THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

LAND REVISION NO. 06 OF 2023

(Arising from the decision and orders of the District Land and Housing Tribunal for Morogoro in Misc. Land Application No. 458 of 2023 which Originates from Land Application No. 82 of 2018 Before Hon. Khasim)

GRACE MICHAEL MMASI.. APPLICANT

VERSUS

ERNEST JOHN MADENGA...RESPONDENT

JUDGMENT

Hearing date on: 23/08/2023
Judgment date on: 31/08/2023

NGWEMBE, J.

This is an application for revision preferred by the applicant under assistance of learned advocate Jackson Liwewa. The application was instituted in this court under section 43 (1)(b) of **The Land Dispute Court Act, Cap 216 R.E 2019.** The purpose of this application is to invite this court to call upon and revise the decision and order of the District Land and Housing Tribunal for Morogoro in Miscellaneous Land Application No. 458 of 2022. The application is supported by the applicant's affidavit whose facts will be referred in the course. A counter affidavit was made by the respondent who seemed to strongly oppose the application.

Before this court, the application was heard on 23/08/2023 when parties addressed this court viva voce.

Maybe it is important to briefly narrate the dispute which gave birth to this application. In the month of April 2015, the applicant borrowed cash money of Tshs. 2,000,000/= from the respondent and surrendered her documents of the house she owns at Lukobe as security. They agreed repayment of that debt on or before the end of that year 2015. On 08/05/2015 she went again to the respondent, this time with her friend and borrowed Tshs. 3,500,000/= to be repaid within 10 days, making a total debt of Tshs. 5,500,000/=. It seems by the end of year 2015, the debt remained outstanding, but only an insignificant part was paid.

The applicant maintained her default until 2018, without any sign of repayment, despite demand notice issued to her. The respondent therefore commenced some process to attach the property issued as security. It seems the applicant was alarmed by the respondent's process so she filed an application before the District Land and Housing Tribunal in which she sought permanent injunction against the respondent, broker and a declaratory order that attempt to attach and sale her house was illegal. She also secured a temporary injunction pending determination of the application.

On the hearing of that application before the tribunal, the respondent raised a counter claim of Tshs. 11,012,500/=. After due hearing, the application was dismissed but the respondent's counter claim was granted and the applicant was ordered to pay the debt. Such decision which granted the counter claim was never challenged, even in this application the applicant does not complain about that decision, therefore remains intact to date. This court in the course of this judgment will take heed to that fact.

In the process and out of court, parties reached an amicable settlement of that debt for Tshs. 8,000,000/= in respect of the whole claim and the applicant herein paid Tshs. 5,000,000/=. There was a term in their settlement deed that, the remaining Tshs. 3,000,000/= should be paid by monthly instalment at the rate of not less that Tshs. 200,000/=. It happened that, the applicant defaulted again, thus the respondent went back to the tribunal and filed Misc. Application No. 458 of 2022 for payment of the decretal sum of Tshs. 11,012,500/= and that the applicant's house be attached and sold to satisfy the claim.

That application was granted, but the tribunal took cognizance of Tshs. 5,000,000/= payment made by the applicant and a tribunal's broker was appointed. When the respondent proceeded with the execution, the applicant filed this application for revision.

Despite this background, I have noted variation in narration of events between the parties. For that, I have preferred to refer to the submissions of each party together with their respective affidavits.

From the applicant's affidavit and the submissions of Mr. Liwewa, it was noted that, on April 2015 the applicant borrowed Tshs. 2,000,000/= cash with an agreement to repay Tshs. 2,500,000/= within the end of that year by Tshs. 250,000/= monthly instalment. States that she paid Tshs. 1,075,000/= only by the end of the agreed year, the balance was Tshs. 3,425,000/=. Yet the respondent coerced her to pay Tshs. 18,000,000/= threatening to attach her house located at Lukobe, in Morogoro Municipality. That she referred the matter to the tribunal through Land Application No. 82 of 2018, which was determined in 24/08/2021 by dismissing it and was ordered to pay only Tshs. 2,500,000/=. It is stated and argued further that, the applicant filed an appeal before this court in order to challenge the decision in Land Application No. 82 of 2018, but on October, 2021 parties resolved

amicably by payment of Tsh. 5,000,000/= which cleared the whole debt of Tshs. 3,425,000/=. Despite the payment, which according to Mr. Liwewa was far beyond the remaining debt, the respondent filed an execution Application No. 458 of 2022 for decretal sum of Tshs. 11,012,500/= and attachment of the house and the tribunal granted the application.

To the applicant's advocate, the respondent had no decree to execute and had no claim whatsoever, since the only debt was Tshs. 2,500,000/= though sometimes it is said to be Tshs. 3,425,000/= all the same, Tshs. 5,000,000/= paid by the applicant was even above the required amount. Added that, the amount of Tshs. 11,012,500/= which the respondent sought to execute was never awarded in the main case, that is Application No. 82 of 2018.

The learned counsel therefore, challenged the tribunal for granting the application, attachment and sale of the applicant's house. To Mr. Liwewa, the tribunal's ruling and orders were nullity. He prayed the application be allowed with costs, decision and orders of the tribunal be nullified by this court.

The respondent filed a counter affidavit disputing most of the main facts in the applicant's affidavit. Inter alia, he stated that, the tribunal did not order the applicant to pay Tshs. 2,500,000/= as the applicant and her advocate submitted, but rather, she was ordered to pay according to the agreement. The respondent went further that, the proper debt was Tshs. 5,500,000/=, but due to the applicant's failure to repay the amount the debt raised up to Tshs. 11,012,500/= according to the terms of their agreement. He admitted that, the applicant paid Tshs. 5,000,000/= in the dishonoured settlement and that in his application for 11,012,500/= the sum was correct due to the damages, costs and

interest and that the balance unpaid is Tshs. 5,000,000/=. Prayed this application be dismissed.

On the above set of facts, this court's duty is to determine whether or not to grant the application. The applicant moved this court under section 43 (1)(b) of **The Land Disputes Court Act**. As earlier pointed out, this application arises from execution decision and orders. Usually there is no automatic right of appeal against the execution proceedings, as in this case, the decision which was being executed was not challenged. This court having considered the facts as a whole, finds that the revision was a proper remedy in case the applicant was aggrieved by the orders and on genuine cause.

I proceeded with hearing having in mind the principle that generally, revision is permissible to a party whose right of appeal is blocked by law. It has been held in many cases including but not limited to; **Moses Mwakibete Vs. The Editor, Uhuru, Shirika la Magazeti ya Chama and Another [1995] T.L.R 134** and **Samuel Kobelo Muhulo Vs. National Housing Corporation (Civil Application 442 of 2018) [2022] TZCA 559.** In **Felix Lendita Vs. Michael Longidu (Civil Application 312 of 2017) [2018] TZCA 299** the Court of Appeal maintained that: -

> *"There is a plethora of authorities to the effect that, revisional powers of the Court can only be invoked where there is no right of appeal."*

It is common ground that under section 43 of **The Land Dispute Court Act,** this court enjoys supervisory and revisional powers over the District Land and Housing Tribunal. The section is quoted as whole hereunder: -

> *Section "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 application being made in 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****.*

(2) In the exercise of its revisional jurisdiction, the High Court shall have all the powers in the exercise of its appellate jurisdiction."

Equally, this court is alive to the rule against disguised use of revision for the purpose of an appeal. See among others, the case of **Harith Rashid Shomvi Vs. Aziza Juma Zomboko (Civil Application 496 of 2020) [2022] TZCA 547,** where it was insisted that: -

"The law, as it stands now, is settled that revisional powers of the Court are not an alternative to its appellate jurisdiction. That this is the law has been pronounced by the Court in a string of decisions."

That string of decisions which the court was referring includes the cases of **Hassan Ng'anzi Khalfan Vs. Njama Juma Mbega (legal Representative of The Late Mwanahamisi Njama) & Another (Civil Application 218 of 2018) [2020] TZCA 32, JV Electrical &**

Electronics Co. Limited & Shanghai Electric Power T & D Engineering Vs. Rural Energy Agency & Others (Civil Application 162 of 2019) [2022] TZCA 385, Halais Pro-Chemie (supra), Moses Mwakibete (supra) and **Transport Equipment Ltd Vs. Devram P. Valambhia [1995] T.L.R. 161.**

The applicant's invitation to this court is mainly on the decision and orders made by the tribunal in Application No. 458 of 2022 on execution. I have studiously examined that decision, the tribunal ruled that the applicant was indebted Tshs. 11,012,500/= to the respondent and paid only Tshs. 5,000,000/=. It proceeded to order that since the applicant did not pay the outstanding sum despite being ordered to pay within 30 days, the respondent should proceed to attach the applicant's house, which was surrendered as a security and sale it to satisfy the remaining debt. I noted earlier that Mr. Liwewa held a firm stance that such amount Tshs. 11,012,500/= was never awarded anywhere so the tribunal was wrong to grant its execution.

This court made a serious study of the proceeding and decisions in both applications. The facts recorded are important to print a clear background and, in the course, to see if the execution decision and order was justified or not. I understand that, the applicant and her learned counsel, together found no valid reason behind the execution orders.

In the main application, which is Application No. 82 of 2018, the applicant was seeking for a permanent injunction against the respondent who seems to have commenced some procedures of attachment and sale of the applicant's property offered as security. During hearing in that case, by way of a counter claim, the respondent established before the tribunal that he had a valid unsettled claim of Tshs. 11,012,500/=

against the applicant. The tribunal having considered the matter as a whole it ruled at page 9 that: -

> *"Nimefikia maamuzi haya na kukubaliana na uuzaji wa nyumba iliyowekwa dhamana kwa sababu ndio makubaliano yaliyoingiwa na mwombaji kwa ridhaa yake aliweka nyumba kama dhamana endapo atashindwa kulipa mkopo na ameshindwa kulipa toka mwaka 2015 hivyo ni haki nyumba/dhamana kuuzwa ili mkopo ufidiwe...makubaliano ya watu binafsi yaliyofanywa kwa ridhaa yao yanawabana na katika shauri hili mwombaji anatakiwa akidhi na afanye sehemu yake ya mkataba, kushindwa kwake ni kuvunja mkataba."*

The tribunal found that the respondent was correct in his contemplated decision to attach the applicant's house because she defaulted repayment of the money she borrowed in an agreement voluntarily entered and offered her house as security. The tribunal was guided by the cases of **Simon Kichele Chacha Vs. Avelina M. Kilawe, Civil Appeal No. 160/2018, CAT at Mwanza** and **Abualy Alibhai Aziz Vs. Bhatia Brothers Ltd [2000] T.L.R. 288.** In both precedents the doctrine of sanctity of contract was addressed and it was ruled that parties are bound by the agreements they freely enter to. That parties must perform such agreement without any excuse. So, the tribunal maintained that the agreements must be respected. This court accepts such to be a correct position of the law.

The tribunal observed further that, the applicant had defaulted for years since 2015 while the respondent had established his counter claim. Therefore, the move adopted by the respondent was correct. At page 11 of the decision, reflects: -

"Kutokana na maelezo yote hapo juu baraza hili linaona kwamba mwombaji hastahili kupata nafuu yoyote kupitia mgogoro/kesi hii kwa sababu mdaiwa amethibitisha madai kinzani yake"

By the above paragraph, the tribunal was well aware of the reliefs sought by the applicant in instituting the application, likewise he was clearly aware of the nature of the respondent's counterclaim.

It seems after having heard from both parties, the tribunal found that the applicant's claims were unfounded. But rather the respondent's counter claim was established. The said counter claim, is well noted at page 6 of the tribunal's judgment that the applicant borrowed Tshs. 2,000,000/= on 13/04/2015 and then on 08/06/2015, went with a friend and borrowed Tshs. 3,500,000/= forming a total of debt of Tshs. 5,500,000/=. This counter claim was supported by AW3 who was the applicant's friend. That the applicant defaulted and remained with the debt for two years and three months thus the debt had raised to 11,012,500/=.

As to how the applicant entered into this debt, it was clearly stated by AW2 and AW3 both of whom are friends to the applicant. I have even noted that, the applicant attempted to tell lies to the tribunal on how she entered into a loan agreement. There are times when she said that she met the respondent who bought her some beers and she got drunk. That she did not know what happened but other people told her that she had surrendered her land ownership documents and secured a loan. There are a lot of facts defeating the logic. While suggesting that she was intoxicated and unaware of the transaction, but she invited friend within a month and secured another loan on her own security.

Also, there is a testimony of AW2 that, parties' relationship, apart from borrowing transaction, was mixed up with a love affair. At least this

court is satisfied that, the applicant was sober minded when she entered into the debts twice from the respondent. There is no doubt that, in both occasions she offered a security stating clearly that if she defaults repayment, the security should be taken. These documents were admitted before the tribunal.

The learned advocate and the applicant did not go to those facts and this court was invited to revise the decision and orders in the execution application, but necessitated to revisit the background touching that other case only for a clear history and proper guidance. Now Mr. Liwewa is firm in his mind that, the said Tshs. 11,012,500/= was never awarded, but only Tshs. 2,500,000/= for which the applicant had paid Tshs. 5,000,000/= far above the required amount. No reason for paying Tshs. 5,000,000/= is stated by the learned advocate, if the correct debt was Tshs. 2,500,000/=. However, even in the main case, the tribunal did not declare Tsh. 2,500,000/= as the sum entitled to the respondent. It is unknown why the applicant in her affidavit and the learned advocate in his submission maintained this fact which was not reflected in the main case.

Yet another fact relevant in this court's consideration is the settlement deed entered between the parties. The applicant agreed to pay Tshs. 8,000,000/= and paid Tshs. 5,000,000/= with an agreement that the remaining Tshs. 3,000,000/= would be paid by instalment. This aspect again was never addressed by the learned counsel. Considering that the settlement deed was executed after the main case was already decided, why did the applicant accept the responsibility to pay Tshs. 8,000,000/= when the actual debt was only 2,500,000/= in the main case, as they suggest?

All the above defeat the arguments of the applicant's advocate. But rather the respondent's argument stands much stronger. It seems,

the logical flow of events is that the applicant's failure to clear the amount prompted the respondent reversion to the order of the tribunal in Land Application No. 82 of 2018. It is clear that the tribunal in making its decision in Application No. 458 of 2022, took cognizance of Tshs. 5,000,000/=, the amount paid in execution of the settlement deed. It then ordered that the outstanding amount be paid. This outstanding amount according to the respondent was Tshs. 5,512,500/=.

This court has seriously examined the proceedings, judgments and ruling of the tribunal to see if there was any ground to revise the decision and orders made in Misc. Application No. 458 of 2022, since the applicant's learned counsel argued that there were illegalities in that case.

Now what are the grounds for revision in a case of this nature? According to section 43 (1)(b) of **The Land Disputes Courts Act,** this court can revise the proceedings, judgment and any order made by the tribunal: -

> *"If it appears that there has been an error material to the merits of the case involving injustice"*

Admittedly, material errors affecting the merit of the case can in some cases constitute illegality, though not all errors constitute illegality. **The Black's Law Dictionary 9th edition** interprets illegality as an act that is not authorized by law or the state of not being legally authorized. It follows that when procedural requirement is not followed in the proceeding, such one is illegality. However, any such illegality or any error committed in the trial must be material and should affect the merit of the case. Injustice must have been occasioned. If the above exist, this court may undoubtedly revise such order, judgment or proceedings.

The reasoning is also supported by the accepted rule that, in order for an application for revision to be granted, the applicant must establish

that, there was an error or illegality, incorrectness or impropriety in the impugned decision or order. See the cases of **Halais Pro-Chemie Vs. Wella A.G. [1996] T.L.R 269 (CA)** and **Vidyadhar G. Chavda Vs. Pravinchandra G. Chavda [2017] T.L.R. 596 [CAT].**

The question is still whether there was illegality in the tribunal's decision and orders in respect of Misc. Application No. 458 of 2022? From the tribunal's record, the following are established facts;

i) In April 2015 the applicant borrowed Tshs. 2,000,000/= from the respondent under the condition that she would pay within that year.
ii) Early May 2015, in company of her friend, the applicant borrowed another sum of Tshs. 3,500,000/= to be paid within 10 days, making the whole debt to be Tshs. 5,500,000/=
iii) For both debts the applicant offered her land wherein stands her house, among the securities and she surrendered the documents to the respondent.
iv) According to the borrowing agreements dated 13/04/2015 and that 08/05/2015 both of which the applicant entered; she stated that in case of default the security should be taken.
v) The applicant defaulted and did not pay the money even after several demands, but said to have paid Tshs. 5,000,000/= after the sum of Tshs. 11,012,500/= was confirmed as counter claim.

I am facing some kind of difficulties if at all there was any illegality in the applicant's dealing with the respondent. I understand that a debt of Tshs. 5,500,000/= was entered in 2015 and same seems to have increased up to Tshs. 11,012,500/= by the year 2018. Although the respondent is said not to have charged any interest on the principal sum, it shows that the applicant committed herself that she will pay the debt together with a monthly bonus of Tshs. 250,000/=. The legality or

validity of the said bonus was never challenged by any of the parties and the decision which accepted the counter claim is never challenged.

However, I am aware that this court in exercise of revision may correct any error even if not raised by the parties. Although the explanation given by the respondent before this court and the tribunal below on how the debt of Tshs. 5,500,000/= grew up to Tshs. 11,012,500/= was plausible and was accepted by the tribunal, I have taken notice of the last transaction entered between the parties which in a way affected the said sum of Tshs. 11,012,500/=. The question is whether that sum of Tshs. 11,012,500/= would remain intact and be executable as the respondent wanted this court to hold.

While confining myself to the relevant impugned decision and orders, I have taken note that the applicant's counsel did not address on the settlement deed which as earlier addressed had the effect on the value of the claim enforced by the respondent. But having examined such decision and orders as herein exhibited, I have formed a position that though the respondent correctly enforced his rights arising from agreement, he was not entitled to ignore the deed of settlement which in essence reduced the decretal sum so to say, from that of Tshs. 11,012,500/= to Tshs. 8,000,000/=. The law is clear, deeds of settlement are effectual as the court orders. Under Rule 2 of Order XXI of the **Civil Procedure Court, Cap 33 RE 2019** adjustment of the decree out of court is permissible and such adjustment is executable. This order which is pari materia to **The Indian Code of Civil procedure** has earned a sound illustration from in The Code of Civil Oricedure at poage 255 whose part is as provided hereunder regarding adjustment of decree: -

> *"The contract represented by the adjustment was to accept Rs. 1,000 in full satisfaction of the decree, and not to execute*

the decree for its full amount. If notwithstanding the payment to A of Rs. 1,000 in pursuance of the adjustment, A causes the decree to be executed, and B is compelled to pay the amount of the decree (that is, Rs. 2,000) in execution, B may sue A to recover back that amount as damages for breach of the contract not to execute the decree."

This settlement deed between the parties was entered when they were before this court in Land Appeal No. 04 of 2021. Generally, the parties were bound by the agreement in the settlement deed as above sufficiently illustrated.

On that basis, the respondent would have executed his claim only to the extent agreed in the deed. If part of the sum was relinquished, so as to remain Tshs. 8,000,000/= it obviously meant payment of Tshs. 8,000,000/= would settle the whole claim. Having so relinquished accordingly and the applicant having paid Tshs. 5,000,000/= in lumpsum as they both admit, it was inequitable for the respondent to go back and seek to execute such right at Tshs. 11,012,500/= as if the amount was never relinquished. There would be a difference of about 3,000,000 Shillings which in any case must have occasioned injustice.

I would reiterate that under the circumstance the respondent was entitled to execute the terms of the deed, which I have read and same provided that the applicant will pay the remaining 3,000,000/= Shillings in 15 months. Article 3 of the settlement deed provided thus: -

"Kwamba baada ya kukamilika kwa malipo hayo ya awali, deni lililobaki hadi sasa kati ya wahusika hawa wawili ni shilingi Milioni tatu (T.Shs.3,000,000/=) tu ambapo imekubalika kuwa, fedha hizo zitalipwa katika awamu nyingine tofauti, ambapo katika malipo hayo, mdaiwa atahakikisha kuwa anamlipa mdai kiasi cha shilingi laki mbili (T.Shs. 200,000/=) tu kila mwishoni

mwa mwezi kuanzia tarehe 27 Februari 2022 na kuhakikisha kuwa hadi kufikia tarehe 30 Mei 2023 deni hilo limalizike au liwe limemalizika kabisa"

On those facts and considering the terms of the deed, it was expected for the tribunal to consider the deed of settlement and aid the execution at the rate of Tshs. 8,000,000/= and not Tshs. 11,012,500/=. Taking the base to be Tshs. 8,000,000/= while Tshs. 5,000,000/= was already paid, it would make the applicant responsible only to the extent of Tshs. 3,000,000/= and not Tshs. 5,000,000/= as the respondent submitted.

The above analysis has formed a strong basis upon which this court to revise the tribunal's order albeit partially as follows; that the respondent is entitled to be paid Tshs. 3,000,000/= from the applicant as per the deed of settlement which is the latter undertaking between the parties. Though the respondent reserves all the rights to enforce rights, but the move to attach the house was not much proportional to the value of the claim hence inequitable. In this revision, I make an order that the applicant should pay the amount Tshs. 3,000,000/= within three months, failure of which, the respondent will have the right to proceed with due process of law. Each party shall bear his or her own costs.

Dated at Morogoro this **31st day of August 2023.**

P. J. NGWEMBE

JUDGE

31/08/2023

Court: Judgement delivered at Morogoro in Chambers this 31st day of August, 2023 in the presence both parties.

A. W. MMBANDO

DEPUTY REGISTRAR

31/08/2023

Court: Right to appeal to the Court of Appeal explained.

A. W. MMBANDO

DEPUTY REGISTRAR

31/08/2023