

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

MISC. LAND APPLICATION NO. 11677 OF 2024

(C/F Misc. Land Application No. 88 of 2020, District Land and Housing Tribunal for
Mbulu)

SIMON NACHAN.....APPLICANT

VERSUS

AGOSTINO HHAMANDI.....RESPONDENT

RULING

27th & 29th May, 2024

KAMUZORA, J.

The applicant has filed the present application under section 41 (1) of the Land Disputes Courts Act [CAP 216 RE 2019], (hereinafter referred to as the LDCA) and section 79 (1)(a) and (c) of the Civil Procedure Code [CAP 33 RE 2019] (referred as the CPC). The applicant prayed for this court to call the records of the District Land and Housing Tribunal for Mbulu at Mbulu (hereinafter referred to as the DLHT) in miscellaneous application No. 88 of 2020 and satisfy itself as to the correctness, legality or propriety of the order dated 15/5/2024 which granted execution and be pleased to revise the proceedings and order thereto. The application

is supported by an affidavit sworn by the applicant and the respondent filed a counter affidavit to contest the application.

Briefly as it could be gathered from the record, the respondent herein sued the applicant and one Daniel Hhamandi before Dongobesh Ward tribunal (hereinafter referred to as the trial tribunal) for recovery of a piece of land measuring about 1½ acres. The respondent's claim was that, the suit land was sold by Daniel Hhamandi to the applicant herein without the respondent's consent. After hearing the parties, the trial tribunal decided in favour of the respondent. The applicant was dissatisfied with the trial tribunal's decision and successfully appealed before the DLHT which quashed the decision of the trial tribunal. The respondent later appealed to the High Court (Arusha registry), Misc. Land Appeal No. 24 of 2019 and the appeal was decided in his favour for the trial tribunal's decision was restored. It appears that, the applicant initiated the appeal process to the Court of Appeal to challenge the decision of this court which was in respondent's favour. The applicant deponed and submitted that there is a notice of appeal already filed to the Court of Appeal and all records of appeal have already been filed before the Court of Appeal and parties are only waiting for the date of hearing of the appeal which is yet to be fixed by the Court of Appeal.

In is on record that, after the decision by this court, the respondent sought to execute the trial tribunal's decision for he filed an application for execution before the DLHT. After series of adjournments the DLHT heard and granted the application for execution vide its order dated 15/5/2024 in which the applicant was required to vacate the suit land. Following such order, the applicant filed the instant application seeking for relief stated above.

When the application was called for hearing, the applicant was represented by Mr. Koisenge, learned advocate while the respondent appeared in person.

The contents of the affidavit were adopted to form part of submission by Mr. Koisenge. He faulted the DLHT for making an order for execution while there is a pending appeal before the Court of Appeal. He submitted that, after the decision was made by this court in Misc Land Appeal No 24 of 2019, a notice of appeal to the Court of Appeal was filed by the applicant who also sought and obtained certificate on point of law. That, he later lodged an appeal on 14/04/2022 which is still pending waiting to be cause listed by the Court of Appeal. He claimed that the DLHT was availed with information on the appeal status and decided to adjourn the case *sine die* waiting for determination of the appeal. That, after sometimes, the applicant was issued with a summons to appear

before the DLHT and on 15/05/2024 the chairman issued an order for execution.

The learned advocate argued that the DLHT order for execution was illegal as the DLHT misdirected itself by holding that there was no appeal pending either in this court or the Court of Appeal contrary to information that was availed before the DLHT on 16/12/2020. That, DLHT held so without even asking the applicant to explain on the status of the appeal. The learned advocate was of view that, since the applicant was not accorded chance to explain on the appeal status, the DLHT made decision without giving the applicant right to be heard against the principle of natural justice. He insisted that, any party to the case has the right to be heard before any decision is made. To buttress his arguments, the learned advocate referred the case of **Pili Ernest Vs. Moshi Musan**, Civil Appeal No 39 of 2019 (unreported) in which the court explained the importance of right to be heard before any decision is made. He therefore urged this court to consider that the order of the DLHT dated 15/05/2024 was contrary to the principle of natural justice.

The learned advocate for the applicant also submitted that the DLHT had no jurisdiction to hear the execution application because the same tribunal had already adjourned the case *sine die* pending determination of appeal, and that, since there was information that the appeal was still

pending, the DLHT had no jurisdiction to continue with execution proceedings. He referred the decision in **Aero Helicopter Tanzania Ltd, Vs. F.N Jansen**, TLR [1990] 42 to support the point that, where there is notice of appeal, the jurisdiction of the lower court is ousted. He further referred the decision of this court in **Kalist Aloyce Masawe Vs. Kijenge Saccos and 2 others**, Civil Reference No. 1 of 2022, page 6.

The learned advocate further submitted that, in his counter affidavit, the respondent averred that there is no any appeal as he was never served with notice of appeal. It was contended by the applicant's advocate that the respondent failed to negate the fact he was represented by advocates from Crown Advocates to where all documents were served. He insisted that, the records are clear that there is a pending appeal before the Court of Appeal and the DLHT was duly informed. He therefore urged the court to quash and set aside the order of the DLHT.

In reply, the respondent submitted that he successfully appealed before the high court hence, he filed an application for execution before the DLHT. That, the applicant objected the execution on account that there was a pending appeal before the Court of Appeal and the chairman ordered the matter to be stayed. That, he waited for four years from 2020 until to-date and but nothing came out thus, he requested the High Court to remit the case file to DLHT for execution and after the file was remitted,

the DLHT issued execution order on 15/05/2024. The respondent argued that, the applicant was informed on the application and was given chance to respond to the application for he was asked if he had any objection. That, the applicant did not object the application and the DLHT upon finding that there was no pending appeal, it issued execution order. The respondent was of the view that, this application is baseless because, the applicant was unable to say if there was any appeal pending. He therefore prayed for the application to be dismissed and a ruling be made that the DLHT was right to issue execution order.

In a brief rejoinder, Mr. Koisenge added that after the DLHT adjourned the matter *sine die*, it was bound to schedule for hearing date of the application for execution or hearing of the objection but that was not done instead the DLHT issued a direct order.

Having considered the parties' rival submissions, the sole issue for determination is whether the application has merits. In doing so, this court will address two issues; one, whether the DLHT had jurisdiction to determine application for execution and two, whether, the applicant was given right to be heard.

Since this is an application for revision, before I venture into the above issues, I would like to refer the law on the revisionary powers of this court. Section 43 (1)(b) clothes this court with powers of revision

against the decision or order of the district land and housing tribunals.

The said provision reads;

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

*(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. [Emphasis added].*

From the above quoted provision, in an application for revision the applicant is required to demonstrate that there is an error material to the merits of the case involving injustice. In the matter at hand, the applicant alleged want of jurisdiction on the part of the DLHT. He argued that, the DLHT had no powers to determine application for execution to which, it earlier on adjourned *sine die* pending determination of appeal but still proceeded with execution while the appeal was still pending before the Court of Appeal. To him, since the application was adjourned *sine die*, the DLHT could not have proceeded with the execution until the appeal before the Court of Appel is determined.

I have keenly perused the DLHT records and I have not come across any order of the DLHT adjourning the application *sine die* pending

determination of appeal before the Court of Appeal. What is reflected on the record is that the matter was being adjourned from time to time waiting for determination of Misc. Land Appeal No. 24 of 2019 that was pending at the High Court (Arusha). After that appeal was determined, the respondent informed the DLHT and sought for execution to proceed and an order for execution was thereafter issued. Thus, the argument that there the case was adjourned *sine die* pending the determination of appeal before the Court of Appeal is not supported by record.

The applicant annexed to the affidavit documents evidencing the existence of pending appeal before the Court of Appeal and referred the case of **Aero Helicopter Tanzania Ltd Vs. F.N Jansen** (supra) to buttress his argument that where there is a notice of appeal to the Court of Appeal then the High Court and subordinate courts lack jurisdiction over the matter. With due respect to the learned advocate, an appeal in itself is not a bar to execution unless, there is an order for stay of execution pending determination of the appeal. See, the decision of the Court of Appeal by the full Bench of the Court in the case of **Hon Attorney General Vs Reverend Christopher Mtikila**, Civil Appeal No. 45 of 2009 (unreported) where the Court made a following reminder

"However, for the avoidance of doubt we wish to refresh the memories of the learned Deputy Attorney General and his team that

the appeal does not operate an automatic stay. So, the law as it is at the moment and onward to the General Elections in October, is what the High Court has decided, that is, independent candidates are allowed."

In the matter at hand, there was no order staying the execution hence the DLHT had powers to proceed with the execution. The decision in **Aero Helicopter Tanzania Ltd** (supra) is also distinguishable to the circumstance at hand. In that decision, there was an application for stay of execution before the high court while there was a notice of appeal pending before the Court of Appeal. The Court of Appeal observed that the High Court lacked jurisdiction to entertain the application for stay of execution since that application could only be entertained by the Court of Appeal. The above position has been underscored in a number of decisions such as **Tanzania Electric Supply Company Limited Vs. Dowans Holdings S. A. (Costa Rica) and Dowans Tanzania Limited (Tanzania)**, Civil Application No. 142 of 2012 and **Serenity On The Lake Ltd Vs. Dorcus Martin Nyanda** Civil Revision No. 1 of 2019 Court of Appeal of Tanzania at Mwanza (both unreported). In the instant matter, there was no application for stay of execution thus, the DLHT could proceed with execution despite there being an appeal before the Court of Appeal.

On the second issue, the applicant argued that he was condemned unheard as there was no notice for execution issued against him. The record shows that, when the respondent moved the DLHT for execution, it ordered a notice to be served to the applicant to appear. The applicant was served and appeared before the DLHT on 09/05/2024 but the case was adjourned to 15/05/2024. On the date fixed, both parties appeared and after the respondent had submitted to his application, the applicant was given chance to address the DLHT on execution application. He came with an excuse that there was an appeal pending before the Court of Appeal. Thus, the argument that the applicant was condemned unheard, is unfounded because the applicant was duly served with notice and appeared before the case was adjourned to another date. On that date, he was also present and was given chance to address the DLHT on the application. Since he was aware that there was an application, it was expected that he also informed his advocate over the matter thus, the advocate could have followed proper procedures in notifying the DLHT over his absence. Thus, the DLHT correctly proceeded with the determination of execution application.

In conclusion, I find no any material irregularity in execution order issued by the DLHT. Consequently, I find this application lacking in merits and I proceed to dismiss it with costs.

DATED at **BABATI** this 29th May 2024.



A handwritten signature in black ink, appearing to read "D. C. Kamuzora".

D. C. KAMUZORA

JUDGE