

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

LAND CASE REVISION No. 2 OF 2022

*(Arising from the decision of the Land and Housing Tribunal of Babati District at
Babati Misc. Application No. 63 of 2022)*

PETRONILA OMARY..... APPLICANT

VERSUS

SHANI AGREY MDUMA.....RESPONDENT

RULING

18th October & 4th November, 2022

TIGANGA, J.

This is an application for revision filed by Petronila Omary, the applicant against Shani Agrey Mduma, the respondent. It seeks to revise the decision in Miscellaneous Land Application No. 63 of 2022 delivered by the District Land and Housing Tribunal of Babati at Babati herein referred to as "the tribunal".

In this application, the Court was moved under the provisions of Sections 41, 43(a), (b) and (2) of the Land Disputes Courts Act, [Revised Edition 2019]. It was made by the chamber application supported by the affidavit duly sworn by the applicant. Through the

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counter affidavit sworn by the respondent the application was contested hence, hearing on merit.

The application is hinged on reasons of correctness, legality and propriety of the proceedings and order made by the tribunal on its decision. Briefly, the background of the matter seats as follows: On 30th May, 2022 the tribunal issued an ex-parte order of eviction and vacant possession to the applicant. At her dismay, the applicant was served with the notice of eviction. It is apparent from the affidavit that, the injunctive and eviction order were given by the tribunal without being there the main application. This is vividly apparent through paragraph 4 of the applicant's affidavit and paragraph 4 of the counter affidavit.

While the respondent supports the position of giving injunctive and eviction order without first filing the main application as to the determination of the land ownership, the applicant vigorously disputes this move and mostly claims for denial of the right to be heard.

With leave of the court and consent of the parties, this application was heard by way of written submissions. Parties were represented by Advocates. Mr. Kuwengwa P.S. Ndonjekwa, learned Advocate who appeared for the applicant whereas Mr. Paschal Peter, learned counsel appeared for the respondent.



According to the submissions by the advocates, the points of divergence were three. First, that, issuing the injunctive and eviction orders without presence of the main application which intends to determine the ownership of the suit property/house and without summoning the applicant to attend and probably defend the application was contrary to the law, and actually violated the principle of the right to be heard which is among the principles of natural justice. Here, Mr. Ndonjekwa cited the cases of **Mabibo Beer Wines and Spirits Ltd versus Lucas Malya @ Baraka Stores and Another** (2009)¹ EA. He also relied on the persuasive authority from elsewhere in common wealth jurisdiction in the case of **General Medical Council versus Sparkman** (1943) AC 627 and the case of **Anisminic versus Foreign Competition Commission** (1996) 2 W.L.R. 163.

Further to that the counsel submitted that the application was incompetent because the provision of section 95 of the Civil Procedure Code [Cap 33 R.E 2019] the tribunal cannot issue an eviction order basing on that provision. In his view the provision invites the court to invoke its inherent powers which is normally invoked where there is no specific provision of the law providing for the relief sought. In his strong view, the order sought would have been accommodated under

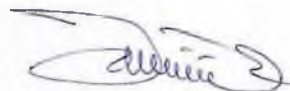


regulation 3(1) and (2)(A)(B)(C)(D)(E)(F) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations G.N No.174 of 2003. And that after receiving the application the tribunal could have been legally required to issue summons to the respondent in terms of Regulation 5 of the regulations. In his view, invoking section 95 in the circumstances of this case was totally a misconception.

Further arguing in support of the revision, he submitted that in the case of **Hasmani vs National Bank** (1937)4 E.A.C.A in which the court held that, the court's inherent powers should not be invoked where there is specific statutory provision which would meet the necessities of the case.

Further to that, he submitted that the Hon. Chairperson erred in applying Order XXXVII rules 1(a) and (4) of the CPC to order eviction of the applicant from the suit land. In his firm view, the applicant was of the opinion that, the whole procedure adopted by the tribunal was illegal and invites the court to base on the said illegalities and revise the decision.

Mr. Peter on this point said that, it was right for the tribunal to hear the application ex-parte owing to the reason that, there was no dispute of ownership of the said house because the applicant was only



the invitee thereat and she was asked to give vacant possession freely but she refused. In his view, the refusal of the applicant to vacate the house in which she was occupying as an invitee necessitated the respondent filing Misc. Land Application No. 63 of 2022 asking for mainly the eviction order which was granted by the tribunal. Following that order, the applicant was served with a 14 days' notice of eviction but still, she refused to vacate the house, therefore, calling for forceful eviction.

Regarding to the complaint that moving the tribunal under section 95 of the CPC was not proper, and that the proper law was regulation 3(1) and (2)(A)(B)(C)(D)(E)(F) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations G.N No.174 of 2003. He submitted that section 95 of the CPC is inherent powers of the court, therefore nothing can stop the court to use its inherent powers.

Regarding the third issue as to whether the tribunal was proper to apply Order XXXVII Rule 1(a) and (4) of the CPC to order eviction of the applicant from the suit land, he said it was proper as the applicant was a mere invitee who refused to vacate and there was no land dispute between the two parties. Therefore, the tribunal was proper when it



issued the eviction order on that base. At the end, he asked the court to dismiss the application for want of merits.

From the summary of the affidavits by the parties, and the submissions filed in support and against the application, it must be noted that, in the order given by the tribunal on 13th May, 2022 two orders were pronounced. **One**, injunctive order and **two**, eviction order. This is reflected at the first page of the impugned order which in Swahili version reads;

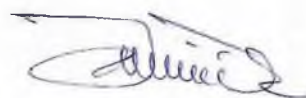
*Kwa sababu zote hizo na kwa kutumia mamlaka ya baraza hili yaliyotolewa kwenye amri ya XXXVII kanuni ya 1(a) na. 4 ya Sheria ya Mwenendo wa Mashauri ya Madai Sura ya 33 Mapitio ya Mwaka 2019. Naamuru Kwamba mjibu maombi au wakala wake au mtu yeyote aliyeko ndani ya nyumba kwa maelekezo yao au mmoja wao **wasifanye jambo lolote kwenye nyumba Na. 241 'G'** na aondoke kwenye nyumba Na. 241 Block 'G' kilichopo eneo la Katesh stand, Katesh mjini katika wilaya ya Hanang Mkoa wa Manyara. (Emphasis added)*

The plain interpretation of the order above can literally be that; the respondent before the tribunal were **stopped/injuncted from doing anything at the house No. 241 'G'** and that he **gives vacant possession of the same house No. 241 'G'**.

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Order XXXVII, rule (1)(a) of the Civil Procedure Code, [Cap. 33 R.E 2019] upon which the order was based, deals with temporary injunction only without mixing it with eviction or vacant possession. With the interpretation aid which is the marginal notes to the said statute, it provides the matter to be cases in which temporary injunction may be granted or declaratory order made. Therefore, issuing eviction or vacant possession order under this provision of the law was a misconception and misapplication of the provisions made by the tribunal, which resulted into issuing an order of eviction or vacant possession without requisite authority for being based on the inapplicable law, in the circumstances of the case.

Now, regarding the issuance of injunctive order, it has been several times without numbers ruled by the courts of record of this country that, injunctive order cannot be issued where there is no main application/suit filed in court and which is pending hearing and determination of the substantive reliefs for which the injunctive order is issued to prevent wastage of the subject matter or to maintain the *status quo*. One of these decisions is the case of **National Housing Corporation versus Peter Kassindi & 4 Others**, Civil Application No. 243 of 2016 (unreported) which had the following to say:

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*"It bears reflecting that a temporary injunction is an equitable relief for maintaining the status quo between the parties **pending hearing and determination of an action in court.**" (Emphasis added)*

Also see the case of **The Trustees of Sunni Muslim Jamaat (With Leave of the Attorney General and Minister for Justice) versus Sayed Mazar Kadir and 2 Others**, Civil Appeal No. 18 of 2002 (Unreported) where it was held that:

"All the orders which were being sought by the respondent ought to have been based on an existing suit. Indeed, Order XXXVII of the C. P. C. speaks for itself. There must be an existing suit before a temporary injunction and/or any interlocutory order could be lawfully granted by any Court. Furthermore, the other reliefs being sought by respondents could not be granted under Order XXXVII. All in all, we accept that the application was legally misconceived and the learned JK. erred in law in entertaining it and granting the reliefs sought therein."

Guided by the above authorities, it is clear that, the tribunal granting the order for injunction in the circumstances where there was no pending land application is in contravention of the principle of law and therefore, fatal. This contravention alone could not let the impugned

order remain intact. It is therefore the ground for necessitating revision of the order granted as its legality is in question.

The findings on these two issues merits to determine the application. The remaining grounds raised cannot change any thing even if they are found either in the affirmative or negative. For the foregoing reason, the orders of injunction and eviction cum vacant possession made by the tribunal were wrongly made for lack of legal foundation, therefore, calling for revision of this court. In the premises, the orders are hereby vacated for being issued without legal base. With the powers conferred upon me under the provisions of Section 43(b)(1) of the Land Disputes Courts Act, [Cap. 216 R.E 2019], I hereby grant the application basing on the reasons and findings herein above and consequently declare the two orders null and void. Since the fault was committed by the tribunal, each party to bear its own costs.

It is accordingly ordered.

DATED at ARUSHA this 04th day of November, 2022




J.C. TIGANGA

JUDGE