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

REVISION NO. 11 OF 2019

(Arising from Misc. Application No. 163 of 2018, Original Misc. Land Application No. 117 of 2019 of Morogoro District Land and Housing Tribunal at Morogoro)

GERALD WILSON KESSY.....1ST APPLICANT
BAHATI GERALD KESSY.....2ND APPLICANT

VERSUS

FADHILA I. SAGASAGA.....RESPONDENT

Date of Last Order: 11.02.2020
Date of Ruling: 14.04.2020

RULING

V.L. MAKANI, J

The applicants herein are GERALD WILSON KESSY and BAHATI GERALD KESSY. They are seeking for the orders of this court as follows:

1. *That the Honourable Court be pleased to revise the proceedings, ruling/order in Application No.163/2018 of The District Land and Housing Tribunal for Morogoro.*

2. *Costs of this Application.*

3. *The Honourable Court is pleased to make any further orders as it may deem fit.*

The application is made under section 43(1) (b) of the Land Disputes Courts Act (Act No. 2 of 2002) and any other enabling provision of the law. The application is supported by the joint affidavit of the applicants.

At the hearing of the application, the applicants were represented by Mr. Hassan Gyuanda, Advocate the respondent was represented by Mr. Jovin Ndungi, Advocate. The matter was argued by way of written submissions. Since this is an application for revision the court was of the view that it has to satisfy itself of the merits of the application by going through the affidavit, submission by the parties and the files in Misc. Application No. 163/2018,163/2016 and 117/2017 of the District Land and Housing Tribunal for Morogoro at Morogoro (the **Tribunal**).

Submitting in support of the application Mr. Hassan gave a brief history of the matter. He said on 04/04/2016 in Land Application No. 163 of 2016 the Morogoro District Land and Housing Tribunal at Morogoro (the Tribunal), declared the applicants the lawful owners of Plot No.615 Block "A" Tungi, Morogoro Municipal (the **suit land**) and was ordered to vacate the suit land. He added that the applicants filed an application for execution vide Land Application No.117 of 2018 and the respondent was ordered to vacate the suit land and a court broker was appointed to assist in the execution of the decree of the Tribunal. The court broker issued 14 days' notice for the respondent to vacate the suit land but the respondent did not obey the said order. The respondent instead filed an application for review in Land Application No.163 of 2018 in which the Tribunal, in course of hearing varied the Order in Misc. Application No.117 of 2018. He added that in Land Application No.163 of 2018 the Tribunal ordered the Morogoro Municipal Director to make valuation and compensate the respondent herein whereby the Director of Morogoro Municipal was not a party to the proceedings. He added that it was even worse in law for the

Tribunal to order that the execution process should stay pending until Morogoro Municipal Council make valuation and compensate the respondent while the decree did not provide for this condition. Further he said that in the Land Application No.163 of 2016 which resulted to Land Application No.163 of 2018, Morogoro Municipal had never been a party to any of the applications, however, when the ruling was delivered in Misc.163 of 2018 Morogoro Municipal was ordered to compensate the respondent. He said that in practice a decree has never been passed against someone who has never been a party to the proceedings.

He submitted further that in Land Application No. 163 of 2018 the Chairman nullified his orders in execution via Land Application No.117 of 2018 and introduced new orders which were not actually prayed by the respondent. He said that the gist of application for review under Order XLII, Rule 1(1) of the CPC (Land Application No. 163 of 2018) was to correct errors on the face of records or after discovery of the new facts. He relied on the case of **James Mapalala vs. British Broad casting Cooperation (2004) TLR 143**. He added that the Chairman misdirected himself for introducing new orders which defeated the entire decree by ordering compensation to the respondent prior to the demolition of the disputed property and ordering stay of execution pending the valuation and compensation as if the same was applied for stay of execution. He said Morogoro Municipal Council was not party to the suit and the Tribunal came up with the a new set of decisions of its own in Application No.163/2018 contrary to the rules of procedure which was not to correct errors as

required by the law but to order Municipal Council to participate fully in the process of execution as if she was party to main application (Land Application No.163 of 2016). He further said that item 4 of the decree did not require full participation of the Morogoro Municipal Council in execution of the said decree but gave room for the respondent herein to seek compensation from Morogoro Municipal Council in its own way without touching the execution decree. He said further that it is surprising that the respondent sought for enlargement of 60 days to demolish his house but instead the Tribunal ordered full participation of the Morogoro Municipal Council of which she was not a party. He therefore invited this Court to revise the proceedings, and decision of the Tribunal for the protection of applicants' rights. He prayed for the grant of the application with costs.

In reply Mr. Ndungi adopted the respondent's counter affidavit as part of the submissions. He said that the order sought to be revised by this court arose from the execution proceedings, therefore it is not reversible by way of application. The order in Land Application No. 163 of 2018 was issued during execution process by the Tribunal in Land application No.163 of 2016. He said that the judgment and decree was neither appealed against nor challenged by either party to this application. He added that it is during execution proceedings that the applicants sought to challenge the gist of the decree. Morogoro Municipal Council was ordered to make valuation report and compensate the respondent and that if the applicant were not displeased by the decree when the judgment was delivered they

cannot be aggrieved by it at the time when the execution was stayed pending implementation of the portion of the same decree. He added that there was no error or misdirection on the part of the Tribunal as the order was done according to law. He said that section 43(1) (b) of Act No. 2 of 2002 under which this Court is moved does not apply to the circumstances. He said that the said provision only applies in proceedings determined when the Tribunal is in exercise of its original, appellate, and provisional jurisdiction. But in the case at hand, the Tribunal was exerting its powers during the execution proceedings. That the decision of the Tribunal can only be challenged by the way of appeal to this honourable court. He cited Regulation 24 of the Land disputes Courts (District Land and Housing Tribunal) Regulations, GN. No 174 of 2004 He said that section 33(3) of CAP 216 empowers the Tribunal to execute its own orders and decree. He said that the modes of executing are laid down under Part V of GN. No.174 in Regulations 23 to 32 and basing on these Regulations the Tribunal was right in its decisions.

Further he said that the respondent could suffer irreparable loss if the stay or suspension order would not have been issued. Further he insisted that the applicant's joint affidavit has nothing evident to prove that there is error, omission or irregularity which has in fact occasioned failure of justice. He insisted further that execution proceedings were only stayed to pave way for evaluation of the building so as to enable the Tribunal and the parties concerned to understand its value before the same is demolished for compensation purposes to the respondent as there was no any party to blame in

the judgment. That it was under the powers of the Tribunal under Regulation 30(1) before the closing of execution to see to it whether justice has been done in accordance with the judgment and decree. He said that this could have not prejudiced the applicants. He said that the applicants should have demonstrated before this honourable court what failure of justice was occasioned on their part and that the conditions for revision set by the law has not been met in this application. He prayed for dismissal of application with costs.

In rejoinder, Mr. Hassan reiterated what he said in his submission in chief.

Supervisory and revisionary powers of this court are found under section 43(1) (a) (b) and (2) of the Land Disputes Courts Act CAP 216 RE 2002. The said provision states:

> *"(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 materiai 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."

Indeed, the above provision empowers this court on its own motion or upon application by parties to call the record of the Tribunal at any time, conduct inspection and give directions if it considers necessary for the ends of justice.

The decree of the Tribunal in Land Application No. 163 of 2016 was as follows:

- *The application is allowed.*
- *The applicants are hereby declared lawful owners of the sit plot (Plot No. 615 Block "A" – Tungi).*
- *The respondent has to abandoned (sic!) the plot by demolishing the structures he built there and therefore hand over vacant possession to applicants.*
- *The Morogoro Municipal Council to compensate the respondent by allocating him alternative plot and compensate him the value of his building to be demolished the valuer from Morogoro Municipal Office to prepare valuation report for purpose of compensating the respondent.*
- *Due to nature of the results, I order neither party to pay costs.*

I have gone through the records; it is apparent that Morogoro Municipal Council has never been a party to any of the proceedings before the Tribunal which involved parties in this suit. That is, Land

Application No.163 of 2016, Land Application No.117 of 2018 and Land Application No.163 of 2018. It was therefore improper for the Tribunal, in my considered view, especially on the initial Land Application No. 163 of 2016, to issue any order directing Morogoro Municipal Council to conduct valuation and compensate the respondent after demolition. This has delayed the applicants' rights of vacant possession in the suit land as Morogoro Municipal Council was never a party to the proceedings.

In Land Application No.117 of 2018 the applicants were seeking execution of decree, but the Tribunal went on granting another term of 60 days for the respondents to secure the valuation report from Morogoro Municipal Council before the respondents could vacate the suit land. As this was an application for execution, the order given by the Tribunal largely affected the merits of the application as the prayers were for execution and not for enlargement of time for the respondent to be compensated. It was even worse as the application seeking for 60 days was not sought by the judgment debtor (the respondent herein).

Likewise, in Land Application No.163 of 2018 the judgment debtor (respondent) sought review of the orders of the Tribunal in Misc. Land Application No.117 of 2018 in which decree holders (applicants) were seeking to execute the decree awarded in Misc. Land Application No.163 of 2016. Instead of confining itself to the prayers sought, the Tribunal went on to order that Morogoro Municipal Council be involved fully to the execution of the decree, allocate alternative plot

and compensate the respondent DESPITE its finding in the very same decision that the Tribunal was functus officio to review its decision unless there are clerical errors.

For the Tribunal to give effective orders as against Morogoro Municipal Council, the said Council ought to have been a party to the original application as a necessary party. In the case of **Oil Com Tanzania Limited vs. Christopher Letson Mgalla, Land Case No. 29 of 2015 (HC-Mbeya),** Hon. Utamwa, J at page 41 had this to say:

> *"...however, a necessary party is a person who has to be joined in the suit yes, but whose presence before the court is necessary for it to effectively and completely adjudicate upon the question involved in the suit."*

Also, in the cases of **Abdullatif Mohamed Hamisi vs. Mehboob Yusuph Othman and Another, Civil Revision No.6 of 2017(CAT-DSM)** and in **Ilala Municipal Council vs. Sylivester J. Mwambije, Civil Appeal No. 155 of 2015**(both unreported) the Court of Appeal stated:

> *"....a necessary party is one in whose absence no effective or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."*

The Court of Appeal in the latter case of **Ilala Municipal Case** quoted with approval the case of **Tang Gas Distributors Limited**

vs. Mohamed Salim Said & 2 Others, Civil Revision No. 6 of 2011, and in that case the Court of Appeal observed:

> *"....it is now an accepted principle of law (see MULLA's treatise (supra) at p. 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party, therefore, is fatal (MULLA at p.1020)."*

It is the general rule that the applicant is entitled to choose the person or persons as defendants against whom he wishes to sue. However, where the court discovers that a necessary party has not been joined in the suit and the parties have no intention to do so, then the court has a duty to have the necessary party added to the suit. In the case of **Tang Gas Distributors Limited** (supra) it was stated:

> *"Settled law is to the effect that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, the Court has a separate and independent duty from the parties to have him added."*

In the present case, both the applicant and respondent called Authorized Land Officers from Morogoro Municipal Council as their witnesses. PW2 confirmed that the applicant was the lawful owner of the suit land as allocated by the Morogoro Municipal Council, and on the other hand, DW1 said the respondent was also the lawful owner of the suit land as allocated by the Morogoro Municipal Council. Indeed, this is a clear incident of double allocation by the Morogoro Municipal Council who are responsible for handling applications and allocations of land within the municipal. It is apparent therefore that

Morogoro Municipal Council was a necessary party and failure by the Tribunal to join her as a party to the application during the trial was a material irregularity that has resulted to injustice as they is no execution that is capable of being effected.

Now what are the consequences of such irregularity? In the case of **Tang Gas Distributors Limi**ted (supra) the court ordered as follows:

> *"we accordingly nullify, quash and set aside the proceedings in the High Court of 16th May, 2011 as well as the judgment, decree and orders emanating therefrom...Finally, we order that the applicant and all interested parties (eg. Abdallah Said and Mehbood Bukhari) be added in the suit as necessary parties and the pleadings be amended accordingly"*

Borrowing from the above case, in the exercise of the revisionary powers endowed in this court under section 43 of CAP 216, the proceedings of the Tribunal in Land Application No. 163 of 2016, Misc. Land Application No. 177 of 2018 and Misc. Land Application No. 163 of 2018 are hereby nullified, and the judgment, decree and orders emanating therefrom are quashed and set aside. It is further ordered that the pleadings be amended so as to add in the application Morogoro Municipal Council. The matter is accordingly remitted back to the Tribunal for re-trial before another Chairman and new set of assessors.

In making the order for addition of Morogoro Municipal Council as a party, the court is aware of the requirement of statutory notice to the

Municipal Council by virtue of section 97 of the Local Government Urban Authority Act, CAP 288 RE 2019; but the notice is waived since this order is being made by the court on its own accord as distinguished from an intended plaint or agent as envisioned by the said provision (see the case of **Ilala Municipal Council** (supra).

Considering the circumstances of the case, there shall be no order as to costs.

It is so ordered.

V.L. MAKANI
JUDGE
14/04/2020