

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF MWANZA)

AT MWANZA

LAND REVISION NO. 02 OF 2022

(Arising from the Ruling of the District Land and Housing Tribunal for Geita at Geita in Misc. Land Application No. 73 of 2021 dated 31st day of January, 2022 before Masao E, (Chairperson))

ALDEGUNDA ROGATH LAKITAYA.....APPLICANT

VERSUS

- 1. ANDREW SHIRIMA1ST RESPONDENT**
- 2. CRDB BANK PLC.....2ND RESPONDENT**
- 3. ADILI AUCTION MART LTD.....3RD RESPONDENT**

RULING

20th & 26th July, 2022

DYANSOBERA, J.:

The applicant, Aldegunda Rogath Lakitaya is seeking revision of the proceedings of the District Land and Housing Tribunal for Geita Mwanza in Misc. Land Application No.73 of 2021 dated 31st January, 2022. According to the chamber summons, the applicant seeks court's indulgence to call for and revise the proceedings, subsequent actions and decision of the said Tribunal arising from Land Application No. 22 of 2021 as there are errors material to the merit of the case involving injustice and further that this Honourable Court exercise its supervisory powers and inspect the records of such Tribunal and give directions as it considers necessary in the interest

of justice. The applicant is also claiming for costs of this application to follow event and any other reliefs.

The application is supported by the applicant's affidavit. The applicant has moved this court under section 43 (1) (a) and (b) of the Land Disputes Courts Act, [Cap. 216 R.E.2019]. The grounds in support of the application are contained in the applicant's affidavit.

Before I determine these revisional proceedings, a brief background of the matter is apothegmatic. On 17th day of June, 2021, the applicant filed a suit before the District Land and Housing Tribunal for Geita registered as Land Application No. 22 of 2021 against the three respondents. She was praying for an order restraining the respondents from selling the suit premises that is a house situated on Plots Nos. 127 and 129 Block "C", Kalangalala area within Geita Urban area.

In tandem with the said suit, the same applicant filed Miscellaneous Land Application No. 73 of 2021 praying for temporary injunction to restrain the respondents, their servants, agents and whosoever purporting to act on the respondents' behalf from disposing of that suit premises. It is on record that the suit premises was made a collateral to the loan of Tshs. 100, 000,000/= secured by the 1st respondent, the applicant's husband.

After hearing the application for temporary injunction against the respondents, the trial Tribunal was satisfied that the applicant failed to meet the prerequisites for the grant of the temporary injunction. It consequently dismissed the application.

The applicant was aggrieved by that finding hence this application for revision.

At the time of hearing this application, Mr. Bernard Msalaba Kaunda, learned Advocate, represented the applicant, in the time, the 2nd and 3rd respondents were advocated for by Mr. Galati Mwantembe, learned Counsel. The 1st respondent appeared in person.

Arguing in support of the application for revision, learned Counsel for the applicant adopted the applicant's affidavit as part of his submission. He contended that in Miscellaneous Land Application No. 73 of 2021, the Tribunal was being asked for a temporary order to restrain the respondents from selling the suit premises pending the determination of Land Application No. 22 of 2021 in which the applicant was, among other things, challenging her consenting for the securing of the loan and at the same time was alleging that the repayment limit was on 30th October, 2025. According to learned Counsel for the applicant, the Chairman of the

Tribunal was required to grant or refuse issuing the temporary injunction order but, instead, embarked on discussing the merits of the suit arguing that *swala la mkopo halipingiki* and that he could not prevent the 2nd and 3rd respondents to recover the money. This, to learned Counsel for the applicant, is an error material to the merits involving injustice and this court should intervene.

On his part, the 1st respondent adopted his counter affidavit.

With respect to the 2nd and 3rd respondents, Mr. Galati resisted the application. He submitted that the application subject of revision was a temporary injunction whereby the applicant was praying for an order to restrain the respondents from selling the land on Plots Nos. 127 and 129 Block "C", Kalangalala, Geita pending the determination of Land Application No. 22 of 2021. In his view, the applicant is moving the court to revise the application for a temporary injunction which is interlocutory in nature. He contended that this court has no jurisdiction to invoke its revisional powers on interlocutory order. He supported his argument by citing the case of **Henry Lyimo v. Eliabu E. Matei** [1991] TLR 93 clarifying that the revisional powers under section 79 (1) of the Civil

Procedure Code are the same powers stipulated under sections 41 and 42 (a) and (b) of the Land Disputes Courts Act [Cap. 216 R.E,2019].

It was Mr. Galati's further contention that even if the the order sought to be revised was not an interlocutory order, yet the circumstances of this application and the nature of the order sought to be revised do not meet the requirements for granting the order of revision. Referring this court to the case of **Mfaume Kilangi v. Margareth Mkwezi**, HC (T) Land Division, Dar, Land Revision No. 29 of 2019 he contended that, on the authority, the revisional powers under section 43 (1) are exercisable only where there has been an error materil to the case involving injustice and that what amounts to an error material to the case involving injustice is an improper exercise of jurisdiction.

With regard to the complaint that the Hon. Chairperson embarked on discussing the merits of the case instead of deciding whether or not to grant the temporary injunction, Mr. Galati argued that the main application was before the said Chairperson and therefore he committed no error in touching on it. It was the Counsel's view that the grounds for review which were highlighted in the case of **Karim Kiara v. R.**, Criminal Application No. 4 of 2007 were not met.

Lastly, Mr. Galati argued that the application for revision cannot be maintained because it has been taken over by events in that temporary injunction being restrictive in nature, it cannot be granted to reverse what has taken place. Counsel relied on the supplementary counter affidavit to support his argument.

In a short rejoinder, Mr. Msalaba sought to distinguish the case of **Henry Lyimo** and argued that it cannot be used in favour of the 2nd and 3rd respondents on account that by the amendment effected by Act No. 25 of 2002 on Section 79 of the Civil Procedure Act, applies only where the interlocutory order determines the case, only the court can have jurisdiction and that this explains why the 2nd and 3rd respondents dropped their preliminary objection as the cited case can be used in favour of the applicant and not the 2nd and 3rd respondents in that there are errors material on merits which occasioned injustice.

On the argument that the injunction has been overtaken by events, it is contended on part of the applicant that that alone cannot be used to deny the applicant's rights as the sale is yet to be absolute and the sale was conducted while the case was in court and that the certificate of sale is but, an afterthought.

Having summarized the background, the averments in the affidavits and the submissions, I am now in a good position to determine this application.

From the material available, there is no dispute that the suit premises was given to the 2nd respondent as security for the loan facility advanced to the 1st respondent in favour of Alpha Hotel Ltd. Likewise, it is clear that the impugned order made by the Resident Magistrate is interlocutory one. It is an interim order pending determination of the suit, that is Land Application No. 22 of 2021 which is currently pending before the Tribunal.

The issue is whether this court has jurisdiction to entertain these revisional proceedings against the interlocutory order. Going by the decision of this court in the case of the case of **Henry Lyimo v. Eliabu E Matei** (supra) cited by learned Counsel for the respondent, this court would lack jurisdiction to invoke its revisional powers. Indisputably, whether or not the court has such power, depends on the law applicable. In the above quoted case, the court was interpreting the provisions of section 79 (1) of the Civil Procedure Code [Cap. 33 R.E.2019, then 2002]. However, in the instant application, the court is called upon to invoke the provisions of

section 43 of the Land Dispute Courts Act [Cap. 216 R.E.2019]. The above provision enacts thus:-

'43.-

(1) In addition to any other powers in that behalf conferred upon the High Court:

(a).....(not relevant)

(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.

As the above provisions depict, this court can invoke its revisional powers , where it appears that, *there has been an error material to the merits of the case involving injustice*. Indeed, this is a cornerstone of the whole application for revision under consideration and this court is called upon to determine whether there are sufficient grounds for this court to make the sought revisional order.

A starting point is the holding of the Hon. Chairperson in its ruling dated 31st January, 2022 where at p. 14 is recorded to have stated:-

'Kwa kuwa suala la kuwepo mkopo huo halipingiki, basi hoja hiyo haina mashiko, hivyo hata ingekuwa mleta maombi atakidhi matakwa ya mawili bado takwa hili halipo upande wake hivyo anakosa sifa na busara ya Baraza hili kutoa zuio, kwani kama nilivyoeleza hapo awali, ili zuio litolewe ni lazima vigezo vyote vikamilike.'

The same Chairperson also observed at pp 13 and 15 of the said ruling thus:

'Kimsingi, hoja ya wakili wa mleta maombi sioni kama ina mashiko kwani hajaweza kuonesha ni namna gani mjibu maombi wa pili hatopata hasara kama zuio litatolewa lakini pia naungana na hoja ya mjibu maombi wa pili kwa kusema kwamba mjibu maombi wa pili ni taasisi ya kifedha na kushindwa kujelesha (sic) madeni yake itapelekea kufilisika. Ni kweli maana dhumuni la kubwa la kuwepo kwa taasisi hii ni kutoa mikopo lakini pia kuhakikisha mikopo inayotolewa inarudi ili kuweza kujiendesha yenyewe na kunufaisha wengine pia, hivyo kama taasisi ambayo inafanya biashara kwa kutoa mikopo swala la kujiuliza ni vipi kama mikopo inayotolewa haiotorudishwa kwa wakati, je taasisi hiyo itaweza kuendelea? Kama jibu ni ndiyo, swali lingine in namna gani kampuni hiyo itajiendesha. Na kama jibu ni hapana basi hamna sababu ya Baraza hili kuingilia mchakato wa mjibu maombi wa pili kurejesha mkopo aliutoa kwa mjibu maombi wa kwanza'.

.....kwa msingi huo na hoja nilizoainisha sioni sababu ya kutumia busara za Baraza hili kuzuia au kumuingilia mjibu maombi wa pili na wa tatu katika mchakato mzima wa kurejesha mkopo wake. Hivyo basi, maombi hayo hayana mashiko nayatupilia mbali, na gharama zitaamuliwa baadaye kwenye shauri la msingi'

It is the applicant's complaint under paragraphs 5 and 7 of her affidavit in support of the application for revision that, among others, the tribunal orders is to the effect that the 2nd and 3rd respondents can proceed with sale of the disputed land (Plot No. 127 & 129 Block C Kalangalala) that is subject matter of Land Application no. 22 of 2021 and that if the 2nd and 3rd respondents exercise the said rights of sale pending the proceeding shall be rendered nugatory.

With respect, I agree that the order of the Chairperson culminated the proceedings by deciding the rights and liabilities of the parties. As clearly shown in the excerpt above, the trial Tribunal encroached upon the merits of the controversy between the parties. That was clearly wrong. The reasons for my finding are not far-fetched. First, the powers of the court while dealing with interlocutory applications is not to delve into serious questions of law which demands detailed arguments and serious considerations and therefore making the court go into the facts the resolution of which might end up in the determination of the original suit.

Second, interlocutory orders do not decide any matter in issue arising in the suit and should not decide the legal rights of the parties to litigation which might end nugatory the whole suit as was the case in the matter under consideration.

As rightly submitted by learned Counsel for the applicant, in the decision of the Hon. Chairperson, instead of restricting himself to the issue of temporary injunction that was before him, he crossed the bounds and encroached upon the merits of the controversy between the parties.

This exercise, to my mind, was an error material to the merits involving injustice and this court has power to intervene by way of revision as provided for under paragraph (b) of sub-section (1) of section 43 of the Land Dispute Courts Act [Cap. 216 R.E.2019].

With regard to the argument by Mr. Galati that the application for revision has been overtaken by events and that temporary injunctive being restrictive in nature cannot be granted to reverse what has taken place, though the argument might be attractive, it is my view that the court is enjoined to decide only on what is before it.

For the stated reasons, I find these revisional proceedings meritorious.

Invoking sub-section (2) of section 43 of the said Act, I grant the application and, accordingly, I revise the proceedings of the District Land and Housing Tribunal for Geita in **Maombi Madogo Na. 73 ya 2021** by quashing all proceedings, judgments and orders subsequent thereto and set them aside.

It is ordered that the District Land and Housing Tribunal for Geita proceed to hear and determine Land Application No. 22 of 2021 with immediate dispatch so that the legal rights of the parties are determined.

Costs to be in the main suit.

Order accordingly.

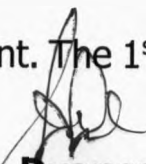
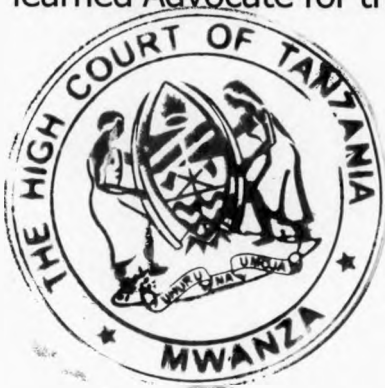


W. P. Dyansobera

Judge

26.7.2022

This ruling is delivered under my hand and the seal of this Court on this 26th day of July, 2022 in the presence of Mr. Galati Mwantembe, learned Counsel for the 2nd and 3rd respondents and holding brief for Mr. Msalaba, learned Advocate for the applicant. The 1st respondent is present in person.



W.P. Dyansobera

Judge