

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND REVISION NO. 8 OF 2023**

*(Originated from Land Application No. 231 of 2013, in the District Land and Housing Tribunal for Kinondoni at Mwananyamala (Hon. R. L. Chenya, Chairperson), dated 27<sup>th</sup> September, 2018)*

**FORTUNATA GERALD MASSAWE..... APPLICANT**

**VERSUS**

**DANIEL ILALAMO MASWI.....1<sup>ST</sup> RESPONDENT**

**GRACE NDYETABURA.....2<sup>ND</sup> RESPONDENT**

**PETER MICHAEL MASELE.....3<sup>RD</sup> RESPONDENT**

**RULING**

*30<sup>th</sup> June, 2023 & 19<sup>th</sup> July, 2023*

**L. HEMED, J.**

The instant application originates from Land Application No. 231 of 2013, in the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the DLHT). It appears that in the said Land Application No. 231 of 2013, the 1<sup>st</sup> Respondent herein, **DANIEL ILALAMO MASWI** had sued the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein **GRACE NDYETABURA** and **PETER MICHAEL MASELE**, respectively, for misrepresentation in selling to him the suit landed property. He thus prayed for judgment and decree

against them jointly and severally for payment of Tshs. 4,300,000/= as compensation for loss of money and land. In the end, the District Land and Housing Tribunal declared the 1<sup>st</sup> respondent the rightful owner of the suit land.

The gathered facts from the affidavits show that the decree holder in Land Application No. 231 of 2013 applied for execution *vide* Execution No. 838 of 2018. The Applicant who was not a party to Land Application No. 231 of 2013, being affected by the execution process, unsuccessfully objected the said execution through Misc. Application No. 764 of 2019 and later on, Application No. 400 of 2021 hence the instantaneous application.

In the present application that has been made under section 43(1) (b) of the Land Disputes Court Act [Cap. 216 R.E 2019], sections 79 (1) (a & e), 95 and Order XLIII Rule 2 of the Civil Procedure Code, [Cap. 33 R.E 2019], the applicant seeks for the following orders:

*"1. That, this Honourable Court be pleased to call for and examine the record, proceedings, judgment and Decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 231 of 2013 made on the 27<sup>th</sup> day of September 2018 for purposes of satisfying itself as to the correctness, legality or propriety of the*

*decision thereof and thereby quash/reverse the same for being irregular, illegal and having acted without jurisdiction.*

*2. Costs to follow the event,*

*3. Any other order as this Honourable Court may deem fit and just.”*

The application was supported by the affidavit deposed by one **Fortunata Gerald Massawe**, the applicant. Mr. **Mruge Karoli**, learned advocate represented the Applicant, while the 1<sup>st</sup> and 2<sup>nd</sup> respondents enjoyed the service of Ms. **Sia Ngowi** and Ms. **Beatrice Soka**, advocates respectively. The 3<sup>rd</sup> respondent was not appearing despite being duly served.

It should be noted that on 5<sup>th</sup> April, 2023, this court issued calling for record of Land Application No. 231 of 2013 from the District Land and Housing Tribunal for Kinondoni. While waiting for the said record, the court directed parties to argue the application by way of written submissions. Parties complied with the directives of the court by 17<sup>th</sup> May, 2023. However, the court could not be able to compose ruling as the records of the trial Tribunal were not availed to the court for determination of the application on merits. Several calling for record were issued in vain. On

18<sup>th</sup> July, 2023, the court received a report from the Chairman In charge of the District Land and Housing Tribunal for Kinondoni informing the Court about the loss of the record of Land Application No. 231 of 2013, **Daniel Ilalamo Maswi vs Grace Ndyetabura and Peter Michael**. The report was accompanied by the affidavit deposed by one **JAMES WILLY SILLAS**, the Chairman in charge of Kinondoni District Land and Housing Tribunal. In his affidavit, Mr. **James Willy Silas** stated thus:

*"5. That on 14<sup>th</sup> July 2023 the Deputy Registrar....called the records the case file for Land Application No. 231 of 2013 involving Daniel Ilalamo Maswi vs Grace Ndyetabura and Peter Michael from the chairman of District Land and Housing Tribunal – Kinondoni for the Appeal purpose.*

*6. That, following the calling for records by the Deputy Registrar of the High Court (Land Division) at Dar es Salaam if the case file for Land Application No. 231 of 2013, we conducted a due diligent search for the said case file in all known places and corners of our office by using known and unknown means but in vain.*

*7. That the said records are therefore lost records incapable of being traced found or located by using any ordinary and unordinary diligence."*

What stands for the court to deliberate and determine in view of the circumstances of this application, is the issue as to what should be the way

forward in resolving the application at hand in times where records get lost. Here is the Applicant who feels that her rights over the suit landed property have been infringed by the decision of the trial Tribunal in Application No. 231 of 2013, in which she was not a party thereto. The applicant has got unfettered constitutional right to use all available legitimate avenues, to pursue her legal rights. On the other side, the Decree Holder has the right to enjoy the fruits of his triumph in the suit at the trial Tribunal on the principle that an impugned proceedings or decision is prima-facie correct until otherwise declared. In the present application, the decision and proceedings in Application No. 231 of 2013 is presumed and remain correct until otherwise declared.

The duty of the court is to balance between the rights of both parties by extensively determining the merits of the application. However, due to the loss of the record of the case concerned, this court cannot be able to examine proceedings, judgment and Decree of the trial DLHT as moved. Who to blame and condemn for the loss of the record? In fact, no party who can be subjected to condemnation for such loss because the responsibility for keeping the court records in safe and proper custody and producing them on demand, rest on the relevant court.

In fact, there is no general rule in our jurisprudence on the way forward when the Court is faced with the problem of missing records of the lower courts as the one in the application under scrutiny. I have seen a decision in **Robert s/o Madololyo vs Republic**, Criminal Appeal No. 486 of 2015 which made guidance as to what has to be done when the record get lost in criminal case. In the said case, the Court of Appeal of Tanzania directed that all stakeholders should be involved to reconstruct the record. In **Mfaume Shaban Mfaume vs Republic**, Criminal Appeal No. 194 of 2014 the Court of Appeal went further to state that where it is impossible to reconstruct then retrial should be directed. It stated thus:-

*"Where reconstruction of the record of appeal is neither feasible nor possible, the court should consider to order for re-trial."*

As aforesaid, in the present case, there is an affidavit of the chairman in charge of the District Land and Housing Tribunal for Kinondoni deponed to the effect that the records subject of this revision have been lost. In the beginning, I thought of adopting the position taken by the Court of Appeal in **Robert s/o Madololyo vs Republic** (*supra*) by directing reconstruction of record through involvement of stakeholders. However, I

realized that this being a civil matter involving private/natural person, this might not be possible to reconstruct records taking into account that the applicant was not a party to the original proceedings. Having considered the fact that the original records have been lost and the impossibility of reconstructing it being obvious, I find it difficult to apply the position taken in **Mfaume Shaban Mfaume vs Republic** (supra).

From the foregoing, I find it apt to invoke the revisional powers under section 43(1)&(2) of the Land Disputes Courts Act, [Cap 216 R.E 2019]. I quash the proceedings and decision of the trial Tribunal in Application No. 231 of 2013. If the dispute persist, anybody interested will be at liberty to refile it in the competent court involving all necessary parties. In the circumstance of this case each party to bear its own costs.

**DATED at DAR ES SALAAM 19<sup>th</sup> July 2023.**



  
L. HEMED

**JUDGE**