

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND REVISION NO. 1 OF 2021**

*(Arising from Application No. 105 of 2012 from Temeke District Land and
Housing Tribunal)*

**MALIKI NYIMBI MAKAME (Administrator of the
estate of the late ASIA AYUBU) APPLICANT**

VERSUS

OMARI ADAMU DIMWE RESPONDENT

RULING

Date of last Order: 16.08.2021

Date of Ruling: 08.09.2021

A.Z.MGEYEKWA, J

The applicant in this application is moving this Court to invoke its revisional power to call upon, examine and revise the proceedings, records, and decision/order in respect of Temeke District Land and Housing Tribunal in Land Application No. 105 of 2012 delivered on 19th October, 2018. The application is supported by an affidavit sworn by

Maliki Nyimbi Makame, the applicant and he sets out grounds for which the prayers are sought. The applicant's affidavit was opposed by the respondents, through a counter-affidavit sworn by Omari Adam Dimwe, the respondent, who holds the view that the District Land and Housing Tribunal for Temeke decision is in order and unblemished.

The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present revision. The dispute was instituted by the respondents, contending that the appellant has constructed a fence on his plot. The whole dispute is based on demarcation of boundary. The Ward Tribunal of Azimio dismissed the case. Then the applicant lodged a Misc. Application No. 11 of 2014 before the District Land and Housing Tribunal for Temeke. The applicant filed an application for stay of execution of judgment in Land Application No. 105 of 2021. Hon. Mbilinyi, Chairman decided the matter in favour of the applicant and he ordered the applicant to file her defence within 14 days from the date of the Ruling.

The parties appeared before the appellate tribunal for continuation of hearing the defence case. The District Land and Housing Tribunal for Temeke after several adjournments decided to proceed *ex parte* against Maliki Nyimbi Makame, the administrator of the estate of the late Asia

Ayubu. The applicant appointed Maliki Nyimbi Makamba to appear and prosecute this matter on her behalf. The tribunal embarked to determine the matter and the applicant case was closed. The matter was set for hearing defence case on 21st July, 2017 however, the applicant nor his advocate appear in court. Unfortunately, after a day, Asia Ayubu was reported dead. The matter was adjourned and the respondent was ordered to appoint the administrator of the estate of the late Asia Ayubu. After several adjournments, the appellate tribunal decided to proceed to compose an *ex parte* judgment and decided the matter in favour of the respondent, and the applicant was restrained from entering and/or interfering in any manner with the suit land.

Undeterred, the applicant lodged the instant application for revision. He urged this court to examine and revise the proceedings, records, and decision/order in respect of Temeke District Land and Housing tribunal in Land Application No. 105 of 2012 delivered on 19th October, 2018.

In his submission, the applicant submitted that he is seeking indulgence of this court to exercise its discretionary power to revise the decision of District Land and Housing Tribunal for Temeke emanated from Land Application No. 105 of 2012. The applicant urged this court to adopt the affidavit and form part of his submission. The applicant started with a brief

background of the facts which led to the instant application which I am not going to reproduce. The applicant stated that he has lodged the instant application based on the following grounds; that the trial District Land and Housing Tribunal denied the applicant the right of being heard and tender his evidence and call witnesses to testify in regard to ownership of the suit land. To bolster his submission he referred this court to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which state that:-

“ Article 13 (6) (a) When the rights and well-being of anyone need to be ascertained to be a court of law or any other relevant instrument, then that person will have the right to be given a chance to be heard in full...”

The applicant complained that the matter proceeded *exparte* without issuing a summons to call the applicant before the fixing date of hearing. She added that the matter was adjourned three times without notifying him while they were aware of the death of Asia Ayubu, the mother of the applicant. He added that his mother directed the applicant to follow the procedure to be a party of the application but unfortunately the tribunal proceeded *exparte* against him.

The applicant continued to submit that the trial tribunal erred in law and facts to issue *exparte* judgment without issuing summons to the relatives

of the deceased. Stressing he argues that the trial tribunal and respondent were aware of the death of the deceased. The applicant went on to blame the tribunal for determining the case to its finality while it was aware that the late respondent died before fixing the hearing date. The applicant urged this court to disregard the annexures supporting the counter affidavit and the same be expunged from the record for being irrelevant.

In conclusion, the applicant beckoned upon this court to revise the judgment and order of the appellate tribunal in Land Application No. 105 of 2012 and order the application be determined in a proper court.

Responding, Omary Adam Dimwe, the respondent from the outset argued that the revision is devoid of merit. The respondent started with a summary of the facts which led to the instant application which I am not going to reproduce. He claimed that the applicant was dissatisfied by the appellate tribunal decision and filed a Misc. Application No.11 of 2014 for stay of execution and setting aside *ex parte* judgment in Land Application No. 105 of 2012. He added that the applicant's application was granted and he was supposed to file a defence within 14 days from the date when the ruling was delivered.

Submitting on the first ground that the District Land and Housing Tribunal denied her the rights to be heard and adduce evidence. The

respondent claimed that the applicant has failed to show how the tribunal denied her right to be heard. He submitted that the records reveal that the applicant was served with a summons but she refused to tender appearance. To bolster his submission he referred this court to page 2 of the Judgment and he also cited the case of **Riggs v Palmer New York Court of Appeals** (1889) N.Y 506, 22 N.E 188, the court held that:-

“That no person is required to benefit or take advantage of his own wrongs.”

The respondent urged this court to dismiss the application with costs since the applicant want to benefit from his own wrongs.

Arguing for the second ground that the appellate tribunal erred in law and fact to issue *ex parte* judgment without issuing summons to the relatives of the deceased to appear. He claimed that the applicant wants to misdirect this court. He contended that the records reveal that the applicant was given four months to appoint an administrator of the estate of the late Asia Ayubu. He valiantly argued that the applicant ignored the court order and did not adduce reasonable grounds. He argued that the applicant was served with a summons to appear in court but she rejected to show appearance.

It was the respondent's further submission that the late Asia Ayubu appointed the applicant to be her lawful attorney with full power and authority in Land Application No.105 of 2012 and Misc. Application No.11 of 2014 of Temeke District Land and Housing Tribunal. He added that the tribunal records show that the late Asia Ayubu was represented by legal assistance from TAWLA. It was his view that the applicant's case could proceed without the presence of the late Asia Ayubu. He urged this court to disregard this ground.

Concerning the third ground that the appellate tribunal erred in law and facts to determine the matter to its finality knowing that the respondent passed away before starting the hearing of the case. He strongly argued that this allegation is devoid of merit. The respondent complained that the records show that after the late Asia Ayubu the tribunal availed the applicant four months to appoint an administrator of the estate but the applicant did not comply with the court order. To support his argumentation he referred this court to page 3 of the appellate tribunal in Land Application No. 105 of 2012. He lamented that the applicant's grounds for review are frivolous and vexatious since the applicant failed to prove her case. Fortifying his position he referred this court to section 110 (1) and (2) section 112 of Evidence Act, Cap.6 [R.E 2019].

On the strength of the above submission, the respondent beckoned upon this court to find that the applicant's application is demerit and the same be dismissed with costs.

In his brief rejoinder, the applicant reiterated his submission in chief. He argued that the respondent is trying to mislead this court by saying that he was served with a summons to appear before the tribunal. He claimed that the summons was done through publication in Uhuru Newspaper dated 07th November, 2012 and the *ex parte* judgment was delivered in 2013. Stressing, he submitted that he was not given the right to be heard. He strongly claimed that there is no record that the applicant was summoned to appear before the tribunal, considering that the parties are neighbours.

In conclusion, the applicant maintained his previous prayer that his application be allowed with costs.

After the submission for and against the revision were both learned counsels have submitted in length. Next for consideration is **whether or not the application for revision is meritorious.**

I have opted to address the second and third grounds for revision which relates to *ex parte* hearing. The applicant complained that he was not summoned to appear before the District Land and Housing Tribunal for Temeke in Land Application No. 105 of 2021. The District Land and Housing Tribunal proceedings reveal that the matter was set for hearing at the District Land and Housing Tribunal for Temeke on 15th April, 2015 for hearing whereby Omary Adamu Dimwe, the current respondent appeared in person and Maliki Nyimbi, the respondent was absent. The Chairman adjourned the matter until 22nd June, 2015 whereby both parties were present and hearing was set on 07th December, 2015. On 07th December, 2015 both parties appeared.

The matter was adjourned and the hearing was set on 17th March, 2016 and parties framed issues for determination and the hearing date was scheduled on 01st June, 2016, 02nd June, 2016, and 06th June, 2016, and parties were warned to appear. Again, the tribunal set a hearing date on 09th to 11th August, 2016. Finally, the plaintiff case started on 12th May, 2017 until 21st July, 2017. The defence case was set for hearing on 22nd September, 2017, and on the said date the respondent Advocate reported that the respondent was sick. Unfortunately, the respondent passed away.

Records reveals that on 16th March, 2018 the tribunal adjourned the matter for three months to allow the respondent's family to appoint the administrator of the estate of the late Asia Ayubu. On 13th July, 2018 when the matter was called for hearing, the applicant appeared, and in record, it shows that it was reported that the appointment of the administrator was ongoing. The Chairman decided to proceed to compose an *ex parte* judgment against the deceased person. Reading the records, it is clear that the issue of summons to appear in court does not seem like a problem. I am saying so because both parties appeared before the appellate tribunal and the hearing was ongoing. Unfortunately, the respondent passed away. However, I have noted that the Chairman proceeded to compose his judgment against a deceased person. I fully subscribe to the applicant's claims that it was not proper for the appellate tribunal to proceed *ex parte* against the deceased person while the Chairman was well informed that Asia Ayubu passed away.

The Chairman was required to adjourn the hearing until the appointment of the administrator of the estate of the late Asia Ayubu. The name of the deceased person was required to be substituted by the name of the administrator of the estate of the late Asia Ayubu. Therefore, it was not proper for the Chairman to compose a judgment against the deceased

person as the Decree cannot be executed against a deceased person. In the case at hand, there is no gainsaying that the respondent side was not heard. The act of the Chairman to compose an *ex parte* judgment against the respondent was contrary to the principle of natural justice. In this regard, I pay full homage to obtain guidance from the cases of **Mbeya Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma**, Civil Appeal No. 45 of 2000 (unreported) where it was observed:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law and stipulates in part.

Similarly, in the case of **Abbas Sherally and Another v Abdul Fazalboy**, Civil Application No. 33 of 2002, the Court went further and observed:-

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party

been heard because the violation is considered to be a breach of natural justice.”

The respondent's side was not heard. Thus, consistent with the constitutional right to be heard as well as settled law, I am of the firm view that, in the circumstances of this case, it would be in the interest of justice if the tribunal could have adjourned the hearing of the respondent's case until the appointment of an administrator of the estate of the late Asia Ayubu who could continue with the case before taking any deliberations by the tribunal adverse or otherwise.

In view of the above findings, I am in accord with the applicant that failure to accord them an opportunity to be heard was a breach of natural justice and a violation of the fundamental right to be heard under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

In the upshot, I proceed to revise the District Land and Housing Tribunal judgment and proceeding to the extent that, I quash the judgment dated 19th October, 2018. I set aside the Order of the appellate tribunal dated 13th July, 2018 in regard to closing the respondent's case and I order the respondent's case to continue between Omary Adamu Dimwe and Maliki Nyimbi Makame, the administrator of the estate of the late Asia Ayubu before another Chairman. I also order the name of Asia Ayubu, the

deceased appearing in the tribunal proceedings in respect to Land Application No. 105 of 2012 be substituted with the name of Maliki Nyimbi Makame, the administrator of the estate of the late Asia Ayubu. The application is allowed without costs.

Order accordingly.

DATED at Dar es Salaam this 08th September, 2021



A.Z.MGEYEKWA

JUDGE

08.09.2021

Ruling delivered on 08th September, 2021 in the presence of both parties.



A.Z.MGEYEKWA

JUDGE

08.09.2021