

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBA DISTRICT REGISTRY**

**AT BUKOBA**

**MISC. LAND APPEAL NO. 34 OF 2021**

*(Arising from the DLHT Karagwe in Misc. Application No. 65 of 2020 and Civil Case No. 07 of 2016  
Nyaishozi Ward Tribunal)*

**EMMANUEL M. BASHUNGWA ..... APPELLANT**

**VERSUS**

**JOSEPH BAGARAGAZA.....RESPONDENT**

**EXPARTE JUDGMENT ON APPEAL**

23/02/2022 & 01/04/2022

**NGIGWANA, J.**

The appellant Emmanuel M. Bashungwa being aggrieved by the whole decision of Karagwe District land and Housing tribunal, registered in this court the following grounds.

- 1. That the Appellate District Land and Housing Tribunal grossly erred in law and fact to interfere with the jurisdiction of the former Chairman of the same rank and set aside the order of amicable Settlement entered on 13/03/2018 by the same chairman.*
- 2. That the order of JK. Banturaki chairman was obtained by fraud setting aside the competent execution by authorities and was never being set aside.*
- 3. That the Hon. Chairman JK. Banturaki was **functus officio** to entertain the execution proceedings which had already been*

*competently determined by the Previous Chairman R.E. Assey without any power of appeal or Revision or Review against the order of the same Tribunal*

He therefore prayed for the following reliefs.

- (i) That the entire Misc. Application No. 65 of 2020 was null and void be nullified and quashed forth with.*
- (ii) That the ruling and order issued on 25/11/2020 were null and void be set aside.*
- (iii) That the execution intended to be executed by Karagwe District Commissioner, be set aside.*
- (iv) That the order directed to the appellant to give Vacant possession be set aside and the parties to maintain the amicable Settlement entered on 13/3/2018*

The brief material facts underlying this matter as can be decerned from the record is that the respondent herein one Josepha Bagaragaza successfully sued the appellant at the Nyaishozi Ward tribunal in Civil Case No. 7 of 2016. Being aggrieved, the appellant lodged the appeal against the said decision in the DLHT for Karagwe at Karagwe. Inadvertently, the appeal was registered as an Application No. 79 of 2016.

Later on, parties agreed to settle the matter out of court amicably, as a result, the District Land and Housing Tribunal through the said application No. 79 of 2016 admitted the deed of settlement on 13/3/2018 before the Chairman Hon. E. Assey and the matter was marked settled. Subsequently,

Joseph Bagaragaza (respondent herein) appeared in the District Land and Housing Tribunal vide application No. 65 of 2020 for execution of the same already settled order and which was already executed by the District Commissioner.

Being unhappy with that move, the appellant approached the DLHT before Hon. Banturaki; Chairman to show cause why execution in Application No. 65 of 2020 should not be executed as the matter between the same parties was already settled through application No. 79 of 2016 but in vain. The DLHT before the said Chairman Banturaki proceeded to order the matter to be executed. Hence the rationale for this appeal.

At the hearing the matter was heard *ex parte* after the exercise of effecting service of the summons to the respondent including substituted service turned futile.

In his *ex parte* hearing, Advocate Mathias Rweyemamu who represented the appellant, orally submitted that the Chairman Banturaki had no mandate to interfere with the matter which was already concluded by the same tribunal. That the said Chairman Banturaki was therefore **"functus officio"**. He therefore reiterated his prayer in the petition of appeal. He particularly prayed that the Misc. Application No. 65 of 2020 be nullified and quashed for being a nullity and that the decision of settlement dated 13/03/2018 be upheld by granting costs to the respondent.

The wanting question in this court is whether this appeal is meritorious?

I agree with Mr. Mathias Rweyemamu that since on 13/03/2018 there was an order of the DLHT before R.E. Assey, Chairman to have marked the

matter between the appellant and respondent settled in Application No. 79 of 2016. The same tribunal (before J.K Banturaki) passed new order to allow an application for execution of the same through Misc. Application No. 65 of 2020 to wit; Application for execution was a flaw and did not augur good administration of justice. In other words, the tribunal (J.K. Banturaki, Chairman) was "***functus officio***". Principally, the doctrine of *functus officio* is clear that the Judge or Magistrate or Chairman or court/Tribunal cannot give a decision twice. In other words, once a court or judge/Magistrate/Chairman makes a final order, it (or he/she) no longer has the competence or jurisdiction to give another decision on the same matter. It (or he/she) is generally precluded from reviewing the terms of the judgment/decision or order apart ***from the correction of clerical mistakes or accidental slips. See Malik Hassan versus SMZ [2005] TLR 236 (CAT).***

However, the situation is different in relation to consent judgment or order because it is a settled law that any deed of settlement registered in court in case of any effort/attempt to challenge or vacate it, is through application for review in the same court which granted it or in case of fraud is by way of appeal to the Higher Court. See **National Insurance Cooperation of Tanzania Ltd versus Steven Zakaria Kiteu and 2 Others**, Civil Reference No. 07 of 2020, HC at Arusha (unreported).

In another precedent case of **Arusha Planters and Trados Ltd and 2 Others Vrs Euro African Bank (T) Ltd**, Civil Appeal No. 78 of 2001 CAT at Dsm (Unreported), which I am thus bound to follow, the Court of Appeal sufficiently underscored that the decree which was issued by the court

cannot be challenged in other proceedings save through review in the same court which issued it and by way of appeal in the allegation of fraud.

In the matter at hand, the deed of settlement which was signed by the parties was duly adopted by the DLHT as the judgment/order of the tribunal hence binding on the parties. In a Kenyan case of **Edward Acholla versus Sogea Satom Kenya Branch and 2 Others**, Civil Case No.1518 of 2013; [2014] e KLR which is highly persuasive, the court held that;

*"Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes its character and becomes a consent judgment or order with contractual effect and could only be set aside on grounds which would justify setting aside, or if certain"*

Since the respondent opted an application for execution which moved Hon. Banturaki, (Chairman) to have vacated the settlement order which was still in force and proceeded to order execution in the presence of the order of the same tribunal settling the same matter instead of filing an application for review (**However, it should not be forgotten that review is for addressing irregularities and not challenging the merits of the case**), the move did not augur with good administration of justice. With due respect, the Tribunal Chairman (JK. Banturaki) misdirected himself self by reasoning that there was no decision which ever overturned the decision of Nyaishozi Ward Tribunal Civil Case No.07/2016 while there was still an order of the same tribunal which marked the same matter between the same parties to have settled. It was also a misdirection of the same

Chairman to have ruled that what was settled was Application No.79/2016 and not appeal since the same case was an appeal against the ward Tribunal decision in No. 07/2016 which was inadvertently registered as an application instead of appeal by the same tribunal. Worse still, the chairman could not even attempt to identify the registration number of the said appeal which he ruled that was not settled. Failure by the Chairman Banturaki to have stated the registration number of appeal which he ruled that was not settled is the clear indication that application No. 79 of 2016 was erroneously registered as an appeal and thus concludes that the matter was settled as an appeal and nothing more was left unsettled.

From the above reasons, this court concludes that the appeal has merit and the proceedings and orders before J. K. Banturaki, Chairman are declared a nullity and forthwith quashed and set aside.

In the event, the entire proceedings and the ruling in Misc. application No. 65 of 2020 were null and void and are hereby nullified, and quashed forthwith, and the resultant orders and reliefs emanated from that application are nullified and quashed too. Since the anomaly was to the great extent caused by the trial DLHT, each party shall bear its own costs.

It is so ordered.



E. L. NGIGWANA

JUDGE

01/04/2022

Judgment delivered this 1<sup>st</sup> day of April 2022 in the presence of Mr. Mathias Rweyemamu, learned advocate for the Appellant, Mr. E.M.

Kamaleki, Judges' Law Assistant, and Ms. Tumaini Hamidu, BC but in the absence of the respondent.



E. L. NGIGWANA

JUDGE

01/04/2022