

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL REVIEW NO. 3 OF 2021

FRANCIS NYERERE SAID APPLICANT

VERSUS

BUNDA TOWN COUNCIL 1ST DEFENDANT

TANZANIA NATIONAL ROADS AGENCY 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

MINISTER FOR LANDS AND

HUMAN SETTLEMENTS 4TH DEFENDANT

COMMISSIONER FOR LANDS 5TH DEFENDANT

JUDGMENT

6th and 6th August, 2021

KISANYA, J.:

The applicant, Francis Nyerere Said is in a pursuit of review of the decision and order of this Court in Land Case No. 7 of 2019 dated 19th March, 2021 in which his suit for declaration as lawful owner of Plot No. 9, Block F, High Density, Bunda Urban Area was dismissed for want of merit. He has filed a memorandum of review under section 78 (1) (a) and Order XLII Rule 1(1)(b) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC). The ground for review reads:-

- 1. That, there is a discovery of new evidence it is an original certificate of the right of occupancy in relation with the*

*land in dispute civil case No. 7/2019, Plot No. 9 Block F,
High Density Bunda Urban Area."*

Appended to the memorandum of review is a copy of certificate of the right of occupancy and letter dated 23rd November, 2017 from Bunda Town Council.

To better appreciate what prompted the filing of this matter, it is to depict, albeit brief, some background. The applicant and 9 other persons instituted a suit against the respondents in Land Case No. 7 of 2019 lodged in this Court. They sought to be declared as the lawful owners of their respective lands located at Nyamuswa-Bulamba-Kisorya which the 2nd respondent, Tanzania National Roads Agency (TANROADS) had issued a notice requiring them to demolish or remove the structures developed within 22.5 meters from the centreline. At the end of trial, this Court was satisfied that the applicant who was the 2nd plaintiff, had failed to prove his claim. That was after noticing that the applicant had not tendered any document to prove ownership of the suitland. Not amused with that decision, the applicant resorted to file the present application on the foresaid ground.

When this matter was called on for hearing today, both parties appeared virtually. While the applicant had the legal services of Mr. Ostack

Mligo, the respondent appeared through Messrs. Kitia Turoke and Saddy Rashid, learned State Attorneys.

Arguing the application, Mr. Mligo contended there was a discovery of new evidence which was in possession of the applicant during the trial. Referring to the judgment of this Court in Land Case No. 7 of 2019, the learned counsel was of the view that had the applicant tendered the original document of certificate of occupancy, the Court would not have dismissed his case. He therefore urged me to review the decision of this Court on the ground of discovery of new evidence. When probed by the Court, Mr. Mligo readily conceded that the applicant was not diligent to procure the original certificate of occupancy.

For the respondents, Mr. Saddy, learned State Attorney resisted the application. He submitted that the application has been made under wrong provision of law. He added that the provisions cited in the memorandum of review applies when a person is aggrieved by the decree from which no appeal arise. The learned counsel was of the view that the decree subject to this court is appealable and thus, the applicable provision was Order XLII, Rule 1 (1) (a) of the CPC.

Without prejudice to the foresaid, Mr. Saddy submitted further that the application has not met the conditions set out under Order XLII, Rule

1(1) of the CPC. He pointed out that the certificate of occupancy which formed the basis of this application was not a new evidence. Referring to the ruling of this Court in Land Case No. 7 of 2019, the learned State Attorney argued that the applicant had knowledge of the whereabouts of the original certificate of title but failed to exercise due diligence to procure it. He submitted further that the said document was with NMB after mortgaging his land. In view of the ruling dated 9th July, 2021, Mr. Saddy was of the view that, the Court was *functus officio* to determine the issue related to admission of certificate of title. He therefore invited the Court to dismiss the application with costs.

In a short rejoinder, Mr. Mligo conceded that the application has been made under wrong provision of law and asked me to employ the principle of overriding objective and determine the matter on merit

I have keenly considered the submission for and against the application. The main contention is whether this application is meritorious or otherwise. The law governing this matter is section 78 (1) (a) and Order XLII Rule 1(1) (b) of the CPC. The provision of Order XL, Rule 1(1)(b) which set out the grounds for review provides as follows:

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

In view of the above provision, I agree with Mr. Saddy that the application has been made under wrong provision. This is so because section 78 (1) (a) and Order XLII Rule 1(1)(b) of the CPC apply where the applicant is aggrieved by a decree or order which no appeal is allowed. The

judgment and decree subject to this application is appealable. Therefore, the application ought to have been made under Order XLII, Rule (1)(a) of the CPC. Therefore, in view of the principle of overriding objective provided for under section 3A of the CPC, I find it appropriate to determine this matter on merit.

Next on consideration is the contention by Mr. Saddy that the Court is *functus officio* to determine this matter. It is settled law that the court becomes *functus officio* upon deciding the matter on merit. In its ruling dated 9th July, 2021, this Court dealt with admission of certified copy of certificate of title. In the instant case, the applicant is moving the Court to review its decision on the ground that there is a discovery of new document which was not in his possession when the ruling dated 9th July, 2021 was issued. In that regard, I am of the considered view that, the Court is not *functus officio* to determine this matter because the issues are not the same.

Reverting to the merit of this application, the applicant is duty bound to prove the grounds for review specified under the proviso of Order XLII, Rule 1 of the CPC. The ground put forward by the applicant is a discovery of new evidence, which is an original certificate of the right of occupancy in relation to the suitland. I am alive that the discovery of new

evidence is a ground for review. However, as rightly argued by Mr. Saddy, it must be proved accordingly by the applicant. Reading from Order XLII, Rule (1)(1) of the CPC, in order the ground of discovery of new evidence to warrant review, the applicant must, among others, prove that upon exercising due diligence, he could not produce the respective evidence at the time when the decree was passed or order made.

In the present case, the certificate of occupancy sought to be considered as a new evidence was appended to the plaint in Land Case No. 7 of 2019. When the applicant was called upon to prove his case, he had no original certificate of occupancy with him. He prayed to tender a copy of the original on the ground that the original had been mortgaged with NMB Bank. The respondents objected admission of certified copies. Making reference to section 67(1) (c) the Evidence Act, Cap. 6, R.E. 2019, the Court sustained the objection on the following grounds:

1. That the applicant had not told the Court the efforts made to procure the original document.
2. That the applicant had not tendered evidence such as the mortgage agreement to substantiate his contention that the original certificate of occupancy was with NMB.

3. That while the applicant deposed that his land was mortgaged in 2018, the certificate of occupancy sought to be tendered had been certified by a private advocate in 2019.

Further to that, this Court held that it would have admitted the said copy had the copy sought to be tendered been certified by the Bank (NMB).

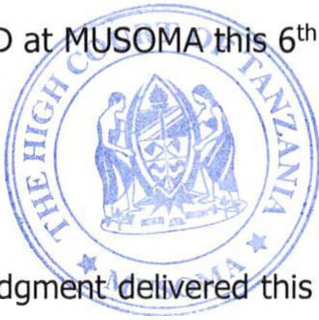
For the foregoing reasons, I am at one with Mr Saddy that, there is no discovery of new evidence because the applicant had a knowledge that the original certificate of occupancy was with NMB. That being the case, he ought to adduce evidence to prove that the original title was with NMB, show the efforts made to produce the original or a copy certified by the bank and tender the certified copy after complying with the provision of section 67 of the Evidence Act. None has been shown in this review proceedings.

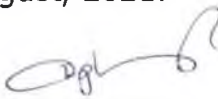
In the circumstances, I am of the view that the applicant did not exercise due diligence to obtain the original or certified copy of the title which is the basis of this review application. The fact that the applicant did not exercise due diligence was not disputed by his counsel. As that was not enough, no evidence has been brought forward to prove that the certificate

of occupancy had been mortgaged on 19th March, 2021 when this Court passed the decree or order.

Eventually, I find no merit in this application for review. It is accordingly dismissed with costs.

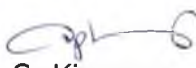
DATED at MUSOMA this 6th August, 2021.




E. S. Kisanya
JUDGE

Court: Judgment delivered this 6th day of August, 2021 in the presence of Mr. Ostack Mligo, learned advocate for the applicant and Mr. Kitia Turoke and Mr. Saddy Rashid, learned State Attorneys for the respondents. BC Simon present.




E. S. Kisanya
JUDGE
06/08/2021