIBA

2. JOSINA COMPANY LIMITED & AUCTIONEER

} **RESPONDENTS**

RULING

Date of last Order: 11.12.2020

Date of Ruling: 14.12.2020

A.Z.MGEYEKWA, J

The applicant filed an application for revision in respect to Land Revision No. 05 of 2020 to revise the order dated 17th August, 2020 for the errors apparent on the face of the records involving irregularity, illegality, and injustice to the party of the application. The application is

supported by an affidavit deposed by Bisanga Ahmed Bisanga, the applicant.

When the hearing was called for hearing the applicant enjoyed the legal service of Ms. Naomi Paul, learned counsel, and the respondents enjoyed the legal service of Mr. Mollohan Kabonde, learned Advocate for the respondents. Before hearing the application, Mr. Kabonde raised an objection.

In support of the preliminary objection, Mr. Kabonde submitted to the effect that the applicant's affidavit was attested by Naomi Paul, learned counsel while she introduced herself as the applicant's advocate. He went on to argue that Naomi Paul did not introduce herself as an Advocate who was holding brief for Ms. Ndege. Mr, Kabonda referred this court to section 7 of the Notaries Public and Commission for Oath Act which bars a commissioner for oath to represent a party due to conflict of interest. He ended up praying this court to find that this application is improperly before this court.

In reply, Ms. Ndege stated that Application No. 05 of 2020 is properly before this court. Ms. Ndege stated that she is the one who prepared and filed the application and Ms. Naomi Paul appeared on her

behalf before this court. It was her view that Ms. Naomi Paul attested the affidavit legally.

On the strength of the above submission, Ms. Ndege beckoned this court to disregard the point of objection and proceed with hearing the application on merit.

In his brief rejoinder, Mr. Kabonde reiterated his submission in chief. He stated the learned counsel for the applicant admitted that Ms. Naomi Paul, learned counsel attested the affidavit therefore the same is not properly before this court. He insisted that his objection is raised within time before hearing of the main application.

Submitting on the main application, the learned counsel for the applicant urged this court to adopt the applicant's affidavit and form part of her submission. She stated that the tribunal proceeded to determine the Misc. Application No. 219B of 2020 *ex parte* and issued an order on 17th August, 2020. She went on to state that thereafter the applicant was served with an order which required him to handover the house. Ms. Ndege strenuously argued that the applicant is residing in Mwanza but they did not bother to serve him to appear before the District Land and Housing Tribunal until he was evicted.

She lamented that the applicant was not accorded the right to be heard therefore the same infringed his right thus she urged this court to nullify the order. Ms. Ndege fortified her submission by citing the case of **Onesmo Nangole v Dr. Steven Lemomo**, Civil Appeal No. 129 of 2019, the Court of Appeal of Tanzania referred to the case of **Abbas Shirany and another v Abdul Pazzel Boy**, Civil Appeal No. 43 of 2002. She went on to state that the applicant filed an application for stay of execution in Misc. Application No. 219B whereas the affidavit was sworn by Zaituni Ng'ariba and John Mark Buyamba verified the said affidavit. She argued that the affidavit cannot be verified by another person. She argued that for the said reason the affidavit was incurable defective, however, the prayer by itself is fatal but the Chairman proceeded to enter ruling against the applicant.

In conclusion, Ms. Ndege urged this court to allow the application with costs.

Briefly but to the point, Mr. Kabonde argued that parties are bound by their pleadings, he urged this court to confine itself to the pleadings and disregard the applicant's prayer. Mr. Kabonde went on to state that the applicant on paragraphs 4 and 5 of his affidavit has prayed for the order that he was deprived his rights to be heard. In his views, Mr.

Kabonde argued that the applicant's claims cannot stand because he was aware that there is a main application pending before the tribunal which means he was served. He added that the applicant could have acted with due diligence to pursue or consult the court clerk in regard to his main application. Mr. Kabonde distinguished the cited cases of the Court of Appeal of Tanzania by saying that the applicant had an opportunity to seek for remedies in the same court.

Mr. Kabonde continued to submit that this matter was an interlocutory order thus the same cannot finalize a case. He argued that the present application arises from the main application that means the applicant had a chance to seek venue in the same tribunal. He lamented that the applicant in his affidavit has not stated whether he exercised the available remedies at the District Land and Housing Tribunal. He added that the applicant's act is an abuse of court process.

With regard to the issue of affidavit sworn by Zaituni (respondent) and was signed by John, he agreed that the same verification was defective. However, he added that the same is curable whereas as the court can struck it out instead of dismissing it.

In conclusion, he urged this court to struck out the applicant's application for the interest of justice and order the applicant to follow proper procedure.

In his brief rejoinder, Ms. Ndege reiterated her submission in chief. She insisted that the matter before the tribunal was heard *ex parte* thus the applicant was not given a right to be heard. She lamented that had it been that the applicant was given right to be heard they could have addressed the tribunal on the point of law that the respondent's affidavit was defective.

On the strength of the above submission, Ms. Ndege urged this court to revise the Misc. Application No. 219B of 2020 with costs.

As the practice of the Court, I had to determine the preliminary objection first before going into the merits or demerits of the application. However, there was an agreement by the counsel for the parties and the Court to the effect that the substantive should be heard along with the preliminary objection.

I have dispassionately considered the so called preliminary point of objection. I do not think what the learned counsel for the respondent has raised terms as a preliminary point of objection at this juncture suffice.

The record reveals that Ms. Naomi, learned counsel on 1st September, 2020 appeared and argued on point of law which in my view, the preliminary objection had no any connection with the applicant's affidavit. So long as Naomi Paul hold brief for Ms. Ndege she was in a position to proceed with hearing the preliminary objection which was not in any way connected to the applicant's affidavit. Therefore section 7 of the Notaries Public and Commissioner for Oath Act is not applicable. Had it been that Naomi, learned counsel appeared today to represent the applicant then the objection could have made sense. Therefore, I find this objection on point of law raised by the learned counsel for the respondent does not hold water to the extent I have demonstrated above and the same is dismissed. I proceed to determine the application on merit.

Having summarized the submissions of both learned counsels, I now turn to confront the grounds of appeal in determination of the application before me.

I have gone through the tribunal records and a glance at the *Exparte* Interim Order dated 17th August, 2020 issued by the District Land and Housing Tribunal in Misc. Land Application No. 120B of 2020 I have found that the matter was determined *exparte* and the applicant was ordered to hand over the disputed premise to the respondent. In my respectful view,

the Chairman's action prejudiced the applicant. The District Land and Housing Tribunal Chairman was not required to evict the applicant while there is a pending main application before him with the same prayers of evicting the applicant. Thus, the Chairman's action was simply a travesty of justice thus the same cannot be left standing since his action diminished the entire tribunal's proceedings in Misc. Land Application No. 219B of 2020.

The consequences of a breach of this principle is to the effect that, its breach, unless expressly or impliedly authorized by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard as it was held in the case of **Patrobert D Ishengoma v Kahama Mining Corporation Ltd and 2 others**, Civil Application No. 172 of 2016 which was delivered on 2nd day of October 2018.

For the foregoing reasons, I find merit in the above ground. Having so done, I think, as already alluded above, this application can be disposed of on this ground only. In the premises, I refrain from deciding on the other reasons raised by both learned counsels since the same will not revise the findings which I have already made.

Consequently, I hold that the order of the District Land and Housing Tribunal in Misc. Land Application No. 219B of 2020 is born out of the improper procedure, is a nullity. Under the powers bestowed upon this Court under section 43 (1) the Land Dispute Courts Act, Cap. 216 [R.E 2019], I hereby nullify the proceedings and order of the District Land and Housing Tribunal in Misc. Application No. 219B of 2020. I order that the matter be determined interparties before the District Land and Housing Tribunal within seven days from today. No order as to costs.

Order accordingly.

DATED at Mwanza this 14th December, 2020.


A.Z.MGEYEKWA

JUDGE

14.12.2020

Ruling delivered on 14th December, 2020 in the presence of both parties.




A.Z.MGEYEKWA

JUDGE

14.12.2020