

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

LAND REVISION NO. 04 OF 2020

(C/F Misc. Application No. 219 of 2021 and Misc Application No. 205 of 2020 at the District Land and Housing Tribunal for Babati at Babati)

FERDINAND GILGO LULU..... APPLICANT

VERSUS

MAGRETA BASSO.....RESPONDENT

RULING

20th & 27 May, 2022

TIGANGA, J.

In this ruling, the applicant Ferdinand Gilgo Lulu, moved this court under Section 43 (1) (a) (b) and (2) of the Land Disputes Courts Act [Cap 216 R.E. 2019] asking for this court to call for the records in Misc. Land Application No. 205 of 2020, before the District Land and Housing Tribunal for Manyara at Babati so as to satisfy itself as to the legality, correctness and procedure propriety of the same and revise them accordingly. He also asked for any other relief which this Honourable Court may deem fit and just to grant.

Before going far in this ruling, I find it apposite to point out the existing relationship between the parties. Though the applicant has not revealed in the application but the record which he asked this court to call

and revise reveals that, the respondent is a mother of the applicant, that means the applicant is a son of the respondent.

Now back to the merits of the application. It was preferred through the chamber summons, which was supported by the affidavit sworn and filed by the applicant. These two documents were drawn by Richard Evance Manyota, Advocate who seemingly was engaged for drawing only.

The reasons and grounds for the application according to the deposed facts, in the affidavit which also forms substantive party of the arguments made in support of the application are that; the current Respondent Magreth Basso filed Land Application No. 63 of 2018 before the District Land and Housing Tribunal of Babati at Babati, claiming a suit premises from the current applicant who in those proceedings was the respondent. When the case was pending but after seemingly one witness had testified, the current respondent Magreth Basso filed Misc. Application No. 205 of 2020 asking for the Tribunal to grant a temporary injunction order restraining the respondent, his agents, servants, workmen or any other person acting under his order, from using, disposing or in any way dealing with the suit land pending hearing and determination of the main case, which is Land Application No. 63 of 2018. She also asked for costs and any other relief which the Tribunal shall deem just and fit to grant

Due to the urgent nature of the application, the trial tribunal chairperson, heard the same *ex parte*, by hearing the counsel for the applicant in that application and granted a temporary interim order pending hearing and determination of the application *inter partes*.

However, after full hearing of the application *inter partes*, the tribunal struck out the said application after the tribunal had been satisfied that the Advocate for the applicant in that application, Mr. Martin Kilobwa, acted as both a witness and an Advocate in the same case consequent of which, he had his affidavit filed in support of the application expunged from the record leaving the application unsupported by affidavit. That means the first temporary order which in my opinion was equal to an order maintaining status quo, died naturally, and became inoperative following the struck out of the main application for temporary injunction. That was on 18/08/2021.

The records show that few months later, that is on 18/11/2021 the current applicant, who was the respondent in the main suit, that is land Application No. 63 of 2018, filed under certificate of urgency, Misc. Land Application No. 219 of 2021. Just like Misc. Land Application No. 205 of 2020, he was also asking for an order for temporary injunction to restrain the current respondent from using, disposing and dealing with the suit

land pending determination of the main suit, that is, Land Application No. 63 of 2018.

In the application he deposed that, the respondent herein was to be stopped because even after Misc. Application No. 205 of 2020 was struck out, still between 06/11/2021 and 14/11/2021 she forcefully trespassed into the land in dispute and cultivated it without lawful permission.

In that application, the respondent was restrained from using the land, while the applicant was allowed to use the land temporarily pending the hearing and determination of the main suit, that is Land Application No. 63 of 2018. The decision was delivered on 27/01/2022.

On 09/02/2022, one Abdallah Kilobwa, Advocate of Duncan Joel Oola & Co. Advocates, wrote a letter of complaint which he addressed to the Hon. Chairman of the District Land and Housing Tribunal of Babati, complaining that after the order of the Tribunal dated 27/01/2022, the current applicant entered in the suit land and grazed his cattle therein and destroyed the crops which the respondent had planted before the order dated 27/01/2022. In that letter, the Advocate asked the tribunal to deal with their complaint by doing the followings: -

- (i) Making an order that the respondent be allowed to take care of the crops which was on the land and harvesting (sic) them as intended
- (ii) That the order be made as immediately as possible to prevent the applicant from further destroying the crops.
- (iii) That the applicant herein be stopped to proceed destroying the crops which are in the farm.
- (iv) That the tribunal should give any other order as it deems fit to protect the interest of both parties.

Following that complaint letter, the tribunal summoned the parties and heard them on the alleged complaint. After hearing them the Tribunal, made the following order, which for easy reference I hereby reproduce;

"Kufuatia malalamiko ya mjibu maombi haya Na. 219/2021 ambayo yaliwasilishwa kwa njia ya barua ya tarehe 09/02/2022 naelekeza yafuatayo;-

Nimewasikiliza Wakili Kilobwa wa mjibu maombi lakini na mleta maombi hayo. Wote hawana ubishi kwamba uamuzi wa mleta maombi ulikuwa ni kwa faida ya mleta maombi (in favour of) Ni kweli hata mjibu maombi anakiri hana ubishi na maamuzi yaliyotolewa tarehe 27/01/2022, kwamba, mleta maombi aendelee kutunza mazao ambayo wote wamekubaliana kwamba

yamepandwa na mjibu maombi. Na kwamba, alitumie shamba kwa kilimo tu apate chakula mpaka shauri la msingi litakapoamuliwa.

Mjibu maombi anasema mleta maombi anachunga mifugo kwenye mazao ya mjibu maombi. Kama jambo hilo linafanyika ni kinyume na maelekezo ya Baraza.

Kwa kuwa mleta maombi pia anakiri kwamba mazao yaliyopo shambani yamepandwa na mjibu maombi. Baraza linaamuru kwamba mjibu maombi aendeleo na kutunza mazao aliyoyapanda shambani, na mleta maombi asimzuie mjibu maombi kutunza mazao hayo. Inaamuriwa zaidi kwamba, mjibu maombi hapaswi kupanda mazao mengine akishavuna yaliyopo. Amri hii ni nyongeza katika uamuzi ulitolewa tarehe 27/01/2022.

Sgd: H.E. Mwihava

16/02/2022"

Basically, the application at hand seeks this court to satisfy itself as to the legality, correctness and procedural propriety of the order of the Tribunal dated 16/02/2022. Although the applicant asked the court to examine two applications which were decided before the Tribunal, in essence the order which triggered the complaint is the one dated 16/02/2022 as the order which was given in Misc. Land Application No. 205/2020 was made in favour of the applicant herein therefore had there been a person to complain, that person would have been the respondent herein, who did not actually complain.

Therefore, my revision will confine itself on the order dated 16/02/2022. It should be noted that the gist of complaint upon which the application at hand is based is paragraph 5 of the affidavit filed in support of the application at hand. The main complaint is that, the applicant was not afforded an opportunity to be heard or to make a reply to the letter filed by the counsel for the respondent herein before the original order dated 27/01/2022.

The court was asked to examine the legality, correctness and propriety of that order dated 16/02/2022. Under section 43 (1) (a) (b) and (2) of the Land Disputes Courts Act [Cap 216 R.E. 2019], the court has such powers to do what it has been asked to do. It should also be noted that, after filing this application, the applicant was ordered to serve the respondent. However, he came with a document to be served with an endorsement of the hamlet chairperson dated 08/05/2022, with his official stamp that the respondent was not found at her home. Following unavailability of the respondent to receive, this court ordered the application to be heard *exparte*.

When called upon to argue the application, the applicant submitted at length giving the history of the dispute. Most of the submissions he made were not part of the content of the affidavit, as they contained a

story of how the misdeed by the respondent was done and were being reported to police and how the police were dealing with them. They also raised a complaint that, during the time when this application was pending before this court, the respondent and her agent, harvested all the crops from the farm. According to him, he wrote an administrative letter to this court asking this court to intervene but his letter was not attended. Therefore, since the crops have already been harvested, he asked the court to order that all his crops which were harvested by the respondent to be returned to him. He also asked the court to make an order that, the crops which are still in another farm measuring 12 acres which also in dispute, should not be harvested by the respondent.

That marks the historical background and the arguments advanced by the applicant. Now in this application the court has been called upon to satisfy itself as to the legality, correctness and procedural propriety of the order given by the tribunal in Misc. Land Application No. 219 of 2021. As I have already pointed out, under the provision upon which this court has been moved, the court has supervisory powers to call and revise if it find that the order or proceedings was illegal, incorrect, irregular or unprocedural.

I have passed through the proceedings from which the order complained of resulted. I am satisfied that proceedings and the order suffers illegality. I hold so because, the order dated 27/01/2022 was as a result of Misc. Land Case Application No. 219 of 2021. The order was given after the court had heard both parties. That order held to the effect that, from the pleadings of Land Application No. 63 of 2018 and in the application No. 205/2020 which was struck out, it was the respondent who moved the motion that the applicant should be stopped from using the suit land. On that base the tribunal concluded that, it was the applicant who was using the land. To be precise on what the tribunal held in its conclusion, it held that: -

"... kwa ushahidi huo basi ninaamini mleta maombi (i.e. Misc Land Application No. 219/2021) ndiye anayetumia. Hii ndiyo sababu, mama yake, mjibu maombi alifungua shauri kumshitaki. Mleta maombi namruhusu alitumie shamba la mgogoro kwa kilimo ili aweze kupata chakula na mahitaji ya watoto wake. Shughuli za kilimo zitafanyika kwa kipindi au mpaka shauri la msingi lisikilizwe na kutolewa hukumu. Ni kwa sababu hizo maombi haya nimeyakubali na gharama zitatazamwa kwenye shauri la msingi."
[Emphasized added].

Looking at this order, it literally allowed the applicant to use the suit land for farming pending hearing and determination of the main suit, that is Land Application No. 63 of 2018. Any other order contrary to this one was supposed to be given by the same Tribunal after being moved by way of review. It should also be noted that, when the application No. 219/2021 was heard it was heard in the presence of the Advocate who was representing the respondent. The records are clear that, the Advocate did not raise any claim that the respondent had crops on the suit land which she was to harvest first before the applicant takes over the land. This means, it was not correct for the tribunal to be moved by an administrative complaint letter and overturn its previous orders. Therefore, the first illegality is the moving the tribunal by a letter instead of a formal application for review.

The second irregularity is that, even if we assume for the sake of argument that it was correct to move the tribunal via an administrative letter, still, even in dealing with the said letter, the records do not show that the applicant was given opportunity to be heard when the order was made. This is notwithstanding the fact that, looking at the phraseology of the impugned order, one would think that there was a discussion before

the order was made. However, the record does not display that, neither does it show that the applicant was asked even to comment on a letter.

It is a cardinal principle that courts or tribunals must base on the evidence or arguments which are on record to reach to its decision. That is to say, the proceedings must be vivid, showing that a party against whom the decision was made was heard. In the case of **Mbeya Rukwa – Auto parts & Transport Ltd vs Jestina G. Mwakyoma, Civil Appeal No. 45/2000 Court of Appeal of Tanzania, at Mbeya.**

It was held *inter alia* that;

*"it is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard, "**audi alteram partem**".*

The Court went further and held that; -

"In this country, natural justice is not merely a principle of common law, it has become a fundamental constitutional right. Article 13 (6) (a) include the right to be heard amongst the attributes of equality before the law. We hold that the decision reached without regard to the principle of Natural justice and or contravention of the Constitution is void ab initio."

In this case, there is no record proving that the applicant was heard before the complaint presented by the respondent's counsel in the letter dated on 09/02/2022 was acted upon and the order dated 16/02/2022 was made. Therefore, in terms of the decision of **Mbeya Rukwa Auto parts & Transport Ltd vs Jestina G. Mwakyoma (supra)**, the decision passed on 16/02/2022 is illegal to the extent explained. It is thus quashed, and set aside basing on the reasons given. The application is therefore granted to the extent explained hereinabove, and the order dated 17/01/2022 is hereby upheld.

Now, regarding the prayer that the crops which were harvested by the respondent be returned to the applicant. I find myself unable to make such an order. I hold so because, that order can only be granted after a party asking for it has proved, first, that there were such crops, second, that the same were harvested by the opponent party against whom the decision is sought to be made, and thirdly, the value of the said crops. All these can be proved by the evidence, which this court had no opportunity to be availed with.

That said, I desist to deliberate on the prayers for such an order for the reasons given. Now having so held, I advise the applicant to proceed taking legal action against the respondent before the competent court or

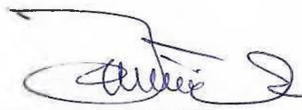
tribunal where he will prove the alleged claim. The prayer regarding the harvested crops has been refused not only on that base, but also on the fact that, it was not prayed in the chamber summons and these facts were deposed to in the affidavit filed in support of the application.

That said, the application is granted to the extent explained above.

It is so ordered.

DATED at **ARUSHA**, this 27th day of May 2022.




J.C. TIGANGA
JUDGE