

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

LAND CASE REVISION NO. 24 OF 2009

*(From the Decision of the District Land and Housing
Tribunal of Mwanza District, at Mwanza in Land Case
Application No. 146 of 2008)*

CONSOLIDATED HOLDING CORPORATION APPLICANT

VESUS

MAHATANE MSANA

& 13 OTHERS RESPONDENTS

J U D G M E N T

BEFORE: HON. NGWALA, J:

This is an application for Revision under **Section 43(1)(b) of the Land Disputes Courts Act, CAP 216. R.E. 2002** which reads as follows:

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

(a)

(b) May in any proceedings determined in the District Land and Housing Tribunal in 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 there in as it may think fit..”

The Chamber summons and affidavit in support of the application was filed in court on 01st June 2009, pursuant to the courts order dated 19th May, 2009. That order was issued upon receipt of a letter of complaint with Reference ***.CHC/dc/a.01/Lit/NBC/37 dated 15th December 2008 entitled MWANZA DISTRICT LAND APPLICATION NO. 146 OF 2008, MAHATANE & 17 OTHER VRS CONSOLIDATED HOLDING CORPORATION”.***

In that letter the applicant amongst other things complained of the judgment debtors who are now the respondents using the court system to fulfill their unjust ends.

It appears from the affidavit filed by the applicant from paragraphs 7, 8 and 9 that the Mwanza District Land and Housing Tribunal ordered the respondents to vacate from the suit premises by issuing an eviction order on the 17th October 2008. The tribunal further issued them with a notice to vacate within 14 days and to show cause why execution should not proceed against them. The respondents never vacated, but filed an application for stay of execution of the said decree pending the determination of the intended appeal on the same day when execution had to proceed. The application for Stay of Execution was heard by the tribunal on 2nd December 2008. It was reserved for a Ruling on 23rd

February 2009, which Ruling was not delivered because the record of that tribunal was placed before the Honourable judge Incharge of the High Court Land Division for inspection and Review of the proceedings on 2nd February 2009. Thereafter as aforesaid the matter came up for hearing on 12th June 2009 when both the learned counsels for the parties in this revision filed their respective Affidavit and counter affidavit.

Mr. Gallati, the learned counsel who appeared for the applicants in these proceedings has urged that the Chairperson in the tribunal below was wrong to entertain an application for stay of execution pending appeal and not pending the intended appeal. He insisted there was no appeal instituted in the High Court (Land Division) by the respondents although the same could be filed if they intended to appeal against the eviction order issued by the said tribunal, under Mr. Mugassa the chairmen.

Mr. Gallant maintained the respondents were playing delaying tactics. The purported proceedings for stay of execution were an abuse of the court due process because the respondents were neither owners nor tenants of the suit premises. They were still in occupation of the suit premises illegally, on the pretext that there was a pending application for stay of execution and denying the applicant the right to vacant possession of the suit premises.

Mr. Kahangwa the learned advocate, who appeared for the respondents, contended that it was not true as submitted by Mr. Gallati that **Order XXXIX Rule 5(1) of the Civil Procedure Code, CAP 33. R.E. 2002** did not give room for an application for stay of execution pending the intended appeal. He argued the said order clearly provided that before the expiration of the time allowed for appealing, the court which passed the decree may stay execution upon sufficient cause being shown, Mr. Kahangwa submitted further, their application for stay of execution was filed well within the prescribed time for appealing, and it could not be said that it was filed irregularly, or wrongly. The intended appeal was not filed because the respondents had not obtained the copies of ruling and decree, despite the fact that they had submitted a letter dated 20th October 2008 requesting for the copies of the decree and order for appeal purposes; Hence the respondents could not have filed their appeal before the High Court, and the same did not bar them from filing their application.

For this reasons Mr. Kahangwa prayed that the application for Revision to be struck out with costs and the file be remitted back to the District Land and Housing Tribunal, so that the proceedings can be completed and the applicants be awarded the opportunity of filing an appeal in respect of the erroneous order of eviction made by the trial Chairperson.

Replying to Mr. Kahangwa's arguments, Mr. Gallati reiterated what Mr.Kahangwa had submitted that at the time

they filed the purported application for stay of execution for the intended appeal, there was no appeal pending and they could have filed the appeal if they wished to do so.

As to the allegation that the application for stay of execution was filed within time, he assured the court that it was filed after a period within which the application to show cause had elapsed and no cause is shown so far. For this reason Mr. Gallati urged the court to find that the application for stay of execution was filed without good faith.

I have had the opportunity of examining the original tribunal file in Mahatane Misana and 17 others Vrs. Consolidated Holding Corporation, application No. 146/2008 of Mwanza District Land and Housing Tribunal, which is referred in the arguments by both the learned counsels in their submissions. I find in that record, the application for a copy of the ruling for appeal purposes appeal was written by Kahangwa and Company Advocates on 16th December 2008. It was lodged in the tribunal on 17th December 2009, well after the hearing of the Application for the stay of execution of the order dated 17th October 2009, which was heard on 2nd December 2008, and fixed for a Ruling on 29th December 2008, and when the matter came up for a Ruling on 29th December 2008. The same was never delivered and it was adjourned to 23 February 2009.

The record too reveal that the application for an order to stay execution of order dated 17th October 2008 pending

determination of an intended appeal was filed on 11th November 2008, on the day when the matter was coming up before the Tribunal for a mention so that execution of the said order of eviction could proceed as the fourteen days within which the respondents could show cause why execution should not take place in accordance with **section 23(3) of the Land Disputes courts Act, No. 2/2002 CAP 216. R.E. 2002**, had already expired on 7th November 2008.

The proceedings on record vividly show this. For purposes of clarity I quote the proceedings of the said tribunal dated 24 October 2008 which read as follows:-

“DATE: 24/10/2008

CORAM: A. Kapinga – Chairperson

Applicant: Mr. Galati Advocate

Respondent: Absent

Mr. Galati Advocate: The Respondents were Served since yesterday, and they did not Appear. I pray execution to continue.

ORDER: (i) Mention on 11/11/2008

(ii) the Respondents are given 14 days to comply with the Decree or to bring reasons As to why execution should Not take place. i..e. a... to Section 23(3) of Act No. 2/2002. IT IS SO ORDERED.

Sgd.

A. KAPINGA

Chairperson

24/10/2008.”

I have also examined the Application which was signed by the applicants, now the respondents and the proceedings. It is my finding that the proceedings handled by E. Mogassa Chairmen were regular and proper and in accordance with the law. However the proceedings handled by A. Kapinga Chairmen, starting from 24th October 2008 up to 29th December 2008, are saturated with irregularities and erroneous orders which are contrary to the law and an abuse of the due process of the law. The non-granting of the orders sought by the applicant after the expiration of time without advancing reasons of any kind, and entertaining an application for stay of execution when an appeal had not been preferred is clearly inconsistent with the provisions of **Order XXXIX Rule 3 of the Civil Procedure Code CAP 33. R.E. 2002** which provides as follows:-

“(3) No order for stay of execution shall be Made under sub rule (1) sub rule (2) unless the High Court or the court making it is satisfied that:-

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made*
- (b) that the Application has been made without unreasonable delay; and*
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”*

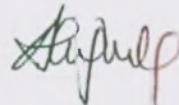
In view of the quoted position, the Tribunal having found that the Respondents had no cause of action against the applicant, there was no way the execution of the decree of the tribunal dated 24/10/2008 could not be enforced after the Respondents had defaulted to show sufficient cause why execution could not take place.

This court is duty bound to see that the rules of the court or tribunals are observed strictly, and they are not there to be violated by any party who deliberately or without any good cause omits or fails to observe the rules. To do so, as it were with the respondents who deliberately committed the lapse in the present case, would defeat the whole purpose and reasoning behind the provisions of Regulation 23 of the Land Disputes courts (District Land and Housing Tribunal) Regulations; 2003, GN. No. 174/2003 detailing on execution of decrees and orders of the tribunal.

In all the circumstances, I consider that this is a proper case for the execution of the inherent powers of the High Court in order to ensure that real and substantial justice is done. Accordingly, in terms of **Section 43(2) of the Land Disputes Courts Act, No. 1/2002 CAP. 216 R.E. 2002**, I therefore make an order in the following terms.

1. The orders of the Chairperson, dated 24th November 2008 is set aside, and the subsequent proceedings are null and void.
2. The execution of a Ruling and its decree or order dated 17th October 2008 should be carried forthwith.
3. The Application for Revision is allowed with costs in this court and the tribunal below.

It is accordingly so ordered.



A.F. NGWALA

JUDGE

03/07/2009