

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

MISC. LAND APPEAL NO. 6 OF 2022

(C/f Misc. Application No. 213 of 2019 District Land and Housing Tribunal for Arusha at Arusha, Originated from Land Complaint No. 28 of 2015 of the ward Tribunal of Kikatiti ward and Misc. Land Application No. 40 of 2020, High Court of United Republic of Tanzania)

PENINA MARKOAPPELLANT

VERSUS

MOSES MARKO..... RESPONDENT

JUDGMENT

21/07/2022 & 25/08/2022

GWAE, J

The appellant, Penina w/o Marko successfully filed a land dispute before the Katiti Ward Tribunal (trial tribunal) against the respondent, Moses Marko (the appellant's son) vide Application No.28 of 2015 whose decision was delivered on the 30th June 2015. The trial tribunal among other things held that, the appellant has a right to permit or bequeath any person of her choice and that the suit land is hers.

On the 21st day of May 2019, the appellant filed an application for execution of the decree of the trial tribunal praying for the following orders; that, the judgment debtor to vacate the suit land within 14 days,

eviction in case the respondent's failure to peacefully vacate from the suit land, that, the court broker be appointed to implement a forceful eviction sought and that, the court broker so appointed to forcefully demolish the structures, boundaries or margins on the suit land (if any).

The execution application was orally argued by the District Land and Housing Tribunal (DLHT) but it was eventually dismissed on the basis that, during hearing of the application the arguments or prayers advanced by the appellant's representative one Juliana Marko were not consistent with the pleadings since there was clear divergence due to the fact that, the appellant's representative sought an order restraining the respondent from entering the suit land and re-affixing boundaries.

Aggrieved by the order of the DLHT dismissing her application for execution, the appellant was anxious to challenge the order however she found herself bound by the law of limitation. She thus successfully applied for extension of time to enable her file an appeal to this court out of the prescribed period vide Misc. Land Application No. 40 of 2020 whose ruling was delivered on the 26th February 2021. Hence, this appeal dependent on the following two grounds;

1. That, the District Land and Housing Tribunal for Arusha erred in law and fact when failed to avail the appellant the

right to be heard during hearing of the application for execution in Misc. Application No. 213 of 2019 as a result he pronounced a shoddy decision

2. That, the Chairperson of the District Land and Housing Tribunal for Arusha erred in law and fact when he failed to consider the application for execution and contents therein instead, he went on to invite one Juliana to submit while she was not part of the case nor the legal representative of the appellant herein as the result a bad decision was pronounced

This appeal was orally argued, the appellant was duly represented by Mr. Richard Manyota, the learned counsel whereas the respondent appeared in person. Submitting for the appeal, Mr. Manyota stated that, it was wrong for the executing tribunal for not availing the appellant an opportunity to be heard since her absence was with leave by one Juliana Marko whom it duly recorded her statement instead of hearing the decree holder now appellant and then delivered its decision.

Attacking the submission of the appellant's counsel, the respondent argued that it was the appellant who sought leave of the executing tribunal to permit one Juliana Marko to submit on her behalf.

Having briefly outlined what transpired before the DLHT and in this court, it is therefore my duty to determine the appellant's grounds of

appeal, starting with the first ground of appeal. As rightly admitted by the respondent that, it was the said Juliana Marko, the appellant's daughter who argued the application for execution, the record of the DLHT clearly reveals that, on the 6th day of September 2019, the appellant entered her appearance but the one who started rolling the ball was the said Juliana Marko. Nevertheless, the respondent questioned locus standi of Juliana Marko as a result, the decree holder informed the DLHT's chairperson that, she was hit on her head with a machet by respondent adding that she had authorized her to represent.

The record of the DLHT also divulges that, the tribunal did grant leave for the said Juliana Marko to represent the appellant. The appellant's daughter who was clothed with capacity of representative then proceeded arguing the appellant's application on behalf of the appellant as correctly argued by the respondent. In that circumstances, the appellant is now seriously complaining to have been denied of her right of being heard. I am quite alive of the principles of natural justice including right to be heard before an adverse action is taken against a party to any proceeding, rules against bias, right to property, right to health etc. I am also aware of the consequential order where there is a violation of the right to be heard in any proceedings, a decision and or ancillary orders made thereto

is a nullification of such proceedings, decisions and orders. The right to be heard is therefore an entitlement of every person by virtue of his or her being human being, it is a fundamental one notwithstanding whether or not the same is enshrined in a country's constitution or not. Fortunately, in our Constitution, 1977 as amended from time to time, under article 13 (1) & (6) English version, that basic right is clearly provided and I quote;

"13 (1) all persons are equal before the laws and are entitled; without a discrimination, to protection and equality before the law

13 (6) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or any other remedy against the decision of the court or of the agency (emphasis mine)".

The fundamental right to be heard has been consistently stressed by our courts for instance the Court of Appeal in the case of **Sherally and another vs. Abdul Fazalboy**, Civil Application No. 33 of 2002 (unreported) stated;

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision 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."

Basing on the principles of natural justice, Article 13 (6) of the Constitution quoted above and case law, it goes without saying that, I am supposed to carefully ascertain whether the appellant was infringed of her right to be heard during hearing of her application for execution. As revealed by the DLHT's record, the appellant orally made the prayer before DLHT seeking leave to be represented by her daughter on the ground that she was sick.

Generally, a party in a legal proceeding may be represented by his advocate or his agent or his relative and notice to that effect is to be issued to the court as well as to the adverse party (See section 30 and section 46 of the Land Disputes' Act, Chapter 216, Revised Edition, 2019). In our case, the impugned proceedings were being held by the DLHT, thus, the provision of the law applicable is section 30 of Cap 216 (supra) and Regulation 13 of the District Land and Housing Tribunal Regulations, 2003, section 30 of the Act reads;

"30.Proceeding of the District Land and Housing Tribunal shall be held in public and a party to the proceedings may appear in person or by an advocate or any relative or any member of the household or authorized officer of a body corporate".

In the light of the above quoted provision of the law and what is revealed by the record, the appellant cannot be heard to have been deprived of her right to be heard since she personally and orally sought and obtained the leave of the tribunal to be represented by the said Juliana Marko, the appellant's own daughter whom she entrusted to represent her due to clear the reason of her sickness. This claim is therefore unfounded or rather it is found to be an afterthought. The first ground therefore lacks merit.

Coming to the **2nd ground**, from outset, I am not supposed to be curtailed by this ground of appeal simply because the court's finding in the 1st ground of the appellant's appeal also disposes of the second ground of appeal.

Nevertheless, I have considered the nature of the decision of the Ward Tribunal and observed that, the parties were directed to remain undisturbed with their respective parcels of land. Thus, if the respondent keeps on trespassing onto the appellant's piece of land that is an offence termed "criminal trespass" since the issue of ownership of the land by the appellant was finally determined and no appeal was preferred by the respondent.

It is also worth noting that, an order dismissing the application for execution bars any subsequent application if needs arises. Thus, in my view, the proper order that ought to have been made by the learned chairperson was an order striking out the said application. Exercising the power conferred to the court under section 43 of the Land Disputes Courts' Act, Cap 216 Revised Edition, 2019, here by quash the DLHT's Order dismissing the appellant's application and substitute it for an order striking out the application for execution.

In the light of the reasons given herein, the appellant's grounds of appeal are unmerited. The appeal is thus dismissed. However, the parties are directed to comply with the valid decision of the ward tribunal delivered on the 30th June 2015. In the event the respondent continues trespassing or causing any damages to the appellant's piece of land, the appellant is at liberty to re-file her application for execution or institute criminal proceedings against the respondent. Given the nature of the parties' relationship, I refrain from making an order as to cost of this appeal.

It is so ordered.



M. R. GWAE,

JUDGE

25/08/2022

Court: Right of appeal fully or any other remedy for an aggrieved party




M. R. GWAE,
JUDGE
25/08/2022