

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND REVISION NO. 36 OF 2023

(Arising from the Ruling Order in Misc. Application No. 95 2019 dated 10th
September 2019, which from Application No. 192 of 2010 dated 24th March 2016)

SADICK H.NNENDENDO.....APPLICANT

VERSUS

SALMA H.NNENDENDO.....1ST RESPONDENT

SALUM H.NNENDENDO.....2ND RESPONDENT

RULING

17/4/2024 & 27th May 2024

GWAE, J.

The applicant, Sadick H. Nnendendo has preferred this application under section 41 (1) and 43 (1) (b) of the Land Dispute Courts 'Act, Cap 216, Revised Edition, 2019 (Act) for the following orders;

1. That, the Honourable Court be pleased to call for records of the proceedings, Ruling and drawn order of the District Land and Housing Tribunal for Temeke at Temeke in Misc. Application No. 95 of 2019 dated 10th October 2019 and exercise its revisional jurisdiction so as to satisfy itself over their correctness, legality, propriety of the proceedings of the above-named decision
2. The costs of the application follow event

3. Any other relief the Court May deem fit and just to grant

This application is duly made by chamber summons supported by affirmed affidavit of the applicant and the same is contested by the respondents through their joint counter affidavit sworn by their advocate one Hussein Hitu. Looking at the parties' affidavits and their documents annexed therein, the issues for determination are

1. Whether District Land and Housing tribunal (Kirumbi-esq) was functus officio to declare "Tigo Communication Tower" was not within the applicant's property via Misc. Application No. 95 of 2019 while there was a valid and unreversed decree in favour of the applicant over the same Communication Tower vide Application No. 192 of 2010 (Mwakibuja-chairperson)
2. Whether an objection proceeding is entertainable in execution application for eviction and not for attachment

Before determining this application, perhaps it is pertinent to have the gist of the parties' dispute abridged. In the year 2010, the applicant filed a land dispute before DLHT through Application No.192 of 2010 against one Moshi Hussein Nnendendo, administratrix of the estate of the late Hussein Abdallah Nnendondo who passed away on 5th June 2010. The applicant before DLHT claimed to have been given the landed property by

his late father by way of gift on 15th March 1980. Finally, DLHT's chairperson (**R. Mwakibuja-Esq**) through her verdict dated 24th March 2016 declared the applicant the lawful owner of the suit property located at Tandika- Kilimahewa area, TMK/TDK/KLH1/196A. The DLHT's chairperson further directed that, the applicant was entitled to collect rent from the suit house and that, MIC Tanzania Ltd communication tower was constructed within the suit property.

It was also directed that, the 2nd respondent to refund the rentals he collected from MIC and that, the suit property to be excluded by the said Moshi Hussein Nnendondo from the estate of the late Hussein Abdallah Nnendondo. Aggrieved by the decision of DLHT, the 2nd respondent appealed to the Court (**Mgonya, J** as he then was now JA) challenging the DLHT's decision Vide Land Appeal No. 58 of 2016 whose judgment dismissing the 2nd respondent's appeal was delivered on 18th August 2017.

After pronouncement of the judgment of the Court on appeal by the 2nd respondent, the applicant applied for the execution his decree via Execution Application No. 440 of 2018. Subsequently, the 1st respondent successfully filed an objection proceeding before DLHT (**A. R. Kirumbi-esq**) through Misc. Application No. 95 of 2019 where the declaratory order was issued with effect that, the TIGO communication tower now HITT

Infrco was not affixed to the applicant's property rather it is part of the 1st respondent's Plot No. TMK/ TDK/KLM1/196. Aggrieved by the decision in objection proceeding, the applicant filed a fresh Application in the DLHT (Rugarabamu-chairperson), Land Application No. 282 of 2019, which was however struck out without an order as to costs, for the DLHT being functus Officio on the 18th April 2023

Before the Court, Mr. Armando Swenya and Mr. Hussein Hitu both the learned advocates represented the applicant and respondent herein respectively. On 5th March 2024, the Court ordered the disposal of the appeal by way of written submissions and parties complied with the filing schedule.

In support of the application, the applicant's counsel essentially reiterated what is contained in his affidavit and urged this Court to be guided by the following judicial decisions. **One, Patricia Simeto vs. Uongozi wa CMM Tawi la Muungano**, (Misc. Land Appeal 119 of 2021) [2021] TZHC Land Div. 6817 (17 December 2021) at page 7 in which the term "Functus Officio" is defined as officer or official body discharging duties without power or authority having accomplished the same. **Two**, the case of **Fanuel Mantiri Ng'unda vs. Herman Mantiri Ng'unda and 2 others**, Civil Appeal N0. 1995 (unreported-CAT)

Three, in Biki Ksoko Medard vs. Minister for Lands, Housing and Urban Development and another (1983) TLR 250, in which this Court (Mwakibete, J) held;

In matters of judicial proceedings once, a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio, The Minister, having reached, a decision and made it known to the parties became functus officio and could not sit in judgment of his own decision."

In his response, the counsel for the respondents argued that, the 1st respondent was neither a party to the proceedings instituted by the applicant nor the 2nd respondent. Therefore, according to him, the DLHT had jurisdiction to entertain the 1st respondent's objection adding that the applicant's former case was related to landed property on Plot No. 196A and not communication tower comprised of 611 square meters which is registered as Plot No. TMK/ TDK/KLM1/196. He finally, argued that, the applicant has failed to demonstrate any illegality or irregularity to warrant this court to grant the reliefs sought by him through his chamber summons.

It is now the duty of the court to determine whether the DLHT's Chairperson was functus officio and whether a person who is contesting

an intended 'eviction' and not 'attachment' in an application for enforcing a decree may file objection proceedings.

Upon perusal of the records of the DLHT, it is plainly observed that the 1st respondent was not party to the Application No. 192 of 2010 except the appellant against the 2nd respondent and the said Moshi Hussein Nnendendo. However, the 1st respondent was the one who testified during trial pertaining the applicant's Application No. 192 of 2010 on 11th July 2013 for the 2nd respondent (her son) as defence witness one (DW1). Thus, the 1st respondent was quite aware of the existence of the dispute in question. She cannot thereafter complain that, she was not party to the former proceedings before DLHT as she was privy thereto as unambiguously provided under explanation VI of section 9 of the Civil Procedure Code, Cap 33, Revised Edition, 2019, which reads;

"Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

The above provision of the law, has been consistently interpreted by our courts for example, in **Peniel Lotta vs. Gabriel Tanaki and others** (2003) TLR 312 where the Court of Appeal of Tanzania set five

conditions precedent in applying the doctrine of res-judicata by stating that;

"Scheme of section 9, therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are:

- (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;*
- (ii) the former suit must have been between the same parties or privies claiming under them;*
- (iii) the parties must have litigated under the same title in the former suit;*
- (iv) Court which decided the former suit must have been competent to try the subsequent suit; and*
- (v) the matter in issue must have been heard and finally decided in the former suit*

In the instant dispute, the 1st respondent must be deemed privy to the former proceedings conducted against her son (2nd respondent) and one Moshi Hussein Nnendondo (an administratrix) unless the suit land and any other buildings affixed therein are different from the one which underwent litigation as elucidated herein.

Examining the records, I find that, it is indistinctly clear that, the applicant's former application (192/2010) relating to property located at

Tandika-Kilimahewa area on Plot No. TMK/ TDK/KLH1/196A was heard and conclusively determined. The DLHT's decision was to the effect that, Communication Tower built by Tigo (T) Ltd was within the suit land and that, the Residential Licence granted to the 2nd respondent in 2007 was cancelled. Hence, the purported transfer by the late Hussein Abdallah (late father of the applicant and 2nd respondent) to the 2nd respondent was declared a nullity and the applicant was consequently declared the rightful owner of the suit land.

Nonetheless, the impugned decision of DLHT's chairperson (**A. R. Kirumbi**) vide application No. 95 of 2019 was to the effect that, the Tigo Telecommunication Tower be free from the applicant's application for the execution of the decree through Misc. Application No. 440 of 2018. For the clarity, part of the decision is quoted herein

"The 1st respondent has not tendered any evidence to show that, the Tigo Telecommunication tower has been fixed or constructed in his Plot No. TMK/TDK/KLHI/196A.

Therefore the application is granted, and the Tigo Telecommunication tower is hereby released from execution of application No. 192 of 2010 as it does not form part or it has not (sic) constructed in the 1st respondent's plot, rather it is part of the applicant's plot No. TMK/TDK/KLHI/196."

Examining the two decisions of Hon. Mwakibuja and Hon. Kirumbi, I find that, the later adjudicator was not justified or his hands were tied up by the former decision of the same tribunal with same adjudicative power, with not appellate jurisdiction. How could it be possible, the same tribunal to subsequently hold that, the applicant has not established that, the Tigo Communication Tower was not affixed to Plot No. TMK/ TDK/ KLHI/196A While in the former Application (192/2010)? The answer is straight away to the negative.

If I was persuaded that, the 1st respondent's objection proceeding was relating to the Tigo telecommunication tower affixed at a different immovable property, other than the applicant's plot, that would justify the DLHT to grant the objection proceeding instituted before DLHT by the 1st respondent and decision thereto. Nevertheless, when I look at the decision of DLHT in the Application No. 192 of 2010 and that, in the objection proceeding, the latter connotes an abuse of court process. I am holding so, simply because the said leseni ya Makazi pertaining Plot. No. TMK/TDK/KLHI/196A purporting to be granted to the 2nd respondent and lease agreement dated 29th February 2008 between MIC (T) were nullified by DLHT since 24th March 2016 and the same decision was confirmed by this Court (**Mgonya, J**) on 18th August 2017.

In my view, the DLHT was functus officio to hear and determine the issue regarding where the Tigo Telecommunication towers were built as it was clearly determined by the DLHT that, the same were within the applicant's property on Plot No. 196A. Thus, in my considered view, the DLTH's Chairman acted without jurisdiction to entertain the issue on, whether the telecommunication tower affixed by Tigo (T) Ltd was within landed property owned by the applicant or respondent. It could be proper for the DLHT to subsequently hold as explained herein if it was established that, the tower already adjudicated is quite different from the one under consideration, which is not the case.

In the 2nd issue, having determined the 1st issue that, the DLHT's chairperson was functus officio pertaining hearing and determination on whose land the Tigo telecommunication tower was affixed, the 2nd issue should not curtail me. It suffices to hold that, an objection proceeding generally applies to the attachment to a property not belonging to the judgment debtor (decree debtor). However, in my view, a person may file the objection proceedings for enforcement of a decree or order by way of eviction intended to the place or house/property, which was not involved as the subject matter, in the adjudication process yielding the decree subject of execution. One of the circumstances that may justify that filing is wrong identification of a suit property. Had the respondents' evidence

was to the effect that, the communication tower, where the eviction was sought was not deliberated by the DLHT vide Application No. 182 of 2010, it would justify the Court to hold that the 1st respondent rightly filed her objection proceeding.

That, said and done, I therefore invoke provisions of section 43 of the Act and proceed reversing, quashing and setting aside the DLHT's decision and its drawn order dated 10th September 2019 as the tribunal was functus officio. Given the relationship that exists between the parties, I decline from making an order as to costs of this appeal and those incurred before the Tribunal.


It is so ordered.

DATED at DAR ES SALAAM this 27th day of May 2024.




M. R. GWAE
JUDGE

Court: Right of Appeal fully explained


M. R. GWAE
JUDGE
27/05/2024