IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC.LAND REVISION No. 02 OF 2021

(*C/F Application No. 91 of 2019 Arusha District Land and Housing Tribunal*)

ELIA EDWARD MOLLEL .....APPLICANT

VERSUS

DAINESS JOHNSTONE MWANDWANI.....RESPONDENT

RULING

29th July & 16th September 2022

TIGANGA, J.

In this application, the applicant herein applied before this court for revision, and he also prayed for costs of this application and other reliefs this Honourable court deem fit to grant. The applicant moved this court under section 43(1), (a) and (2) of the Land Disputes Courts Act, [Cap. 216 R.E 2019] and any other enabling provisions of the law.

The background of this matter is that, in essence, parties had dispute over the ownership of land measured 238 square meters which is located at

mtaa wa Mwanama at Oloirien Ward within Arusha City which is bordered with the road at the north, Mama Charles at South, Benedictor Claud Msoffe at the East and Deus at the West with estimated value of TZS 30,000,000/=. The dispute was heard before the District Land and Housing Tribunal for Arusha, at Arusha where the respondent won the contest. The genesis of the dispute arises from the allegations that, both parties purchased the said land on two different dates with different sale agreements. The first sale agreement was concluded on 30th July 2018 and the second one on 20th December 2018. Both parties were actually sold the land by one Hellen Alphonce Haule, who was sued by the respondent as the 1st respondent before the trial tribunal. At the end of the trial, the trial tribunal found and decreed that;

i. The sale of the suit land by the 1st respondent to the 2nd respondent (the current applicant) is illegal

ii. The applicant (the current respondent) was declared as a lawful owner of the suit land.

ii. The 2nd respondent (the applicant herein) was ordered to provide vacant possession of the suit land and the same should be handed over to the applicant (the respondent herein)

iv. Both respondent who are (the applicant herein) and the vendor of the land were condemned to pay cost.

It is that finding which aggrieved the applicant herein who decided to move the court for revision. With leave of the Court and consent of the parties, the application was argued by way of written submissions. The Counsel for the applicant submitted that, the matter before the tribunal was heard ex parte before Honourable Mdachi and the judgment was in favour of the respondent. He further submitted that, on the 11th August 2020 the applicant filed an application to set aside an ex parte judgment which was admitted as Misc. Application No. 205 of 2020 and the same was assigned to Hon. F. Mdachi who determined the main suit.

The Counsel for the applicant further submitted that, before determination of an application to set aside an ex parte judgment, the respondent filed an application for execution in the same file No. 91 of 2020 in the name of Dainess Johnstone Mwandwani. The said application was filed in the same file of Application No. 91 of 2019 and it was assigned to a different Chairperson Hon. Kagaruki.

He further submitted that, the judgment and the decree were defective hence not capable of being executed in favour of Dainess Johnstone Mwandwani because whatever was done was nullity and ought to be nullified by this Honourable court. The basis of his argument being the fact that, the respondent was supposed to have made an application before the tribunal to rectify the anomalies and in any case, parties affected by the judgment and the decree were supposed to have been informed through summons by the tribunal to attend for such rectification.

He further submitted that the applicant has never been served with any summons to appear on the date of judgment or on a date fixed for the tribunal to rectify the defective judgment and the decree. He prayed this court to nullify the proceedings, the judgment and the decree therein and the purported execution for being illegal.

In response to the submission in chief, Counsel for the respondent replied that, the respondent filed the application for execution of the decree on the 17th August 2020, which was dully served to the applicant on 02nd September 2020 and the applicant was duly served with the summons, following that service, his counsel appeared and prayed to file the affidavit

in opposition of the application for execution, which he was ordered to file up to 08th October 2020, but he did not file it as ordered.

The matter was fixed again for mention on 18th November 2020 but nothing was filed to object the application. When the matter was scheduled for hearing on 28th January 2021, the applicant's Advocate filed a notice of absence before the tribunal that, he was not in good health condition, the ground which was found meritless by the tribunal, consequence of which the matter was heard ex parte and the execution order was made by the tribunal having satisfied itself that, there was no appeal as well as an order for stay of execution.

He further submitted that, the applicant ought to apply for the relief he sought before the High Court before the execution of the said decree. as the execution of the decree in question vitiated his right to either appeal or apply for revision. He cited regulation 25(1) of the GN No. 174 of 2003 to emphasize on his argument.

The Counsel for the respondent further submitted that, the execution order issued by the trial tribunal complied with the regulations governing execution of the decree before the tribunal and neither its judgment nor the

decree were defective as alleged by the applicant. He further submitted that, the execution order was issued on the 28th January 2021 and on the 29th January 2021 the applicant filed Misc. Application No. 42 of 2021 which in the view of the Counsel for the applicant found it to have been overtaken by events.

The said execution took place on the 26th February 2021 and the report was filed on the 01st March 2021. He further submitted that on the 04th October 2021 the applicant's application to set aside the ex parte judgment was also dismissed for being incompetent. He concluded the reply submission by praying before this court to dismiss this application for lack of merits.

In rejoinder submission, the applicant reiterated his submission in chief and he insists this court to consider his application. From the application and the submission made in support and against, one main issue which calls for determination, that is whether this application has merit.

Having passed through both parties' submissions, I have painstakingly figured out the grounds for revision presented by the applicant, what can be apparently deciphered in the applicant's grounds of revision is that, his claims

implies that he was not only denied the right to be heard but also, he alleges that the judgment and the decree of the tribunal were defective.

It is on record at page 2 paragraph 3 of the trial tribunal's judgment that, the applicant and his Advocate failed to enter appearance before the trial tribunal on the date when the application was fixed for the hearing. That default resulted into the ex parte hearing of the application. It is very unfortunate that, the applicant raises the ground that he was not informed of the matter and hence he was not heard. As earlier on stated, the applicant was accorded the right to be heard but he defaulted to enter appearance without reasonable excuse for such default. It is my considered view that, to be accorded the right to be heard is subject to responsibilities, failure by the applicant to enter appearance estopes him from complaining to be deprived of the right to be heard.

With regard to the fact that, the execution did not comply with the regulations, it is clear that an order for execution was issued on the 28th January 2021 and the applicant applied for the stay of execution vide Miscellaneous Application No. 42 of 2021 on the 29th January 2021. Impliedly, the application for stay of execution had already been overtaken by events, hence the applicant withdrew that application for stay of

execution on the 04th March 2021. Since the application for stay of execution had already been overtaken by events, it makes this ground fail too as since the applicant lacks justification to complain that, the execution had irregularities. His application for stay of execution was in contravention of **Regulation 25(1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations**, GN No. 174 of 2003, which provides as follows;

> *"Notwithstanding regulation 24 a judgement debtor who intends to appeal to the High court (Land Division) may at any time before the decree or order of the Tribunal executed, apply to the Tribunal for stay of execution."*

As earlier on stated, it was the applicant's own default to apply for stay of execution, while the execution order had already been issued by the trial tribunal. There is also no irregularity substantiated by the applicant before this court to convince the Court on the presence of faults in execution by the trial tribunal.

With regard to the fact that the tribunal's judgment and decree were defective, it is my view that, this allegation lacks specificity as it is too general hence this court find the applicant to have failed to substantiate the same

as he has not pointed out what makes him believe that the judgment and decree of the trial tribunal were defective. It is the rule of the thumb that, he who alleges must prove. This means the applicant who has alleged the defects in the judgment and decree and who under the rule referred to here in above was duty bound to prove, has actually failed to prove his allegations that the judgment and the decree of the trial tribunal are defective by pinpointing the alleged irregularities in both the judgment and decree. The fact that the respondent was not supposed to apply for execution also doesn't hold water since the applicant has not made it clear as to the reasons making him believe that the respondent had no judgment or decree in her favour worthy execution while the trial tribunal's judgment show that the respondent was the successful party. It should be noted that, **Regulation 23(1) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations**, GN No. 174 of 2003 provides that;

> *"The decree holder may, as soon as practicable after the pronouncement of the judgment or ruling, apply for the execution of the decree or order as the case may be."*

In line with the above position of the law, I am quite convinced that, the respondent applied for the execution of the decree under the ambit of

the law. He was therefore legally justified to move the court to execute the decree passed by the District Land and Housing Tribunal in her favour.

The fact that the parties were not summoned for the rectification of the anomalies in the judgment and decree, the applicant has not pinpointed the anomalies hence it is a mere argument with no legal and factual bases. Even the fact that the applicant applied for the setting aside of the exparte judgment by the tribunal the application which was struck out for being incompetent and the fact that the applicant did not have any further action in seeking for the relief, implies nothing but to have agreed with the decision.

As aforesaid, the application at hand is destitute of merit and the only blow it deserves is dismissal, hence it is hereby dismissed with costs.

It is accordingly ordered.

DATED at **ARUSHA** on the 16th day of September 2022.

J.C. TIGANGA

JUDGE.