IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. LAND APPLICATION No. 23 OF 2022

(Originating Land Application No. 236 of 2021 before the District Land and Housing Tribunal for Babati at Babati)

ABDI HASSAN GULLED .....1ST APPLICANT

AHMED HASSAN GULLED .....2ND APPLICANT

SARA ABDILAIH .....3RD APPLICANT

VERSUS

ISMAIL JAMA GULLED (As Administrator of the state of

Deceased one YUSUPH GURRE ISMAIL) .....RESPONDENT

RULING

19th July & 09th September 2022

TIGANGA, J,

In this application, the applicants moved this court under section 41 (1), 42, 43(1)(a)(b) and 51 of the Land Dispute Courts Act [Cap 216 R.E 2019], and

Order XXXVII rule 5 of the Civil Procedure Code [Cap 33 R.E 2019]. The application was made by chamber summons supported by an affidavit affirmed by Allawi Hassan who introduce himself as the Advocate who appeared and represented the applicants before the DLHT in Misc. Land Application No. 236 of 2021. In the chamber summons the Court is asked to;

(a) Set aside and or vary the order dated 13th of January 2022 delivered by H.E Mwihava Chairperson on Misc. Land Application No. 236 of 2021 due to irregularity, impropriety and illegality on such Order which was delivered at the District Land and Housing Tribunal for Babati.

(b) Any other relief this Honourable Court may deem fit and just to grant.

Save for few issues made in expounding the contents of the affidavits, to the great extent the submission made by the counsel were nothing but a reiteration of the contents of the affidavits. Therefore, for avoidance of unnecessary repetition, I will consider both, the affidavits and the

submissions filed by the parties, together. However, before endeavoring to discuss the merit of the application. I find it apposite to point out the background of the matter at hand albeit briefly. The background as can be deciphered from the record is that, the applicants and respondent herein were the respondent and applicants respectively in Misc. Land Application No. 236 of 2021 before the trial tribunal. In that application, the applicant, now the respondent herein, was applying for temporary injunction. When the applicants herein were served with Misc. Land Application No. 236 of 2021, they appeared through the legal representation of Mr. Alawi Hassan, learned counsel and informed the court that, they be given time to prepare because the application was defective, as both the chamber summons and affidavit do not seem to support each other. The basis of such contention is that, the chamber summons together with its certificate of urgency was filed on 30th November 2021 while the affidavit in support of the chamber summons was filed on 06th December 2021. In his view, these documents were not filed together, therefore they do not belong the same application. He also said that, the chamber summons described the land in dispute to be 5 acres, while the affidavit describes the land to be 6 acres.

From the record, the trial tribunal did not take that to be a preliminary objection, it proceeded to hear the application on merits and gave the decision thereby granting the temporary injunction, an order which is the subject of this revision.

In the affidavit filed in support of the application and the submissions made by the applicant, there was also a complaint that, the ruling in Misc. Land Application No. 236 of 2021 was prematurely delivered on the 13th January 2022 without first hearing and determining the preliminary objection raised by Mr. Alawi which was to be decided before concluding the application. It was also the complaint of the applicant that, in Misc. Land Application No. 236 of 2021 the main suit was mentioned to be Land Application No. 28 of 2012, the suit which had never existed. To make the matter worse the trial tribunal went further and wrongly stated at page 1 of the ruling that the applicants and respondent herein had land application No. 83 of 2019 which had already been determined while such application never existed as well, he said. The counsel also deposed and argued that, upon perusal of the impugned record which he did immediately after the pronouncement of the

temporary injunction order, he found neither the hand written nor typed interim order which was issued against the applicants herein.

In his arguments, it was until 02nd day of February 2022 when the applicants herein were availed with a copy of the ruling of Misc. Land Application No. 236 of 2021 which was stamped and dated on 13th January, 2022 while in fact it was not in the file on the date when the counsel for the applicant perused the record.

He said, the application for temporary injunction is governed by order XXXVIII rules 1 (a) and (b), 2 (1) (2)(3), 3 and 4. Such provisions provides for a mandatory requirement, which shall be adhered to first before granting an injunctive order. He submitted that, apart from statute, there are land mark cases which guide the court.

In support of his arguments, he cited and relied on the case of **Atilio vrs. Mbowe** (1969) HCD 254 in which Hon. Georges C J, (as then was), stated the principle which shall be adhered in granting an injunction. These criteria are that, there must be a serious question to be tried on the facts alleged and probability that the plaintiff will be entitled to success.

In the chamber application filed in Misc. Land Application No. 236 of 2021, before the trial tribunal there was no any serious question to be tried or a probability that the application would be granted. The second principle is that, the courts interference is necessary to protect the plaintiff from the kind of unfairness, which may be irreparable, before his legal right is established. He said, basing on the application in Misc. 236 of 2021 before the trial tribunal and its annexures, in his view, it did not disclose any necessity to protect the plaintiff from the kind of injury which may be irreparable before his legal right is stablished.

He submitted that, such piece of land has been owned or is under possession of the applicants herein since 1974, while the order for injunction was applied by the respondent herein in the year 2021. This means that, there was no irreparable loss which the respondent could suffer since that piece of land could never be owned or possessed by the respondent herein or by the deceased, Yusuph Gutre, whose estate the respondent is the Administrator.

Regarding to the third principle in the case of **Atilio vs Mbowe's** (supra) that, in granting an injunctive order, the Court should confirm that on the balance of convinience, there will be great hardship and mischief suffered by the plaintiff from withholding of the injunction than will be

suffered by the defendant from granting it. In his view, the court must be satisfied that, the damages which the plaintiff will suffer will be such that, mere monetary compensation will not be adequate. Summing up, he generally submitted that, the order of injunction issued on 13th January, 2022 did neither conform with the law nor the guidance under the case laws.

He submitted that, the order for temporary injunction is issued at direction of the court. In the case of **Ibrahim vs Ngaza** [1971] HCD, 249, it was held that, it is a question of discretion of the court which must be exercised judiciously after appreciating the facts and applying them to the principle governing issuance of temporary injunction.

Basing on that fact, it is his belief that, the order of injunction was fraudulently obtained because its ruling is full of errors and omission with total informalities or requirement of issuing it. He prayed this court to set aside or vary the order dated 13/01/2022, of the trial tribunal and give any other relief which the court may deem fit to grant. Also that, the court makes an order that, if there is any suit whether civil or criminal, which may emanate from such ruling dated 13/01/2022, the same be declared to be void and consequently extinguished.

The application was opposed by the respondent who filed the counter affidavit which was affirmed by the respondent. At the hearing of the application, Mr. Thadei Lister, while expounding the contents of the counter affidavit submitted that, his client was the applicant in Land Application No. 28 of 2021 and Misc. Land Application No. 236 of 2021 before the trial tribunal.

According to him, Misc. Land Application No. 236 of 2021 was filed under certificate of urgency which he filed on 30th November 2021, however, the chamber summons was signed by the Court clerk on 06th December 2021 while in fact the receiving stamp was affixed on 30th November 2021. He submitted that, the error of the date of signing the documents on the different date with that of when they were received, was not committed by the respondent but by the court.

He affirmed and submitted further that, there was no preliminary objection before the trial tribunal but what was done, on 08th December 2021 before hearing of Misc. Application No. 236 of 2021, was a discussion on some errors that the applicants' Advocates noticed and the Advocate of the

respondent informed the tribunal that, some were typing errors while other errors not caused by the respondent.

Further to that, he said the tribunal determined the concerns raised by the counsel for the applicant on 13th January 2022. He said, the number written 28 of 12 was erroneously written instead of 28 of 2021 and the same mistakes was repeated in the ruling, something which is normal in the legal practice which is curable by rectification that is why the respondent wrote a letter on 05th February, 2022 to the tribunal asking for rectification of the said typing errors.

Regarding the allegation that, there was no a hand written copy or the typed copy of the ruling in the case file when the counsel for the applicant perused the original case file, he said he has faith with the tribunal as the ruling which they were supplied has similar contents with that of one delivered by the tribunal on 13th January 2022. In his view, the allegation by the applicants' counsel is baseless. He submitted also that, the dispute in the main application is yet to be decided and that what was decided is a temporary injunction to stop the breach of peace.

Regarding the provision of section 43 (1) (a) and (b) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], he submitted under that provision, the powers of this court can be invoked when it appears that, there are error occasioning injustice. According to him, in this application, the whole submission talks of the irregularities in Misc. Land Application No. 236 of 2021 before the trial tribunal. The second point which is vivid is that, the applicant has not been satisfied by the decision of trial tribunal, and the way the complaints are crated it appears that, he has filed appeal in disguise. But, in law he was required to point out injustice caused to the applicants.

The other issue which he addressed is on the discrepancy on the size of the land in the chamber summons and affidavit. He submitted that, though he acknowledges the same but he is of the view that, that does not mean that, the affidavit does not support the chamber application. In his view, both documents are referring to Land Application No. 28 of 2021. According to him, this is not a ground for revision.

Lastly, the counsel addressed the submission on the trial court on non adherence to the principle in the case of **Atilio vrs Mbowe** (supra) and submitted that, reading between lines of the arguments, it is like the applicants are appealing on the merit of the decision. He submitted that, the

applicants being represented by the learned counsel are aware of the provision of the law, that the order is not appealable. He further submitted that the order of the tribunal, stopped both of them not to enter in the land in dispute but not the applicants alone.

Addressing the pointed out irregularities, he submitted that the said irregularities are appealable. That, section 45 of the Land Disputes Courts Act, (supra) appreciates that there may be errors or irregularities, and it is only when the said irregularities have in fact caused or occasioned the failure of justice, can be revised. According to him, the question that arises is how that decision has occasioned injustice to the applicants? In his view, the applicants have not proved that, there was any injustice to their side caused by the order. He prayed the application to be refused with costs.

In rejoinder submission made by the counsel for the applicants, he submitted that, the respondent has in essence agreed that, the there is a discrepancy of the size of the land in the chamber summons and the affidavit. One written six acres while the other one five acres. He also said in essence the date of receiving the documents was 30th November 2021 while the documents were presented for filing on 06th December 2021. Regarding as to whether there was an objection or not, he said the objection was raised orally and argued

orally, and the same was recorded in the court proceedings of Misc. Land Application 236 of 2021 but it was not determined by the court prior hearing of the application. He maintains that, there was no discussion of the raised point of the preliminary objection as alleged.

He insisted further that, the case No. 28 of 2021 has never existed and so is Land Case No. 83 of 2019. He referred to section 45 of the Land Disputes Courts Act, [Cap. 216 R.E 2019] that, no decision of the tribunal may be reversed on account of an error or omission unless that error or omission has occasioned the miscarriage of justice, in his view the decision he is challenging has caused great injustice to the applicants. In an insistence tone, he said when he perused the case file he found it was written, MSILIME, NA KAMA MTALIMA MGAWANE NAZAO NA ISMAIL JAMA GULLED, but later he was served with the typed copy of the ruling which was full of irregularities.

He lastly submitted that, the interim order caused the applicant great injustice, and since there was no breach of peace at the time when the interim injunction was purportedly granted and still there is no, then the

interim order be set aside and reversed because the proceedings are full of irregularities.

Regarding as to whether the applicants filed the PO or not, he said the PO was filed but it was not determined that is why he contend that the application was determined prematurely. He submitted further that, the application at hand is not an appeal as argued by the counsel for the respondent, it is an application to revise the order of the tribunal.

He also said that, the persons against whom the order was granted were on the suit land using it for subsistence. The order which stopped them from using it prejudiced them. He insisted that, the chamber summons and affidavit were filed on different dates and that was so done fraudulently. He, in the end submitted that the application be allowed as prayed.

That being the summary and historical background of the application, I find it apposite to start with the law upon the court has been moved. In short, this application has been filed under two laws, that is sections 41 (1), 42, 43(1)(a)(b) and 51 Land Disputes Courts Act (supra) and Order XXXVII, Rule 5 of Civil Procedure Code (supra).

Whereas section 41(1) provide this court with powers to receive and hear appeal and revision from the DLHT, section 42 provides for the power of this Court on Appeal, section 43(1)(a)(b) provides for the general powers of this court of supervision and revision, while section 51 deals with the issues of admissibility of evidence. Order XXXVII rule 5 of the Civil Procedure Code (supra) mandates this court to discharge or vary or set aside an order for injunction upon application by the party dissatisfied by the impugned order.

Now, looking at the phraseology of the application and the arguments advanced, I find that, the applicant mainly intended to invoke the revisional jurisdiction of this court. However, while arguing the application, the counsel submitted in respect of some issues as if he was appealing against the decision passed by the trial tribunal on injunctive order.

In this ruling, I will deal with the issues in the manners they were raised and argued by the parties. Starting with the first issue which is on what date the application was filed, it is true that, the documents themselves show that, they were received and stamped on 30th November 2021. The chairman signed the chamber summons on 30th November 2021 while the tribunal clerk signed it on 06th December, 2021. At the same time, the certificate of urgency was signed by the same clerk on 30th November 2021. The

respondent gave explanation that, all documents were filed on the same date which is on 30th November 2021. That, they were filed and received together and if there is any error on the place where the clerk signed, it is not the fault of the respondent. He submitted that, this issue was raised before the trial tribunal which was satisfied that the documents were filed on the same date that is 30th November, 2021, therefore, the issue of the filling date cannot be raised at this stage.

Now the issue is whether the variance of these dates on the documents signifies that the documents were filed on different dates and therefore were not supporting each other? It is evident that, the documents were filed before the trial tribunal, it is therefore the trial tribunal which is better placed to know that, the documents were filed together or not. It is fortunately that; the issue was raised before the trial tribunal. The tribunal proceeded to hear the matter. That means, by necessary implications it was satisfied that, the documents were filed together and the application was competent before it. However, looking at the points raised and argument in support of this issue, it should be noted that, what the applicant has raised is seeking to impeach the record of the tribunal.

It is a trite law that, court record being a serious document should not be lightly impeached as there is always a presumption that, court record presents accurately what happened. Allowing impeachment of court records on flimsy grounds as in the instant case, would lead to anarchy and disorderly in the administration of justice and ultimately prevent dispensation of justice. See **Halfan Sudi vrs Abieza Chichi**, [1998] TLR 527 at page 529 as relied upon by this Court in the case of **Nestory Ludovick vrs Melina Mahundi**, PC.Civil Appeal No. 95 of 2020.

In this application the grounds upon which the applicant wants this court to base in disqualifying the application are mere assumption that as the documents bears different dates, the same were not filed together and therefore filed in contravention of the provision of the application of the law which requires the application to be filed by the chamber summons supported by the affidavit. That said, I therefore find this point to have no merits. It therefore fails.

Moving to the second ground of complaint that, the trial court prematurely determined the application for temporary injunction and that, it was supposed to be decided after resolving the preliminary objection raised by the applicant. According to him, it is a mandatory requirement that where

the objection is raised, then it must be decided first before the main case or application. He relied Order VIII, rule 2, which provided to that effect.

The issue as to whether there was a preliminary objection raised or not, will not detain me. The record will tell the tale. Passing through the record, there is no formal notice of preliminary objection filed in court. What is vivid is that, on 08th December 2021 when the application was called for hearing, Mr. Hassan learned counsel for the applicant noted the dates difference in the certificate of urgency, affidavit and the chamber summons. He asked the tribunal to give him time so that he can peruse the documents. That prayer was responded to by Mr. Chami, counsel for the respondent who insisted that, the application was under certificate of urgency therefore the applicant therein be heard exparte. Following that insistence, the trial chairperson ordered that, the hearing proceeds as scheduled. Due to that, hearing of the application commenced where both counsel addressed the court. While the counsel for the applicant therein addressed the court on the importance of issuing the temporary injunction, the counsel for the respondent therein submitted that the application did not meet the threshold established in the case of **Atilio vs Mbowe** (supra). Therefore, he urged the court to refuse the application. Over and above that, he also raised the issue of disparity of

the dates of receiving the documents in court and the size of the suit land as mentioned in the chamber summons and in the affidavit respectively.

Looking at what transpired, it can then be concluded that, there was then no preliminary point of objection raised which would have been decided before the trial tribunal had decided the application for temporary injunction. I hold so because, a preliminary objection needs to meet a minimum threshold established in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** [1969] E.A 696 which requires that,

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is exercise of Judicial discretion."*

From the excerpt referred to herein above, it is evident that, there was no preliminary objection raised on 08th December 2021 to be determined first. Therefore, that grounds fall short of merits as it was merely a factual issue. It therefore fails.

The third ground is that, the injunction granted against respondent on 13/01/2021 was full of errors, omission, with total informalities. The counsel submitted that, it is a common knowledge that Misc. Applications must originate from the main suit. in his view, the order for injunction granted against the applicant herein originated from Land Application No. 28 of 2021, but nowhere in such ruling or order such mention of original application was cited.

To the contrary, at paragraph 1 and 2 the tribunal mentioned Land Application No. 28 of 2012 and Land Application No. 23 of 2016, the applications which neither existed nor had relevancy to the matter at hand. In his view, the trial tribunal misguided itself in granting an order for injunction without stating in ruling as to why such order shall be granted.

He said the application for temporary injunction is governed by Order XXXVIII rule 1 (a) and (b) Rule 2 (1) (2)(3), 3 and 4. That, such provisions provide for a mandatory requirement, to be established first before granting an injunctive order. He submitted that, apart from the statute, there is case law which guides the court.

He cited and relied on the case of **Atilio vrs. Mbowe** (1969) HCD 254 in which Hon. Georges CJ, (as then was), restated the principle which need to be adhered to in granting injunctive orders. The criteria are that, there must be a serious question to be tried on the facts alleged and probably that the plaintiff will be entitled to success. That, in the case before the trial tribunal there was no any serious question to be tried or probable that the application would be granted.

Having considered the submission by the counsel for parties in support and against the application I find in agreement that section 43(1)(b) empowers this court in the exercise of its revisional jurisdiction upon application or in its own motion if it has been proved that there has been an error material to the merit of the case involving injustice, revise and make a such decision or order as it may think. These powers are discretional. They are exercisable only after the court has been satisfied that error material to the merit of the case involving injustice. In this case therefore, the applicant has shown errors, but those errors are in my opinion, minor errors such as typing errors, or misquoting errors which in my view, have not been proved to be material to the merit of the application. It should also be noted that, looking at the application and the arguments by the learned counsel, they

are more of the appeal than the application for revision. I hold so because the applicant has narrated on how the court failed to apply the authority in the case of **Atilio vs Mbowe** (supra) the omission which resulted into him reaching to a wrong conclusion. In my view wrong or undesired conclusion is not the subject of revision, it is the subject of appeal.

It is also the law as provided under section 45 of the Land Dispute Courts Act (supra) that an error or omission of the sort complained of by the applicant committed by the Tribunal should not be the ground of reversal or alteration on appeal or revision unless that error or omission has in fact occasioned a failure of justice. This means, the applicant must prove by evidence that, the said order or omission has indeed or in fact occasioned failure of justice.

In this case, as part of that proof, the applicant submitted in the rejoinder that, he was prejudiced because he has been in use of the disputed land for subsistence since 1974. Therefore, stopping them from using the land has caused him suffering. Looking at the application, the order sought and the reasons given for its grant, the court said, it is for maintaining peace between the parties. The order was directed to both parties, and their agents. If injustice then it was not one sided, it was on both sides. That said, I find

that the applicants have actually failed to establish the ground upon which the order can be reversed and set aside.

That being the case, this ground and the sub grounds thereunder also fail for the reasons given. That said, the whole application is dismissed for want of merits.

It is accordingly ordered

DATED at **ARUSHA** this 09th day of September, 2022.

J.C. TIGANGA

JUDGE