

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

LAND REVISION NO. 03 OF 2023

**(Originating from Application No. 217 of 2017 District Land and Housing
Tribunal for Mbeya from the Stay of Execution Order)**

AYASI RASHID MBISA APPLICANT

VERSUS

JAMIL TWALHA RASHID MBISA AND 26 OTHERS RESPONDENT

RULING

Date of last order: 14/11/2023

Date of Ruling: 06/03/2024

NGUNYALE, J.

The applicant Ayasi Rashid Mbisa by way of chamber summons supported by an affidavit has preferred the present application per section 43 (1)(b) of the Land Disputes Courts Act Cap 216 R. E 2019 praying for the following orders; **one**, that the court be pleased to call and inspect an error material to the case involving injustice on the ground that, the District Land and Housing Tribunal for Mbeya had no jurisdiction to stay the execution in Application for Execution No. 217 of 2021 and **two**, any

other relief(s) the court will deem fit and just to grant. The application was against the respondents namely; Jamil Twalha Rashid Mbisa, Asaa Twalha, Halima Twalha, Hassani Twalha, Lazia Twalha, Misk Twalha, RaiyaTwalha, Shufaa Twalha, SIlaju Twalha, Twaibu Twalha, Zombe Twalha, Azizi Twalha, Debora Mkongwi, Edwin Sukemo, Fatuma Hussein, FELE F. Ramadhan, George Mwakatobe, Jeny, Jumanne Yunus, Lukia John, Michael Mwambugi, Mwajuma Mussa, Rashid Ramadhani, Zabinu Khatibu Mwapili and Asha said hereinafter to be referred to as the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th and 26th respondents respectively.

The application was supported by an affidavit which was sworn by the applicant Ayasi Rashidi Mbisa. He deponed that, he was the decree holder in application for Execution No. 217 of 2017 filed in the District Land and Housing Tribunal for Mbeya at Mbeya. The respondents applied for an order of stay of execution advancing the ground that the matter to which the execution relies is pending before the Court of Appeal of Tanzania. The applicant raised an objection that the application for execution ought to be filed before the Court of Appeal of Tanzania and not before the tribunal. The District Land and Housing Tribunal overruled the objection and on 18th April 2023 stayed the execution. The applicant averred further

that the tribunal had no jurisdiction to stay execution he opted for the application for revision.

The respondents preferred the preliminary objection against the application for execution on points of law that **one**, the application is incompetent vide Rule 24 of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003 GN. 174 of 2003, alternatively this application is not fit for revision and **two**, the applicant's affidavit is incompetent as it contains opinion, conclusion and legal argument.

The court proceeded to determine the preliminary objection on point of law before going to the merits or substance of the case. Such move was supported by the case of **Bank of Tanzania Ltd vs Devram P. Valambia**, Civil Application No. 15 of 2002 (unreported) which insist that since preliminary objection deal with point of law, it means the suit may be disposed summarily serving time of the court and the parties.

The hearing of the preliminary objection took the form of written submission. The applicant appeared in person and the respondents were enjoying the service of Philip Mwakilima learned Counsel. On the first point of objection Mr. Mwakilima submitted that Rule 24 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 GN 174 of 2003 provides that any person who is aggrieved by the decision of the

tribunal shall subject to the provision of the Act, have the right to appeal to the High Court. Revision has never become an alternative to appeal except in exceptional circumstances. He referred the court to the case of **Transport Equipment Ltd vs Devram P. Valambhia** [1995] TLR 161 where it was held that the appellate jurisdiction of the court is, in most cases mutually exclusive; if there is a right of appeal then the right has to be pursued, except for sufficient reason amounting to exceptional circumstances, there cannot be resort to revisional jurisdiction.

In the other development he cited the case of **Tanzania Game Tracker Limited versus Bryan Priestley**, Civil Application No. 17/02 of 2019 where it was held; -

"According to the law therefore, where there is a right of appeal the power of revision of this court cannot be invoked. Such powers are exercised in exceptional circumstances to warrant this court to exercise its Revisional powers while he has a right of appeal"

He submitted that; the above position is a clear guid that the application is wrongly placed before the court as the applicant remedy was an appeal other than revision. His right of appeal has not been blocked by any judicial process because the right to revision is neither natural nor inherently. He prayed the application to be dismissed with costs.

On the second point of objection that the applicant's affidavit is incompetent as it contains opinion, conclusion and legal argument he

referred the court to the case of The **DPP versu Dodoli Kapufi and Another**, defined an affidavit to mean in law;

".. an "affidavit" is:- "A voluntary declaration o f facts written down and sworn to by the declarant before an officer authorized to administer oaths": BLACK'S LAW DICTIONARY, 7 h edition, at page 58;

Or

"It is a statement in the name o f a person, called a deponent-f by whom it is voluntarily signed or sworn to or affirmed. It must be confined to such statements as the deponent is able o f his own knowledge to prove but in certain cases may contain statements o f information and belief with grounds thereon": Taxmann's LAW DICTIONARY, D.P. MITTAL, at pg. 138."

He went on to submit that, if one looks at the averment at paragraph 4, and 5 of the applicant's affidavit are the opinions, conclusion and welcome the legal argument between the parties are not matters of evidences/facts, given the situation, then paragraph 4 and 5 serves to support this application and once paragraph 4 and 5 are expunged there remains nothing in the affidavit to support the application. He prayed the court to dismiss the application with costs.

The respondents in their joint reply submission came with the view that the said preliminary objections have been misplaced for failure to properly observe laws of the land and the court records to which the revision stems. They submitted that the revision is proper because it originates from the order of the tribunal to stay execution. No objection was filed by

the respondent before the tribunal. Objection proceedings ought to challenge at the tribunal.

He submitted further that The Land Dispute Courts Act Cap 216 R. E 2019 gives a remedy to revision, but the District Land and Housing Tribunal Regulations, GN 174 of 2003 are silent on the procedure to be applied where a party has been aggrieved by the stay order which emanates from execution application. For this situation it was their submission that, where the regulations are not adequate, Civil Procedure Code Cap 33 R. E 2019 applies per section 51 (2) of the **Land Disputes Courts Act** Cap 216 R. E 2019. They added that execution orders are not appealable, but fits for revision; they humbly invite the court to be bound by the provision of order XL Rule 1. He referred the court to the case of **Kelvin Rodney Zambo versus UAP Insurance Tanzania Ltd** Civil Revision No. 39 of 2019 High Court of Tanzania at Dar es Salaam where it was held; -

"... from the above provision of the law (Order XL Rule 1) it is clear that, no appeal lies from execution order as the above provision silence on that. I have also gone through section 74 of CPC which provides the list of order which appeal lies bus the same does not provide"

He moved further to rely to the case of **General Tire (E. A) LTD versus Amenyisa Macha and others** Civil Appeal No. 21 of 2003 *High Court of Tanzania (Arusha Registry) where it was held; -*

"...in the light of the aforesaid, apparently, no appeal lies from an execution order. Any person aggrieved by a decision on execution may

challenge the same by way of revision in the court higher in the judicial hierarchy. The remedy of appeal is restricted in execution orders as attempted by the appellant in the matter at hand ... ”

He submitted that the case of **Transport Equipment Ltd** (supra) as relied by the objector is distinguishable because the above case and other cases were against an order which was appealable.

In the second point of objection, they submitted that paragraph 4 of the applicant affidavit does not contain what is alleged to be opinion, argument and conclusion. They only contain facts which were stated by the applicant in his personal knowledge. He relied to the provision of Order XIX Rule 3 (1) of the **Civil Procedure Code Cap 33 R. E 2019** which provides; -

"...Affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted ..."

In respect of paragraph 5 of the affidavit of the applicant, they admitted that the same makes conclusion the practice which is restricted in affidavit. He prayed the court to expunge such paragraph. He was of the view that expungement of the same the substance of the averments by the applicant will remain intact and the application shall remain competent.

In rejoinder the respondents' Counsel prayed the court to adopt his earlier submission in chief and insisted that the applicant had no right of appeal. The Civil Procedure Code is inapplicable where the remedy is provided under GN No. 174 of 2003.

Having heard the parties through the rival submission my work has become simple, that is to determine whether the points of law raised through a preliminary objection has merit or not. To start with, let me start with the first point of objection to the effect that, the application is incompetent vide Rule 24 of the **Land Disputes Courts** (The District Land and Housing Tribunal Regulations, 2003 GN. 174 of 2003. The objector submitted that revision is an alternative to appeal process. In reply the applicant submitted that the impugned order of the tribunal is not appealable thus he opted for revision process. He was of the view that the order against execution is not appealable.

I wish to referred to the Rule 24 which has been relied by the objector which provides; -

'Any party who is aggrieved by the decision of the Tribunal shall subject to the provision of the Act, have the right to appeal to the High Court (Land Division)

Provided that, an appeal shall not in any case be a bar to the execution of decree or order of Tribunal.'

Guided by the provision above, any aggrieved party with the order of the tribunal has a right to appeal to the High Court. Neither the regulations nor the Land Disputes Court classified orders which are appealable and none appealable. The fact that those legislations does not give distinction to the appealable orders, it was not proper for the applicant to be proactive to import the distinct procedure used in the Civil Procedure Code Cap 33 R. E 2019. The Civil Procedure Code has a different approach as far as appeal against an order of execution is concerned as noted by the applicant in his submission.

Therefore, I am in agreement with the respondents that appeal is not an alternative right to appeal in a circumstance where the right of appeal exist as provided by Rule 24 of the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003 GN. 174 of 2003. The position that revision is not an alternative to appeal has been stated in numerous decisions of the courts of record including the case of **Chrisostom H. Lugiko versus Ahmednoor Mohamed Ally**, Civil Application No. 5 of 2023 Court of Appeal of Tanzania at Tabora. In that case the Court observed that a revision is not an alternative to the appeal, those are two distinct remedies which should not be used in place or in substitution of the other. The revision is exercised upon the discretion of

the court in a circumstance whereas an appeal is a aggrieved party's direct right.

From what I have endeavoured to state, it was wrong for the applicant to invoke revision jurisdiction of the court rather he ought to make an appeal. Consequently, the first point of objection has merit.

On the second point of objection that the applicant's affidavit is incompetent as it contains opinion, conclusion and legal argument the applicant conceded to paragraph 5 of the affidavit contain conclusion but he said that paragraph 4 is sound and proper. In order to answer to the complaint in paragraph 4 of the affidavit I wish to reproduce the relevant paragraph; -

'That, despite the preliminary objection raised and submitted by the applicant before the District Land and Housing Tribunal, that the matter of stay ought to have been filed by respondent in the Court of Appeal of Tanzania, the District Land and Housing Tribunal overruled the said objection, and on 18th day of April; 2023 stayed execution'

I am in agreement with the respondents that affidavits which contain contains opinion, conclusion and legal argument are restricted in legal practice. In reading between lines the above paragraph, I failed to establish any point of opinion or conclusion other than facts in the knowledge of the applicant. I therefore agree with the respondents that the very paragraph does not contain conclusion as alleged by the

applicant. But paragraph 5 which has been establish to contain conclusion is hereby expunged from the record of the application.

In the light of the foregoing, I am satisfied that there is merit in the first point of the preliminary objection. For this reason, the application is incompetent. In view of the position stated the application is hereby struck out with costs. Order accordingly.

Dated at Dar es Salaam this 06th day of March 2024.



D. P. Ngunyale

Judge

06/3/2024

Ruling delivered this 06th day of March 2024 in presence of Mr. Beatrice Kessy for the respondents linked vide video conference from Mbeya High Court conference room.



D. P. Ngunyale

Judge

06/3/2024

