

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO. 119 OF 2021

(Arising from the District Land and Housing Tribunal for Ilala District Misc. Land Application No. 127/2021 Originating from Kimanga Ward Tribunal in Application No.48/2018)

PATRICIA SIMETO APPELLANT
VERSUS

UONGOZI WA CCM
TAWI LA MUUNGANO RESPONDENT

JUDGMENT

Date of the last order: 08.12.2021

Date of Judgment: 17.12.2021

A.Z. MGEYEKWA, J

The Appellant was aggrieved by the decision of the *District Land and Housing Tribunal for Ilala in Land Application No. 127 of 2021* before Hon. M. Mgulambwa, Chairperson dated 28th July, 2021. The material background facts to the dispute are not difficult to comprehend. They go

thus: the respondent lodged a suit at the trial tribunal complaining that the appellant has invaded the CCM plot and has planted banana trees.

The Ward Tribunal proceeded with hearing the case *ex parte* against the appellant and delivered its judgment in favour of the respondent. Dissatisfied the appellant filed an application for an extension of time to appeal against the decision of the Ward Tribunal of Kimanga. The matter before the District Land and Housing Tribunal was determined and the Chairperson found herself *functus officio* to determine the matter since it was the same tribunal that executed the Ward Tribunal of Kimanga decision. Therefore the appeal was dismissed.

Undeterred, the appellant opted to lodge an appeal to this Court with only one ground of appeal as follows: -

- 1. That the District land and Housing Tribunal had erred in law and in facts in rejecting or refusing and/or dismissing the Applicant's Application before it merely on the allegation that, execution of its decree had already been effected and completed thus rendering her functions official (sic).*

When the matter came for hearing on 08.12.2021 the Appellant was represented by Mohamed Mkali, learned Advocate whereas the respondent was represented by Paul Mkenda, learned Advocate.

The learned counsel for the appellant was the first to kick the ball rolling. He submitted that the appellant on 5th March, 2021 filed an Application No. 127 of 2021 in the District Land and Housing Tribunal for Ilala, seeking for extension of time to file an application for revision for the District Land and Housing Tribunal to revise the decision of Kimanga Ward Tribunal regarding Application No.48 of 2018. He added that the application was dismissed on 28th July, 2021 for the reason that the execution was already effected hence that the District Land and Housing Tribunal was "*functus officio*".

The learned counsel added that the appellant was aggrieved hence the instant appeal. It was his view that it was not proper for the District Land and Housing Tribunal to dismiss the application based on the above-given reasons in the ruling.

On the strength of the above submission, the learned counsel for the appellant beckoned upon this court to find that the appellant has adduced sufficient cause for her delay to file the application. He prayed for this to allow the appeal with costs.

In response, the learned counsel for the respondent came out forcefully and defended the District Land and Housing Tribunal decision as sound and reasoned. Ms. Salma Haule was brief and straight to the point. She

argued submitted that the tribunal Chairman was right in determining the matter and that the proper remedy for the applicant to adapt was to apply for revision in the High court. He further contended that, the hands of the District Land and Housing Tribunal Chairman was already tied up and the Chairperson was *functus officio* to proceed with determining the matter.

In his rejoinder, the learned counsel for the appellant insisted that the District Land and Housing Tribunal was required to revise the proceedings of Kimanga Ward Tribunal and not the decision of the District Land and Housing Tribunal hence that the District Land and Housing Tribunal Chairman was not "*functus officio*" hence that the application was wrongly dismissed.

After unfathomable consideration of the submissions before me, among the issue for determination is *whether the applicant was duly served during the hearing of Application No. 127 of 2021*. During execution, the District Land and Housing Tribunal proceedings reveals that on 07th February, 2019 and 12th March, 2019 the Chairman had ordered for affixation to the appellant's premise. However, there is no reason as to why they opted to affix the summon since there is no any proof of service to the respondent that had bounced and the same resulted in affixation as provided under Order V Rule 13 of the Civil Procedure Code Cap 33 [R.E. 2019] that:-

“Where the serving officer, after using all due and reasonable diligence, cannot find the defendant and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall within fourteen days of affixing such copy then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.” [Emphasis added].

I have perused the District Land and Housing Tribunal records to find if there was a proper service and found that the proof of affixation is not indicated in the tribunal records, that is to say, the appellant was not summoned to appear contrary to Order XXI Rule 20 of the Civil Procedure Code Cap.33 [R.E. 2019], that provides for the respondent in execution cases to be summoned to show cause. Therefore, the District Land and Housing Tribunal records do not show whether there was proof of service to the respondent

Concerning the second issue of application for extension of time, the appellant in Application No. 127 of 2021 before Hon. Mgulambwa, applied for an extension of time to file an application for review out of time. For ease of reference, I reproduce the appellant's prayers as follows: -

“Mwombaji kupitia kifungu Na 14 (1) cha Sheria ya Ukomo Na. 89/2019 mwombaji ameomba yafuatayo:-

- *Baraza hili linaombwa liongeze muda wa kupata/kufanya mapitio nje ya muda dhidi ya mwenendo na maamuzi ya Baraza la Kata ya Kimanga kwenye Shauri Na.48/2018, maamuzi ya tarehe 06.09.2018.*
- *Gharama za kesi zitolewe.*
- *Nafuu nyingine yeyote Baraza hili itakavyoona inafaa.”*

On its decision, the Chairman among other things ruled that:-

*“Jalada la maombi ya utekelezaji la Baraza hili linaonyesha kwamba utekelezaji huu ulishafanyika na dalali wa baraza alitekeleza alishaleta taarifa ya kwamba utekelezaji umeishafanyika hivyo basi mikono yangu imeshafungwa kutoa amri nyingineyo hai maombi yalishakubaliwa na utekelezaji kufunga jalada la utekelezaji, yaani nitakuwa (**functus officio**) kwa kuendelea na kesi hii. Mwomabaji anashauriwa asiwe anakataa wito apokee aende kukataa maneno.”*

In finding out whether the Chairman was *functus officio*, I find it crucial first to define the word *functus officio*. In the **Black's Law Dictionary, 8th Edition at page 696**, *functus officio* is defined to mean:-

"Having performed his or her office" or an officer or official body) without further authority or legal competence because the duties and function have been fully accomplished."

Likewise, in the case of **School Trustees of Washington City Administrative Unit v 3 Benner**, 222 N.C. 566, 24 S.E.2d 259, 263, quoted in the dictionary defined the phrase *functus officio* as follows:-

"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also, to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect. Blanton Banking Co. v Taliaferro, Tex.Civ.App, 262 S.W. 196.

Applying the above legal precedents, *functus officio* means the District Land Housing Tribunal could not entertain the same matter which was before it. In the case at hand, the District Land and Housing Tribunal executed the Ward Tribunal of Kimanga order in Misc. Application No. 374 of 2018, therefore, I fully subscribe to the submission made by Ms. Salma

Haule and the District Land and Housing Tribunal for Ilala that the Chairperson was *functus officio* to determine the issue related to execution. In the case, **Kamundu v R** (1973) EA 540 the E.A, the Court of Appeal held that: -

"A court becomes functus officio when it disposes of a case by a verdict of a guilty or passing sentence or making some orders finally disposing of the case."

This Court followed the above position in the case of **Bibi Kisoko Medard v Minister for Lands Housing and Urban Developments and Another** [1983] TLR 250 in which the late Mwakibete J, held that:-

"A matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

Apart from the issue of execution, this court after going through the appellant's grounds of appeal and the records of the Ward Tribunal, noted that there are some irregularities concerning issuing of a summons. Although the execution took place, the same does not deprive this court to adjudicate on appellant's other claims as it was stated by the Court of Appeal of Tanzania in the case of **Ms. Sykes Insurance Consultants Co. Ltd v Ms. Sam Construction Co. Ltd**, Civil Revision No. 08 of 2010,

whereas the Court when clarifying Order XXI Rule 57(2) of the Civil Procedure Code Cap.33 [R.E. 2019] referred to MULLA (op. cit) at page IS0S-5A held that: -

"Whenever a claim is preferred under Order 21/ rule 58 against the attachment of immovable properties/ the fact that the properties are sold or the sale is confirmed, will not deprive the court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial court... and in the event of the claim being allowed, the sale and confirmation of sale shall to that extent be treated as a nullity and of no effect."

The Court further stated that:-

".... we are of the firm view that the learned Judge had not only the power but also the duty to hear and determine Mrs. Anna Mhina's application. Having failed to do so i.e having declined to exercise his jurisdiction, regardless of the merits or otherwise of her claims, we have found ourselves lacking the temerity to hold that no gross injustice was occasioned to her. Her application had to be heard even if eventually it would have been found lacking in merit."

In the upshot, I am convinced that this case fits in the mould of cases for which extension of time on the ground of delay may be granted. Circumstances of this case reveal sufficient cause capable of exercising

the Court's discretion and extending time within which to file an application for revision before the District Land and Housing Tribunal against the decision of the Ward Tribunal of Kimanga, Application No.48 of 2018.

Accordingly, I allow the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 17th December, 2021.




A.Z.MGEYEKWA
JUDGE
17.12.2021

Judgment delivered on 16th December, 2021 in the presence of Mr. Mohamed Mkali, learned Advocate for the appellant and also holding brief for Mr. Mkenda, learned Advocate for the respondent.




A.Z.MGEYEKWA
JUDGE
17.12.2021