IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 09 OF 2019

(Arising from Misc. Land Application No. 18/2012, of the District Land and Housing Tribunal for Mkuranga)

KAUYE HASSAN MBELWA (Administratix of the Estate of the late Hassan Mbelwa).....APPLICANT

VERSUS

ASHURA RAMADHANI CHAMRUME.....RESPONDENT

RULING

Date of Last Order: 24. 11. 2021

Date of Ruling: 02. 12. 2021

OPIYO, J.

The background of this application is in the *ex-parte* judgment given in the Land Case Application No.18 of 2012, by the District Land and Housing Tribunal for Mkuranga which declared the late Hassan Mbelwa, Maneno Ally and Mwenyekiti wa Kijiji- Mkokozi, as trespassers in the land, located at Mkokozi Village in Mkuranga District, here in after called the suit land. The decision was delivered by the learned Chairperson of Mkuranga District Land and Housing Tribunal, Hon. J.P Kaiza, dated 15th of April 2013, in favour of the respondent here in above. Thereafter, the respondent applied for the execution of the *ex-parte* decree, vide Misc. Application No. 40 of 2013, the same was allowed and through the

services of NOLIC AUCTION MART, a tribunal broker, a notice was served to all judgment debtors, dated 05th February 2015, ordering the persons named there in to demolish their buildings found in the suit land. The facts further show that, Mr. Mbelwa died later in November 2015 and the applicant here in above stepped into the shoes of her late father as the Administratrix of his estate. Now she has preferred the instant application looking forward to this court to revise the *ex parte* judgment of Hon. J.P Kaiza, vide Land Application No. 18 of 2012. The Application was brought under section 43(1) (a) and (b) of the Land Dispute Courts Act, Cap 216 R.E 2019 and sections 79(1) (a), (b) and (e) of the Civil Procedure Code Cap 33 R.E 2019. The same was accompanied by the affidavit of Kauye Hassan Mbelwa, the applicant here in above.

The application was heard by way of written submissions. Advocate Twaraha Yusuph appeared for the applicant while the respondent appeared in person. While preparing this ruling two legal issues came to light that affects the competence of this application. Firstly, as I have noted above that the original case was heard and decided *ex-parte* against the deceased Hassan Mbelwa and two others and has never been set aside. Secondly, as we speak, the execution of the said decision has already been completed. These facts were well narrated by the respondent in her reply to submissions and addressed by the applicant's counsel in his rejoinder submissions.

Now, the pressing issue at this juncture is whether the instant application can stand in such circumstances. In my discussion, I have considered the submissions of the parties, but I will not reproduce the same beforehand,

rather, I will be using them in the course of analysis of the two issues noted above.

In addressing the first issue, reliance is made on the provision 11(2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulations embracing the gist of Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019. The regulation provides that:-

> *"A party to an application may, where he is dissatisfied with the decision of the tribunal under sub-regulation (1) within 30 days apply to have the orders set aside, and the tribunal may set aside the orders if it thinks fit so to do and in case of refusal appeal to The High Court."*

Plainly, as per the above quoted provision of the law, the way to fight or challenge an *ex parte* judgment is to apply to the court which passed that judgment to set it aside. The law is to the effect that, in any case in which a decree is passed *ex-parte* against a defendant, he/she may apply to the court by which the decree was passed for an order to set it aside. If he satisfies the court that the summons, was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise, as it thinks fit and shall appoint a day for proceeding with the suit inter parties. In other words, the law has given an option to set aside an *ex-parte* judgment and decree is optional to the person so aggrieved by it, but once the application has been made before the court and upon being

satisfied with the reasons provided by the applicant for his/her non-appearance, it may make an order to set aside the same. In case the setting aside is refused the party has an option of appealing to the High court. Failure to observe this procedural law, the decision will remain intact as nothing can be made to change or vary it as it stands in the impugned judgment of Hon. J.P Kaiza, learned Chairperson of Mkuranga District Land and Housing Tribunal.

Looking at the submissions of both parties, although that of the applicant's counsel intentionally omitted these facts, but the respondent's reply submissions narrated well of what transpired between the parties prior to the institution of this application.

The respondent stated categorically that, at some point the applicant unsuccessfully attempted to set aside the *ex parte* decision of Hon. Kaiza, by filling an application to do so, vide Misc. Application No. 11 of 2015, before Hon. R.L Chenya. The application was dismissed for being filed out of time on 24th July, 2017. He went on to apply for an extension of time which again was dismissed for lack of sufficient reasons on 03rd of June 2016, vide Misc. Land Application No. 43 of 2015. Therefore, based on these set of facts, it is obvious that the *ex parte* judgment of Hon. Kaiza remains unchanged to date. Since it was made *ex-parte*, there is no way the same can be changed save by way of setting it aside.

The record at hand supports her arguments. The applicant argued that there was a matter that was previously delt with by Vikindu Ward Tribunal, but in application No. 26/2008 in which the applicant's father won, meaning that the suit from which this application emanates from was res

judicata right from inception, but no document was attached to prove that for the court to rely on. Also, as the applicant had taken a right course in trying to set aside the *ex parte,* but discarded the same after the dismissal of his application for extension of time, it was not right move to opt for unmaintainable application for there being nothing to revise.

Furthermore, the decisions that is sought to be revised has already been executed since February 2015, vide Misc. Application No. 40 of 2013. Therefore, this application has already been overtaken by events. There is nothing to revise in the first place.

That being said and done, I find this application to be incompetent before this court and the same is hereby struck out with costs.

Ordered accordingly.

M.P. OPIYO,

JUDGE

02/12/2021