IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

LAND REVISION NO. 03 OF 2020

(Originating from the decision of the District Land and Housing Tribunal for Rukwa District at Sumbawanga in Land Application No. 2 of 2013)

SIMON PETER KIMITI .....APPLICANT

VERSUS

1. JOSEPH BALTAZAR KAMEKA
2. ALFRED MANYIKA .....**RESPONDENTS**
3. PAUL J KIMITI
4. GEORGE SING'OMBE

RULING

Date of Last Order: 04/ 11/ 2021
Date of Ruling: 19/ 01/ 2022

NDUNGURU, J

This land revision application by the applicant, Simon Peter Kimiti is brought under **section 41, 43 (1) (b) of the Land Disputes Courts Act, Cap 216 RE 2019.**

The application is supported by the affidavit sworn by the applicant Mr. Simon Peter Kimiti.

The applicant prays for this court to call, inspect, revise and set aside the Judgement and its subsequent orders of the District Land and Housing Tribunal for Rukwa in application No. 02 of 2013 dated

18/12/2014 so as to satisfy itself as to the material errors, legality, propriety, rationality, logical and correctness, of the proceedings, judgement and respective orders.

In opposing the application, the 1st respondent, Joseph Baltazar Kameka through his learned advocate one Erick Nyato filed a counter affidavit sworn by himself.

Before making my mind on the submissions made by the parties, I believe a brief resume of facts on this matter is worth making. It is in record that, the 1st respondent Joseph Baltazar Kameka herein instituted suit against Alfred Manyika, Paulo J Kimiti and George Sing'ombe, 2nd ,3rd and 4th respondents respectively in application No. 02 of 2013. The suit was in respect of the Plot No. 260 Block U Katandala Area in Sumbawanga Municipality where 1st respondent claimed to be the lawful owner of the plot which also he asserted that 2nd, 3rd and 4th respondents trespassed therein in different times and started constructing building without legal justification. After hearing of the application, the 2nd, 3rd and 4th respondents were declared trespassers to the plot and thus be evicted from the plot and their buildings therein also be demolished. The 1st respondent also be paid Tshs. 15,000,000/= as general damages.

When the 1st respondent was in the process of executing orders emanating from Land Application No. 02 of 2013 in respect of a title

deed No. 260 Block U (LD), it was discovered that the attachment/execution does not cover only the land of 2nd, 3rd and 4th respondents but also the land occupied by the applicant herein who was not a party to the proceedings at the District Land and Housing Tribunal for Rukwa. Likewise Municipal Council of Sumbawanga who allocated the said plot to the applicant was not joined as a necessary party to the proceedings.

The applicant was not happy with the attachment of his plot by 1st respondent in executing orders granted by DLHT for Rukwa, hence this application for land revision.

When the matter came for hearing before this court, Mr Deogratius Sanga learned advocate who represented the applicant also holding brief for Mr Erick Nyato for the 1st respondent. Mr Sanga prayed to argue the application by way of written submissions whereas the prayer was granted. Each party filed their respective submission as scheduled by the court.

In support of the application Mr. Mathias Budodi, learned advocate submitted that record and proceedings of the impugned decision (land application No. 02 of 2013 of the DLHT for Rukwa) the applicant was not a party to the suit. The applicant interest has been affected by the orders emanated from impugned judgement as shown in the applicant affidavit as well the counter affidavit of the 1st respondent.

Mr Budodi submitted that the applicant has preferred this revision as the only remedy available to a person who was not a party as per the authority of **Arcopar (O.M) S.A versus Herbert Marwa and Family & 3 Others**, Civil Application No. 94 of 2013 CAT DSM.

Mr Budodi adopted the content of his chamber summons and the accompanying affidavit sworn by the applicant.

It was the submission of Mr Budodi that the applicant was not joined in the trial court proceedings (in application No. 02 of 2013) as a result he was not summoned before the trial tribunal. However, he argued that execution of the above decree turned to involve the applicant's piece of land which the applicant has exhaustively developed. The same being allocated by the responsible land authorities as per the letter of offer dated 25.07. 2016.

Further, Mr Budodi argued that under para 8 of the applicant's affidavit, the applicant contended that it was in the process of execution when the first respondent discovered that the land which the decree should be executed includes the applicant land. That fact was not disputed under para 9 of the first respondent counter affidavit which noted the said applicant facts and admitted further the reason why the respondent did not join the applicant in the trial court's proceedings.

It was his further argument that under **Order I Rule 6** of the Civil Procedure Code, 1966, Cap 33 RE 2019 it was the duty of a person who sues to identify all possible defendants more so necessary parties whose rights are likely to be affected by the decision of the case. He stated that the first respondent did not bother to join the applicant who was necessary party in the trial tribunal proceedings together with Sumbawanga Municipal Council and or the Commissioner for land which allocated the land in dispute to the applicant which the first respondent claims to be the rightful owner.

Mr Budodi underscored that it is a settled principle that failure to join necessary parties vitiated the whole proceedings as per the case of **Juma B. Kadala versus Laurent Mnkande [1983] TLR 103**. He stressed that the remedy is to strike out the suit which has been decided by the trial court without joining the necessary parties (he also referenced the case of **Peter Richard versus Masau Bujungu**, Land Appeal No. 10 of 2020 HC at Sumabawanga at pg 5). He pointed out that the rationale behind the principle is that there cannot be an effective decree where necessary parties are not party to the proceedings. He added that any decision arrived at in violation of the principle of natural justice (audi alteram partem) specific right to be heard is a nullity and should be nullified.

Responding other issue, Mr Budodi submitted that the counsel for the first respondent Mr. Erick Nyato is an admitted advocate also that the counsel for the first respondent was the witness (PW1) and prosecutor of the case at the trial. It is a cardinal principle that an advocate cannot be a witness and the advocate of the same case, the fact vitiated the whole proceedings of the trial court.

In addressing another issue, Mr Budodi submitted that the proceedings suggests that the prosecutor of the matter at the trial court was under the power of attorney. The purported power of attorney did not pass the test as set as per the case of **Parina A. A. Jeffers & Another versus Abdulrasul Ahmed Jaffers & 2 Others** [1996] TLR 110 in terms of reasons for accepting a power of attorney. He was of the contention that neither the facts stated in the power of attorney, nor the evidence in record suggested that the first respondent was either sick, of utmost old age or he was outside the country which make his procurement to the court to be impossible. He pointed out that the purported power of attorney was never registered as required under section 8 (1) (a) (b) of the Registration of Document Act, 1965, Cap 117 RE 2019 for it to be enforceable in law. He referenced the case of **Rayah Salum Mohamed versus the Registered Trustees of Masjid Sheikh Alban**, Civil Application No. 340/18 of 2019 CA at DSM. He was of the view that the purported power of attorney was invalid as

there was no a legal power of attorney, hence he had no *locus stand* in the trial court's proceedings.

Lastly, Mr Budodi submitted that the opinion of assessors was not properly and legally accommodated in reaching to the findings of the trial tribunal in the impugned judgement. He stated that in the present case opinion are not reflected in the proceedings but merely appears in the judgement. The remedy is to nullify the entire proceedings, quash the judgement and set aside the decree as per the Court of Appeal case of **Sikuzani Saidi Magambo & Another versus Mohamed Roble**, Civil Appeal No. 197 of 2018 CA at Dodoma.

Finally, Mr Budodi prayed for the court to allow the application for revision with costs.

In reply, Mr Erick Nyato, learned advocate for the first respondent submitted that it was assertion of the first respondent that the applicant was not joined as a party to the proceedings in the trial tribunal because during the institution of the suit the applicant was unknown as to whether he was among of the trespasser of the first respondent land. He submitted that the applicant emerged during ongoing execution process; the time when he started to build his residential premise within the first respondent property that is plot number 260 Block U (LD)

Katandala Area Sumbawanga Municipal within Rukwa which to date has not been subdivided.

Mr Nyato contended that the purported allocation of the applicant by land authorities within the first respondent land was illegal because the first respondent land to date is not divided.

He argued that **Order 1 Rule 9** of the Civil Procedure Code, Cap 33 RE 2019 precludes the suit to be defeated by reason of non-joinder or mis-joinder of parties. He stated that Order 1 Rule 6 of the Code does not provide mandatorily but leaves an option to choose parties to sue. The first respondent decided to call land officer as a witness in the trial tribunal. The applicant encroachment in plot number 260 Block U (LD) Katandala Area Sumbawanga Municipal which is the property of first respondent was unknown hence the authorities cited by the applicant are irrelevant.

It his assertion that as admitted advocate, he is not restrained to represent the first respondent. He was admitted in the roll of advocate in a year 2014 and the suit before the trial tribunal was filed on 19th of April 2013 with the registered power of attorney with reference No. RD/OPT/13/4/66 dated 9-4-2013. At that time, he submitted that he was not registered advocate that is why he was prosecution witness (PW1) in the trial tribunal. However, during execution stage he was

already admitted as an advocate. He got instructions from the first respondent where he acted as advocate.

As regards the opinion of assessors, he submitted that were prepared, ready to the parties and was considered during the composing of the trial tribunal judgement. He was the position that since the judgement of the trial tribunal was delivered on 2014 then trial tribunal cannot be bound by the case of **Sikuzani Said Magambo & Another versus Mohamed Roble**, Civil Appeal No. 197/2018 which was delivered on 2018.

He finally prayed for the court to uphold the judgement of the trial tribunal and dismiss the application with costs.

In rejoinder, Mr Mathias Budodi submitted that the first respondent conceded to the fact that the applicant was not joined as a party to the trial court proceedings. The argument that at the time of institution of the suit the first respondent did not know the applicant's land was involved in the dispute until during execution process is an excuse that does not save the miscarriage of justice.

As regards subdivision, it was his submission that the matter attracts fresh suit which shall afford each party a chance to prove legality of acquisition of title.

Responding further Mr Budodi reiterated what he has submitted as regards non-joinder of necessary party, however he added that a suit cannot be dismissed by the trial court only for the non-joinder of necessary party.

He finally insisted that Mr. Eric Nyato was both a councel and witness as per the records of the trial tribunal.

I have considered the submissions by the parties, pleadings and the law. Let me address first the issue of non-joinder of necessary party, whether or not there was a necessary party. Then, what is the legal effect of determining the suit without a necessary party. The same if is determined affirmatively will be capable of disposing of the entire revision without addressing other raised issue.

It is very clear that the question of joinder of parties may arise either with respect to plaintiff or defendants. Particularly, the joinder of plaintiff is regulated by **Rule 1 of Order 1** of the Civil Procedure Code, Cap 33 RE 2019 according to which all persons may join in one suit as plaintiffs in whom the right to relief alleged to exist in each plaintiff arises out of the same act or transaction; and the case is such of a character that, if such person brought separate suits, any common question of law or fact would arise. On the other hand, under Rule 3 of Order 1, all persons may be joined as a defendant against whom any

right to relief which is alleged to exist against them arises out of the same act of transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise.

As regards necessary party our law recognizes its existence to a suit before the court and the importance of joining him where he is not joined. It gives powers to the court to join such necessary party. The provisions of **Order 1 rule 10 (2)** and **Order 1 rule 9** of the Civil Procedure Code.

In the case of **Abdullatif Mohamed Hamis versus Mehboob Yusuf Osman and Fatna Mohamed**, Civil Revision No. 6 of 2017 Court of Appeal defined as follows;

> *".....a necessary party is one whose presence is indispensable to the constitution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as*

whether or not, in the absence of the party, an executable decree may be passed."

In the instant case, as per the applicant affidavit and evidence on records there is no denial that the applicant was not a party to the trial tribunal proceedings in Application No. 02 of 2013 and he was not aware of such application to the tribunal, except during the execution process as he pleaded in paragraphs 7,8 and 9 of affidavit, thus could not get a chance to appeal against it.

It is a settled principle that where a party was not a party in the proceedings before the Court, and he has interest in the suit property, and he cannot appeal, his only remedy is to come to the Court above by way of revision. See the case of **Arcopar (O.M) S.A versus Harbert Marwa and Family Investments Co. Ltd, Simon Decker, Attorney General and Badar Seif Sood** (supra).

Since, as I have just remarked, the applicant was not a party to the trial tribunal proceedings, the fact not disputed by the first respondent herein in his counter affidavit, the same to the Land Allocating Authority not joined as necessary parties in the suit, thus were condemned unheard and in the circumstance, therefore no effective decree could be passed in their absence. In my consideration this is serious procedural irregularity that may occasion injustice to the

applicant. The tribunal erred in law for failure to afford the applicant and the respective land allocation authority right to be heard.

It is trite law that a party must be afforded with a right to be heard failure to afford a hearing before any decision affect the rights of any person. In the case of **Tan Gas Distributor Ltd vs Mohamed Salim Said**, Civil Application for Revision No. 68 of 2011, the Court of Appeal held thus;

> *"No decision must be made by any court of justice/body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*

The consequences of a breach of the principle renders the proceedings and decisions and /orders made therein a nullity even if the same decision would have been reached had the party been heard as it was held in the case of **Abbas Sherally and Another vs Abdul S/H.M Fazalboy**, Civil Application No. 33 of 2002, unreported. Therefore, I am in accord with the learned advocate for the applicant that failure to accord the applicant and land allocating authority chance to be heard in a circumstance where a decree passed affects their rights was a breach of natural justice and a violation of fundamental right to

be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

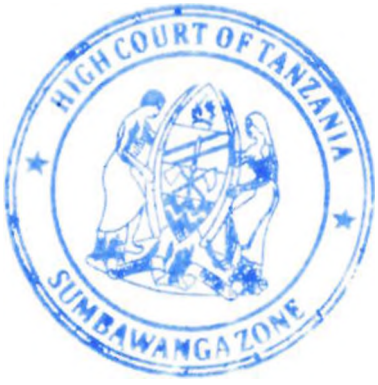
In view of the above, the only viable option for the applicant is to move the court by way of application for revision as it was done in this case. As it is now a settled law in our jurisdiction that a party to proceedings cannot invoke the revisionary jurisdiction unless it was shown that the appellate process has been blocked by judicial process. See the case of **Halais pro- Chemie Industries Ltd vs. Wello A. G** [1996] TLR 269, **Chama cha Walimu Tanzania vs. The Attorney General** E.A.LR [2008] E. A 57.

In this case, the applicant's advocate did avail to this court reasons for this application for revision as averred by the applicant in his affidavit. That the applicant was denied a right to be heard at the trial tribunal proceedings and that he could not have appealed against the decision issued in application No. 02 of 2013 as he was not aware of the application. That the decree passed if executed is going to affect the right of the applicant as he has exhaustively developed the plot allocated by the land authority.

In view of the foregoing reasons, I find there is considerable merit in the application by the applicant and in my view no other remedy available other than to grant the revision as I hereby do.

This Court further order that the trial tribunal proceedings and orders in application No. 02 of 2013 issued by the District Land and Housing Tribunal for Rukwa are hereby quashed and set aside. A party with any claim is at liberty to start afresh at the trial tribunal. No order as to costs.

It is so ordered.



D. B. Ndunguru

JUDGE

19.01.2022