

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

MISC. LAND APPLICATION NO. 174 OF 2022

(C/F Land Application No. 62 of 2018 District Land and Housing Tribunal of Karatu)

BO,O META MORO 1ST APPELLANT
SLAA KULE 2ND APPELLANT
DIYO KULE 3RD APPELLANT
EMAO UMALI KULE 4TH APPELLANT
YOHANA UMALI KULE 5TH APPELLANT
SIMON KULE 6TH APPELLANT

VERSUS

THADEUS QUWANGA RESPONDENT

RULING

19th July & 18th August, 2023

TIGANGA, J.

Under sections 42 (1) (a) (b) and 51 (1) of the **Land Disputes Courts Act**, Cap 216 R.E. 2019 (Land Disputes Act) and Order XXXVII Rule 5 of the **Civil Procedure Code**, [Cap 33 R.E 2019] (CPC); the applicants pray that this court be pleased to set aside and/or vary the orders issued ex-parte on 27th May 2022 by the District Land and Housing Tribunal of Karatu (the trial tribunal).

According to the applicant's joint affidavit and the trial tribunal's judgment, the respondent filed a suit against the applicants claiming that,

they trespassed into his land measuring nine (9) acres located at Karatu, in Karatu District. However, when the matter was scheduled for hearing, the appellants defaulted appearance hence the matter proceeded and was decided *ex-parte*. This application, therefore, was filed to challenge the said *ex-parte* decision. They also averred that this is not their first case with the respondent as there was a Misc. Land Application No. 72 of 2019 which originated from Land Application No. 62 of 2018 both filed before the trial tribunal. In the latter application, the decision was not in their favour, thus, they appealed to this Court through Land Appeal No. 07 of 2020 of this Court, Masara, J who ordered the matter to start afresh before another chairperson with a different set of assessors, because there was an infringement of the fundamental right to be heard. Following that decision, the respondent intended to appeal against such decision and filed Misc. Land Application No. 22 of 2021 praying for leave to appeal to the Court of Appeal. However, he later withdrew the appeal and filed the application subject to this revision.

In his counter affidavit, the respondent opposed the application and raised the following four points of preliminary objection;

1. That, the application is incompetent for contravening the provision Regulation 11(2) of the Land Dispute Courts (the District Land and

Housing Tribunal) Regulation 2003 read together with Order IX Rule 13 sub-rule (11) the Civil Procedure Code [Cap 33 R.E. 2019].

2. That, Applicant's application is hopelessly time barred.
3. That, the applicant's affidavit is defective for containing legal argumentative, conclusion, and prayers.
4. That, the application is incompetent for being brought against interlocutory orders or rulings.

The objections were heard by way of written submissions, whereas the appellant appeared in person and was unrepresented the respondent was represented by Mr. Samwel Welwel, learned Advocate.

Supporting the 1st preliminary objection, the counsel for the respondent submitted that, the application is incompetent for contravening the provision of Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation G.N. No. 174 of 2003 (Land Regulations). He added, as per the applicants' affidavit, the order against which this revision is filed, was given *ex-parte* against them. Thus, the law is clear that any order made *ex-parte* by the trial tribunal can be set aside by the same Tribunal upon which the application was filed by the aggrieved party as provided under regulation 11 (2) of the Land Regulations. That being the case, there is no room for revision

against the said order dated 27/5/2022 rather the proper remedy was for the applicants to apply to set aside such ex-parte order.

Regarding the second point of preliminary objection, learned counsel submitted that this application is hopelessly time-barred because the order against which this application is filed was given on 27/5/2022, however, the applicants filed this application for revision on 30/11/2022 after the lapse of more than six months. Since the Land Disputes Courts Act is silent under section 43 as to the limitation of time to file revision, wisdom is sought from the mother law, the Law of Limitation Act, [Cap 89 R.E 2019] which governs the limitation of time in judicial proceedings. As per the schedule under item 21, the law provides that, where no time is prescribed under the CPC, Magistrate Courts Act, or other written law, then the limitation time is sixty days which is equivalent to two months. However, the applicants spent almost six months hence, their application is time-barred therefore, has to be dismissed as per section 3 (1) of the Law of Limitation Act.

Regarding the third point of preliminary objection, Mr. Welwel submitted that the affidavit supporting the application is defective for it contains legal argumentative, conclusion, and prayers. He mentioned some of the arguments as the fact that the order was obtained

fraudulently and the conclusion that it was illegal. He referred the court to the case **Mohamed I.A. Abdul Hussein vs. Pita Kempap Limited** [2005] T.L.R. 383 where it was held *inter alia* that, an application supported by a defective affidavit lacks the necessary support and is incompetent. He prayed that the same be struck out.

On the 4th objection, he submitted that the application is incompetent for being brought against interlocutory orders or rulings. That, the order dated 27/05/2022 is interlocutory and it does not have the effect of finally determining the matter as per section 79 (2) of CPC because no one was declared the lawful owner of the disputed land. He argued that the order made by the trial chairperson was an interlocutory one pending the final determination of the main case, hence this court has no jurisdiction to invoke its revisional powers under section 43 (1) of the Land Disputes Act. He prayed that the application be dismissed with cost.

In reply, the applicants submitted that this application is competent and does not contravene regulation 11(2) of the Land Regulations as claimed. That, the order for injunction was sought by the respondent and granted in their absence and they were just served a copy of the ruling by Rotia Ward Executive Officer. Thus, there was no *ex-parte* order for the

applicants herein to apply on the same tribunal to set aside because the matter proceeded without their knowledge, hence they were curtailed a right to be heard. They referred the Court to the case of **Rutagatina CL vs. The Advocate Committee and Clavery Mtindo Ngalapa**, Civ. Appl, 98/2010 (CAT unreported) in which it was held that no appeal lies against any interlocutory order which is why they filed the current application.

Regarding the 2nd objection, the applicants submitted that the application at hand is not time-barred as claimed by the counsel for the respondent since section 43 of the Land Disputes Courts Act does not provide so. They argued that the position would have been per item 21 of the schedule of the Law of Limitation Act, only if the application would have been ruled in a normal ordinary cause. However, the impugned ruling of the injunction order is peculiar and hence needs the attention of this Court.

Replying to the 3rd objection, the applicants submitted that, their joint affidavit avers the facts as required by the law, thus, the same is valid. They prayed for this Court to reverse, amend or vary the ruling of the trial tribunal which granted an injunction as it occasioned a miscarriage of justice to the applicants. The basis of these allegations is

that the same is full of errors, omissions and with no legal basis. They prayed that this Court finds it just to overrule the preliminary objection with costs.

In his rejoinder, the respondent's counsel submitted that the applicant had submitted in detail the history and the merit of their application, not the objection he raised. He prayed that this application be dismissed with costs.

Having considered both parties' affidavits and submissions filed in support or against the objection this Court will now proceed to determine the objections raised. Starting with the first point of objection raising the complaint that, the application is incompetent for contravening Regulation 11 (2) of the Land Disputes Act. This provision reads;

*11 (2). A party to an application may, where he is dissatisfied with the decision of the Tribunal **under sub-regulation (1) within 30 days apply to have orders set aside, and the Tribunal may set aside orders if it thinks fit so to do and in case of refusal appeal to the High Court.** (emphasis mine)*

The above provision has to be read with its sub-regulation 1 which reads;

"11.-(1) On the day the application is fixed for hearing the Tribunal shall-

(a) where the parties to the application are present proceed to hear the evidence on both sides and determine the application;
(b) where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant;"

From the two provisions, it is crystal clear that once *ex-parte* proceedings are conducted and the *ex-parte* judgment or order is delivered to that effect, an aggrieved party against whom the *ex-parte* decision was made should apply for the order or decision to set aside before challenging the decision on appeal or revision before the higher court. The application to set aside the *ex-parte* decision must be made before the same tribunal which passed the said *ex-parte* decision.

The applicants have brought this application under sections 42, 43 (1) (a), 51 (1) of the Land Disputes Courts Act and Order XXXVII Rule 5 of the CPA. According to them, this court is properly moved under the above laws. For easy reference, I find it pertinent to reproduce said provisions as follows;

S. 42. The High Court shall in the exercise of its appellate jurisdiction have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence and whether additional evidence is taken or not, to confirm, reverse,

amend, or vary any manner the decision or order appealed against.

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

*(a) shall exercise **general powers of supervision** over all District Land and Housing Tribunals and may, at any time, call for and inspect the records of such tribunal and give directions as it considers necessary in the interests of justice, and all such tribunals shall comply with such direction without undue delay;*

*(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate, or revisional jurisdiction, on the application being made on 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.*

51.-(1) *In the exercise of its jurisdictions, the High Court shall apply the Civil Procedure Code and the Evidence Act and may, regardless of any other laws governing **production and admissibility of evidence, accept such evidence and proof which appears to be worthy of belief.***

Also, Order XXXVII Rule 5 of the CPC reads.

5. Any order for an injunction may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

Reading between the lines of these quoted provisions and starting with section 42 of the Land Disputes Courts Act, it vests this Court with the power to take or order the DLHT to take and certify additional evidence, or vary decisions of the DLHT when exercising its appellate jurisdiction. Section 43 of the same law, vests this Court with supervisory and revisionary powers to the proceedings and decisions of the DLHT.

Section 51 of the same law, on the other hand, provides for the power of this court to apply the Civil Procedure Code and Evidence Act in admitting evidence in land dispute cases, while Order XXXVII Rule 5 of the Civil Procedure Code, provides for the right of an aggrieved party to apply to set aside the injunction orders. It is therefore not certain what exactly is the nature of this application. However, from its nature, at least we are sure that it is not an appeal, therefore the provision of section 42 of the Land Dispute Courts Act is not applicable. It is also not the application for taking additional evidence, therefore section 51 of the Land Disputes Courts Act, is equally not applicable. Lastly, we are also sure that this is not a prayer to set aside the injunction order, therefore, Order XXXVII Rule 5 of the CPC is not applicable and thus irrelevant.

Moreover, on the other hand, section 43 of the Land Disputes Courts Act empowers this Court to supervise and revise the orders of the DLHT,

from its wording and the reliefs sought, the application at hand is for revision therefore the appropriate provision to move the court is section 43 of the Land Disputes Courts Act. As much as I agree that, this Court has general supervisory and revisionary powers to the subordinate courts and tribunals, those powers are in some few exceptional circumstances limited. One of the cases in which the powers are limited in the circumstances where the decision sought to be revised was, in terms of Regulation 11(2) of the Land Regulations passed ex parte and has not been set aside either successfully or unsuccessfully.

In the matter at hand that the proceedings and the order sought to be revised were passed ex-parte against the applicants, and the applicants did not file the application to set aside the ex-parte decision. In the case of **Dangote Industries Ltd Tanzania vs. Warnercom (T) Limited**, Civil Appeal No. 13 of 2021, CAT at Dsm (unreported) the Court of Appeal had this to say regarding setting aside *ex-parte* judgments or orders;

*"It would appear to us to be the principle in the said authorities that, where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the ex parte judgment first. This principle is based on the long-standing rule of procedure that, **one cannot go for appeal or other actions to a higher court if there are***

remedies at the lower. He has to exhaust all available remedies to the lower court first.

The Court of Appeal went on to say that;

*"This Court was saying, basing on the authority in its previous decision in **Jaffari Sanya & Another vs. Saleh Sadiq Osman** (supra) that, as **the jurisdiction to set aside an ex parte judgment is exclusively conferred to the trial court, it cannot be addressed by way of an appeal.** If we can quote from page 11 of the ruling, the Court observed as follows:-*

*"On the basis of the above provision and authorities, it is **settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to apply that effect in the court that entered the judgment.**"* [Emphasis supplied]


In light of the above authority, it is my considered opinion that the proper way forward for the applicants was/are not to appeal or seek revision but to apply to set aside such an ex-parte order as provided under Regulation 11 (2) of the Land Regulations. This will enable them to be heard *inter-partes* so that their rights in respect of the suit land can be realized. Having so found, this application is therefore misconceived, I do not find the need to belabour in other objections as this one is enough to dispose of the application in its entirety. I find no reason to belabour in disposing of the rest of the ground of objection.

In the upshot, the first limb of the preliminary objection is upheld, consequent of which the application is dismissed with cost for being destitute of merits, the applicants are advised, subject to the law of limitation, to apply setting aside the *ex-parte* proceedings and decision reached at the trial tribunal pursuant to the law as explained hereinabove.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 18th day of August 2023




J.C. TIGANGA
JUDGE