

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 83 OF 2021

(Arising from the Civil Case No. 09 of 2012 ay Mwalusembe Ward Tribunal and Misc. Land Application No. 971 of 2016 and District Land and Housing Tribunal No. 71 of 2020 before Hon. Mwakibuja, Chairman)

ABDALLAH HASSANI MKAMBAKUAPPELLANT

VERSUS

KASSIM MKAMBI MINDU.....RESPONDENT

R U L I N G

Date of last Order:08/07/2022

Date of Ruling:29/07/2022

T. N. MWENEGOHA, J.

The appeal arose from the decision of the District Land and Housing Tribunal of Mkuranga District in Misc. Land Application No. 71 of 2020, herein referred as the trial tribunal. The appellant, being aggrieved by the decision of Mkuranga Tribunal appealed to this Court with the ground that the

- 1. That the District Land and Housing Tribunal erred in Law and fact in basing the objection as a basis of discharging or dispose the Application applied without due to procedural Law;**

2. That the District and Housing Tribunal erred in Law and fact in deciding, in favour of the objector without due regard to natural justice;

3. That, the District Land and Housing Tribunal erred in Law and fact in failing to observe the intention of the legislature in regard to right to own property.

The appeal was heard by written submissions where both appellant and the respondents appeared in person:

In support of the first ground, it was the argument of the appellant that the trial Tribunal erred by upholding the preliminary objection by basing the objection in point of law as a basis of such decision without due regard to procedural law.

That the Chairperson had no understanding or rather had confusion between objection proceedings under Order XXI rule 58 of the Civil Procedure Code and that objection in point of law. That, the applicant had sought for injunction order with the intention of stopping execution so that an investigation can be carried out under Order XXI Rule 57 and 58 of the Civil Procedure Code so as that the Tribunal could satisfy itself if the summons to show cause was fully served to the appellant or not. That, infact a process server known as Adili had not rendered the service to the appellant. Hence the Chairman should not have upheld the preliminary objection. Therefore, the decision given is wrong due to wrong direction.

Regarding the second ground, the appellant argued that, the Chairman denied the appellant the right to be heard, which is against the principle of Audi Alteram Partem which requires no one to be condemned unheard. Therefore, the Tribunal denied the right to the appellant, for failing to direct itself that application filed was the objection proceedings and not objection in point of law. Hence the trial Tribunal misdirected itself.

On the third ground, the appellant submitted that the trial Tribunal failed to observe the intention of the legislature in regard to right to own property by not observing properly the need to be "heard". That, had the Tribunal investigated the claim by either calling the Village Chairman or the process server himself they would have gotten the truth of the fraud and lies of the process server. That, no process server had served the appellant with the relevant summons.

It was their prayers that the appeal be allowed.

In their reply, the respondents argued that the Honorable Chairperson was correct to dismiss the Application based on the preliminary objection the appellant filed an Application for temporary injunction. That, the respondent raised a preliminary objection because there was no suit which was pending before the trial Tribunal to warrant the Chairperson to order the temporary injunction. Hence, the appellant's Application at the Tribunal was contrary to Order XXXVII Rule 1(a) of the Civil Procedure Code Cap. 33 R. E. 2019, as well as the case of **Atilio vs. Mbowe (1968) HCD No. 84** which provides for the condition upon which a Court can grant the temporary injunction.

It was their argument that the appellant had cited that the Application originated from the Civil Case, No. 9/2012 and Misc. Land Application No. 39/2015 and 2015 respectively. However, these cases were not pending before the tribunal and no appeal was pending in any Court of law.

That, in these circumstances, the chairperson was correct to dismiss the Application. That, allegation of the appellant that the Application for temporary injunction was part of the order sought with intention to stop any execution are mere words with no proof as the Chamber Summons contained one prayer only, which was application for injunction.

In opposing to the second, the respondents argued that in Civil Case No. 09/2012 and No. 39 of 2013 which had already been determined there was the presence of the appellant and he was given time to defend himself and A decree was issued on 05/05/2015 by Hon. R. Mbilinyi, Chairman. The Tribunal dismissed the application because the appellant's arguments had no merit at all. A decree was issued on 05/05/2015 by Hon. R. Mbilinyi, Chairman. Further that, by order of the Tribunal in Misc. Land Application No. 97 of 2016 it ordered the Adili Auction Mart to hand over the property to respondent, the order which was properly executed. Therefore, that it is unreasonable allegation of the appellant to claim that his right to be heard was denied by the Chairperson.

It was the respondent's prayer that the Court to dismiss the Appeal with costs.

Having gone through the submissions of parties as shown above and records before me, the question for determination is whether the appeal has merits. I have noted from the records at hand that, the Misc Land Application No. 71 of 2020 was instituted under Order XXXVII praying for temporary injunction after a decree issued in Misc. Land Application No. 97 of 2016 was already executed. The appellant instituted the Misc. Land Application No. 71 of 2020 to object such execution and prayed for temporal injunction against the same. It is the argument of the appellant in his memorandum of appeal and submissions that he had all rights to institute the Misc. Land Application No. 71 of 2020 as he was not served with the summons to appear for the execution proceedings but rather the court process server lied to have served him.

Moreover, in his prayers at the Tribunal it was the appellant's submission that through the Misc. Land Application No. 71 of 2020 he was praying for temporary injunction against the execution of Misc. Land Application No. 97 of 2016. I further note that the appellant seems to be confused as to whether he filed for temporal injunction as expressed in his memorandum of appeal filed in this Court or objection proceedings as he alleged before the Chairman of the trial Tribunal.

The Chairman at page 3 of his Ruling which is appeal against had stated that:

"Kutokana na maelezo ya pande zote mbili haibishaniwi kwamba utekelezaji ulishafanyika mwaka 2016 na mjibu maombi alishakabidhiwa eneo hilo. Baraza limeshindwa kuelewa kwa nini mleta maombi ameleta maombi ya kusitisha utekelezaji wakati katika maelezo yake anakubali

kwamba utekelezaji ulishafanyika japo aliupinga pasipo mafanikio"

These facts highlighted above are the reason that I will not dwell much in analyzing facts of this appeal. It is evident that the appellant has misconceived and misdirected himself on remedies to be sought through prayers for temporary injunction as reflected in chamber summons filed through Misc. Land Application No. 71 of 2020.

As reasoned by the Tribunal, the execution was already carried out and therefore his application was incompetent. Moreover, the applicant was part to the main case and was heard. Even if the Court would have been of the view that the appellant was not heard, the remedy would not have been to file an application for temporal injunction as he did. Clearly, with absence of a main suit, a temporary injunction suit ought to have failed. Nor objection proceedings for that matter as the appellant was part to the case before and was heard on the matter.

Indeed, the appellant's application contravened legal provisions of the law and was incompetent before the Tribunal. That is why it was opposed by the respondents through preliminary objection.

I therefore of the view that the findings of the trial Tribunal were correct and are hereby upheld accordingly.

Consequently, the appeal is dismissed with costs.




T. N. MWENEGOHA
JUDGE
29/07/2022