

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**MISCELLANEOUS LAND APPLICATION NO. 115 OF 2022**

*(Arising from Misc. Land Application No. 18 of 2014 of the District Land and Housing Tribunal for Mwanza at Mwanza dated 22/10/2021, by M. Mayeye,)*

**RAULENT BAGENI..... APPLICANT**

**VERSUS**

**RIGALIUS KAJETANI..... RESPONDENT**

**RULING**

*29<sup>th</sup> March & 2<sup>nd</sup> May, 2022*

**ITEMBA, J.**

This is an application for revision of a decision issued by the District Land and Housing Tribunal for Mwanza herein the DLHT. The dispute originates from Land Dispute No. 0138/2012 at Mkolani Ward Tribunal herein the Ward Tribunal, where the respondent complained about the applicant crossing the existing boundaries and erecting a building within his premises. The said Ward Tribunal issued a decision an order which will later be explained. The respondent applied for execution of the said order before the DLHT. Upon the said tribunal being satisfied that the applicant has not objected to such application, it confirmed the Ward Tribunal's order.

The applicant was aggrieved and filed this application under section 43 seeking for the following:

- 1. That, this Honourable court be pleased to call, revise and give directions in respect of the decision and orders made by the District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Application No. 18 of 2014 dated 22/10/2021.*
- 2. That, this Honourable court be pleased to set aside the execution order by the District Land and Housing in Misc. Application No. 18 of 2014.*
- 3. That, costs for this application be provide for.*
- 4. That, this Honourable court may be pleased to make any other order or orders as it may deem just and equitable to grant.*

In his affidavit the applicant states that the DLHT acted illegally as it included facts which were not pleaded and decided at Ward Tribunal and that his house has never been constructed in the respondent's plot as he had abide to the original boundaries. Secondly, he stated that he was not served with the application for execution. He came to know about the

application on 1/6/2021 after receiving summons to appear and on the same day the application was heard.

At the hearing the applicant fended for himself. He reiterated what was stated in his affidavit and he faulted the ward tribunal's decision to demolish his building as it is within the boundaries. He added that the disputed plot was once a squatter and it was later surveyed through "*Upimaji shirikishi*" which is corresponding a joint survey, and that he was supposed to be issued with a title deed thereafter.

The respondent was represented by Mr. Nasimire, learned advocate. The learned counsel objected the application. Having prayed for the counter affidavit of the respondent to be adopted, he submitted that before the DLHT, the applicant was summoned to state why execution should not proceed but he did not file a counter affidavit neither did he appear before the said Tribunal. That is why the DLHT allowed the application for execution. He stated further that the submissions by the applicant were to be presented before the DLHT through an affidavit and not at this High Court stage.

In the alternative, Mr. Nasimire raised a legal issue that the application is brought under section 43 of Cap 216, without specifying the proper subsection. He added that the applicant being a layman would be excused for such omission but the application being prepared by a lawyer, one Mr. Muhingo it should have been properly drafted. He stated that, ideally the correct section is 43(1)(b) thus the court was not properly moved.

In rejoinder, the applicant insisted on two issues that the decision by the tribunal was that every party was in his original boundaries and that he was not served with summons to appear before the District Land and Housing Tribunal.

This being the case, the issue is whether the application has merit.

I will start with determining the legal issue raised by the respondent as it dictates the jurisdiction of this court. As argued by the respondent's counsel, the court is moved through section 43 of Cap 216 instead of Section 43(1)(b) of the same Act. The respondent's counsel is justified, the application needs to be properly cited with correct subsections, however because the main section 43 is mentioned by the applicant and the missing sub section (1)(b) are traced within the same main section 43, I do not see

any injustice caused by the omission to either of the parties. The chamber summons indicates that the applicant is moving the court to exercise its supervisory and or revisional powers under section 43 of the Act. Being led by section 3A (1) of the Civil Procedure Code, Cap 33, R.E (2019) and considering the overriding objective of the said Act, I find this objection carries no weight. Thus, the court is properly moved to determine the application.

Moving to the grounds of application, the applicant is basically complaining against the decision of the District Land and Housing Tribunal being contravention of the law and that he was not given time to defend himself. It should be noted that this application emanates from the application for execution hence this court is limited only to execution and not the merit of the matter. In the persuasive Indian decision of **V. Ramswami Vs T.N.V.Kailash Theyar** reported in AIR 1951 S.C,189 (192), it was observed that,

*"the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation "*

It follows therefore this being a revision application emanating from an executing court, I will deal with only grounds which refer to the execution of the Ward Tribunal's orders and not the merit of the said decision. The rest of the complaints if any, were supposed to be filed before the District Land and Housing Tribunal as clearly stated by the counsel for the respondent.

I have taken note that the applicant did not file a counter affidavit before the DHLT; the implication is that; the applicant was not contesting the application on points of law.

In paragraph 6 of the applicant's affidavit the applicant states that:

*"There is no evidence that I was served with the application for execution and chose not to reply to it as I came to know about it on 01/06/2021 after receiving a summons to appear at the DLHT Mwanza on the same date (01/06/202) when the same was heard"*

While the respondent replied in paragraph 4 of the counter affidavit that:-

*"The applicant was duly served on 28<sup>th</sup> day of March 2021, with the notice to show cause why the decree should not be*

*executed against him and subsequently on the 13<sup>th</sup> day of April 2021 and the 2<sup>nd</sup> day of July 2021 as per Annexure RK-1 hereto but never entered appearance in response to the said notice"*

Having gone through the courts records it shows that the matter was scheduled for mention for the first time on 12.2.2014 where only the decree holder was present. The court recorded that

*"the judgment debtor acknowledge the service of summons on 2.2.2014"*

*"No stay of execution filed up to date".*

Thereafter, the matter was mentioned for 3 times and on 2.7.2014 the court decided to make its ruling after visiting *locus in quo*. All these times, the applicant (judgment debtor herein) was recorded absent. It is not known whether the visit to the *locus in quo* was done or not. It is also not apparent as to what happened between the year 2014 and 2021 which is about 7 years period since the last court order of ruling. Yet, on 19.4.2021, there was a change of a chairman and the DLHT ordered that: (1) Judgment debtor to be summoned, (2) Recall for the file from the ward tribunal (3) Mention on 1/6/2021.

It is not clear why would the file be recalled from the Ward tribunal while the matter was already at ruling stage. Leaving that aside, based on page 7 of the Ward Tribunal's proceedings, it appears that on 1.7.2021 the court ordered the applicant to be issued with copies of application, he was served on the same day and was ordered to reply the same by 15.7.2020. Therefore, contrary to what the applicant is alleging, he was present when this court order was issued and the matter was scheduled for hearing. On 17.9.2021 the matter was heard and it was decided that the application was granted as the applicant did not file a counter affidavit to object it.

Therefore, the DLHT proceedings do not support the applicant on the fact that he was not served with the application for execution.

Secondly, in paragraph 5 of the affidavit the applicant is complaining that the ruling issued by the DLHT contains facts which were not pleaded before the Ward Tribunal. As mentioned earlier, neither the DHLT nor the High Court can interfere with the merit of the ward tribunal's decision. I agree with the counsel for the respondent that the applicant was supposed to raise most of the complaints before the DLHT and not the High court.



Considering the applicant second complaint, it partly touched the execution itself. At the hearing, the applicant has explained that what was ordered to be executed by the DLHT is not what was decided by the Ward Tribunal. If I may refer to the decision by the ward tribunal dated 16<sup>th</sup> November 2012, it states as follows:

*"1. Baraza limechunguza kwa kina kutokana na maelezo ya pande zote mbili na vielelezo na kutembelea eneo la mgogoro kulingana na misingi ya sheria ya Ardhi Na. 4 na 5 za mwaka 1999.*

*(a) Kuhakikisha kuwa haki ya umiliki au utumiaji wa ardhi zinatambuliwa, zinaeleweka na zinalindwa na sheria kuzingatia ushuhuda wa mipaka ya asili. Kila mmoja kati ya mdai na mdaiwa wanatakiwa kuheshimu mipaka yao ya asili.*

*(b) Mdai na mdaiwa mnatakiwa kuondoa migogoro isiyokua ya lazima.*

*Endapo mmoja hajaridhika na uamuzi rufaa iko wazi kwa siku 45 kuanzia siku iliposomwa hukumu."*

Meanwhile the application for execution (form no. 3) the applicant states that;

*3."the decree/order made the following other awards (which are not monetary):*

***"traditional existed boundaries should be respected"***

*4. I apply for execution of the decree in the following mode/manner:*

***'The respondent to demolish any object that encroaches into the applicant's land in contravention of the traditional boundaries'***

Following this application for execution, the decision of the DLHT which was the executing court stated at page 2 of its decision that:

*"Hivyo basi kwa kuwa mshindwa Tuzo alikaidi kuleta kiapo kinzani (pingamizi) ni wazi kwamba hakuwa na nia ya kupinga maombi hayo kwa namna hiyo maombi ya mshinda Tuzo yamekubaliwa, Mshindwa Tuzo anapewa amri ya kuvunja nyumba aliyojenga ndani ya kiwanja cha Mshinda Tuzo haraka iwezekanavyo ia pande zote mbili wanatakiwa kuheshimu mipaka asili kama ilivyowekwa hapo awali.*

***Imeamriwa hivyo."***

In other words, the ward tribunal order was just for 'the traditional boundaries to be respected' the issue of demolishing part of the applicant's building was introduced by the respondent during execution. This was not right. As mentioned above in the same spirit of **V. Ramswami Vs T.N.V.Kailash Theyar** (*supra*) the execution court is supposed to interpret the decree and stick to the decision by the trial court and not otherwise.

Looking at the two orders (the Ward tribunal and the DLHT) as shown above, it is clear that the contents are different. The DLHT was supposed to

act according to the decision by the Ward Tribunal and not to add or alter its contents. And based on the deliberation above, there was nothing to execute before the DLHT.

Section 43 (1) (b) of the Land Disputes Court's Act, Cap 216 [R.E 2019]

(1) states that:

*"43. -(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-*

*(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.*

Consequently, the decision of the District Land and Housing Tribunal giving rise to this application for revision, cannot stand as it contains an error material to the merit of the case and it involves injustice. Therefore, under section 43(1)(b) of Cap 216, I hereby nullify the proceedings and set aside the ruling issued by the DLHT in Misc. Land Application No. 18/2014 on

22.11.2021. To be precise, the decision by the Ward Tribunal remains undisturbed.

Every party should bear its own costs.

It is so ordered.

DATED at Mwanza this 2<sup>nd</sup> day of May, 2022



**L. J. ITEMBA  
JUDGE  
02.5.2022**

Ruling delivered at Mwanza this 2<sup>nd</sup> day of May, 2022, in the absence of the applicant, in presence of the respondent in person and Ms. M. Mhina, RMA.



**L. J. ITEMBA  
JUDGE  
02.5.2022**