IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 08 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni at Kinondoni in Land Application No. 491 of 2016)

VICTORIA RWEIKIZA .....APPLICANT

VERSUS

ALEX MSAMA MWITA .....1ST RESPONDENT

BENEDICTO R. IJUMBA.....2ND RESPONDENT

NOELA O. ISHEBABI.....3RD RESPONDENT

Date of last order: 20/7/2022

Date of Judgment: 19/9/2022

RULING

A. MSAFIRI, J.

This is a ruling on application for revision lodged in the Court by the above named applicant on 17/3/2022 under sections 43 (1) (b) of the Land Disputes Courts Act [CAP 216 R.E 2019]. The applicant prays for the following orders namely;

a. An order expunging the document in the Tribunal file titled "Settlement Deed" signed by the 1st and 2nd

respondents on 30/11/2016 and filed in the Tribunal on 2/12/2016;

b. An order quashing and setting aside the proceedings and order and decree of the Tribunal dated 16/2/2017;

c. Having made the above orders, make an order requiring the Tribunal to issue a summons inviting all the parties to appear before it on a date to be set by the Tribunal to continue with the case in accordance with the law from where it stopped immediately before 16/2/2017;

d. Make an order awarding costs of this application in favour of the applicant;

e. Make any other relief that the court deems fit to grant.

The application has been taken at the instance of the applicant and it is supported by the affidavits of the applicant and that of Pascal Living Mshanga, learned advocate for the applicant.

On 1/6/2022 this Court ordered the application to be disposed of by way of written submissions whereby the applicant's submission was drawn and filed by Mr. Pascal Mshanga learned advocate. Mr. Rajabu Mrindoko

drew and filed reply submission for the 1st respondent. The 2nd and 3rd respondents did not enter appearance despite being duly served.

As it could be gathered from the record, on 28th September 2016, the 2nd respondent herein instituted Land Application No. 491 of 2016 at the District Land and Housing Tribunal for Kinondoni District sitting at Kinondoni (hereinafter referred as the DLHT), against the applicant, 1st and 3rd respondents. Essentially the 2nd respondent was claiming for reliefs *inter alia* that he be declared as a lawful owner of the piece of land known as Plot No. 750 Block "J" Mbezi Beach Area within Kinondoni Municipality (hereinafter referred to as the suit premises).

It is on record of the DLHT that, the applicant and the 3rd respondent did not file their respective written statements of defence and the matter was finally determined after a settlement deed had been entered between the 1st and 2nd respondents. I had an opportunity to go through the said deed of settlement which was filed before the DLHT on 2nd November 2017. On clause 1 of the of the said deed of settlement, the 1st respondent agreed to pay a sum of Tsh 50,000,000/= to the 2nd respondent and on such payment the latter abandoned all his claims over the suit land.

In this application the applicant has reproached the manner in which the matter before the DLHT was handled on several grounds.

On the first ground the applicant contended that the applicant was not a party to the settlement deed and the decree extracted from it. On this complaint it has been submitted that the settlement deed had the effect of dispossessing the applicant with her property and therefore she was condemned unheard. It has been submitted further that the record of the DLHT is silent as to who moved it to record the purported settlement deed. The applicant therefore submitted that she was condemned unheard contrary to the dictates of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

To fortify her stance, the applicant referred to me the decision of this Court in **Novat Onesmo Mseiy v Deogratius Christian Marandu,** Land Appeal No 20 of 2019 (unreported) in which this Court quoted with approval the decision of the Court of Appeal in **Abbad Sherally and another v Abdul Fazalboy,** Civil Application No. 33 of 2002 (unreported) in which it was held that, a decision arrived at in violation of the right to be heard will be nullified.

Hence the fact that the applicant was not a party to the purported settlement deed and the resultant decree emanating thereof warrants this Court to exercise its revisionary powers and set aside the purported decree.

On the second ground of complaint, the applicant faults the proceedings for non compliance with the order regarding the issue of service of summons and pleadings. The applicant has submitted at length contending that the applicant was never served with summons as ordered by the DLHT. It was further submitted that the matter was before Hon. Mlyambina, Chairperson but on 16/2/2017 the matter came before Hon. Chenya, Chairperson and there was no reason why the matter shifted hands. By not issuing summons to the applicant renders the proceedings of the DLHT a nullity, the applicant submitted.

On the aspect of the incompleteness of pleadings before the DLHT, the applicant has submitted at length on that aspect but what I could gather from her submission is that it is only the 1st respondent who filed his written statement of defence. The applicant and the 3rd respondent were not given time to file their respective written statements of defence

hence the settlement deed could not have been reached without all parties having filed their respective written statement of defence.

On the last ground of complaint, the applicant contended that the power of attorney which was used to effect sale of the applicant's property to the 1st respondent was already revoked by the applicant. The applicant submitted that she initially gave power of attorney to the 3rd respondent on 28/6/2010 with limited powers to sign, receive and collect the applicant's title deed. There was no power for sale given to the 3rd respondent by the applicant. The power of attorney given to the 3rd respondent was revoked on 11/11/2015 hence no property could ever pass to the 1st respondent.

On reply, the 1st respondent having adopted his counter affidavit contended that there is no any illegality in the proceedings of the DLHT to warrant the Court to invoke its powers of revision. On the allegation that the applicant was not a part to the settlement deed, the 1st respondent contended that the applicant cannot challenge the said settlement deed rather it is only parties thereto who can challenge it. The 1st respondent contended further that the applicant could have moved the DLHT to call the 2nd respondent to proceed with the case against the 3rd respondent.

who were not parties to the settlement deed and even raising counter claim against the 1st respondent.

On non service of summons to the applicant, the 1st respondent contended that he had no duty to serve the applicant with summons rather it was the duty of the 2nd respondent to prove whether he served the applicant with summons or not. Hence the complaint is wrongly made against the 1st respondent.

As to the complaint regarding the recording of the settlement before the applicant and the 3rd respondents had filed their respective written statements of defence, the 1st respondent has contended that it was not the duty of the 1st respondent to know as to why the applicant and the 3rd respondent had not filed their respective written statements of defence.

On the last ground of complaint the 1st respondent contended that, the said ground is misconceived because the applicant is trying to pre-empt the merits of the case by giving evidence in submission. The applicant should have waited if the revision succeed then she will have the room of challenging it as to how the 1st respondent got ownership of the property in question.

On rejoinder the applicant has essentially reiterated her submission in chief.

Having gone through the submission by the learned advocates for the applicant and the 1st respondent rival and in support of the present application, the sole issue that calls for the Court's determination is whether the present application has merits.

I wish to point out that in the instant application, the applicant is moving the Court to invoke its powers of revision as stated before. This Court derives its powers of revision over the proceedings or any order from the District Land and Housing Tribunals under Section 43 (1) (b) of the Land Disputes Courts Act [CAP 216 R.E 2019]. The said provision provides;

> ***43****.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-*
> *(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 material to***

the merits of the case ***involving injustice****, revise the proceedings and make such decision or order therein as it may think fit.* [Emphasis added].

From the foregoing provision of the law, in an application for revision like the present one, the applicant must show that there is an error material to the merits of the case involving injustice.

In the present application there is no dispute that the applicant and the 3rd respondent did not file their respective written statements of defence. On record there is a written statement of defence by the 1st respondent who was the 3rd respondent before the DLHT. The applicant has submitted at length that she was condemned unheard and illegally dispossessed of her property because she was never served with summons to appear before the tribunal. The 1st respondent simply distanced himself from those allegations.

In the instant matter reading through paragraphs 4 and 5 of the applicant's affidavit it is clearly stated that she was in Norway. She travelled in 2010 and in 2018 she was back in Tanzania. I have carefully gone through the record of the DLHT and see that, summons was issued to the applicant and was received by one Award Swaibu, a watchman on

13/10/2016. There is an affidavit of service at the back of the said summons by the process server namely Othman Msolopa and the same was attested by one A. A. Azizi advocate.

Equally the 3rd respondent's summons was received by one Idrisa Mwaisaka, a brother to the 3rd respondent. The service was effected through Othman Msolopa and there is affidavit of service and the same was attested by one Goodchance Lyimo advocate.

From the above facts, unlike the applicant's bolded claims that no *affidavit was filed as required by the law, there* are indeed affidavits at the back of each summons and the same were attested before commissioners for oaths as I have indicated above. The next question which I have to consider is whether the applicant and the 3rd respondent were served. Starting with the applicant, the summons issued to her was received by one **Award Swaibu** a guard on 13/10/2016. The applicant simply claimed that she was never served. But both in her affidavit as well as submission in chief as well as rejoinder submission she said nothing regarding the person namely **Award Swaibu** who is indicated to have received the summons on behalf of the applicant.

The applicant was reasonably expected to say something regarding that person. This is because she had an opportunity to peruse the DLHT record through her advocate who filed supplementary affidavit. Failure to say anything I am of the considered opinion that the applicant was served though her watchman.

I have considered the applicant's arguments that there was nothing said regarding re-service to the applicant while the same was ordered only against the 3rd respondent. As I have indicated earlier the summons issued to the applicant was received by **Award Swaibu** a guard on 13/10/2016, the matter was fixed for mention on 18/10/2016. It is on record of the DLHT that re-service was ordered only against the 3rd respondent.

A perusal to the record shows clearly that the 1st respondent had already been served through one **Mahamudu M. Mbelwa** while applicant's summons was received by the person named above but for the 3rd respondent it is clearly indicated as per the affidavit found at the back of the summons that she could not have been served. That is why re-service was ordered against the 3rd respondent.

I will now turn to deal with the applicant's complaint that she was illegally dispossessed of the suit premises by the 3rd respondent who

disposed it to the 1st respondent. The applicant has contended at length that she only gave a power of attorney to the 3rd respondent with powers to only sign and collect a title deed on behalf of the applicant. I saw the said power of attorney which has been attached on the applicant's affidavit as "annexure AA2". Indeed looking at the said power of attorney so attached gives such powers to the 3rd respondent as to signing, receiving and collecting all documents and title of the suit premises.

I have had an opportunity to go through the entire record of the DLTH, I was able to see another power of attorney executed on 28th June 2010 which was filed as an annexure AM-1 to the written statement of defence by the 1st respondent. The same reads in no ambiguous terms that the applicant was a donor while the 3rd respondent was a donee of the said power of attorney. It reads as follows;

> *"The powers and authority conferred herein upon my attorney are limited to signing, execute deeds, mortgaging, disposing (selling) receiving and collecting on my behalf all documents and proceeds in respect of the title and property mentioned above"*

The said power of attorney attached to the 1st respondent's written statement of defence was witnessed by Mwami Mango Kiozya, advocate. Now the applicant did not say anything regarding the said power of attorney which expressly conferred powers to the 3rd respondent among other things to dispose of the suit premises.

I am of the settled mind that the applicant is aware of the same as her advocate namely Pascal Living Mshanga perused the DLHT record and that power of attorney was attached to the 1st respondent's written statement of defence. Whether the same was forged or not should have been proved by the applicant.

Therefore taking into account what I have deliberated above on the allegations by the applicant that she was condemned unheard and that she was illegally dispossessed of her property I find them to be farfetched and I hold that, the prayer to have the settlement deed quashed cannot be granted on the basis of the applicant's claim.

I have also considered the applicant's claim that no one moved the DLHT to have the matter settled. There is a settlement deed that was filed on 2nd November 2016 the same was signed by the applicant and the 1st respondent so they are the ones who moved the DLHT to have the matter

settled by lodging a settlement deed which was later reduced as the decree of the DLHT.

Lastly, I have taken into account the applicant's claim that the matter was initially before Hon. Mlyambina- Chairperson and without reasons the file shifted to Hon. Chenya. I find this claim to be baseless because on 16th February 2016 though it is indicated that Hon. Chenya- Chairperson issued an order that the matter was settled but the actual decree arising from the settlement order was signed by the Hon. Mlyambina-Chairperson. So even if I were to nullify the proceedings as prayed by the applicant, I would have done so in respect of the proceedings dated 16/2/2017 and that would have no impact on the settlement decree duly signed by Hon. Mlyambina –Chairperson.

In upshot and for the foregoing I hold that the present application lacks merits and it is hereby dismissed with costs.

Order accordingly.

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

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A. MSAFIRI,

JUDGE

19/9/2022