IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 286 OF 2022

(Arising from the Judgment of the High Court – Land Division at Dar es Salaam in Land Appeal No. 108 of 2011)

IBRAHIM SHIJA KITULA ..... APPLICANT

VERSUS

ZABRON SHEM.....1ST RESPONDENT

PHILIPO CHARLES.....2ND RESPONDENT

R U L I N G

Date of last Order:3/11/2022
Date of Ruling:16/0911/2022

K. D. MHINA, J.

By a chamber summons taken under Sections 78 (1) (a) and Order XLII Rule 1(1) (a) of the Civil Procedure Code [Cap. 33 R. E. 2019] (the CPC), the Applicant is applying for a Review of the decision of this Court in Land Appeal No. 108 of 2011, dated 7 November 2012.

In the chamber summons, the Applicant has highlighted the errors as the grounds for review as follows: -

1. *That there is an error of law and fact on the face of the record in that the learned trial Judge misdirected herself heavily on the issue which was before her, the illegality of the decision of the DLHT for Kinondoni in declaring that the 1st respondent as the lawful owner of the disputed premises while Manzese Primary Court had already determined the issue of ownership in Madai Na. 128 of 2003.*
2. *That there is an error of law and fact on the face of the record in that the learned trial Judge misdirected herself in toto in considering that the issue before her was pertaining to the execution of the decree by evicting the 1st respondent from the disputed premise while considered the grounds of appeal raised by the appellant in Land Appeal No. 108 of 2011 before she advised the appellant to follow and use appropriate remedies other than to lodge an application at the DLHT for Kinondoni while the Tribunal illegal decision is already in co-existence with the decision of Manzese Primary Court in Madai Na. 128 of 2011.*
3. *That there is an error of law and fact on the face of the record in that the learned trial Judge misdirected herself in holding that the matter does not fall under the armpit of the principle of res-judicata while the subject matter of the dispute and parties before the DLHT for Kinondoni in Land Application No. 419 of 2006 were the same as in Madai Na. 128 of 2003 before Manzese Primary Court and appeals at Kinondoni District Court and at the High Court in PC Civil Appeal No. 153 of 2005, which was decided in favour of the applicant.*
4. *That there is an error of law and fact on the face of the record in that the learned trial Judge misdirected herself in finding that the PC Civil*

Appeal No 153 of 2005 was not determined on merits and, as such, did not qualify within the principles of res-judicata while it was emanated from Madai Na 128 of 2004 from Magomeni Primary Court after being determined on merits".

The application proceeded by way of written submission and ex-parte, after the respondents' absence despite duly being served by publication vide Mwananchi Newspaper dated 30 July 2022.

The applicant was under the grant of legal assistance from the Tanganyika Law Society, and Mr. David Ntonge, a learned advocate, was assigned to represent him.

In support of the review, starting with the first ground, Mr. Ntonge submitted that the learned trial Judge misdirected herself on the issue before her. The issue before her was the illegality of the decision of the DLHT to declare the 1st respondent as the lawful owner of the disputed premise while the Manzese Primary Court had already determined the ownership issue in Madai Na. 128 of 2003.

Further, he submitted that in Madai Na. 128 of 2003, the issue of ownership was determined in favour of the applicant. When the first respondent was aggrieved and appealed to Kinondoni District Court, his

appeal was dismissed vide Civil Appeal No 43 of 2003. When he was dissatisfied again, he appealed to the High Court in PC Civil Appeal No 153 of 2004. The appeal was dismissed for non-appearance.

Later, the applicant lodged an application for vacant possession of the suit premises at the DLHT for Kinondoni, but the Tribunal wrongly declared the 1st respondent as the lawful owner.

He concluded by submitting that the learned trial judge never considered those facts; otherwise, she could find the decision of the DLHT in Land Application No. 419 of 2006 tainted with illegality.

On the second ground, Mr. Ntonge submitted that the learned trial Judge misdirected herself in toto in considering that the issue before her was pertaining to the execution of the decree by evicting the 1st respondent from the disputed and advised the appellant to follow and use appropriate remedies other than to lodge an application at the DLHT for Kinondoni.

He further argued that because of the co-existence of the Tribunal decision and that of Manzese in Madai Na. 128 of 2003, the trial judge could address that issue and would not hold that her hands were tied up because the matter was competent before her.

Mr. Ntonge's argument in respect of the third ground was that the learned trial Judge misdirected herself in holding that the matter does not fall under the armpit of the principle of res-judicata while the subject matter of the dispute and parties before the DLHT for Kinondoni in Land Application No. 419 of 2006 were the same as in Madai Na. 128 of 2003 before Manzese Primary Court and appeals at Kinondoni District Court and at the High Court in PC Civil Appeal No. 153 of 2005, which was decided in favour of the applicant.

He further argued that in proceedings of the Primary Court of Manzese in Madai Na 128 of 2003 and Land Application No 419 of 2006, the subject matter and the parties were the same, falling under the armpit of section 9 of the CPC.

On the last ground, he submitted that the learned trial Judge misdirected herself in finding that the PC Civil Appeal No 153 of 2005 was not determined on merits.

Further, he argued that PC Civil Appeal No 153 of 2005 originated from the Primary Court of Manzese in Madai Na. 128 of 2003; therefore, it was wrong to equate PC Civil Appeal No 153 of 2005 and Madai Na. 128 of 2003

and hold that PC Civil Appeal No 153 of 2005 was not determined on merits; therefore, it was not res-judicata.

Having gone through the written submission from the applicant, the entry point in this application is Order 42 Rule 1 (1) (a) and (b) of the CPC, which empowers this Court to review its own decision. The Order states as follows: -

> *"1. (i) Any person considering himself aggrieved: -*
>
> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) By a decree or order from which no appeal is allowed,*
>
> *and who from the* ***discovering of new and important matter or evidence*** *which after the exercise of due diligence, was not within his acknowledge or could not be produced by him at the time when the decree was passed or order made,* ***or error apparent on the face of the record or*** *for* ***any other sufficient reason****, desires to obtain a review of the decree passed or order made against him, may apply for a review of* ***Judgment*** *to the Court which passed the decree or made the* ***order****.* ***[Emphasis provided]***

It is settled that for an application for review to succeed, a party applying must establish any of the grounds under Order 42 Rule 1 (1) (a) and (b) of the CPC.

In several cases, the Court of Appeal of Tanzania developed some fundamental guidelines when dealing with reviews.

In **Abbas Kondo Gede vs. The Republic**, Criminal Application No. 75/01 of 2020 (Tanzlii), the Court of Appeal of Tanzania held that:-

> *"There mere fact that the Court did not agree with the applicant on the grounds of appeal cannot constitute an apparent error on the face of the record to justify review."*
>
> Further, the Court held that;
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> *"Review is not to challenge the merits of the decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party".*

Again, in the **Grand Alliance Ltd vs. Wilfred Lucas Tarimo and four others,** Civil Application No. 229 of 2020. (TanZLII) the Court of Appeal provides for the scope of the review applications. On page 14, it held that:-

> *"It should be emphasized that the scope of our mandate in the instant application is limited within the impugned decision. In review, the*

Court has no powers to venture into any other record beyond the impugned decision".

In **Executive Director Golden Sands Hotel Ltd Zanzibar vs. Attorney General of Zanzibar and another**, Civil Application No. 4 of 2016 (Tanzlii), the Court held that:-

"It is clear that the Court has power and unfettered description to review its own decision, but the said power and discretion should be exercised within the ***specific benchmarks****." [* ***Emphasis provided]***

Those benchmarks were;

One, *"The Court.....should not by any means open to revisiting the evidence and re-hear the appeal."*

Two, *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error without engagement in elaborated argument to establish it."*

I now turn to the application's first, third, and fourth grounds. These grounds are related and interwoven as they concern the illegality of the decision of the DLHT to declare the 1st respondent as the lawful owner of the disputed premise while the Manzese Primary Court had already determined the ownership issue in Madai Na. 128 of 2003, the issue of res-

judicata, and whether PC Civil Appeal No 153 of 2005 was not decided on merits.

Looking at the impugned decision and for clarity, I wish to quote from pages 2-3;

> *"This matter has from record taken four courses (4) before reaching this Court. In PC Civil Case No. 153 of 2005, parties were Zabron Shem vs Philipo Charles & another, before Mlay J; the matter was dismissed for "Want of Prosecution". Neither the appellant nor the respondent appeared. It was therefore not heard on merit, and as such did not qualify within the principles of "Res-judicata". Same parties yes, same subject matter fine, but not final conclusively determined. The other referred matter Civil No 43 of 2004 at District Court of Kinondoni from original Primary Court of Manzese in no 128/2003, in which the court decided in favour of the appellant in this matter on the ground that 'no irregularity' on part of reaching the matter in the favour of the appellant. It was dismissed with costs. It is the counsel for the appellant contention that the Tribunal had no right to deal with this matter based on these two cases referred above. While it is the case, I see no fulfillment of the 'Principle of Res-Judicata' in the case in appeal which was never determined on merits, the other was.*

From the quoted part of the impugned decision, the issues of the illegality of the DLHT decision, res-judicata, and whether PC Civil Appeal No 153 of 2005 was not determined on merits were determined.

In the impugned decision, it was decided that;

i. The matter was not a res-judicata
ii. PC Civil Appeal No 153 of 2005 was not final and conclusively determined and
iii. There was no illegality in the DLHT decision.

On the second ground of the application, again, the issue was determined in the impugned judgment. At page 3, the Court held that;

> *"The 1st respondent has from that order refused to vacate he was to follow and use appropriate available remedies other than to lodge an application at Kinondoni Housing Tribunal in Application No 419/2006".*

Therefore, after careful scrutiny of the grounds of the application, it is quite clear that the applicant is challenging the appellate court's decision. It is the dissatisfaction with the merits of the Court's decision.

As alluded to earlier when cited **Abbas Kondo Gede** (Supra), the intention of the Review is not to challenge the merits of the impugned

decision but rather intending to address irregularities of a decision or proceedings which caused injustice to a party.

In the application at hand, the applicant, on both grounds, fails to point out the irregularities or apparent errors in the face of the record in the impugned decision. He only raises grounds for complaints on what was decided by the Court. In this, I wish to quote **Tanganyika Land Agency Ltd and seven Others vs. Manohar Lal Aggrawal,** Civil Application No. 17 of 2008 (unreported), where the Court of Appeal of Tanzania held that:-

> *"For matters which were dealt with and decided upon appeal the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the court process, but would result to endless litigation".*

Therefore, since the review is by no means an appeal in disguise and dissatisfaction with the outcome of an appeal cannot be ground in the application for review, it is. Therefore, this application is not tenable.

Flowing from above, the applicant has failed to satisfy the requirement for a review under Order 42 Rule 1 (1) (a) and (b) of the CPC, but instead, he raised the grounds to challenge the merits of the decision.

For the reasons above, I find no merit in this application, and consequently, I dismiss it. No order as to cost since the Applicant was under Legal Aid.

It is so ordered.

K. D. MHINA
JUDGE
16/11/2022