

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

LAND REVISION NO. 52 OF 2022

(Arising from the Ruling in Application No. 121 of 2022 at the District Land and Housing for Temeke by Hon. J. Sillas, Chairman dated 17th November 2022)

OILCOM TANZANIA LTD APPLICANT

VERSUS

PAYAS R. MOREMI & GENOVEVA KILIBA t/a

BETTER LIFE INVESTMENT..... RESPONDENT

RULING

Date of last Order: 24.04.2023

Date of Ruling: 27.04.2023

A.Z. MGEYEKWA, J

This is an application for Revision against the decision of the District Land and Housing Tribunal for Temeke at Temeke. The application is brought under section 43 (1) (a) and (b), 44 (1) & (2) of the Land Disputes Courts

Act, Cap 216, and section 79 (1) (c) of the Civil Procedure Code, Cap.33 [R.E 2019]. The application is supported by an affidavit sworn by Ramadhani Karume, the applicant.

The dispute pits the applicant against the respondent, and the applicant's prayer is for this court to;

1. Call the records of the District Land and Housing Tribunal for Temeke in Land Application No. 121 of 2022 by Hon. Sillas, Chairman dated 17th November 2022 to satisfy itself as to the correctness, legality, and appropriateness of the findings in the proceeding and Ruling.
2. Call for record and examine the proceedings and the ruling of the Tribunal for Temeke in Land Application No. 121 of 2022 by Hon. Sillas, Chairman dated 17th November 2022 to satisfy itself as to the regularity and procedure.

The application was argued before this court on 24th April 2023, the applicant was represented by Ms. Flora Kessy, learned counsel and the respondent enjoyed the legal service of Mr. Hussein Hitu, learned counsel.

Submitting in support of the application, Ms. Flora urged this Court to adopt the affidavit of Ramadhani Karume in support of this application to form part of her submission.

Ms. Flora started to narrate the genesis of the matter which I am not going to reproduce in this Application. Concerning the first ground, Ms. Flora contended that in order to rule out that a case is *res judicata* the court must look at the requirement set under section 9 of the Civil Procedure Code Cap.33 [R.E 2019]. He submitted that in the Application No. 121 of 2022 and Civil Case No. 83 of 2017, the parties were the same though the subject matter was not the same. The learned counsel for the applicant went on to submit that in Civil Case No. 83 of 2017, the cause of action was related to breach of contract while in Application No. 121 of 2022, the claims were concerning rent arrears.

Therefore, in her view, the Tribunal was not correct to rule out that the matter was *res judicata*. To support her submission she cited the cases of **Rehema Sivatory Luoga v Shaweji Ibrahim & 2 others**, Land Appeal No. 114 of 2018 HC at and **Linda Christopher (Administratrix of the estate of Specioza Patrick) v Dickson Majaliwa & 6 others**, land Case No 85 of 2021, where the Court provided five elements which must exist in order to say that the matter is *res judicata*. Hence, Ms. Flora insisted that the District Land and Housing Tribunal was wrong in declaring that the parties are the same while the matter is not the same. She urged this Court to find that it

was wrong for the District Land Housing Tribunal for Temeke to dismiss Application No. 121 of 2022 for being *res judicata*.

On the second ground of revision, Ms. Flora contended that the Tribunal proceedings were tainted with irregularities. She submitted that on 7th November 2022, the Land Application No. 121 of 2022 was scheduled for mention but unfortunately, Hon. Silas dismissed the application for being *res judicata* with costs. Ms. Flora argued that the Court is not allowed to dismiss a suit on the mentioned date. To buttress her contention she referred this Court to the cases of **Mr. Lemrice Israel Kivuyo v M/S DHL World Express DHL Tanzania Ltd**, Civil Appeal No. 83 of 2008, and **Shengena Ltd v National Insurance Cooperation and consolidated holding Cooperation**, Civil Appeal No. 9 of 2008. Ms. Flora stressed that when a case is scheduled for mention, parties are expecting the matter is scheduled for orders.

Based on the above reasoning, Ms. Flora urged this Court to set aside the order of the District Land and Housing Tribunal in Land Application No. 121 of 2022. She faulted the Chairman for relying his analysis on the arguments of the parties without having the Judgment of Civil Case No. 83 of 2017 in place to certify himself to the correctness of the raised objection.

In conclusion, the applicant's counsel urged this Court to allow the application.

Responding, Mr. Hussein urged this Court to adopt the Counter Affidavit of the respondent to form part of his submission. Mr. Hussein defended the District Land and Housing Tribunal's decision as sound and reasoned. He submitted that the matter before the DLHT in Land Application No. 121 of 2022 was heard by both parties, the respondent's counsel raised an objection that the Application for being *res judicata*. Mr. Hussein went on to submit that it indisputable fact that before starting hearing the case, the Chairman asked the parties some questions, thereafter allowed the respondent to argue his preliminary objection and the applicant was afforded a chance to reply.

The learned counsel for the respondent distinguished the cited cases of Mr. **Lembrice Israel Kivuyo** (supra) and **Shengena Ltd** (supra) because in the cited cases the matter was scheduled for necessary orders and in the matter at hand the matter was scheduled for mention and parties were asked to proceed with hearing whereas both parties agreed to proceed with hearing the objection.

Mr. Hussein went on to submit that the applicant submitted that the nature of Civil Case No. 83 of 2017 and Land Application No. 121 of 2022 relates to a contract between the applicant and respondent, whereas the applicant rented the respondent's apartment at Chang'ombe nearby VETA and the applicant is the one who breached a contract, hence, the respondent lodged a case. He added that later the applicant was defeated then he decided to file Land Application No. 121 of 2022. He submitted that the parties are the same and the subject matter is the same and it originated from a breach of contract. He added that the issue of rent was considered and determined by this Court. Therefore, the same could not be raised by the applicant in Application No. 121 of 2022.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this Court to dismiss the Revision with costs.

In her rejoinder, the learned counsel for the applicant reiterated her submission in chief. She admitted that the respondent raised a preliminary objection but she stressed that the Tribunal dismissed the matter on the mention date. She stressed that the claims in Application No. 121 of 2022 and Land Case No. 86 of 2017 were quite different.

In conclusion, Mr. Flora beckoned upon this Court to grant the applicant's application and set aside the District Land and Housing Tribunal decision dated 17th November 2022.

Having heard the submission of both learned counsels for and against the preliminary objections, the issue for determination is *whether the preliminary objection is meritorious*.

Concerning the first ground of revision, the applicant is faulting the Chairman's decision that the Application No. 121 of 2022 was *res judicata*. However, in my considered view, this is not a fit ground for revision because revisional power of the Court can only be invoked where there no right of appeal. See the case of **Felix Lendita v Michael Long'idu**, Civil Application No. 312/17 of 2017. The issue whether Application No. 121 of 2022 was *res judicata* cannot be brought before this Court by way of revision. As long as there is a right of appeal then the right has to be pursued and the same cannot be resort to the revisional jurisdiction of this Court. In the case of **Augustino Lyatonga Mrema v Republic, & Another** [1996] TLR 272, the Court of Appeal of Tanzania held among other things that:-

"To invoke the Court of Appeal's power of revision there should be no right of appeal in the matter; the purpose of this condition is to prevent the power of revision being used as an alternative to appeal."

According to the law, therefore, where there is a right of appeal the power of revision of this Court cannot be invoked. Such powers are exercised in exceptional circumstances. In the matter at hand, the applicant has not shown any exceptional circumstances to warrant this Court to exercise its revisional powers while he has a right of appeal. Therefore, this ground is untenable in the eyes of the law.

As to the second ground, the applicant's counsel is complaining that the Tribunal dismissed the Application on the date of mention. The matter was determined the matter on the date of mention. From the outset, I have to say that this ground is a demerit. The records show clearly that there was a preliminary objection raised by the respondent, the Chairman requested the parties to address him and the parties were ready to proceed with hearing the objection. Therefore, as long as the parties were afforded an opportunity of hearing and they utilized the opportunity of being heard then I do not find any reason to fault the District Land and Housing Tribunal for Temeke in hearing and determining the matter on merit.

For the sake of clarity, I have read the case of **Lembrice Israel Kivuyo** (supra), the matter was set for mention and the Court dismissed the case without determining the case on merit. In **Shengena Ltd** (supra), the issue for discussion was related to the dismissal of a case on the date when the matter was scheduled for mention, whereas the plaintiff and his counsel did not show appearance. The matter was dismissed and the parties were not given a chance to be heard on merit. While in the case at hand, the Chairman afforded the parties the right to be heard. Therefore, in my considered view, the cited cases are distinguishable from the instant case. Consequently, this ground is devoid of merit.

In the upshot, I find that the Application is short of merit. Therefore, I proceed to dismiss it with costs.

Order accordingly.

Dated at Dar es Salaam this date 27th April 2023.



Alv
A.Z.MGEYEKWA
JUDGE
27.04.2023

Ruling delivered on 27th April 2023 in the presence of Mr. C. Silungwe, counsel holding brief for Mr. Karume, counsel.




A.Z.MGEYEKWA

JUDGE

27.04.2023