

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

MISC. LAND APPLICATION NO. 58 OF 2022

(Originating from Misc. Land Application No.38 of 2021 before Maswa District Land and Housing Tribunal, the same originating from Land Application No. 02 of 2020 before Maswa District Land and Housing Tribunal)

NYABISHI LUHENDE.....APPLICANT

(Administrator of the estates of the late **Holo Shuga**)

VERSUS

SHEGE GASHILI.....1ST RESPONDENT

JISENA BUNDALA.....2ND RESPONDENT

KWILASA NHANDI.....3RD RESPONDENT

RULING

14th April & 16th June 2023

MASSAM, J:

Before me it's a contentious application, whereby the applicant pressed his application for revision and examine the order in Misc. Land Application No. 38 of 2021, which ordered him to vacate from the suit land. The applicant was aggrieved with such decision hence preferred this application for revision.

The brief facts of the case are that the applicant herein filed Land Application No.02 of 2020 against the Respondents before the District Land and Housing Tribunal for Maswa at Maswa where the matter was decided on merit and the suit land was declared as follows; Nhandi Shuga was given 66 acres, Kasilili Shuga was given 66 acres, Holo Shuga was given 66 acres and the remaining 2 acres were reserved for burial activities.

The respondents filed Misc. Land application No.38 of 2021, being an application for execution of the decree in Land Application No.02 of 2020. According to the applicant became aware with such application and orders when the Court Broker came to evict him from the suit land. Believing that he was not given the right to be heard and thus the proceedings for execution was procured by fraud and mistake he preferred the instant application for revision before this Court.

The application was supported by the applicant affidavit whom his major complaints are to the effect that, there was fraudulently in procuring execution order for eviction and he was not aware with the application for execution which was determined by the tribunal. He also averred that, there was mistake and irregularities which were made by the tribunal when delivering the order for execution. He pointed some of

irregularities to the effect that the order for execution was not clear and not limited. He said during the trial of the main suit (Land Application No.2 of 2020), the tribunal allocated to him about 66 acres of piece of land, but the execution order generalized the whole land including that allocated to him by the tribunal. He also averred that the respondents were not decree holders and therefore have no locus stand to apply for execution as they were not decreed to be ownership of the remained suit land.

The application for revision was heard inter parties, where Mr. Pharles Malengo learned advocate for the Respondents addressed this Court that the application for revision by the applicant was time barred and thus this court lacks jurisdiction to determine revision application filed by the applicant.

This Court ordered the parties to hear the matter and in facts the objection raised by the Respondent's Counsel by way of written submission whereby both parties complied thereto. The respondents enjoyed the service of Mr. Malengo learned advocate while the applicant filed his submission by his own.

Having stated the background of this application I will now first determine the objection raised by the Respondents Counsel Mr. Malengo,

argued in support of his objection that, this Court lack prerequisite jurisdiction to try the application for revision filed by the applicant for being time barred and thus attract dismissal penalty as per Section 3 (1) of the Law of Limitation Act Cap 89 RE 2019.

Mr. Malengo also submitted that the applicant has preferred his application based on Section 43(1)(b) of the land Disputes Courts Act, Cap 216 RE 2019. The application by the applicant calls the redress of this Court to call for, examine and revise the proceedings of the District Land and Housing Tribunal for Maswa in Misc. Land Application No.38 of 2021.

According to Malengo the proceeding to the effects were taken on 19.11.2021 by the tribunal and the ruling in such Misc. Land application No.38 of 2021 was delivered on 29/11/2021 and ordered the applicant to vacate from the suit land.

From the above facts, Mr. Malengo argued that it is not therefore disputed that the cause of action arouses from the proceedings of District Land and Housing Tribunal dated on 19.11.2021 when the eviction order was pronounced.

Mr. Malengo further submitted that The Land Disputes Court Act, Cap 216 R:E 2019 under Section 38 (1) provides the time limit of sixty days for any person aggrieved with the decision of the District Land and Housing Tribunal when exercising its appellate or revisional jurisdiction, and under Section 41(2) of the same Act provides for time limit of forty five days for a person who is aggrieved with the decision of the District Land and Housing Tribunal when exercising original jurisdiction, so the Act does not provide for the time limit for filing revision in the High Court, and therefore govern to that effect it is the Law of Limitation Act Cap 89 R:E 2019 comes into place. Mr. Malengo cited item 21 of Part III of the Law of Limitation Act (supra) which provide the time limit of sixty days for making application like the instant application. He referred this Court to the decision in the case of **Mwandu Gweku and Another versus The Attorney General**, Misc. Criminal application No 04 of 2018 to the effect.

Mr. Malengo also averred that according Sections 4 & 5 to the Law of Limitation Act (supra) provides as to when the right of action accrues and as to when the period of limitation starts to accrue in relation to the proceedings which is the time from the date on which the right of action for such proceedings accrues.

Mr. Malengo further submitted that, the applicant's right of action accrued from 19.11.2021 when the District Land and Housing Tribunal ordered the applicant to be evicted from the suit land and the applicant's house built thereon be demolished. According to Mr. Malengo the computation period begun on 19.11.2021 to 10. 10.2022, when the applicant application for revision was filed before this Court, where about 324 days lapsed and the applicant was late to file his application for about 264 days. And therefore, according to Section 3 (1) of the Law of Limitation Act, the application by the applicant ought to be dismissed. He referred this Court to the decision in the case of **NBC Limited and Another vs. Bruno Vitus Swalo**, Civil appeal no.331 of 2019(CA) to that effects.

On the side of the applicant who presented his submission drafted by himself submitted that, the objection by the respondents Counsel is nothing than wasting the time of this Court as there was nothing to be executed before the Tribunal as the Respondents were not decree holders as per judgement in Land Application No. 02 of 2020. And therefore, there was incurable irregularity which cannot be hidden on the ground of time limitation.

Applicant further submitted that, Section 43 (1) of the Land Disputes Courts Act(supra) empowers this Court to call for, inspect records and revise proceedings of the District Land and Housing Tribunal and thus the Court in exercising such powers is not limited by time rather is embodied to look for errors committed by the tribunal.

He added by stating that in main Land Application No.02 of 2020 before the Tribunal, the applicant was awarded 66 acres of piece of land but unfortunately the same were taken during the execution process by handing it to persons who were not decree holders.

The argument by the respondents Counsel that, the application is time barred on the ground that the eviction order was issued on 19/11/2021. According to the applicant the ground raised by the respondents' counsel was couched by failure to understand the applicant's prayer in the chamber summons accompanied by his affidavit which he prayed for setting aside for execution process.

Again he said that on paragraph 5 of his affidavit, he stated clear that he was not aware of the existence of the said execution dispute, and the same came to his knowledge after his houses were demolished in September 2022, this means that the execution order was issued on 29/11/2021 and executed in September 2022 which took place almost

a year, taking into board that there was big differences between issuance of eviction order to the court broker and evicting the judgment debtor.

He further submitted that, he was neither summoned to attend execution proceedings nor given notice of eviction before being forcibly evicted in his awarded 66 acres and therefore to him is the time of which the action arose, and he then preferred this application requesting this Court to determine as to whether it was proper for the Tribunal to take away the applicant's 66 acres of land which awarded by the same Tribunal in the main suit.

Also he averred that, the execution process was full of fraud and mistake, **firstly** by not being served to attend the hearing on the application for execution by the respondents, **secondly** for the tribunal to order 66 acres be given to respondents despite prior being awarded to the applicant, and **third** the respondents were not decree holders to the effect and thus have no locus stand to apply for execution.

Again he submitted that pursuant to Section 26 (a)(b) and (c) of the Law of Limitation Act Cap 89 RE 2019, provides that the effects of fraud and mistake makes limitation period not start running until such fraud or mistake is discovered so he referred this Court to Section 2 (1)

of same Act which defines fraud conduct to mean some special relationship between the parties concerned, is an unconscionable thing for the one to do towards the other. He said that the said mistake in the execution proceedings was that the area handled over to the respondents was the one awarded to the applicant and that the respondent herein were not declared owners of the remaining 132 acres in the land in dispute but the same was awarded to Nandi Shuga who were not parties.

Lastly he submitted that the time limitation for the proceedings in the execution accrued from the time where the applicant was evicted from the land in dispute and the same handled over to the respondents in September 2022, and thus his application was filed on 10/10/2022 before the lapse of 60 days after the applicant had discovered the said mistake or fraud. He then pressed for his application for revision be determined on merit.

Mr. Malengo when making his rejoinder to the effect, he reiterated what he firstly submitted in chief and pressed for dismissal of the applicant application.

Having heard rival submission by the both parties, I have now to determine and the issue is whether the objection so raised by the respondents' counsel has legal bases.

I have gone through the trial tribunal judgment in land application No 02 of 2020, and the ruling for the execution order in Misc. Land application No.38 of 2021 which both involved the parties.

The trial tribunal judgement in Land Application No.02 Of 2020 at page 12, the District Land and Housing Tribunal concluded that;

"...it is hereby ordered as here under;

- i. That the distribution made by the 1st respondent who is the administrator of the deceased person one Shuga Nila was lawfully made in respect to the disputed land"*

Similarly on page 11 the said judgement provides *that "... Therefore, basing on the testimonies on record and what I have endeavored to demonstrate herein above, I am of the settled position that the applicant has managed to prove his case and thus I am in agreement with the respondents that the applicant's mother was given 66 acres of land and being that the position the said distribution should remain as it is"*

Whereas, at page 8 of the same judgement provides *" the applicant mother was given 66 acres of land where they stated the said land was*

distributed to the effect that Nhandi Shuga was given 66 acres, Kashilili Shuga was given 66 acres, Holo Shuga was given 66 acres and the remaining 2 acres were reserved for burial activities.”

I have decided to extract a piece of findings of the District Land and Housing Tribunal in the main case involved the parties, which ultimately prayed to be executed by the respondents.

The applicant raised a point that the respondents were not decreed to be lawful owners of the disputed land and thus had no locus stand to apply for execution as they were not decree holders.

I partly I agree with the applicant that, the respondents were not decree holders and thus not entitled to apply for execution. The tribunal decreed the following to be lawful owner of the suit land namely; Nhandi Shuga was given 66 acres, Kashilili Shuga was given 66 acres, Holo shuga was given 66 acres and the remaining 2 acres were reserved for burial activities.

The parties in the case were: **Nyabishi Luhende (administrator of estates of late Holo Shuga) versus Shege Gashili, Jisena Bundala and Kwilasa Nhandi.**

Based on those facts it is clear that the District Land and Housing Tribunal grossly erred to hold so, instead since the applicant was also

the applicant in the main suit burdened with the duty to prove his case then it was enough to conclude that the applicant failed to prove his case, and do away with declaring some persons to be lawful owners of the disputed land of whom were not parties to the main suit.

Whereas, on the point as to whether the application was timely barred, I have also pursued to the provisions cited by both parties.

The respondent's counsel advanced before this Court that, the applicant's right of action accrued from 19.11.2021 when the District Land and Housing Tribunal ordered the applicant to be evicted from the suit land and the applicant's house built thereon be demolished. According to Mr. Malengo the computation period begun on 19.11.2021 to 10.10.2022, when the applicant filed his application for revision before this Court, where about 324 days lapsed and the applicant was late to file his application for about 264 days. And therefore, according to Section 3 (1) of the Law of Limitation Act, the application by the applicant ought to be dismissed as elaborated in the case of **NBC Limited and Another vs Bruno Vitus Swalo**, Civil appeal no.331 of 2019 (CA) to that effects.

On the side of the applicant, submitted that the time limitation for the proceedings in the application for execution accrued from the time

where the applicant was evicted from the land in dispute and the same handled over to the respondents in September 2022, and thus his application was filed on 10/10/2022 before the lapse of 60 days after the applicant had discovered the said mistake or fraud. He then pressed for his application for revision be determined on merit.

He further argued that he was neither summoned to attend execution proceedings nor given notice of eviction before being forcibly evicted in his awarded 66 acres and therefore to him is the time action arose, and he then preferred this application requesting this Court to determine as to whether it was proper for the Tribunal to take away the applicant's 66 acres of land which awarded by the same Tribunal in the main suit.

He also averred that, the execution process was full of fraud and mistake, firstly by not being served to attend the hearing on the application for execution by the respondents, secondly for the tribunal to order 66 acres be given to respondents despite prior being awarded to the applicant, and third the respondents were not decree holders to the effect and thus have no locus stand to apply for execution.

He further submitted that pursuant to Section 26 (a) (b) and (c) of the Law of Limitation Act Cap 89 RE 2019, provides that the effects of

fraud and mistake makes limitation period not start running until such fraud or mistake is discovered.

It has not provided by the respondent's counsel as to whether the applicant was served with the application for execution in Misc. Land Application No.38 Of 2021.

This Court has in numerous decisions emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. See for example **D.P.P. v. Sabina Tesha & Others [1992] TLR 237, Transport Equipment v. Devram Valambhia [1998] TLR 89** and **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma [2003] TLR 251, ECO-TECH (Zanzibar) Limited v. Government of Zanzibar, ZNZ Civil Application No. 1 of 2007 (unreported)**, just to mention a few. The right to be heard is one of the fundamental constitutional rights as it was religiously stated in the case of Mbeya-Rukwa (supra) at page 265 thus: 'In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right, Article 13(6)(a) includes the right to be heard among the attributes of equality

before the law and declares in part: (a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu." In the above case the Court stressed that a party does not only have the right to be heard but to be fully heard. The right of a party to be heard was similarly discussed in the case of **Abbas Sherali & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) in which the Court among other things observed as follows: "

The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified. See also Order XXI Rule 12 (1) (a) (b) and Rule 20 (1)(a) (b) of the Civil Procedure Code, Cap 33 RE 2019.

Thus, in view of what I have endeavored to discuss, I am satisfied that the applicant was denied the right to be heard on the crucial question of the application for execution filed by the respondents and I am further satisfied that the denial was in violation of the fundamental constitutional right to be heard and the applicant was prejudiced.

Now, the applicant stated that he become aware with the execution order at the time when he was evicted and his house was demolished in September 2022. He then preferred this application for revision which was within 60 days.

The eviction order which was sent to the tribunal Broker was delivered on 29/11/2021. At page 2 of such eviction orders provides that *"... This tribunal grants the application for execution as prayed by the decree Holders and you are hereby ordered to evict the judgement debtors herein and demolish the house built thereon in the suit land and hand over the same to the decree holder as per tribunal's ordered dated on 19.11.2021 following Misc. Land application No38 of 2021"*

The parties in Misc. Land application No.38 of 2021 were Shege Gashili, Jisena Bundala, Kwilasa Nhandi (decree holders) versus Nyashimbi Luhende (judgement debtor)

Now, form the point of view it is immaterial that the application was granted in 2021 but came to be exercised on September 2021, this shows that there was on going issues which have not put clear by the decree holders.

Whereas, as mentioned earlier pursuant to the judgment of the tribunal the respondents were not decree holders and thus the land in dispute was not allocated to them and therefore cannot execute it.

However, my other findings to the effects are that the tribunal delivered twice execution order that is to say that dated of 19.11.2021 and that of 29.11.2021, because there is no distinct of the two both aimed at evicting the applicant from the suit land. I do not know how it was possible.

Moreover, as said earlier the applicant was not availed with the opportunity of being heard in regard to the application for execution made by the respondents before the tribunal.

Section 26(1) of the Law of Limitation Act (supra) provides for the effects of fraud or mistake Where in the case of any proceeding for which a period of limitation is prescribed *(a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;*

(b) the right of action is concealed by the fraud of any such person as aforesaid;

or (c) the proceeding is for relief from the consequences of a mistake,

Based from the facts above and in pursuant to Section 26 (1) (a) (b) and (c) of the Law of Limitation Act, I hereby held that there was fraud and mistake in the proceedings for execution in Misc. Land Application No.38 of 2021 and since the applicant became aware with the proceedings of execution when he was evicted by the tribunal broker from the suit land and proceeded to file application for revision then he was within the time. I therefore overrule the objection raised by the respondent's counsel.

Having so held, since the application for revision was heard inter parties, I will therefore proceed to determine such application on merit.

The applicant through his advocate Emmanuel Butamo learned advocate argued that this Court had to call the records, examine and revise the proceedings of the trial Tribunal in Misc. Land Application No.38 of 2021. To him he argued that the proceedings were preceded by irregularities and mistake. He further submitted that in main Land Application No. 02 of 2020 he was awarded 66 acres of land by the tribunal, but when the order for execution came, his land awarded to him was also taken and handled over to the respondents by the tribunal broker, contrary to the judgment in the main suit.

He also submitted that since he was not heard and never summoned to defence such application, and since is unhappy with the eviction order made in Misc. Land Application No. 38 of 2021, he has then applied for revision of the proceedings which ultimately for delivery of the eviction order.

On the side of the Respondents, Mr. Malengo argued that, there is no any error as portrayed by the applicant. Since the eviction order was not made to 66 acres allocated to the applicant instead it was to the parcel of land in disputes. Mr. Malengo argued that they have no objection for the applicant to be allocated his 66 acres of land and he argued the applicant to go and apply for execution before the tribunal for his recovery of 66 acres of land awarded to him.

In rejoinder Mr. Emmanuel Butamo, reiterated what he submitted in chief.

Having heard both parties, the issue is whether this application has been brought with sufficient cause.

I have gone through the trial Tribunal records, ruling, chamber summons, affidavit and submission by the parties. In deed I have taxed my mind to understand what transpired before the District Land and

Housing Tribunal in the main suit which is Land Application No.02/2020 and Misc. Land Application No.38 Of 2021.

The trial Tribunal judgement in Land Application No.2 Of 2020 at page 12, the District and Housing tribunal concluded that;

" ...it is hereby ordered as here under;

- i. That the distribution made by the 1st respondent who is the administrator of the deceased person one Shuga Nila was lawfully made in respect to the disputed land "*

Whereas at page 11 the said judgement provides that *"....Therefore, basing on the tesmonies on recorded and what I have endeavoured to demonstrate herein above, I am of the settled position that the applicant has managed to prove his case and thus I am in agreement with the respondents that the applicant's mother was given 66 acres of land and being that the position the said distribution should remain as it is"*

Whereas, at page 8 of the same judgement provides *"the applicant mother was given 66 acres of land where they stated the said land was distributed to the effect that Nhandi Shuga was given 66 acres, Kashilili Shuga was given 66 acres, Holo Shuga was given 66 acres and the remaining 2 acres were reserved for burial activities."*

From the quoted findings of the District Land and Housing Tribunal, I am of the view that the respondents were not decreed to be lawful owners of the disputed land and thus had no locus stand to apply for execution as they were not decree holders.

Whereas, since the respondents were not decreed to be decree holders and thus were not entitled to apply for execution. The tribunal decreed the following to be lawful owners of the suit land namely; Nhandi Shuga was given 66 acres, Kashilili Shuga was given 66 acres, Holo shuga was given 66 acres and the remaining 2 acres were reserved for burial activities.

The parties in the case were: Nyabishi Luhende administrator of estates of late Holo Shuga versus Shege Gashili, Jisena Bundala and Kwilasa Nhandi.

Based on those facts it clear that the District Land and Housing Tribunal grossly erred to hold that the respondents in Misc. Land Application No.38 of 2021 were decree holders and thus should evict the applicant (respondent). In my view the judgment of District Land and Housing Tribunal in Land application No 2 of 2020 is unexecutable.

Having observed the above, I find the application by the applicant was brought with sufficient cause and thus is hereby granted. I hereby

order for retrial of the application for the execution and the same be tried by different set of assessors and other Hon. Chairman to the effects. I make no orders as to costs.

It so ordered.



DATED at **SHINYANGA** this 16th day of June 2023.


R.B. Massam
JUDGE
16/6/2023