

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**CIVIL REVIEW NO.2 OF 2022**

*( Arising from Civil Appeal No.34 of 2021 in the High Court of the United Republic of Tanzania at Arusha.)*

**AMON PETRO AMON.....1<sup>ST</sup> APPLICANT**

**CHES COMPANY LTD.....2<sup>ND</sup> APPLICANT**

**Vs**

**NAKUHAJA MOSES MYOMBO.....1<sup>ST</sup> RESPONDENT**

**PETER JOSEPH CHACHA.....2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order:7-10-2022*

*Date of Ruling:25-11-2022*

**B.K.PHILLIP,J**

This Ruling is in respect of an application for review lodged by the applicant herein following the judgment of this Court in Civil Appeal No.34 of 2021.A brief background to this application is worthy it in order to appreciate the coming discussion.

In 2021, the respondents herein lodged a case at the Resident Magistrate's Court of Arusha at Arusha against the applicants herein vide Civil case No.22 of 2021. Thus, the respondents and applicants herein were plaintiffs and defendants respectively in the aforesaid Civil Case

No.22 of 2021.The respondents' prayers in the aforesaid Civil Case No.22 of 2021 were as follows;

- i) Payment of Tshs 200,000,000/= being specific damages.
- ii) An order for payment of general damages suffered by the plaintiff as a result of the 1<sup>st</sup> defendant's delay in settling the plaintiff's claims.
- iii) An order for the 1<sup>st</sup> defendant to pay interests at commercial rate on the decretal sum.
- iv) Costs of the suit.
- v) Any other relief as the Court may deem just to grant.

Upon being served with the plaint the advocate for the applicants (defendants in the main case) raised three points of preliminary objection, to wit;

- i) That the honourable trial Court had no jurisdiction to entertain and adjudicate the suit because it is a land dispute.
- ii) That the plaint did not disclose cause of action against the defendants.
- iii) That the suit was bad in law and embarrassing to the defendants for failure to follow the principles of pleadings.

The points of preliminary objections were heard inter-parties and at the end of the day the trial Court upheld the 1<sup>st</sup> point of preliminary objection. It rule out that the respondents' case was a land matter, thus the trial Court had no jurisdiction to entertain the case. It dismissed the case. Aggrieved by the Ruling of the trial Court, the respondents herein lodged

their appeal to challenge the dismissal of their case vide Civil Appeal No.34 of 2021. The appeal was heard by way of written submissions. In the judgment of this Court, the subject of this application, I made a finding that the dispute between the parties in the suit is not a land dispute. Thus, I allowed the appeal and ordered the case file to be remitted to the trial Court for continuation of the hearing. Aggrieved by the judgment of this Court, the applicants filed the instant application praying for review of the judgment of this Court in Civil Appeal No.34 of 2021. For ease of reference I have opted to reproduce the grounds for review hereunder verbatim.

- i) *That there was an error on the face of the record in failing to include in its judgment the respondents in the appeal written submission in defense which was filed before the Court on the 19<sup>th</sup> day of April 2022 just in time and in compliance with the schedules as ordered by the Court to the parties. Attached herewith as annexure AM-2 are copies of the respondent's written submission duly stamped at the Court registry and its accompanying receipt for proof of filing fees payment as required.*
- ii) *That the Honorable Court relied in its decision on an attached lease agreement without realizing that the said lease had expired way back in January 2020, long before the case was instituted and that there was no current lease agreement binding the parties to the tune of breaking a contract. The appellants were however forcefully still occupying the said premises until- to date and without paying rent under the guise of a case pending in Court.*

- iii) That due to the failure by the respondents in this application to pay rent or enter into new tenancy agreement , the 1<sup>st</sup> applicant in this application sought the services of the 2<sup>nd</sup> applicant with the intention of performing a legal eviction but upon receiving the eviction notice the respondents in this application rushed to court and filed a civil case No. 22 of 2021 before the Resident Magistrate Court of Arusha and still continued occupying the premises without paying rent at all.*
- iv) That the demised property had never been a commercial purposes property and that it was leased for residential purposes only. That there has not been any change of use whatsoever by the owner to warrant business transaction within the premises. The expired lease agreement is clear on this matter.*
- v) That there was an error in the face of the record when the Court failed to consider that since it had received a rejoinder from the respondent, it would trigger that the respondents in the appeal must have filled their written submission against which the appellants' rejoinder gained ground .This is tantamount to the applicants being denied the right to be heard for an oversight remote from them and thus, a denial of natural justice.*

- vi) *That after filing their case in Court , the respondents continued living within the disputed premises and without paying rent until to date. In a second effort to regain his premises again, the 1<sup>st</sup> applicant wrote a letter to the respondent demanding vacant possession of his premises and passed through the area ward office where they were summoned .However, the respondent after being summoned before the ward chairman ,they refused to vacate the premises because there is a case pending in Court over the same premises thus claiming interest on land. Attached herewith is annexure AM-4 is a copy of the hand written reply claiming interests in the premises.*
- vii) *That the honorable Court made its decision unaware that the appellants in the appeal are still occupying the same demised property attached to the land belonging to the 1<sup>st</sup> respondent in the appeal until to date and without paying rent thereby squaring the dispute on a land dispute whose interests attaches to a failed lease agreement relationship.*
- viii) *That it is trite law that the jurisdiction of a court be ascertained before entertaining any matter before it. The land Act No.4 Revised Edition 2019 under section 2 defines land to include buildings while section 167 (1) of the same Act and on land dispute resolution , vests exclusive jurisdiction to the Court of*

*Appeal, the High Court , the District Land and Housing tribunals, Ward Tribunals and the Village Land Councils to determine all matters of dispute and proceedings concerning land . The Act Supplement, Written Laws ( Miscellaneous Amendment) (No.3) Act 2021 puts new emphasis under section 45 (c) on how matters relating to land interests should be instituted . The matter in the appeal No. 34 of 2022 revolves around a leased property on land hence an interests in land matters.*

This application was heard viva voce. The learned advocate John Mbitu appeared for the applicants whereas the respondents appeared in person, unrepresented.

Mr. Mbitu argued the 1<sup>st</sup> and 5<sup>th</sup> ground conjointly. His submission was to the effect that this court erred in law to make a finding that the applicants did not file their reply to the respondents' submissions because they complied with the Court order and filed their reply submission as ordered by the Court. To cement his argument he referred this Court to annexures AM-2 collectively (copy of the ERV Receipt for payment of the court fees for filing the applicants' written submission and copy of applicants' written submission) and AM-3 (the Respondents' rejoinder to their submission in chief). He contended that the right to be heard is fundamental right and the applicants were denied their right to be heard because their written submission were not considered despite the fact that the same were filed in Court timely as ordered by the Court.

With regard to the 2<sup>nd</sup> ground Mr. Mbitu submitted that in deciding the appeal this Court relied on a lease agreement which had expired quite a long time ago. The respondents are still occupying the suit property without paying any rent and the lease agreement had already expired. He contended that since the respondents are in occupation of the suit property impliedly they are continuing to demand possessory rights of the suit property. He insisted that under the circumstances, the dispute between the parties is a land dispute. Mr. Mbitu went on submitting that part 9 of the Land Act provides that a party may seek reliefs in a Civil Court and according to the law the expression " matters concerning land " combines two different claims, that is ownership and possessory rights. To cement his arguments he cited the case of **Entertainment Masters Ltd Vs Serafina Ltd and Greenlighth Auction Mart , Land Case No. 110 of 2021** ( unreported).

Mr. Mbitu submitted for the 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> ground conjointly. His submission was to the effect that since the respondent failed to heed to the applicants' demand for vacant possession of the suit property, then the respondents' case that was filed by at the lower case is a land case. He contended that no eviction from the suit property was effected whatsoever which could result into claim for damages, thus, the claim for damages was untenable. He was of the view that since the respondents refused to pay rent then the dispute between the parties is a land case.

Moreover, Mr. Mbitu argued that the suit filed by the respondent at the lower Court was improper since section 107 of the Land Act provides for

the right to file an application not a suit, thus the trial Court had no jurisdiction to entertain the suit.

With regard to the 8<sup>th</sup> ground, Mr. Mbitu argued that Section 167 (1) of the Land Act confers exclusive jurisdiction to Land Courts for all matters concerning land disputes.

With regard to the 4<sup>th</sup> ground, Mr. Mbitu reiterated his submissions on other grounds. He insisted that the phrase "matters concerning land" means and includes matters related to possessory and ownership rights, and the existence of any of the two makes a matter a land case which has to be adjudicated by a land Court. He closed his submission by beseeching this Court to grant this application.

In rebuttal, the 1<sup>st</sup> respondent submitted that the Resident Magistrate's Court of Arusha has jurisdiction to determine the dispute between the parties. She was of strong view that the impugned decision is not erroneous. He prayed for the dismissal of this application with costs.

The 2<sup>nd</sup> respondent was in agreement with the 1<sup>st</sup> respondent. He argued that this Court cannot determine whether or not the eviction notice issued by the 2<sup>nd</sup> appellant was proper. He contended that the eviction notice was not signed by the 1<sup>st</sup> applicant and he is not claiming for the possessory right of the suit property but he is claiming damages caused by a fake eviction notice issued by the 2<sup>nd</sup> applicant herein. He prayed for the dismissal of this application.

In rejoinder, Mr. Mbitu reiterated his submission in chief.



Having analyzed the submission made by both sides, I think it is imperative to point to point out the characteristics of an application for review, to wit; One, An application for review is not an appeal though the way the grounds of review are supposed to be structured is similar to an appeal. They are supposed to be brief, precise to the point and should not contain arguments. The provision of order XLII Rule 3 of the Civil Procedure Code ("CPC") provides that the provisions as to the form of preferring appeal shall apply, *mutatis mutandis*, to an application for review. The form for preferring an appeal is provided in order Order XXXIX Rule 1(2) of the CPC. The same reads as follows;

*Order XXXIX Rule 1(2) " The Memorandum of appeal shall set forth, concisely and under distinct heads, ground of objection to the decree appealed from **without any argument or narrative**; and such grounds shall be numbered consecutively."*

( Emphasis is added)

Two, an application for review has to be preferred where there are new evidence or matters discovered after the impugned decision which were not available during the hearing of the case or where there are glaring irregularities on the face of the record. Order XLII Rule 1 (1) (a) (b) of the "CPC" provides as follows;

*Order XLII Rule 1 (1) " Any person considering himself aggrieved –*

- (a) By a decree or Order from which an appeal is allowed, but form which no appeal has been preferred ;or*
- (b) By a decree or Order from which no appeal is allowed ,*

*and who, from the discovery of new and important matter or evidence which , after the exercise of due diligence , was not which his knowledge or could not be produced by him at the time when the decree was passed or order made , or on account of some mistake or error apparent on the face of the record ,or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him , may apply for a review of judgment to the Court which passed the decree or made the order.”*

( Emphasis is added)

Now, looking at the grounds of review reproduced at the beginning of this Ruling, I have noted that with the exception of the 1<sup>st</sup> ground , the remaining grounds are not in the acceptable form since they are in a narrative form, not concise and contain arguments.

Without prejudice to my observation herein above and for the interests of justice I have decided consider the relevant arguments raised by Mr. Mbitu which seem to fall within the ambit provided by the law. To start with, as correctly submitted by Mr. Mbitu, I stated in the impugned decision that the appellants did not file their reply submissions because when I was composing the impugned judgment , neither reply submission from the applicants herein nor rejoinder submission from the respondent was in the Court file and up to date those documents are not in the Court file. It is very unfortunate that I am not in a position to say with certainty what happened in the filing of the applicants' written submission and the respondents' rejoinder. Thus, I was constrained to compose the judgment

basing on the applicants' submission only which was in the Court file. Now, I have perused the copies of the applicants' written submission and the respondents' rejoinder annexed to this application. The same indicates that they were duly received. Having seen the aforesaid submissions, my task is to go to consider and determine the arguments raised therein and finally make a finding on whether the impugned judgment should be remain as it is or be varied.

Upon perusing the submission filed by the applicants and the rejoinder made by the respondents herein, I have not found anything new which could move me to vacate the order I made in the impugned decision because the arguments raised in the aforementioned submission are similar to the ones which were relied upon by the trial Court in its Ruling, and I dealt with those arguments in the impugned decision. In his reply submission which was missing in the case file Mr. Mbitu referred this Court to the provisions of sections 2 and 167 of the Land Act, and section 2 and 3 of the Land Disputes Courts Act No.2 of 2002 which I dealt with in the impugned judgment. For clarity, let me reproduce hereunder the relevant part of the impugned decision. At page 5 -6 of the impugned decision I said the following;

*"...Looking at the facts alleged by the appellants in the plaint and the reliefs prayed therein, it is clear that the appellants claims are based on the tenancy agreement which they attached to the plaint. Their cause of action is breach of a tenancy agreement. The appellants are claiming for payment of Tshs 200,000,000/= being losses suffered after being evicted from the rented premises in question.*

*The provisions of section 3 of the Land Disputes Courts which was relied upon by the trial Magistrate Court in holding that it has no jurisdiction to entertain the appellants' case provides as follows;*

*"Section 3: Institution of land disputes*

- (1) Subject to section 167 of the Land Act Cap. 113, and section 62 of the Village Land Act Cap. 114, **every dispute or complaint concerning land** shall be instituted in the Court having jurisdiction to determine land disputes in a given area.*
- (2) The Courts of jurisdiction under subsection (1) include:*
  - (a) The Village Land Council;*
  - (b) The Ward Tribunal;*
  - (c) The District Land and Housing Tribunal;*
  - (d) The High Court (Land Division);*
  - (e) The Court of Appeal of Tanzania."*

*(Emphasis is added)*

*Now the pertinent question here is; are the appellants' claims "concerning land". In the case of **Charles Rick Mulaki Vs William Jackson Magero, Civil Appeal No.69 of 2017**, (unreported) Hon Maige J, as he then was, held as follows;*

*"...the expression "matters concerning land" would only cover*

*Proceedings for protection of ownership and or possessory rights in land"*

*I entirely associate myself with the above quoted holding of this Court as far as the interpretation of the expression "matters concerning land" is*

*concerned. In the instant case the appellants are neither claiming for protection of ownership and/ or possessory right of the rented premises . Their claims are basically based on losses incurred following the alleged breach of the tenancy agreement. I am of the settled view that the provisions of section 2 and 3 of the Land Dispute Courts are not applicable in the instant case..”*

From the foregoing, after taking into consideration the reply submission made by the applicants’ advocate my stance remains the same that respondents’ case is not a land case. I still hold that the interpretation and application facts of the case as per the plaint filed at the Resident Magistrate’s Court to the law I made is correct. I wish to reiterate what is said in the impugned judgment, that is in order to understand, whether the Court has jurisdiction or not two matters have to be looked upon One, you look at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see as to whether the Court has power to grant them and whether they correlate with the cause of action. [ see the case of **Exim Bank (T) Limited Vs Agro Impex (T) Ltd and others , Land Case Appeal No. 29 of 2008** (unreported)].

Moreover, I wish to point out that Mr. Mbitu’s arguments on the expiry of the lease agreement and lack of justification on the respondents’ claims for damages as well as his assertions that the respondents refused to pay rent and vacate from the suit premises are irrelevant in this application because firstly, the same were not included in his reply submission , secondly , those arguments goes to the merit of the respondents’ case, thus they cannot be dealt with by this Court in a

manner presented by Mr. Mbitu because evidence is need to prove his assertions. Thus , the same are supposed to be raised at the trial Court. In the upshot, it is the finding of this Court that this application lacks merit and it is hereby dismissed. Each party will bear its own costs.

Dated this 25<sup>th</sup> day of November 2022



A handwritten signature in blue ink, appearing to read "B.K. Phillip".

**B.K.PHILLIP**

**JUDGE.**

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