

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 41 OF 2021

*(Originating from the District Land and Housing for Mbezi Ward Tribunal in
Land Application No.25 of 2020)*

ODEMARI MUSHI **APPLICANT**

VERSUS

EZEKIEL LWILA **RESPONDENT**

RULING

Date of last Order: 03.10.2022

Date of Ruling: 05.10..2022

A.Z. MGEYEKWA, J

This is an application for Revision against the decision of the District land and Housing Tribunal for Temeke at Temeke. The application is brought under section 43 (1) (a) of the Land Disputes Courts Act, Cap 216. The application is supported by an affidavit sworn by Omary Ndete, the applicant.

The background of the matter briefly goes as; the respondent lodged a case at the Ward Tribunal for Mbezi in Case No. 25 of 2020 alleging that the appellant has trespassed on his land and constructed a wall. The trial Tribunal determined the matter *ex parte* after the physical service was made but the appellant denied to sign the summons. The trial tribunal decided the matter in favour of the respondent. Thereafter the respondent filed Application No. 838 of 2020 before the District Land and Housing Tribunal for execution.

The dispute pits the applicant against the respondents, and the applicant's prayer is for this court to invoke and exercise its revision jurisdiction to call and examine and revise the proceedings, records, and decision/order in respect of Temeke District Land and Housing Tribunal in Land Application No.71 of 2021 delivered on 3rd August, 2021 by Hon. J.M Bigambo.

When the appeal was placed before Hon. Arufani, J for hearing on 27th July, 2022, the applicant enlisted the legal service of Mr. Jonas Kilimbi, learned counsel, and the respondent appeared in person, unrepresented.. The respondent urged this Court to argue the application by way of written submission. On the parties' concurrence, the hearing of the matter was

through written submissions the filing of which followed the schedule drawn by the Court.

In his written submission, the applicant's Advocate started to narrate the genesis of the matter which I am not going to reproduce. Submitting in support of the revision, the counsel for the applicant complained that the District Land and Housing Tribunal ignored the applicant's submission without any justifiable reasons. To buttress his contention he cited the case of **Lutter Symphorian Nelson v Attorney General & Ibrahim Said Msabaha** [2000] TLR 419, Civil Appeal No. 24 of 1999. The counsel for the applicant went on to argue that the appellate tribunal did not consider the applicant's reasons for why the execution order should not be granted whereas the applicant submitted that there are contradictions in the decree on the area to be demolished.

The learned counsel for the applicant went on to submit that the execution has been overtaken by the event since the said execution has been carried out by the respondent even before the institution of Application No. 25 of 2020 at Mbezi Ward Tribunal. He added that the applicant's and his witnesses proved the same that the wall in dispute was already been demolished by the respondent. To support his submission he referred this

court to the trial tribunal judgment specifically pages 1 and 2, the respondent stated that:-

“Niliona anafanya uonevu kwangu pia anadharau mamlaka ambayo yapo kisheria nikaamua kwenda kubomoa ukuta huo.”

He went on to argue that the respondent’s witnesses testified to the effect that the respondent had already demolished the wall. Reliance was placed on the case of **Access Bank Tanzania Ltd v Shanila Mwenda Ramadhani**, Civil Revision No. 27 of 2016 (unreported). He submitted that the cited case is similar to the case at hand whereas the respondent applied for execution at Kinondoni District Land and Housing Tribunal while knowing that the wall in dispute was demolished. Therefore ordering demolition was a wastage of time. He also cited the case of **Metro Petroleum Tanzania Ltd & another v United Bank of Africa**, Civil Appeal No. 147 of 2019.

On the strength of the above submission, the counsel for the applicant beckoned upon this Court to grant the applicant’s application with costs.

Opposing the appeal, Mr. Godlove Godwin was brief and straight to the point. He contended that the applicant’s submissions are misconceived. He argued that the respondent successful obtained the judgment against the applicant in Mbezi Ward Tribunal and the tribunal visited *locus in quo* and ordered the

applicant to demolish the wall which was constructed in the respondent plot but the applicant refused, hence the applicant lodged a suit against the respondent.

Mr. Godlove Godwin continued to submit that the executing tribunal acted properly according to the Decree of Mbezi Ward Tribunal as evident in the trial tribunal proceedings. To support his submission he referred this Court to page 8 of the trial tribunal proceedings/ judgment. He insisted that after the visit locus in quo, the tribunal saw the wall and ordered the appellant to demolish the said wall. He stated that it is not true to say that the whole wall was demolished by the respondent since in the course of demolishing the said wall the respondent was arrested and thus, the respondent decided to lodge a case at the trial tribunal seeking an order of demolition.

Mr. Godlove Godwin argued that there is a wall built by the applicant and if the respondent had demolished the whole wall, the trial tribunal during the visit in quo could not have seen the said wall, and the same they could not have ordered the applicant to demolish. The counsel for the respondent contended that the applicant is introducing a fictitious case while the civil and criminal cases were dismissed for lack of merit and the applicant has been lodging revisions and the same is demerit.

On the strength of the above submission, the applicant beckoned upon this Court to dismiss the application with costs.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by both counsels. Having done so, it should be now opportune to determine the issue *whether the revision is meritorious*.

The applicant's counsel contended that the execution is overtaken by the event because the same has been carried by the respondent. I had to go through the trial and appellate tribunals' records to find out what transpired at both tribunals. The records reveal that the respondent filed Execution No. 838 of 2020 at the District Land and Housing Tribunal. In his submission, the counsel's grounds against the execution order was to the extent that the Ward Tribunal did not visit *locus in quo* since the respondent has demolished the wall before the order of the Ward Tribunal.

I have perused the appellate tribunal records and its Ruling and noted that the appellate tribunal before reaching its decision analysed the trial tribunal decision. The appellate tribunal in its findings noted that the trial tribunal visited *locus in quo* and found that the base of the fence approximately 50 cm was constructed inside the respondent's land. Thus, the evidence on

record proves that the applicant unlawfully constructed a fence on the respondent's land, as a result, the appellate tribunal ordered the applicant to demolish the base of the fence which was constructed on the respondent's land within 14 days. Therefore, in my view, the applicant's complaints that the respondent demolished the fence is unjustifiable since the trial tribunal made it clear that the base of the fence was still intact, hence the trial tribunal ordered the applicant to demolish the wall.

Regarding the issue of contradiction of the Ward Tribunal decree, I have revisited the trial tribunal and the appellate tribunal records and noted that the applicant's counsel has raised this ground for the first time before this Court. This ground is advanced completely and canvasses as a new ground before this Court. It will be recalled that the applicant has not raised the said ground at the District Land and Housing Tribunal. It is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. The Court of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."

Applying the above authorities, it is clear that the applicant was required raise the same at the District Land and Housing Tribunal or he could have filed a proper application at the trial tribunal to rectify the alleged defects.

The foregoing findings culminates into the conclusion that all the grounds of revision fronted by the applicant's counsel are not fit grounds for revision. Consequently, the application for revision is also seriously wanting in merit and is hereby dismissed entirely. No order as to costs.

Order accordingly.

Dated at Dar es Salaam this date 5th October, 2022.




A.Z.MGEYEKWA
JUDGE
05.10.2022

Ruling delivered on 5th October, 2022 in the presence of Mr. Jonas Kilimbi learned counsel for the applicant.




A.Z.MGEYEKWA
JUDGE
05.10.2022