

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 02 OF 2023

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni
District at Mwananyamala in Miscellaneous Application No. 984 of 2021)

MAYNARD LUGENJA.....APPLICANT

VERSUS

MICHAEL LEMA BATHROMEO.....RESPONDENT

R U L I N G

Date of last Order: 12 June 2023

Date of Ruling: 09 August 2023

K. D. MHINA, J.

This application for revision is brought by way of chamber summons made under Sections 41 and 43 (1) (b) of the Land Disputes Courts Act, Cap 216 [RE 2019] ("the LDCA").

The orders being prayed are for this Court to;

- (i) *Call for the record, revise, quash and reverse the ruling and drawn order of the District Land Housing Tribunal for Kinondoni at Mwananyamala dated 1 December 2021 in Miscellaneous Application No. 984 of 2021.*

(ii) Costs of the application.

(iii) Any other relief (s) the Court may deem fit and just to grant.

The application is supported by the affidavit disposed of by Maynard Lugenja, the applicant.

The ground of the application was expounded in paragraph 7 of the affidavit that the applicant was never afforded the right to show cause why execution should not be endorsed before the Tribunal granted the application for execution.

The respondent countered the application by filing the counter affidavit stating that the applicant was afforded the right to be heard.

The revision was argued by way of oral submissions. The applicant was represented by Mr. Wilson Ogunde, a learned advocate, while the respondent by, Mr. Goodchance Lyimo, also a learned advocate.

In supporting the application, Mr. Ogunde submitted that in 2021 the respondent filed an application for execution at the Tribunal vide Misc. Application No. 984 of 2021 and the applicant was served with a notice to show cause why execution should not be granted.

The applicant filed an affidavit to show cause why execution should not be granted and also filed an application for a stay of execution vide Misc. Application No. 371 of 2022. The application for stay was filed on the ground that there was a pending application between the parties before this Court vide Misc. Land Application 111 of 2022. Both applications for stay of execution and execution were scheduled for mention on 1 December 2022.

But prior to that date, the application which was before this Court, i.e., Misc. Land Application 111 of 2022 was dismissed; therefore, on 1 December 2022, the Tribunal dismissed the application for stay of execution since it was overtaken by events and proceeded to endorse the execution on the ground that the pending application for stay was dismissed.

Mr. Ogunde further submitted that the applicant had a right to be heard in the application for execution in Misc. Application No. 984 of 2021 because of the outcome of the application for stay of execution, i.e., Misc. Application No. 371 of 2022 had nothing to do with the applicant's right to show cause.

He further submitted that Order 21 Rule 20 (1) (a) of the CPC provides that when an application for execution is made after a lapse of one year from the date of the decision, the judgment debtor is entitled to show cause.

He concluded by submitting that the applicant had been denied the right to be heard as protected by Article 16 (6) of the Constitution; therefore, he prayed that the application be granted.

In response, Mr. Lyimo submitted that after the filing of Misc. Application No. 984 of 2021, the applicant was served with the notice to show cause. On 9 September 2021, the respondent filed the affidavit to show cause why execution and the reason advanced was that there was a process of appeal after the applicant filed a notice of appeal against the decision of this Court in Land Appeal No. 112 of 2017 between the parties.

Further, the applicant applied for a stay of execution at the Tribunal for the reason that there was a pending application before this Court, Misc. Land Application 111 of 2022.

Mr. Lyimo also submitted that as per the decision of this Court in **Yohana John Kavishe vs. The Registered Trustees of E.L.C.T North Central Diocese**, Civil Application No. 06 of 2021 (HC-Arusha), the

execution could only be stopped if the decree has been satisfied and if there is an order for stay of execution. Therefore, when the Tribunal found that the pending application for stay had no legs to stand, there was nothing to preclude the Tribunal from issuing execution orders.

He further submitted that the applicant was afforded the right to be heard, and he filed the affidavit to show cause and that on 1 December 2022, the matter was fixed for necessary orders and not for mention.

In his brief rejoinder, Mr. Ogunde mostly reiterated what he had submitted earlier in his submission in chief. For that reason, I don't see a reason to reproduce what he had submitted.

Having considered the chamber summons, its supporting affidavit, counter affidavit and the oral submission made by the counsel for the parties, the issue to resolve is whether the applicant was given a right to be heard before the Tribunal endorsed the execution.

In determining the issue to be resolved, I have to revisit the Tribunal's proceedings in the applications for execution and stay of execution. For that matter, it is pertinent to give a brief background of this matter with a chequered history.

The background facts leading to this matter trace back to 23 January 2012 (11 years ago) when the applicant filed a land matter (Land Application No. 25 of 2012) at the DLHT for Kinondoni over a dispute regarding the ownership of land described as Plot No. 165 Block "E" located at Tegeta Mtongani within Kinondoni District against the respondent and The Director of Kinondoni Municipal Council. The Tribunal's decision dated 8 May 2017 declared the respondent, who had a title deed in respect of the plot in dispute and was paying land rent as a lawful owner.

Dissatisfied, the applicant appealed to this Court vide Land Appeal No. 112 of 2017. After the hearing on 21 September 2018, the appeal was dismissed for want of merits.

Undaunted, the applicant approached this court again with an application for leave to appeal to the Court of Appeal vide Misc. Land Application No. 678 of 2020. On 24 June 2020, following the applicant's counsel's prayer for withdrawal, this Court withdrew that application.

Again, the applicant filed another before this court, i.e., Misc. Land Application No. 561 of 2021 sought for extension of time to apply for leave

to appeal to the Court of Appeal. On 25 February 2022, the application was struck out for being incompetent.

The applicant further filed Misc. Land Application No 111 of 2021 in this Court prayed for an extension of time to file a review against the decision in Misc. Land Application No. 678 of 2020. He intended to request a review of the decision, which he prayed to withdraw. On 31 October 2022, this Court dismissed that application for want of merits.

Coming back to the determination of this application, the records reveal that on 16 July 2021, the respondent applied for execution at the Tribunal to execute the decision in Land Application No. 25 of 2012. After being served with the notice to show cause why the execution order should not be issued, the applicant took the following actions;

First, She filed an affidavit to show cause why execution should not be issued. The ground expounded in the affidavit was that the applicant was in the process of appealing to the Court of Appeal against the decision of this Court in Land Appeal No. 112 of 2017.

Two, She applied for a stay of execution. The reason for the application was that there was a pendency of Misc. Land Application No. 561

of 2021, before this Court for an extension of time to apply for leave to appeal to the Court of Appeal.

On 13 June 2022, Mr. Lyimo advocate informed the Tribunal that Misc. Land Application No. 561 of 2021 was already determined by this Court on 25 February 2021, a fact to which also Mr. Ogunde agreed. Therefore, on 20 June 2022, the Tribunal struck out the application for a stay of execution as it had no legs to stand.

Regarding the application for execution, on 1 December 2022, the Tribunal ruled that since there was no pending application at the High Court and Court of Appeal, execution should proceed and ordered the applicant within 14 days to demolish the structures he built in the suit land and vacated from that place.

The question is whether, from the above scenario, the applicant was afforded the right to be heard or not.

This should not detain me long. Regulation 23 (3) and (5) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, G.N No. 174 of 2003, read that;

"3. The Chairman shall, upon receipt of the application, make an order requiring a judgment debtor to comply with the decree or order to be executed within the period of 14 days".

"5. The Chairman shall, where there are objections from the judgment debtor, consider the objection and make such orders as may be appropriate".

Briefly, the above sub-regulation provides for the issuance of summons to show cause the Judgment debtor and how to deal with objection (s) or reasons in showing cause raised by the Judgment Debtor.

In this matter, the complaint by Mr. Ogunde was, despite filling the affidavit to show cause, the applicant had a right to be heard in the application for execution (Misc. Application No. 984 of 2021) because of the outcome of the application for stay of execution, i.e., Misc. Application No. 371 of 2022 had nothing to do with the applicant's right to show cause.

On this, I have the following observation, in raising objections as a matter of practice, the judgment debtor or his/ her advocate may show cause orally or may file the affidavit to show cause; therefore

One, since the applicant decided to file an affidavit to show cause and, on the date when the execution was scheduled, he was absent, and his

counsel also was absent, the Tribunal was proper to determine the application based on the affidavit to show cause. This Court already held in **Atumonekye Mwenda vs. Hezron Mangula, Misc. Land Application No. 05 of 2020**, Tanzlii [HC- Iringa], that in case there is an affidavit, even if there are no oral or written submissions to elaborate or explain further, Courts may proceed to decide the matter as the evidence (affidavit) is already in the record.

Two, the only reason contained in the affidavit to show cause was a pending application at the High Court. The same was also raised in the application for a stay of execution. As I alluded to earlier, on 13 June 2022, while dealing with the application for stay of execution, the counsel for the applicant admitted that the pending application was determined and the Tribunal proceeded to strike out that application.

From the above scenario, even if this Court, for instance, find that there is an infringement of the right to be heard, still it is of no sense to quash the Tribunal decision and order a retrial. Because if the re-trial would be ordered, it is only for the hearing on the explanations for and against the ground raised in the affidavit to show cause. And that ground would be whether or not Misc. Land Application No. 561 of 2021 determined.

In my opinion, that does not make any sense because the record indicated and the counsel for the applicant admitted in the application for a stay of execution that the pending application was already determined. In the circumstances ordering retrial is a wastage of time and abuse of court processes.

Further, he could not raise new grounds at the hearing/ explanation of the affidavit to show as per the proviso of Regulation (5) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations, G.N No. 174 of 2003, which read that;

"Provided that hearing of objections under these sub-regulations shall be limited to the subject matter of the objection".

The position also is clearly stated by the Court of Appeal in **Rosemary Stella Chambe Jairo vs. David Kitundu Jairo**, Civil Reference No. 6 of 2018 [Tanzlii], where the Court discussed the statement from the bar it held that;


"The practice abhorred and discouraged from the Court".

Flowing from above, the Executing Tribunal exercised its powers properly by endorsing the execution. Therefore, the application not only lacks merit but also is a wastage of time and abuse of the Court process.

In the upshot the application for revision is rejected as there is nothing to revise. Consequently, it is dismissed with costs.

It is so ordered.




K. D. MHINA
JUDGE
09/08/2023