

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA

LAND REVISION NO. 6 OF 2019

*(Originating from the District Land and Housing Tribunal for Kiteto at Kibaya,
Application No. 7 of 2017)*

SHABANI ABDALLAH *(Dully appointed Administrator of the
Estate of the late Mwanaidi Omary)* **APPLICANT**

Versus

YAHAYA RODI **1ST RESPONDENT**

SWALEHE ALLY **2ND RESPONDENT**

MUSTAFA SALUMU **3RD RESPONDENT**

NINGA HAMISI **4TH RESPONDENT**

RULING

4th & 17th December, 2020

Masara, J

The Applicant has preferred the instant application under sections 43(1)(b) of the Land Disputes Courts Act, Cap 216 [R.E 2002] moving the Court to revise the proceedings of the District Land and Housing Tribunal for Kiteto (the tribunal) in Land Application No. 7 of 2017. The application is supported by an affidavit affirmed by Jafari Ganga, holding Power of Attorney to represent the Applicant. The Respondent, despite been given several opportunities, did not oppose the application as no counter affidavit was filed.

The facts from which this application arose as obtained from the affidavit and annexes in support of the Application can be summarised as follows:

Jafari Ganga sued the Respondents under a Power of Attorney conferred to him by the Applicant in this application on 20/6/2016. The Applicant petitioned and was appointed as the administrator of the Estate of the late **Mwanaidi Omay** by Kiteto Primary Court on 8/11/2016 vide Administration Cause No. 7 of 2016. The Applicant through his Attorney unsuccessfully sued the Respondents herein in the District Land and Housing Tribunal for Kiteto vide Land Application No. 7 of 2017. In that application, the Applicant sought to be declared the lawful owner of the disputed land measuring 60 acres which belonged to the late Mwanaidi Omary. In its judgment delivered on 2/11/2017, the Tribunal chairman held that the Respondents were the lawful owners of the suit land as they bought the same at different times and sizes from the Applicant and his brother between 2002-2005.

On 5/12/2018, Mwanaharusi Abdallah, being appointed as the administratrix of the Estate of the late Mwanaidi Omary replacing the Applicant herein, filed Land Application No. 6 of 2018 in the same Tribunal. In its ruling delivered on 17/1/2019, the learned chairman dismissed the application for being *res judicata* which was raised by the Tribunal *suo motu*. The Attorney filed application No. 25 of 2019 in this Court seeking an extension of time to file revision, and the application was granted. On 24/10/2019 he filed the instant application moving the court to revise the proceedings in respect of Land Application No. 7 of 2017. As hinted out earlier, the Respondents did not contest the application.

It is a settled law that failure to file counter affidavit as ordered by court has the implication that the Respondent does not contest the application. In other words, the facts deposed in the affidavit are not disputed by the adverse party. The record shows that on 20/4/2020, the Respondents prayed to file counter affidavit, and the same was ordered to be filed by 4/5/2020. Until 12/10/2020 when the second Respondent entered appearance, the same had not been filed. In ***Asha Ramadhan Mwambala Vs. Mselemu Ramadhan***, Misc. Land Application No. 219 of 2018, (unreported), HC Land Division DSM; consequences of failure to file a counter affidavit were stated in the following words:

*"The position of the law is that **where a party fails to file counter affidavit, that means he has no objection to the application.**"*
(emphasis added)

Although the application is uncontested, still the Applicant is duty bound to prove the prayers he makes before the court. At this stance, I am guided by the Court of Appeal decision in ***John Dongo and 3 Others Vs. Lepasi Mbokoso***, Civil Application No. 14/1 of 2018 (unreported), where it was held:

"Although the application is uncontested, I still find it necessary to consider at this juncture as to whether the Applicants have been able to advance good cause to warrant extension of time."

On 12/10/2020 when the application came up for hearing, the Applicant had nothing to say, he asked the Court to adopt the contents of his affidavit in support of the application and decision thereon to be made. The parties appeared in court in person, unrepresented.

The basis of the Applicant's application is reflected under paragraphs 12 and 13 of the affidavit in support of the Application. In paragraph 12, the Applicant contends that the conduct of the Land Application No. 7 of 2017 is tainted with a lot of irregularities and illegalities which to a large extent have been caused by the Tribunal Chairman. Further, paragraph 13 of the affidavit is to the effect that it was due to the instructions of the trial Chairman which has led to miscarriage of justice that this court is sought to rectify.

I have given a careful scrutiny to the affidavit of the Applicant and its annexes. At the outset, the issue I feel obliged to determine is whether the application is competent before this court.

At paragraph 1 of the affidavit, Mr. Ganga states that he represented the Applicant in Application No. 7 of 2017 before the Tribunal. It is further stated at paragraph 2 that the Applicant was appointed as the Administrator of the Estate of the late Mwanaid Omary on 8/11/2016 and he filed the accounts of the late Mwanaid Omary on 28/2/2017 where the Applicant discharged himself from the office of the administrator of the late Mwanaidi Omary.

From the foregoing paragraph, it is apparent that the Applicant having filed final accounts of the deceased's estate, he closed the probate cause, and discharged himself from administration of the deceased's Estate. It is on record that the Applicant sued under capacity of being the administrator of the deceased's estate. It is therefore undisputed that as soon as he filed the final accounts, the Applicant was discharged from being the administrator of

the deceased's estate. Thus, he had no capacity to sue under that capacity anymore. As reflected in the Power of Attorney given to Mr. Jafari Ganga, the Applicant conferred those powers as the administrator of the Estate of the late Mwanaid Omary. Having discharged his duties as the administrator, the Power of Attorney donated to Mr. Ganga has no effect since the Applicant's interest in the deceased's estate had ceased. That said, it is the finding of this Court that Mr. Ganga erroneously filed this application, as he has no *locus standi* to do so. His Power of Attorney vanished the moment the Applicant's status as the administrator of the deceased's estate ceased.

In addition to the above finding, the Power of Attorney is self-explanatory. It states that it would be valid from the date it was signed until 20/6/2019. The instant application was filed on 24/10/2019, after the expiry of the Power of Attorney. The application is therefore rendered incompetent as the person prosecuting the same has no powers so to do. This renders the impugned decision nugatory as the Attorney has no power to sue. This reason alone sufficiently disposes the application, but for the purposes of having a clear record, the Court deems it appropriate to comment on yet other anomalies which this Court finds imperative to address.

In the course of going through the records, it is apparent that this application was filed out of time. The decision of the trial Tribunal was delivered on 2/11/2017 and the instant application was filed on 24/10/2019, almost two years later. The law under section 41(2) of Cap. 216 provides the time for Revision to be 45 days from the date the impugned decision is delivered.

The Applicant under paragraph 1 of the affidavit stated that he filed Misc. Land Application No. 25 of 2019 in this Court seeking extension of time and the same was granted. However, the ruling or order granting that application does not feature in the record of application, making it suppositious. Since there is no proof that the extension of time was sought and granted, the application is found to be time barred.

Moreover, section 43(1)(b) of Cap. 216 can be invoked if it appears that there has been an error material to the merits of the case involving injustice. The relevant provision provides:

"In addition to any other powers in that behalf conferred upon the High Court, the High Court (Land Division)-
(a)N/A;
*(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, **if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.** (emphasis added)*

From the above provision of the law, it is therefore the duty of the Applicant to show that there has been an error material to the merits which may lead to injustice. As I have shown above, the Applicant under paragraphs 12 and 13 simply stated that there are irregularities and illegalities which to a large extent were caused by the trial Chairman and that the chairman has led to miscarriage of justice. The Applicant did not amplify these accusations.

I take note of paragraphs 4 and 6 of the affidavit where the Applicant stated that they were advised by the Tribunal chairman to sue in the name of the administrator of the deceased's estate. Further, following the hardship encountered by the Applicant's refusal to prosecute the case, they were advised by the Tribunal chairman that the Applicant gives power of attorney to a person to sue on his behalf and the Applicant gave that power on 5/7/2017. I decline to agree with the Applicant that the trial chairman's advice, if any, led to miscarriage of justice. The averments by the Applicant that there were illegalities and irregularities occasioned by the trial Tribunal chairman are, to say the least, unsubstantiated. In the first place, the Applicant did not disclose those illegalities and irregularities in his affidavit. Alternatively, in case they relied on the chairman's advice, it was done at their own detriment since they had an opportunity of seeking it from some other person they trusted. Lastly, the decision of the trial Tribunal was not perpetrated by his advice, rather it was based on the Applicant's failure to prove ownership over the suit land. Therefore, the Applicant has failed to move the court properly on the prayers he seeks in this Court.

The other notable anomaly I perceive is that this application for revision was preferred as an alternative to an appeal. A person aggrieved by the decision of the trial Tribunal has a right of appealing to this Court. Revision is preferred where an appeal is not provided or under compelling exceptional circumstances. I am guided by the decision of the Court of Appeal in ***Transport Equipment Ltd Vs. Devram P. Valambhia*** [1995] 161 where the Court observed:

"The appellate jurisdiction and revisional jurisdiction of the Court of Appeal of Tanzania are, in most cases, mutually exclusive.; if there is a right of appeal then that right has to be pursued and, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to the revisional jurisdiction of the Court of Appeal." (emphasis added)

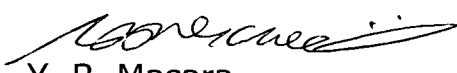
See also; ***Felix Lendita Vs. Michael Long'idu***, Civil Application No. 312/17 of 2017 and ***Hassan Ng'anzi Khalifan Vs. Njama Juma Mbega (legal representative of the late Mwanahimis Njama) and Another***, Civil Application No. 218/12 of 2018 (Both unreported).

In this application, the Applicant has not shown exceptional circumstances to move the Court to exercise its revisional powers. Guided by the above decisions which I consider to be the position of the law, I find the application for revision to be taken as an alternative to appeal. The Applicant was first supposed to exhaust the appeal remedy in lieu of the course taken. I desist from discussing Land Application No. 6 of 2018 which was filed by the Applicant's sister since it was not made part of this application. I therefore find the application wanting in merit.

For the reasons I have endeavoured to discuss the application is without merit. It is hereby struck out. I make no order as to costs, considering the fact that it was not contested.

Order accordingly.




Y. B. Masara

JUDGE

7th December, 2020