

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

MISC. LAND APPLICATION NO. 735 OF 2022

(Arising from the Order of Application No. 218 of 2013 dated 28th July,
2022 of the District land and Housing Tribunal for Ilala)

SHENAZ ISMAIL NORAY APPLICANT

VERSUS

DHIRAJIAL MULJI DURASA RESPONDENT

RULING

Date of last Order: 13.12.2022

Date of Ruling: 20.12.2022

A.Z.MGEYEKWA, J

The applicant filed an application for revision in respect to Land Application No.218 of 2013 against the Order dated 28th July, 2022 which was delivered by the District Land and Housing Tribunal of Ilala. The application is supported by an affidavit^{de} deponed by Crescencia Rwechungura, learned counsel for the applicant. The application has encountered formidable opposition from the respondent and has

demonstrated his resistance by filing a counter affidavit deponed by Dhirajial Mulji Durasa, the respondent and his counsel lodged the following preliminary objection:-

- 1. That application is an abuse of the Court process and is barred by law vide Act No. 25 of 2002 as the main case is still pending final determination and the order sought to be challenged is not final but interlocutory one.*

When the matter was called for hearing on 13th December, 2022 the applicant enjoyed the legal service of Mr. Daniel Ngudungi, learned counsel and the respondent had the legal service of Ms. Cresencia Rwechungura, learned counsel.

As the practice of the Court has it, I had to determine the preliminary objection first before going into the merits or demerits of the appeal. That is the practice of the Court founded upon prudence which this Court could not overlook.

In support of the preliminary objection, Mr. Daniel submitted that the application is incompetent before this Court and an abuse of the Court process. He valiantly argued that the application at hand emanated from an interlocutory Order. To buttress his submission he referred this Court to page 3 of the District Land and Housing Tribunal Ruling. Mr. Daniel spiritedly contended that the matter is pending in Court for more than six

years. Mr. Daniel seeks refuge in the case of **Augustino Masondo v Widmel Mushi**, Civil Application No. 283 of 2018 CAT (unreported).

The counsel for the applicant argued that this is an abuse of the Court process since the applicant is filing unlimited number of applications done by the same counsel. He stressed that whether a suit is abated or not is an issue of interlocutory and so long as the matter is pending at the Tribunal, the applicant is not allowed to apply for an extension of time to file a revision but rather proceed with hearing and wait for the matter to be determined to its finality. Mr. Daniel added that it is an abuse of the Court process because the matter is heard partly.

In conclusion, the learned counsel for the respondent beckoned upon this Court to dismiss the application with costs.

Opposing the preliminary objection, Ms. Rwechungura contended that interlocutory order is not defined under the Civil Procedure Code Cap. 33 [R.E 2019]. She submitted that under the Webster Dictionary interlocutory is defined as a temporary order while the applicant is litigating the main suit. She valiantly argued that the order of Hon. Kirumbi, Chairman is not an interlocutory order because the issue of abatement was finally determined. The counsel submitted that the respondent filed a suit against the applicant Mulji who passed away, and his brother never notified the tribunal. She went on to submit that the applicant notified the court about

the passing of Mulji and there was no any administrator of the estate who was appointed. Ms. Rwechungura submitted that on 24th May 2022, the applicant stated that the legal representative was required to join the matter as a result the Chairman stated that it is a ruling and ordered the matter to proceed against the first respondent and abate against the 2nd respondent. She insisted that one cannot sue a purchaser without the vendor. She stressed that the right to sue survives and the deceased had to bring a legal representative. To buttress her position she cited Order XXII Rule 4 (1) of the Civil Procedure Code Cap. 33 [R. E 2019]. She strongly argued that it was a final order to proceed with hearing without bringing a legal representative within 90 days and then the said days lapsed.

In conclusion, Ms. Rwechengura stressed that the instant application is not related to an interlocutory order, she urged this Court to strike out the objection.

In his short rejoinder, the applicant's counsel reiterated his submission in chief. The learned counsel added that the issue of 90 days to appoint an administrator of the estate of the deceased is Rule 4 (2) and (3) of the Civil Procedure Code, Cap.33 [R.E 2019]. He strongly argued that the matter cannot abate against all respondents since the respondent is alive. He added that the applicant has a chance to challenge the same before

this Court after hearing the case to its finality. Mr. Daniel contended that the learned counsel for the applicant has submitted from the bar because the deceased was the vendor and the respondent was a shareholder, thus they were tenants in common. She insisted that the act of the applicant is an abuse of the Court Process, he urged this Court to sustain the objection and dismiss the application with costs.

Having summarized the submissions and arguments of both learned counsels, I should now be in a position to determine the point of preliminary objection on which the parties bandying words. The issue for determination is *whether the preliminary objection has merit*.

I have perused the Ruling of the District Land and Housing Tribunal for Ilala in respect to Application No. 218 of 2013 19th August, 2022 the Chairman overruled the preliminary objection raised by the applicant's counsel that Application No. 218 of 2013 needs to be marked abated since the vendor has passed away. On his side, Mr. Daniel objected and stated that the claim is intact thus he urged the tribunal to proceed against the first respondent. The record reveals that the Chairman determined the matter and stated as long as the buyer who is in the possession of the suit premises is alive the matter will proceed against him and the Chairman overruled the objection raised by the learned counsel for the applicant and ordered the matter to proceed with hearing.

It is undisputable fact that Application No. 218 of 2013 is pending before the District Land and Housing Tribunal of Ilala. Therefore, the matter is supposed to proceed with hearing at the tribunal. Section 79 (2) of the Civil Procedure Code Cap. 33 [R.E 2019] does not allow a Court to proceed with revision when the matter is pending before the Court or Tribunal. For ease of reference, I reproduce Section 79 (2) of the Civil Procedure Code Cap.33 [R.E 2019] as hereunder:-

“79 (2) Notwithstanding the provisions of subsection (1), 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.”

Similarly, this Court and the Court of Appeal of Tanzania in the cases of **Lucky Spin Ltd (Premier Casino) Ltd v Thomas Alcorn & Joan Alcorn**, Revision No. 445 of 2015, Labour Division at Dar es Salaam and **Hasmukh Bhagwanji Masrani v Dodsai Hydrocarbons and Power (Tanzania) PVT Limited & 3 Others**, Civil Application No. 100 of 2013 decided that revision cannot be exercised in a decision that is not finally determined. Therefore, I fully subscribe to the learned counsel for the respondent's submission that no application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of any Court or Tribunal unless such decision or order has the effect of

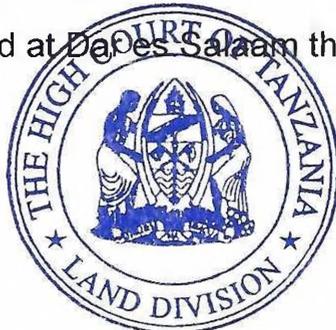
finally determining the suit. Consequently, revision cannot be exercised in a decision that is not finally determined as clearly stated under section 79 (2) of the Civil Procedure Code Cap.33 [R.E 2019].

Given the above analysis and the position of the law, it is obvious that the nature of the Ruling before this court arises from an interlocutory order issued by the District Land and Housing Tribunal for Ilala and the matter before the District Land and Housing Tribunal for Ilala is not determined to its finality.

In the upshot, the point of preliminary raised by Mr. Daniel, learned counsel for the respondent has merit. Therefore, I uphold the preliminary objection and strike out the application. Costs to follow the event.

Order accordingly.

Dated at Dar es Salaam this date 20th December, 2022.




A.Z.MGEYEKWA

JUDGE

20.12.2022

Ruling delivered on 20th December, 2022 in the presence of Ms. Jacqueline Kulwa, counsel for the respondent.




A.Z.MGEYEKWA

JUDGE

20.12.2022