IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND REVISION NO. 4 OF 2023

(Arising from Land Appeal Case No. 24 of 2022 in the High Court of Tanzania at Musoma, Misc. Land Application No. 1079 of 2020 originating from Land Application No. 52 of 2018 and Misc. Land Application No. 172 of 2020 in DLHT – Musoma, Land Appeal No. 98 of 2018 in the Court of Tanzania at Mwanza and Land Appeal No. 18 of 2019 with extended Jurisdiction of the Resident Magistrate Court of Mwanza at Mwanza)

SALOME MKULU ..... APPLICANT

VERSUS

SEKA VILLAGE COUNCIL..... 1ST RESPONDENT

SUBIA GENERAL SUPPLIES LTD..... ..... 2nd RESPONDENT

RULING

13th & 20th June, 2023

M. L. KOMBA, J.:

On 14/11/2018 the Chairman of District Land and Housing Tribunal for Mara at Musoma (the DLHT) via Application No. 52 of 2018 declared the applicant as a lawful owner of the disputed land and issued a decree to that effect. Applicant sued **the respondent (Seka Village Government)** and other four people who encroached her piece of land. Following that decree the applicant filed application for execution No. 172 of 2020 at the same DLHT

where Hon. Chairperson declined to entertain objection raised by the 1st respondent herein on account that the DLHT is *functus officio* to vacate its previous order and that on 03/03/2021 it ordered the 1st respondent (judgment debtor) to surrender vacant possession over the suit land.

Dissatisfied by the said decision, **Seka village Government** appealed to High Court via Land appeal No. 32 of 2021, appeal which, on 23/07/2021 was dismissed for want of prosecution. Tirelessly, by the name of **Seka village Council** the 1st respondent filed application No. 1079 of 2021 to the same DLHT moving the DLHT to nullify its own judgment and award in Application No. 52 of 2018 and requesting the tribunal to suspend execution proceedings and decree awarded in application No. 172 of 2020. This time the 1st respondent succeeded and the applicant was aggrieved by that decision hence this revision. Applicant herein is prayed this court to examine the proceedings of the DLHT over Application No. 1079 of 2021 dated 11 March, 2022 originating from land application No. 52 of 2018 and revise the same when deem fit.

When the application was called on for hearing the applicant was represented by Mr. Emmanuel Gervas, an advocate while Mr. Nathaniel Mude learned State Attorney represented the 1st respondent.

Mr. Gervas prayed this court to adopt affidavit of the applicant, Salome Mkulu and submitted that the reasons for revision are found at paragraph 11 of the affidavit that;

i. That, the trial tribunal erred in law and fact for failure to determine that the 1st respondent failed to join the third necessary party which is Seka Village Government in the Misc. Land Application No. 1079/2021 of the objection proceedings.
ii. That, the trial tribunal erred in law and facts determine the issue concerned the third party who is Seka Village Government without joined as necessary party.
iii. That, the trial tribunal erred in law and fact for failure to determine that the objection proceedings of the 1st respondent is the afterthought application which intended injustice to the appellant who sued Seka Village Government as it was represented by the same advocate who never disputed that Seka Village Government has no locus stand to sue or being sued.
iv. That, the trial chairman erred in law and fact for being an advocate of the third necessary party Seka Village Government who was not a party of the case.

v. That, the trial chairman erred in law and fact quashing the Judgment and order of the Land Application No. 52/2018 and Misc. Land Application No. 172/2020 in sua motto and violate the principle of functus officio without inviting parties to address him.

In making the ball roll, Mr. Gervas joined first and second reason for revision and submitted that the DLHT errored by failure to recognize that Seka Village Government was not joined and failed to appear as the issue discussed by the DLHT in application No. 1079 of 2021 concerned the Seka village Government. He explained that in the main suit which is application No. 52 of 2018 applicant herein was the applicant and sued five people including the Seka village Government and the applicant was declared a lawful owner of the disputed land. Following that declaration, the 1st respondent was ordered vacant possession. Seka village Council via appeal No. 98 of 2019 appealed to High court and the matter was dismissed.

He further submitted that the applicant filed execution proceedings No. 72 of 2020 and the prayer was granted. Before execution, the 1st respondent filed a fresh application No. 1079 of 2021 challenging execution order claiming that the Seka village Government has no mandate to be sued and form party of the suit except Seka village Council and prayed the DLHT to

vacate its judgement and orders originating from Application No. 52 of 2018, the prayer was granted. Mr. Gervas submitted that application No. 1079 of 2021 was illegal and unproperly filed as it was new suit and does not find its root from application No.52 of 2018 and application No. 172 of 2020 because the mentioned application concerned five (5) respondents but the application No. 1079 of 2021 other parties were not joined while issues discussed concerned parties who were not in court.

The counsel for applicant while arguing for the third reason he said the objection proceedings via application No. 1079 of 2021 was afterthought because Seka village Government replied WSD, appeared in court and appealed (appeal no. 32 of 2021) by the name of Seka Village council and never objected the same. It was his submission that Seka Village Council and Seka village Government is one and the same thing as Seka Village council was attending in court defending the suit without objection being represented by the same advocate.

Further, he lamented over the authority relied by the Hon. Chairman while vacating its order in the main suit, the case **of Serikali ya Kijiji cha Bugoji na Zephania Mahindi,** Land Appeal No. 91 of 2020 HC Musoma which was decided in 2020 while the main suit was filed and decided in the year 2018.

He submitted that the case is distinguishable as in the case at hand the Seka village Council appeared in court and defend on behalf of the Seka Village Government and the appeal was filed by the Seka village Council on behalf of Seka Village Government.

It was his submission that for the objection proceedings to succeed the objector must be a third party and that objector must prove that he has interest over the property. He explained that the objector in Application No. 1079 of 2021 was party to proceedings as he filed WSD and the property was not in his possession and pray this court to find technicality on the side of 1st respondent and accept the application.

On the fourth reason he submitted that Hon. Chairman turned to be an advocate of the Seka village Government when he writes in the judgment that Seka Village Government is not recognized under the law while the Seka village Government was not in court, he was asking where does these words come from if not that the Chairman turned to be an advocate of the non-joined party who was not heard in the said application. Mr. Gervas in the last reason submitted that Hon. Chairman did not observe the principle of *functus officio* when he nullifies the decision of his own tribunal in Application No. 1079. He said decision over application No. 52 of 2018 was supposed to be

revised by the higher tribunal and for this matter is the High Court. He submitted further that Hon. Chairman nullified even his own decision in application No. 172 of 2020. He was of the position that the process of objecting the decision which was erroneously arrived was supposed to be by way of revision to High Court. He finalized his submission by referring this court to the case of **TTCL Ltd and Another vs. the Telecom** (2006) Vol 1 EA 393 that Court orders must be respected. He prayed for revision so that this court can pronounce another position.

In his side Mr. Mude addressed each reason for revision separately. On the first reason he submitted that there is nothing called Seka Village Government and that the authority in the case of **Kijiji cha Bujogi** (supra) explain who was supposed to be sued and it was not possible to join a party who was not in existence and therefore there was no irregularity.

He further submitted that order XXI Rule 57 allow a third party to bring his complain in court and that, application No. 1079 of 2021 was filed by Seka village council as a third party to case No. 52 of 2018. On the interchange of names between the village Government and village Council Mr. Mude relied on the case of **Kijiji cha Bujogi** (supra) that the attachment was not right as Section 8 of Village Act, Cap 114 [R. E. 2019] specify the owner of land

in the village. Moreover, it was his submission that section 26 of the Local Government (District Authorities) Act, Cap 287 (Cap 287) when village is established by its name has capacity to sue and be sued and it was the duty of the applicant to know who to sue as a result the award has been directed to non-existing Institution.

On the fourth issue the counsel for the respondent submitted that there are two different institution which is Seka village Council and Seka Village Government and that, the decision in application No. 1079 of 2021 was correct and that the names which appeared in WSD and the appeal are human error and this court should focus on decree which is addressed to non-existing institution. He explained further that objection was the proper procedure because the 1st respondent was not party to a suit which Application No. 52 of 2018 then the right channel was objection as they have interest over the disputed land.

On the last reason of revision about the capacity of the Chairman to nullify its own decision he submitted that the chairman was right and the decision in Application No. 1079 of 2021 was correct and resisted the principle of *functus officio* as the counsel for the applicant did not cite any provision of law which restrict chairman to nullify decision of its own tribunal and

therefore, he said, this reason has no leg to stand. The cited case of **TTCL Ltd and Another vs. the Telecom** (supra) he said is distinguishable as it does not relate to the case at hand. He prayed this application be dismissed with costs and applicant be directed to file a fresh suit as there was no land dispute against the 1st respondent.

During rejoinder Mr. Gervas submitted that according to Interpretation of Laws Act, Cap 1 the decision in **Kijiji cha Bujogi** shall not affect already existing case, nevertheless, Seka village Government exists and was represented by State Attorney. He further refers to paragraph 7 of applicant affidavit that Seka village Government appealed (32 of 2021) against the decision and the dismissal order is still pending as it was not set aside. It was his submission that Seka village Council and Seka Village Government appeared in case in various circumstances using this name interchangeably and if at all the 1st respondent was lawful objector, why then she objected against only one person while the case involved many parties and the decree was addressed to many parties. He was firm that counsel for the 1st respondent did not submit a certificate of incorporation to prove that Seka Village Government has no mandate over the village land but Seka village

Council and that Hon. Chairman of the DLHT was *functus officio* as elaborated in decision of application no. 172 of 2020.

I am subjected to the contending arguments of the trained minds for both parties to proper scrutiny. While applicant claim there is irregularity in whole process at DLHT, the respondent presents that everything was in order. In determining this application, I will analyze reasons for revision as presented by the counsel of the applicant who combine the first and the second and the rest will be dealt individually.

Starting with the third reason that the objection proceeding No. 1079 of 2021 was afterthought as the 1st respondent was sued as Seka village Government and during hearing she defended as Seka village Council and that applicant claim the names to be used interchangeably, therefore, it is one institution. Respondent claimed that section 8 of Cap 114 specifies the owner of the village land and section 26 of Cap 287 is to the effect that the established village has a capacity to sue and to be sued. For easy of reference I recite the relevant provision hereunder;

> *8.-(1) The village council shall, subject to the provisions of this Act, be responsible for the management of all village land.*

Cap 287 provides that;

S. 25. There shall be a village council for every village in accordance with the provisions of this Act.

S. 26 (1) As soon as may be practicable after the election of the first village council following the registration of a village, the Registrar shall furnish to the village council a certificate of incorporation in the prescribed form, and also a copy of that certificate to the appropriate Director.

(2) Upon the issue of a certificate of incorporation in relation to a village, ***the village council of the village in question shall, with effect from the date of that certificate****, be a body corporate, and shall–*

(a) have perpetual succession and an official seal;

(b) in its corporate name be capable of suing or being sued;

(c) subject to this Act, be capable of holding and purchasing, or acquiring in any other way, and disposing of any movable or immovable property.

While noting the above position of the law, counsel for the 1st respondent did not submitted certificate of incorporation to prove that Seka Village Council was registered and has power to be sued. Moreover, as seen from the record that as Seka village Government and Seka Village Council was used interchangeably in this dispute, Mr. Mude in his submission pray this court to find that was human error. With due respect am not ready to buy

that idea, rather I use section 123 of the Evidence Act, Cap 6 R. E. 2019 which introduces the doctrine of estoppel;

> *'123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.'*

From the above section, the fact that 1st respondent appeared in court on behalf of Seka village Government and 07/05/2018 filed WSD on application No. 52 of 2018 defending the application against Seka village Government and that 1st respondent filed an appeal No. 32 of 2021 over the same application, this court finds that the 1st respondent is estopped from claiming that these are two different Institution. I find the decree over application No. 52 of 2021 was corrected issued and that application No. 1079 of 2021 was afterthough.

I will now combine reason number 1, 2 and 4 on non-joinder of necessary part and Hon. Chairman position in application No. 1079 of 2021. It is trite law that in any application following main suit, applicant may maintain

parties who has rights arising from series of acts as provided under Order I rule 3 of the Civil Procedure Act, Cap 33 R. E. 2022 thus;

> *3. All persons may be joined as defendants against whom any right to relief in respect of or* ***arising out of the same act or transaction or series of acts or transactions is alleged to exist,*** *whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise.*
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> *9. A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and* ***the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.***

From the above rules of Oder I, all persons are allowed to be joined in a suit, for this matter, an application. The word used is 'may' that means is not mandatory but if the party opt not to join a party, then a court is barred to deal with a matter which is not before it. In the case at hand, Hon. Chairman pronounced that Seka village Government is not recognized by law and therefore it in non-existence. The Seka village Government, who is the 1st respondent appeared in court and defended the suit to the finality and lost. That means the Institution is in existence that's why it was represented in

tribunal. Later on Hon. Chairman as submitted by the counsel for the applicant became an advocate of the party who was not in court. Order I rule 9 direct that a court should deal with the matter regarding the rights and **interests of parties actually before it.** Seka Village Government was not in court but its affairs were discussed and decided in his absence. If it does not exist how then it make appearance and defend the main application. This is irregularity which must not be left in court record.

Lastly, applicant claimed that the DLHT was *functus officio* to deal with a matter which previous was decided by it. The council for the respondent was of the position that there is no provision of law that was supplied by the counsel for the applicant to boost his argument. The doctrine of *functus officio* is a common law doctrine which is clear that once a court determines a matter to its finality, it is barred to issue a second decision and in case the party is dissatisfied he is required to file a revision or appeal in the higher court. This is common law doctrine is adopted in our legal regime and precedented in series of decisions.

The court of Appeal of Tanzania in the case of **Mohamed Enterprises (T) Limited vs. Asoud Mohamed Nasser,** Civil Application No. 33 of 2012 held that:-

*'Once judgment and decree are issued by a given court, judges (or magistrates) of that court become **'functus officio'** in so far as that matter is concerned. Should a new fact arise which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court.'*

Applying the above holding by the Court of Appeal of Tanzania means, District Land and Housing Tribunal for Musoma became *functus officio* in so far as application No. 52 of 2018 and application No. 172 of 2020 was concerned, therefore, no other Chairman was competent to handle the subsequent application. The only option open to the 1st respondent herein was to follow proper procedure to challenge the said execution. He did not do so, instead he filed application in the same tribunal and before the same Chairman Hon. Kitunguli, E. whom previous declared himself to be *functus officio* on 03/03/2021 when moved to determine the issues of *locus standi* of the 1st respondent in Application for execution No. 172 at the 3rd page of the ruling.

The procedure adopted by Hon. Kitunguli, Chairman of the District Land and Housing Tribunal for Musoma in Application No. 1079 of 2021 therefore, is detested. See **Misozi Mganga (Administratrix of The Estate of The**

Late Mganga Lugoda) vs. Muya Sekondo (admistrator of The Estate of The Sekondo Lugoda) and 2 Others (Land Revision 19 of 2022) [2023] TZHCLandD 16441 (5 May 2023) and **Patricia Simeto vs. CCM Tawi la Muungano,** Misc. Land Appeal No. 119 of 2021 (unreported).

Nevertheless, having found that the whole procedure of entertaining the 1st respondent's complaints was un-procedural, I proceed to nullify the District Land and Housing Tribunal for Musoma proceedings in application No. 1079 of 2021, dated 11/03/2022, I quash the Ruling and Orders emanated from nullified proceedings and set aside the orders attached thereto.

It is so ordered.

DATED at MUSOMA this 20th day of June 2023.

M. L. KOMBA

Judge

Judgement delivered in chamber in the presence of Mr. Emmanuel Gervas counsel for the applicant and Mr. Nathaniel Mude, the State Attorney who represented the 1st respondent.

M. L. KOMBA

Judge

20/06/2023