IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 175 OF 2022

MUSTAFA HOSEIN ITEGULE .... APPLICANT

AVELINA MAKILIKA ....2nd APPLICANT

VERSUS

HASSAN HERMAN MBWAMBO...............................RESPONDENT

R U L I N G

15/09/2022 & 20/10/2022

Masoud, J.

The applicant invited the court under section 43(1)(b) of the Land Disputes Courts Act, cap. 216 R.E 2019 to call for record and inspect and revise the legality of the proceedings and decision delivered on 17/02/2022 as per Hon. Mwakibuja, Chairman in Misc Application No. 106 of 2020 of the District Land and Housing Tribunal of Mkuranga.

In his affidavit, the applicant attributed the reasons for her application to the failure to be served with the respondent's application for setting aside the dismissal order in Application No. 106 of 2020 before the said district tribunal, the respondent misled the court that the applicant could not be found for personal service, hence erroneously the

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granting of substituted service; Application No. 106 of 2020 was filed out of 30 days contrary to regulation 11 of the 11(2) of the Land Disputes Courts(The District Land and Housing Tribunal) Regulations, 2003 (GN No. 174 of 2003), and accordingly, the tribunal had no jurisdiction to entertain the application.

In his counter affidavit opposing the application, the respondent stated that the Application No. 106 of 2020 was properly entertained and determined as the applicant was duly notified. The attempt to serve the applicant through the relevant local government of Mwanadilatu was futile as he was not found for personal service. It was averred also that the applicant was notified of the application by the tribunal clerk but refused to appear.

It was further averred by the respondent that it was under such circumstances that the substituted service was ordered. As to the restored application, service for the same was effected to the applicant's mother, as the applicant could not be found. In the end, it was averred that the Application No. 106 of 2020 was filed within time and under proper provision of law.

The respondent also raised two preliminary points of objection. They were, firstly, that the application was bad for contravening section 79(2)

of the Civil Procedure Code, cap. 33 R.E 2019, and secondly, that the application was bad in law for being preferred through a wrong procedure.

In respect of the preliminary points of objection, it was the contention of Ms Jackline Kayombo, Advocate for the respondent, that pursuant to section 79(2) of the Civil Procedure Code (supra), the present application could not lie in this court as the above mentioned Application No. 106 of 2020 restored the Application No. 26 of 2018 and did not as such finally determine the latter.

Having been restored, the court was told, Application No. 26 of 2018 was still pending before the District Land and Housing Tribunal of Mkuranga. The provision of section 79(2) of the Civil Procedure Code (supra) which was relied on was quoted thus:

> "...no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the court unless such decision or order has the effect of finally determining the suit."

I was urged, for the above reasons, not to entertain the instant application.

The reply by the applicant through Mr Benedict Bagiliye, learned Advocate, had it that the provision of section 79(2) of the Civil Procedure Code was inapplicable for two reasons. One, the applicable provision is section 43(1)(b) which vests this court revisional jurisdiction over the district tribunals, and two, the Application No. 106 of 2020 had already been finally determined which means that section 79(2) of the Civil Procedure Code could not apply in the circumstances.

On my part, I am clear that the Application No. 106 of 2020 which restored Application No. 26 of 2018 did not dispose of the latter. Indeed, having been restored by the former, the latter is still pending. I am in agreement with the submission by the respondent's counsel that the provision of section 79(2) of the Civil Procedure Code would in the circumstances apply.

Much as the provision of section 43(1)(b) of the Land Disputes Courts Act (supra) is the applicable provision vesting revisional powers to this court, such powers cannot be invoked in the instant application in view of the restriction provided for under the provision of section 79(2) of the Civil Procedure Code which applies pursuant to the provision of section 51(2) of the Land Disputes Courts Act (supra). I would therefore sustain the first point of preliminary objection.

As to the second point of preliminary objection, it was the submission of the learned counsel for the respondent that the instant application was bad as it was brought before this court under a wrong procedure. It was shown that instead of the applicant applying before the district tribunal to set aside the ex parte ruling that restored the Application No. 26 of 2018, he wrongfully preferred the instant application for revision. Being bad as it is, the same should not be entertained.

In reply, I was told that there was no room to the applicant to apply for setting aside the ex parte decision which restored Application No. 26 of 2018. Reliance was in this regard made to regulation 11(1)(b) and 13(4) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003(GN No. 174 of 2003) to support the learned Counsel's line of argument.

Having considered the rival arguments in relation to the provisions relied on by the applicant's counsel, I was satisfied that the applicant's argument referring to the above mentioned provisions is misplaced. I am thus in agreement with the arguments by the applicant. I accordingly prepared to uphold the second point of preliminary objection.

In the result, the application for revision is incompetent. It is for the reasons shown herein struck out with costs. It is so ordered.

Dated at Dar as salaam this 20th October 2022.

B. S. Masoud

Judge