

**THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY**

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

**MISCELLANEOUS LAND APPLICATION NO. 118 OF 2021**

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Application No. 13B of 2021. Originating from Land Application No. 13 of 2021 from the District Land and Housing Tribunal for Mbeya at Mbeya.)

**MUSIBHA MOHAMED NYAKULINGA.....APPLICANT**

**VERSUS**

**ALFRED MWAKIWONE.....RESPONDENT**

**RULING**

Date of Last Order: 01/06/2022  
Date of Ruling : 06/07/2022

**MONGELLA, J.**

The applicant filed the application at hand under certificate of urgency seeking for this Court to call for, inspect, and revise the records of the District Land and Housing Tribunal for Mbeya at Mbeya (the Tribunal) in Application for Execution No. 13B of 2021 on account of errors material to the merits of the case involving injustice. The application has been brought under section 41 (1) and 43 (1) (a) and (b) of the Land Disputes Courts Act, Cap 216 R.E. 2019. It is supported by the affidavit of the applicant.



Both parties engaged legal services from learned counsels. The applicant was represented by Mr. Kamru Habibu and the respondent was represented by Mr. Victor Mkumbe. The application was argued by written submissions.

Mr. Habibu started by giving the background of the dispute. He submitted that the matter emanates from Execution proceedings in the District Land and Housing Tribunal for Mbeya (the Tribunal, hereinafter) in Application No. 13 of 2014. He said that the main suit before the Tribunal concerned ownership of the house on Plot No. 1848 Block "M" Forest area in Mbeya City, which the applicant alleged to have purchased through sale following an order from Iyunga primary court. The Tribunal declared the sale a nullity and that the land in dispute belonged to the respondent. It further ordered the parties to make a follow up on the sale of the house in dispute in the primary court, which issued a divorce decree. Given the Tribunal decision, the respondent filed execution proceedings in the Tribunal, which issued eviction orders that are subject of the application at hand.

Concerning the application at hand, Mr. Habibu after adopting the applicant's affidavit, submitted that the main issue for determination by this Court is whether the proceedings in Execution Application No. 13B of 2021 are marred with irregularities or errors material to the merits of the case involving injustice. He argued that the proceedings and subsequent orders issued in the said execution proceedings were flawed with serious irregularities and illegalities as the laws and practices relating to execution of decrees and orders were not adhered to.



Referring to **Regulation 23 of the Land Disputes Courts Act (District Land and Housing Tribunal Regulations, 2003, G.N. No. 174 of 2003**, he argued that the said provision governs execution of decrees and orders by providing what is to be done. He contended that under the provision, the decree holder is required to make an application for execution through a prescribed form by indicating the mode in which execution is sought to be carried out; upon receiving such application, the Chairman is required to make an order requiring the judgment debtor to comply with the decree or order sought to be executed within 14 days; where after expiry of 14 days period there is no objection or response from the judgment debtor, the Chairman shall make execution orders as he thinks fit; if the judgment debtor raises objections, the Chairman shall consider them and make appropriate orders.

Considering the orders by the Tribunal Chairman, he had a stance that the above legal requirements were not complied with as the Hon. Chairman ordered the applicant to vacate the land in dispute within the period of 14 days and Pamoja Auction Mart, the Tribunal broker, to enforce the order and file execution report on 18<sup>th</sup> January 2022. In the circumstances, Mr. Habibu was of the view that the order, from the face of it, was final as the broker was already appointed to enforce the decree. He argued that the applicant was not accorded the opportunity to put forward his objection or response as to why the execution should not be carried out as applied.

He considered the omission a serious irregularity as the applicant was deprived an opportunity to be heard in the execution proceedings. He



contended that failure to afford a party an opportunity to be heard vitiates the whole proceedings. To bolster his point he referred the Court to the case of **Mbeya Rukwa Auto Parts Transport Limited vs. Jestina George Mwakyoma** [2003] TLR 251; and that of **D.P.P. vs. Sabina Tesha & Two Others** [1992] TLR 237. In conclusion, he was of the view that the errors are fatal for infringement of mandatory rules. He prayed for the Tribunal proceedings and order in Execution No. 13B of 2021 to be revised and quashed with costs.

In reply to the application, Mr. Mkumbe kind of raised a preliminary objection challenging the application for revision. He argued that the applicant had every right and opportunity to appeal against Application No. 13B of 2021, but opted to come to this Court through revision. Citing a decision by the Court of Appeal of this Land in the case of **Halais Pro-Chemie vs. Wella A. G.** [1996] TLR 269, he argued that except under exceptional circumstances, a party to proceedings cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court. In consideration of the holding of the case he contended that revisional jurisdiction can be invoked on matters which are not appealable.

He argued further that if there were indeed errors committed by the Tribunal, the law under **Regulation 23 (5) of the Land Disputed Courts (sic) (The District Land and Housing Tribunal) Regulations, G.N. No. 174 of 27.6.2003** provides as to what is to be done. The said provision requires the Tribunal Chairman to consider the objections, if any, any make appropriate orders. He argued further that the said provision requires the

applicant to have raised any objections he had in the Tribunal and not in this Court as he did.

Reverting to the right to appeal, he referred to **Regulation 24 of G.N. 174, 2003** which directs that a party aggrieved by the decision of the Tribunal has the right to appeal to the High Court (Land Division). He contended that nowhere in G.N. No. 174 of 2003 it is provided that instead of abiding by the said regulations, a party can go straight to the High Court as done by the applicant. In an attempt to blackmail the Court emotionally, he contended that if such step is allowed to stand it would create a bad precedent, as a party can choose at will to abandon G.N. No. 174 of 2003 and go straight to the High Court. He prayed for the application to be dismissed.

Mr. Habibu briefly rejoined. He argued that the remedy to be pursued by a party aggrieved by an execution order is revision and not appeal. In support of his argument he referred the case of **Kelvin Rodney Zambo vs. UAP Insurance Tanzania Ltd (Formerly Known as Century Insurance Company)**, Civil Revision No. 27 of 2019 in which while referring to the case of **General Tire (E.A) Ltd. vs. Amenyisa Macha and Others**, Civil Appeal No. 21 of 2003 (HC at Arusha, unreported) held that "**no appeal lies from an execution order.**" He said that in accordance with the decision, whoever is aggrieved by the decision of an executing officer may challenge the same by way of revision in the higher court in judicial hierarchy. Considering the cited decisions, he concluded that the applicant has invoked the right procedure in challenging the orders by the Tribunal Chairman as the execution officer.



After digesting the rival submissions from both counsels and gone through the Tribunal record, I shall first deliberate on the legal issue raised by Mr. Mkumbe in his reply submission. Mr. Mkumbe challenged the application on the ground that the applicant ought to have filed an appeal and not revision as he did. The law is settled to the effect that for revisional powers to be invoked there must be material irregularity in the decision or order of the lower court/tribunal. To explain this point better, a leaf can be borrowed from **section 79 of the Civil Procedure Code, Cap 33 R.E. 2019** which provides for circumstances under which revisional jurisdiction can be invoked. The provision provides for the following circumstances:

- "(a) The subordinate court has exercised a jurisdiction not rested in it by law; or*
- (b) The subordinate court has failed to exercise a jurisdiction rested in it; or*
- (c) **The subordinate court has acted in the exercise of its jurisdiction illegally or with material irregularity;***
- (d) **Where no appeal lies.**"[Emphasis added]*

From the above provision, I agree with Mr. Mkumbe on the point that revision is not a substitute of appeal. It can only be invoked where the above circumstances are present. In the matter at hand, the Hon. Chairman, as lamented by the applicant, and also vivid on the face of the Tribunal record, never ordered for summons to be served to the applicant for him to be given the chance to respond to the application. He acted in contravention of the legal procedure enshrined under **Regulation 23 (3) of G.N. 174, 2003**. By non-adhering to the procedure under this provision, he exercised his jurisdiction with material irregularity. See also: ***Eva Simon Kasongwa vs. David Edward Mwakalindile*** [2020] TLR

271; *Tima Haji v. Amiri Mohamed Mtoto & Mamba Auction Mart*, Civil Revision No. 61 of 2003 and *Abdul Hassan v. Mohamed Ahmed* [1989] TLR 181.

In addition, in accordance with the decisions in the case of *Kelvin Rodney Zambo vs. UAP Insurance Tanzania Ltd (Formerly Known as Century Insurance Company)*, (supra) and that of *General Tire (E.A) Ltd. vs. Amenyisa Macha and Others*, (supra) cited by Mr. Habibu, no appeal lies against execution orders. In the premises the applicant had no avenue for filing an appeal. Mr. Mkumbe's arguments challenging the revision are therefore found to lack merit.

Basically, Mr. Mkumbe opted not to reply to the substance of the application. As such I shall only consider the arguments by the applicant's counsel. As stated earlier, the applicant calls for this Court to revise the proceedings and order of the Tribunal in the Execution Proceedings mainly on the ground that he was not given the opportunity to be heard. He claims not to have been summoned to attend the proceedings, but was only served with execution order.

The Tribunal made orders in terms of **Regulation 23 (4) of G.N. 174, 2003**. In my view, before embarking to invoke Regulation 23 (4), the Tribunal ought first to have adhered to the provisions of **Regulation 23 (3)** which require the Chairman, upon receipt of the application for execution, to make an order requiring the judgment debtor to comply with the decree or order to be executed within the period of 14 days. Specifically it provides:



*"The Chairman shall, upon receipt of the application, make an order requiring a judgment debtor to comply with the decree or order to be executed within the period of 14 days."*

Regulation 23 (4) comes into play when the judgment debtor fails to comply with the order issued under Regulation 23 (3) as above. The question to be asked is therefore, whether the Tribunal Chairman issued any order in terms of Regulation 23 (3) as above and whether the order was duly served to the applicant. Before deliberating on the question, I find it pertinent to reproduce the order hereunder for ease of reference. The Order issued on 20<sup>th</sup> December 2021 goes as:

**"AMRI**

- Wewe Musibha Mohamed Nyakulinga unaamriwa kuondoka na kukabidhi nyumba Namba 1848 Kitalu "M" Forest Mpya Mbeya ndani ya siku 14.
- Pamoja Auction Mart watekeleze amri hii.
- Taarifa ya utekelezaji iletwe tarehe 18/1/2022."

My understanding of the provisions of Regulation 23 (3) and (4) is that the Tribunal ought to make two separate orders. The first, requiring the judgment debtor to comply with the decree within 14 days, and the second, where the first is not complied, to execute the decree. Scrutinizing the Tribunal order as quoted above, it is clear, as argued by Mr. Habibu, that it was for execution in terms of Regulation 23 (4). This is because the Tribunal went further to direct Pamoja Auction Mart, a court broker, to effect the execution and file a report to that effect to the Tribunal by 18<sup>th</sup> January 2022. In my considered view, the order in terms of



Regulation 23 (3) ought to direct the judgment debtor to comply with the decree within 14 days otherwise necessary execution orders shall be effected in terms of Regulation 23 (4).

The same also must be duly served to the judgment debtor. It is the applicant's contention that he was not aware of the application for execution as he was never served. The assertion has not been countered by the respondent and his counsel. This touches the appellant's fundamental right to be heard. It is trite law that the right to be heard is sacrosanct and its infringement renders the proceedings and subsequent orders defective to the extent of being vitiated. See: **Hassan Kibasa vs. Angelesia Chang'a**, Civil Application No. 405/13 of 2018 (CAT at Iringa, reported at Tanzlii), in which the Court of Appeal while revisiting its previous decision in the case of **Abbas Sherally & Another vs. Abdul S.H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) had the following to say:

*"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

See also: **OTTU on Behalf of P.L. Assenga and 109 Others vs. AMI (Tanzania) Ltd.**, Civil Application No. 44 of 2012 (unreported); **National Housing Corporation vs. Tanzania Shoe Company and Others** [1995] TLR 251; and

**Director of Public Prosecutions vs. Sabinis Inyasi Tesha and Another** [1993]  
TLR 237.

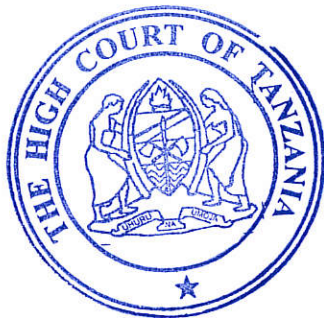
In the circumstances, I find the proceedings and orders by the Tribunal Chairman fatally defective and I nullify them accordingly. The matter is remitted back to the Tribunal to be determined afresh by according the applicant the right to be heard and adhering to the provisions of the law. Considering the circumstances of the case, I order for each party to bear his own costs of the suit.

Dated at Mbeya on this 06<sup>th</sup> day of July 2022.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Ruling delivered in Mbeya in Chambers on this 06<sup>th</sup> day of July 2022 in the presence of the parties and Mr. Victor Mkumbe, learned advocate for the respondent.



  
**L. M. MONGELLA**

**JUDGE**