

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 37 OF 2022

BETWEEN

DEOGRATIAS BELIAN LEMA APPLICANT

VERSUS

**ADAM ASSEY
SAID MFINANGA
AGNEVA MFINANGA
ELLY NGOWO**

..... RESPONDENTS

RULING

01/11/2022 & 13/12/2022

A. MSAFIRI, J.

The applicant Deogratias Belian Lema has filed this Application under Section 68(e), Section 95 and Order XLIII ,Rule 2 all of the Civil Procedure Code Cap. 33. (the CPC)

He is praying for the Court to exercise its revisional jurisdiction and call for the records and examine the decision of the District Land and Housing Tribunal for Temeke (herein DLHT) dated 31/3/2021 in Land Application No. 26 of 2017 for the purpose of satisfying itself as to its correctness, legality or propriety and thereafter quash proceedings, judgment and decree in the

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said Application. The application was supported by the affidavit of the applicant himself.

Upon filing their joint counter affidavit, the 2nd, 3rd and 4th respondents also filed a Notice of preliminary objection to the effect that this application is incompetent for being brought under wrong provisions of the law.

As per the law and procedure the raised preliminary objection had to be disposed of before proceeding with the hearing of the main suit or application. The hearing of preliminary objection was done orally.

At the hearing of the preliminary objection, the 2nd, 3rd and 4th respondents were represented by Mr. Rajab Mrindoko, learned advocate while the applicant was represented by Ms. Aida Herman, learned advocate. The 1st respondent was absent without any notice despite the fact that he was duly served and proof of service was supplied to the Court. Hence the Court ordered for the hearing to proceed in his absence.

Mr. Mrindoko submitted in support of the preliminary objection that, the applicant has cited inapplicable provisions of law to move this Court, and that the cited provisions are not relevant in this application. He submitted further that, it is established that, where there is specific enabling provisions of law to cater for the situation, it is improper to cite other provisions which

Alls

cannot be invoked to confer jurisdiction to the Court. That, the cited provisions in the application at hand has nothing to do with the order sought of revision.

Mr. Mrindoko stated that the decision being challenged arise from the Temeke DLHT and there is a proper and specific provision to move this Court to exercise its powers of revision. He said that the applicable provision is Section 43(1) (b) of the Land Disputes Courts Act, Cap 216 R.E. 2019.

He said that the remedy of an incompetent application is to strike it out hence he prayed for the application to be struck out and costs to be awarded to the 2nd – 4th respondents. To cement his points, Mr. Mrindoko cited the cases of **Aero Helicopter TZ Ltd vs. F.N. Jensen** [1990] TLR 143 and **Citibank Tanzania Limited vs. Tanzania Telecommunications Co. Ltd & 4 others**, Civil Application No. 64 of 2003 CAT at Dar es Salaam (unreported).

In response, Ms. Herman vehemently contested the raised preliminary objection. She submitted that the preliminary objection is misconceived and that citing a wrong provision of law is not fatal and can be cured as long as what is pleaded by the applicant is within the jurisdiction of the Court. *Alls*

To support her points, she cited the cases of **Mohamed Clander vs. Juma Mfaume**, [1989] TLR, and **Alliance One Tobacco Ltd vs. Mwajuma Hamis**, Misc. Civil Application No. 893 of 2018.

She argued that the preliminary objection is based on technicalities which can be cured by invoking overriding objective principle as provided under the Constitution of the United Republic of Tanzania as per Article 107 A.

She prayed for the Court to overrule the preliminary objections and proceed to hear the application on the merit.

In rejoinder, the counsel for the 2nd 3rd and 4th respondents reiterated his submission in chief. On the principle of overriding objective which the counsel for the applicant has relied upon, Mr. Mrindoko cited the case of **Mondorosi Village Council & two others vs. Tanzania Breweries and 4 others**, Civil Appeal No. 66 of 2017, CAT at Arusha (unreported). In the said case, it was held that the overriding objective should not be blindly applied against the mandatory provisions of law. He reiterated his prayers.

Having heard the submissions by the parties and considered the authorities cited in support of their submissions, the sole issue is whether the preliminary objection raised has merit. *Alls* -

The respondents have challenged the present application that the application is incompetent for citing the irrelevant provisions which have nothing to do with the order sought i.e. this Court to exercise its revisional powers.

I agree with the counsel for the 2nd, 3rd and 4th respondents that the enabling provisions when one is seeking for the orders for this Court to exercise its revisional powers is section 43 (1) (b) of the Land Disputes Act, which reads as follows;

43 (1); In addition to any other powers in that behalf conferred upon the High Court, the High Court;

(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on an application being made in that behalf by any party or its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such order therein as it may think fit.

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From the wording of the above provision, it is clear that the applicant who seeks for the Court to exercise its revisional powers should rely on section 43 (1) (b) of the Land Disputes Act.

However, in the application at hand, the applicant has brought the same under totally inapplicable provisions of law, which, to borrow the words of the counsel for the respondents, are irrelevant. In the chamber summons, the applicant has cited section 68(e), Section 95 and Order XLIII Rule 2 of the CPC.

Section 68 (e) provides for the interlocutory orders which is totally different from this application which is seeking for revisional orders.

Section 95, confers this Court with inherent powers and is mostly used when the CPC has no particular provision to govern on the particular matter. This section cannot be used here as there is specific enabling provision for revisional orders which is section 43(1) (b) of the Land Disputes Act.

Order XLIII Rule 2 of the CPC, provides that every application made under the CPC shall be made by chamber summons supported by an affidavit. This cannot be enabling provision as it merely set the procedure on how the applications should be brought before the Court. *Alles-*

It is my finding that the citation of totally wrong provisions of the law to support this application goes to the root of the matter as this Court has not been moved. Even the principle of overriding objecting cannot cure the fatal omission as I have already stated, the omission goes to the root of the case. In the case of Mbezi Fresh Market Ltd and two others vs. International Commercial Bank (Tanzania), Misc. Commercial Application No. 93 of 2020 (unreported), this Court held that;

"At this juncture, I think it is worth pointing out that despite the advent of the principle of overriding objective, the position of law as far as the legal requirement to move the Court properly is concerned is still the same, that is the parties to a case have to move the Court properly by citing proper provisions of law ..."

Basing on those findings, I find the application to be hopelessly incompetent for being brought under wrong enabling provisions of the law.

I therefore find merits in the raised preliminary objection by the 2nd, 3rd and 4th respondents and I hereby strike out this application with costs.




A. MSAFIRI
JUDGE
13/12/2022