

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 04 OF 2022

(Originating from the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala in Land Application No. 1377 of 2021 dated 19.01.2022)

ALLY SHOMARI.....APPLICANT

VERSUS

**JUMA SAID (Being Administrator
of the Estate of SAID JUMA)..... RESPONDENT**

R U L I N G

Date of last Order: 8 November 2022

Date of Ruling: 25 November 2022

K. D. MHINA, J.

This Application is brought under the chamber summons made under Section 43 (1) (2) of the Land Disputes Courts Act, Cap 216 [RE 2019] ("the LDCA") and Sections 75 (1) (c) and 95 of the Civil Procedure Code [Cap. 33 R. E. 2019] ("the CPC").

The orders being prayed are for this Court to;

- (i) Call for the record and revise the decision of Hon. Rugarabamu Chairman delivered on 19 January 2022 to

determine its propriety or otherwise as the said decision is illegal and based on a material irregularity by entertaining the application for execution without affording the right to be heard.

- (ii) Any other relief (s) the Court may deem fit and just to grant.
- (iii) Costs of the application.

The application is supported by the affidavit disposed of by Ally Shomari, the applicant.

At the hearing, the applicant was represented by Mr. George Sang'udi, learned counsel, while Mr. Mohamed Majaliwa, a learned counsel, appeared for the respondent.

In support of the application, Mr. Sang'udi advanced two grounds and argued as follows;

Firstly, he argued that there was an irregularity in the decision of the Tribunal because the applicant was denied the right to be heard.

Further, he submitted that on 19 January 2022, when the matter was scheduled for a hearing of execution, the applicant was served with the summons indicating the hearing would take place at about 15:00 hours.

That day the applicant was sick; therefore, he sent the advocate Mussa Saidnally Mruma, but when the advocate appeared, he found the case was already heard.

He further argued that the right to be heard is a fundamental right, and he substantiated his submission by citing **Pili Ernest Vs. Moshi Musani**, Civil Appeal No. 39 of 2019 (CAT), unreported, where at page 4, it was held that;

"..it is a cardinal principle of natural justice that a person should not be condemned unheard".

On the second ground, Mr. Sang'udi submitted that the order by the Chairman of the Tribunal dated 19 January 2022 immediately appointed the court broker without waiting for 14 days for the applicant to comply with the order issue.

He further submitted that Regulation 23 (3) of the Land Disputes Courts (The District and Housing Tribunal) Regulations, 2003 provides for

the "window period" of 14 days for the Judgment Debtor to the execution order. The Regulation read as follows

"The Chairman shall, upon receipt of the application, make an order requiring the judgment debtor to comply with the decree or order to be executed within the period of 14 days".

Mr. Sang'udi cited Regulation 23 (4) and submitted that after 14 days of notice expiring and when there is no objection from the judgment debtor, the Chairman could make orders as he thinks fit.

To cement his position, Mr. Sang'udi cited **Julius Melkiori Vs. Agripina Matle & 2 others**, Land Revision No 9 of 2020 (HC-Arusha), at page 11 where it was held that;

*"The interpretation to the above provision is that, after receiving the application for execution made under sub-regulations (1) and (2) the Chairman, under sub-regulation (3), will issue an order to the judgment debtor to comply with the decree within 14 days. After expiration of such period, the Chairman is entitled under sub regulation (4) to make execution orders as he thinks fit.
Sub regulation*

(5) will only be applicable where there is objection raised against the execution."

In conclusion, Mr. Sang'udi prayed for the Tribunal's decision to be revised and quashed.

In reply, Mr. Majaliwa first attacked the jurisdiction of this Court in dealing with the application at hand. He submitted that in accordance with Section 38 (1), (2), and (3) of the CPC, this Court does not have jurisdiction to entertain this matter. He said that the section provides that when issues arise in execution proceedings, the Court with the mandate to deal with those issues is the executing court, not the higher court.

In responding to the submission, Mr. Majaliwa stated that the right to be heard is not an irregularity. Further, that issue was supposed to be raised before the executing court by requesting the right to be heard.

Apart from that, he also argued that it was the applicant himself who failed to attend to the Tribunal despite being served with the summons. That summons was written in Swahili, and the time indicated was "saa 3:00 asubuhi.

He further argued that on the issue of 14 days' notice, the Chairman was right to appoint the Court Broker because the law requires the order to execute can be given within 14 days. Therefore, execution can be either day between the 1st day to the 14th day.

In rejoinder, Mr. Sang'udi first submitted that this Court has jurisdiction because the Tribunal had already determined the matter; therefore, the remedy was to apply for the revision.

Further, he submitted that when the right to be heard is denied, that is an irregularity because irregularity arises when anything unlawful is done.

On the issue of 14 days' notice and the right to be heard, he reiterated his submission in chief and added that the Court Broker should be appointed after the expiration of 14 days. Further, the summons indicated that the matter was scheduled at 15:00 hours.

Having given due consideration to the parties' submissions on this revision, I find it convenient to start deliberating the issue of jurisdiction, as raised by the counsel for the respondent when he was replying to the submission.

The starting point in this matter is the decision of the Court of Appeal of Tanzania in **Tanzania – China Friendship Textile Co. Ltd vs. Our Lady of the Usambara Sister (2006) TLR 70**, where it held that:-

"The question of jurisdiction can be raised at any stage."

In this application, the issue raised by Mr. Majaliwa was that this Court lacks jurisdiction to entertain the application for revision.

Again, the Court of Appeal cemented this position in **Yusuf Khamis Hamza vs. Juma Ali Abdalla, Civil Appeal No. 25 of 2020** (Tanzlii), where the Court held that:-

"We are alive with the settled position of the law that time limitation goes to the Jurisdiction issue of the Court, and it can be raised at any time, even at the Appellate stage by the Court, but in order for it to be noted and raised it would require material evidence to be placed before the Court."

Therefore, from two cited Court of Appeal decisions, the conditions for raising limitation are two;

- i. One, it can be raised at any stage of proceedings.

- ii. There must be material evidence to be placed before the Court (Right to be heard) before the Court determines the matter.

In the present application, both advocates presented their submissions on the jurisdiction of the Court after Mr. Majaliwa raised it. They both submitted the reasons for and against the jurisdiction of this Court on the matter.

Therefore, the counsel for the respondent rightly raises the issue of jurisdiction. Further, the right to be heard was availed to both parties who submitted material evidence for and against the jurisdiction of the Court.

Now the issue for deliberation is whether this Court has jurisdiction or not.

In support of the argument that this Court does have jurisdiction, briefly, Mr. Majaliwa submitted that because the complaints sought to be reviewed stem from execution proceedings; therefore, in terms of Section 38 (1), (2), and (3) of the CPC this Court is barred from entertaining the matter.

He elaborated that said provisions of the CPC provide that when issues arise in execution proceedings, the Court with the mandate to deal with those issues is the executing court, not the higher court.

On the other hand, Mr. Sang'udi submitted that this Court has jurisdiction as he argued that because the Tribunal had already determined the matter; therefore, the remedy was to apply for the revision.

Canvassing through the record of the Tribunal, I found that the Respondent applied for execution against the Applicant on 28 December 2021. On the same date, the Tribunal issued a summons for the applicant to appear on 19 January 2022.

Further, the record reveals that on 19 January 2022, the Tribunal, after holding that the applicant was absent, appointed the Court broker to execute the decree in favor of the respondent.

It is from that order that the applicant filed this application to seek the revision because of the irregularities he pointed out in the course of the execution of a decree.

In the circumstances such as the above, what is the procedure to challenge and resolve the issues that arise in the course of execution of a decree before the Tribunal?

In exercising its powers, the DLHT is governed and regulated by the **Land Disputes Courts (The Land and Housing District Tribunal) Regulations 2003** ("the Regulations").

The Regulations contain procedures to be applied at the DLHT. As far as execution and stay of execution procedures are concerned, Regulations 23, 25, 29, and 30 are relevant. But the mentioned Regulations happen to be silent in the event of complaints relating to irregularities in the course of the execution of a decree.

In such circumstances, the law is already settled that if there is a lacuna in the Land Disputes Courts Act, this Court can invoke the provisions of the **Civil Procedure Code** [Cap 33 R: E 2019] ("the CPC") to fill the gap (s). That "leeway" is provided under Section 51 (2) of the Act, which provides that;

"51 (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56, and where

there is inadequacy in those Regulations it shall apply the Civil Procedure Code.

On this, Section 38 (1) of the **Civil Procedure Code** [Cap 33 R: E 2019] (the CPC) clearly provides for the way forward in case of irregularities in the course of execution of a decree. Therefore, this is an “escape route” for inadequacy under the Regulations. The relevant provision state as follows;

*"38 (1) All questions arising between the parties to the **suit** which the decree was passed, or their representative, and **relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**" (Emphasis provided)*

Therefore, from above, it is quite clear that the questions or complaints must relate to the execution, discharge, and satisfaction of the decree between the parties to the suit or their representatives. Then the court with the mandate is the execution court. Further, a separate suit is not allowed.

The Court of Appeal of Tanzania in **Hassan Twaib Ngonyani Vs. Tazama Pipe Line Ltd**, Civil Appeal No. 201 of 2018 (TanZlii), clearly elaborates on the applicability of Section 38 (1) of the CPC when it held that;

"..under section 38(1) of the CPC, Mr. Kahendaguza is correct, the executing court enjoys exclusive jurisdiction to deal with any question relating to execution, discharge and satisfaction of the decree. Where a resolution of any question requires ascertainment of controversial factual issues, the executing court is entitled, under section 38 (2) of the CPC even to convert execution proceedings into a suit.

Again, the Court of Tanzania faced a similar issue in **CRDB Bank Vs. George M. Kilindu and Another**, Civil Application No. 74 of 2010 (unreported), where CRDB Bank applied for Revision at the Court of appeal in respect of the execution proceedings at the High Court. The Court of Appeal held that;

"We are unable to read section 38 (1) of the CPC to have provided any such exception as contended by Mr. Nyange. The section is couched in mandatory terms. It reads.....In view of the foregoing, therefore, we agree with Mr. Mhango that this Court is not the proper forum to deal with matters arising from execution proceedings."

Therefore, as rights submitted by Mr. Majaliwa Advocate, in terms of Section 38 (1) of the CPC, this Court does not have jurisdiction. On


the other hand, I am unable with the submission by Mr. Sang'udi Advocate that the Tribunal already determined the matter, which was why the applicant applied for revision. The reason is that the execution at that time was still ongoing.

Flowing from above, it is quite clear that the applicant was supposed to challenge the conduct of the execution proceedings at the executing tribunal, taking into account that the execution proceedings were still ongoing. At that time, only the Court Broker was appointed to execute the decree. Therefore, I find it improper to interfere with the actions of the executing Tribunal at this moment.

In the upshot and for the forgoing, I sustain the point of law on jurisdiction raised by Mr. Majaliwa Advocate, therefore there is no need to deliberate and determine the grounds contained in the application.

Consequently, this application for revision is dismissed with costs.




K. D. MHINA
JUDGE
25/11/2022