

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND REVISION NO. 50 OF 2022**

*(Arising from Land Application No. 88/2021 in the District Land and Housing Tribunal for Temeke between Fakhi Adam Athumani vs Juma Hamad Juma delivered by Hon. Sillas, Chairman on 19/10/2022)*

**JUMA HAMADI JUMA ..... APPLICANT**

**VERSUS**

**FAKHI ADAM ATHUMANI ..... RESPONDENT**

*19/04/2023 & 28/04/2023*

**RULING**

**A.MSAFIRI, J**

This is an application for revision against the decision of the District Land and Housing Tribunal for Temeke, in Application No. 88 of 2021, before Hon. Sillas, Chairman delivered on 19.10.2022.

The application was made under Section 41 of the Land Dispute Courts Act, Cap 216 [R.E. 2019] and Part III, Item 21 of the Schedule of Law of Limitation Act, Cap 89 [R.E. 2019].

The application is premised on the grounds appearing on the chamber summons together with the supporting affidavit of Mr. Sillas Adam Nziku, learned Advocate.

The application is contested by the respondent who filed his counter affidavit affirmed by Fakhi Adam Athuman (the respondent) on

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06.03.2023. The respondent also filed a preliminary points of objection on three grounds namely; -

- 1. That the application is unmaintainable for being supported by the incurably defective affidavit in the following aspects.*
  - i. Affidavit contains hearsay (sic) hence defective*
  - ii. Affidavit contain untruth statements and extraneous matters by way of opinion and legal arguments.*
  - iii. Affidavit is bad in law for containing prayer.*
- 2. That this Application is incompetent for being improperly brought because the applicant has not exhausted the required remedy i.e. the right to set aside ex parte judgment and the right of appeal.*
- 3. That the application is bad in law for being omnibus.*

When the matter was called for hearing of the preliminary objection, on 21.03.2023, it was agreed by the parties and this Court granted leave for the disposal of preliminary objection by way of written submissions, whereas both parties complied with the scheduled Court order.

The submission by the respondent in support of preliminary objection was prepared by Mr Leslie Saliyana Koini learned Advocate while the applicant was represented by Mr. Sillas Adam Nziku learned Advocate.

Arguing in support of the first ground of preliminary objection, Mr Saliyana, submitted that most of the paragraphs in the applicant's affidavit contain legal arguments, opinion and hearsay, and prayers which are not allowed in affidavit making. He cited the example of paragraph 7 of the applicant's affidavit which he contends that it contains prayer.

He pointed that the effect of application that has been supported by defective affidavit is that the said application is incompetent before the

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Court. To support his submission, he cited the case of **Uganda vs. Commissioner of Prisons, Exparte Matovu** [1996] EA.

On the second ground of preliminary objection, Mr Saliyana submitted that the applicant cannot go for revisional without exhausting the other available remedy under Regulation 11(2) of the District Land and Housing Tribunal Regulations G.N. No. 174 of 2003, which is right to set aside ex parte Judgment and the right to appeal. He cited the case of **Moses Mwakibete vs. The Editor- Uhuru, Shirika la Magazeti Ya Chama and National Printing Company** [1995] TLR 134.

He submitted further that, besides that, the applicant had an alternative remedy which is provided by the law that is to set aside ex parte judgment, hence that could not come for revision before this Court except in exceptional circumstances as stated in the case of **Hallas Pro Scheme vs Wella A.G** [1996] TLR 269 where the Court held;-

- i. The court, in its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court.*
- ii. Except under exceptional circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the court as an alternative to the appellate jurisdiction of the court,*
- iii. A party to proceedings in the High court could invoke the revisional jurisdiction of the court in matters which were not appealable with or without leave.*
- iv. A party to proceedings in the High Court could invoke revisional jurisdiction of the High court where the appellate process has been blocked by judicial process: the decision....'*

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On the third ground of preliminary objection, counsel submitted that this application contains omnibus prayers, which are one, application seeking an order to set aside ex parte judgment and two, an application for revision exercisable by two diverse courts, hence that this application is omnibus. To bolster the above point he cited the case of **Rachel Joshua vs. Meda Joseph**, Misc. Civil Application No. 10 of 2020.

In response of the first ground of preliminary objection, Mr Nziku contended that the remedy for the defective paragraphs in the applicant's affidavit is to expunge the defective paragraphs and proceed with the rest. He cited the case of **Anna Makanga vs. Grace Woiso**, Civil Reference No. 21/2006, Court of Appeal of Tanzania at Dar es Salaam at pages 4,5,6, & 7.

Regarding to the second ground of preliminary objection, Mr Nziku submitted that the applicant could not go setting aside the ex parte Judgment because the applicant is not intending to challenge the ex parte Judgment which was entered in his absence, but is challenging the irregular conduct of proceedings and orders issued by the trial Chairman. Hence, the applicant is not challenging the ex parte judgment itself, but the outcome of such ex parte Judgment and how it was reached.

He stated that, the applicant is calling this Court to revise the proceedings to cure the procedural irregularities/faults committed in the said proceedings.

The counsel for the applicant did not respond on the third ground of preliminary objection.

I have carefully considered the submissions by both learned counsels. The major issue is whether the preliminary objections raised by the

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respondent are tenable. In determination of the said three grounds of preliminary objections, I will start with the second ground of preliminary objection.

From the pleadings and submissions by parties, it is clear that, the Land Application No. 88 of 2021 which the applicant is seeking to be revised by this Court was between **Fakhi Adam Athuman** (the respondent in this application) **vs. Juma Hamad Juma** (the applicant in this application) that is to say the parties in this application were parties in the previous application before the DLHT.

Principles within which revision can be done were pointed out in different authorities including the case of **Hallas Pro Scheme vs Wella A.G** [1996] TLR 269 as was cited to this Court by the counsel for the respondent. It was held among other things thus;

- i. *N.A..*
- ii. *Except under exceptional circumstances, a party to proceedings in the High Court could not invoke the revisional jurisdiction of the court as an alternative to the appellate jurisdiction of the court. ( emphasis added).*

In the instant application the applicant was a part to the Land Application No. 88 of 2021, though alleges not to have made his defence, I think that is a different thing, being a party to the suit and failure or denial to defend are two different things.

It was also ruled in the case of **Felix Lendita vs. Michael Long'idu**, Civil Application No. 312/17 of 2017, CAT held that: - "

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*'There is a plethora of authorities to the effect that, **revisional powers** of the Court can only be invoked **where there is no right of appeal.**' (emphasis supplied).*

The applicant was a party in Application No. 88 of 2021, and he has shown his intention is not to challenge the ex-parte Judgment basing on his reasons for his absence when the same was passed, but that the applicant intention is to challenge the irregularities in the said Application No. 88 of 2021 before the District Tribunal.

That being the case, I think, the proper remedy for the applicant to adopt was to lodge an appeal under Section 70 of the Civil Procedure Code, Cap 33 [R.E. 2019] ( the CPC) and not revision. I say so, because the applicant could not apply for setting aside ex parte Judgment if at all was not going to challenge the ex parte Judgment itself.

It is a trite law that, an ex-parte judgment is appealable under Section 70(2) of the CPC which provides that an appeal may lie from an original decree passed ex-parte. Section 70(2) of the CPC unambiguous as it is, does not impose any condition for appealing against an ex-parte judgment.

Thus, the requirement that an aggrieved party should not appeal before attempting first to set aside an ex-parte Judgment, does not apply where the appellant is not interested to challenge an ex-parte order.

More so, as the provision of section 70(2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an ex parte judgment, it is not for the Court to narrow down its scope by implying that the legislature intended that such an appeal would be

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conditional upon there being an attempt to set aside the ex-parte judgment.

In that regard, the applicant had an alternative remedy of appeal because he was a party to the previous application and therefore cannot come for revision where he has not exhausted the available remedies.

Having determined the second preliminary objection, I find it to be tenable and proceed to sustain it. I find that this application for revision is incompetent before the Court as the applicant has not exhausted the right to appeal on the challenged matter. Since this ground of objection has the effect of disposing of this application, I find no need to embark on determination of the remaining two grounds of preliminary objections.

Having reasoned so, I proceed to struck out this application with costs.

It is so ordered.



A. HSAFIRI  
JUDGE

**28/04/2023**