

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND REVISION NO. 33 OF 2023

(Originating from Misc. Land Application No. 546 of 2022)

ANGELA KASSIM MWINUKA APPLICANT

VERSUS

KAMILI JOHN LEMA RESPONDENT

R U L I N G

Date of last Order:15/08/2023

Date of Ruling:14/11/2023

K. D. MHINA, J.

In this application, the applicant has moved the court under the provisions of Section 43(I)(a)(b) and of the Land Disputes Courts Act, Cap. 216 R.E 2019 and any other enabling provision, seeking for the following orders:

- i. That this Honourable court be pleased to call for record and proceedings of The District Land and Housing Tribunal (the DLHT) for Kinondoni District at Mwananyamala in respect of Miscellaneous Application no. 546 of 2022 and revise the ruling dated 08/5/2023 for the errors apparent on the face of records involving injustice on the part of the Applicant*
- ii. Cost of this application to be borne by Respondent*

iii. That this honourable court be pleased to grant any other relief(s) deemed appropriate

The application is supported by the affidavit disposed of by Angela Kassim Mwinuka, the applicant, which expounds the ground of the application.

In response to the application, the respondents countered it through the affidavit in reply sworn by Kamili John Lema, the respondent.

At the hearing, the applicant was represented by Ms. Kashindye Thabit, learned advocate, while the respondent, was unrepresented.

The grounds prompted this application are shown under paragraph 10,11, 12 and 13 of the applicant's affidavit

The brief background of this matter is necessary in order to understand the gist of the conflict between the parties. It goes as follows;

The applicant through Land Application No. 478 of 2019 at District Land and Housing Tribunal (the DLHT) of Kinondoni lodged a suit against the Respondent claiming that the Respondent had trespassed into her land. In the end the DLHT entered a judgment in favour of the applicant by holding that the Respondent trespassed into Applicant land by "two blocks size" and ordered the demolition of the same.

Undaunted, the respondent appealed to this court vide Land Appeal No. 41/2022 challenged the whole judgment and decree of the DLHT.

On 28/6/2022, this Court allowed the appeal by quashing the proceedings and set aside the findings, judgment and decree of the DLHT.

Further, this Court ordered the parties to respect their boundaries as when they purchased from one Sevenday Kaunda.

After that decision, the respondent went back to the DLHT and filed execution proceedings in Misc. Land Application No.546 of 2022. The DLHT gave the parties 14 days to abide with the decision of this Court and in case of failure to comply, the DLHT appointed Castro Matei, the broker from JUCACO AUCTION MART to demarcate the land with a dispute.

On 1 February 2023, the Broker, issued a 14 days notice to the applicant, referred her as a judgment debtor demanded her to divide and hand over the land in execution of the decree in appeal of this Court. The notice was titled.

YAH: NOTISI YA SIKU 14 YA KUGAWA ENEO NA KUKABIDHI ENEO.

On 10 March 2023, the applicant wrote a complaint letter to the DHLT Chairman, complained that part of fence wall in her land was

demolished contrary to the directives of the DLHT that their plots be surveyed in order to review the boundaries. Following that complaint letter, the DLHT called on the parties and invited to address it on that issue.

On 8 May 2023, the DLHT Chairman delivered the verdict by dismissing the applicant claims.

Dissatisfied, the applicant filed this application for revision urged this Court to call for records and proceedings of the DLHT in respect of Miscellaneous Application No. 546 of 2022 and revise the ruling dated 08/05/2023 for the errors apparent on the face of records involving injustice on the part of the Applicant. The Applicant want the High Court to revise based on the following issues:

- i) That the trial Tribunal erred in law in the determination of Misc. Application Number 546 of 2022 by failing to take into account that the applicant is lawfully owner of disputed piece of land as granted from the judgment and decree in application no 478 of 2019 dated by Hon.Wambili Chairperson.*
- ii) That the Trial chairperson erred in law and fact by failing to consider that the respondent was a trespasser in the disputed premises.*

iii) That the trial chairperson erred in law and fact by failing to consider that a demolition made by Jucaco Auction Mart was in respect of a wrong place.

Supporting the application, Ms. Thabit stated that the decision of the DLHT in Misc. Application No. 546 of 2022 was not proper due to the fact that the applicant could not be the trespasser on her own land. The applicant was the legal owner of plot Number. ND/MSS/MGR21/39 Msasani, Makingira with a size of 129 SQM.

In Land Application No. 478 of 2019 it was held that the respondent trespassed into the applicant's piece of land of length of two blocks and the respondent was ordered to demolish the structure into that a piece of Land

The decision of Chairperson Chenya created confusion in a sense that on his Ruling dated 29 November 2022, he based on the issue of neighbours and to respect the boundaries as per Judge Msafiri explained at page 14 of her Judgment and Decree in Land Appeal No. 41 of 2022.

He further urged that, the demolition which was conducted in the applicant's absence was conducted against the judgment pronounced on the Land Application No 458 of 2019.

Ms. Thabit further argued that JUCACO AUCTION MART demolished the small gates which the parties used to pass and the wall fenced the back of the houses but not two size blocks which the respondent trespassed to the applicant's piece of land. She referred this court to the case of **Mfaume Kilangi vs. Magreth Mkwezi**, Land Application No. 29 of 2019 (HC- Land Division).

In response, the respondent submitted that after the expiration of time to appeal against the decision of the High Court, the respondent through Execution no. 546 of 2022 at DLHT applied to execute the decree of this Court in Land Appeal 41 of 2022 which upheld respondent five grounds of appeal, quashed the judgment and decree of Kinondoni District and Housing Tribunal in Land Application no. 478 of 2019, and ordered parties to respect the boundaries of their areas as purchased from Sevenday Kaunda.

Therefore, it was wrong for the applicant to claim that the DLHT erred in law in Execution no. 546/2022 for executing the judgment and decree of the High Court in Land Appeal no. 41 of 2022 instead of the judgment and decree DLHT in Land Application No. 478/2019 which was set aside.

As to the second and third ground, the respondent jointly submitted that whilst analysing the evidence during the trial this Court observed that there was a passageway between the houses belonged to the parties and there was a gate which was used by both parties and so the respondent was not a trespasser

He further argued that, the decision in Execution No. 546/2022 at DLHT for Kinondoni was lawful and all procedures were observed. The Tribunal executed the High Court order that each party to respect the boundaries set and each one to keep on her/his part of land as purchased from Sunday Kaunda.

At the time of the purchase there was no gate nor a wall which block the passageway, to respect the boundaries of their areas is to allow free access to the passageway.

The respondent further argued that the court broker Jucaco Auction Mart duly followed all legal requirements in executing the decree of land appeal no. 41/2022 as per the Kinondoni DLHT in execution no. 546 of 2022. The tribunal, on 08/05/2023 following the applicant complaint over the execution proceedings, heard both parties and observed that the execution was valid in the eyes of the law.

He concluded by submitting that the application is devoid of merits due to the following reasons;

That the respondent did not trespass into the applicant land as it had already been determined in Land Appeal No. 41 of 2022 by the High Court Land.

That the applicant was wrong to allege that she was the lawful owner of the disputed piece of land as per the judgment and decree in Land Application No. 478 of 2022 at the DLHT while the judgement and decree was set aside.

Further, based on the case of **Mfaume Kilangi** (Supra), in the instant application, the applicant failed to prove the ingredients of operative error, failed to prove an error, failed to manifest the error on record and proving how the error was resulted into the miscarriage of justice.

In rejoinder Ms. Thabit stated to submit by posing the questions which is hereby produced;

- i. Which orders of the Court/Tribunal gives a power to the respondent to apply for the execution before the DLHT for Kinondoni at Mwananyamala?*

- ii. Did High Court of Tanzania Land division in land Appeal No. 41/2022 before Hon. Judge Msafiri rules out on the favour of the respondent?*
- iii. To which judgment gave the respondent a power to execute the order hence applied for execution while the judgment of the High Court Land division in appeal No 41 of 2023 did quashed and set aside all orders and proceedings of the DLHT for Kinondoni judgement in the case No. 478/2019?*
- iv. Did the order of the High Court Land division can be executed by tribunal, if so at what authority did gives power the said tribunal of exercise the powers of the high court?*

From above she submitted it was clear that there was nothing to be executed by any parties instead of filing a fresh suit if the parties' desires to do so.

She concluded by submitting that the respondent's act to apply for execution was a total miscarriage of justice and abuse the Court process and procedures in which the execution was wrongly executed to wrong person.

Having considered the chamber summons, its supporting affidavit, counter affidavit and the written submissions made by parties I will start by quoting the holding of the decision of this Court in Land Appeal No. 41 of 2022 dated 28 June 2022. I quote;

"From this analysis, I allow the appeal, quash and set aside the findings, judgment and decree by the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 478 of 2019. The parties are to respect the boundaries of their areas".

What was quashed was the decision of the DLHT, which declared that the respondent trespassed into the applicant land by a "two bricks size" and ordered the applicant to demolish the structure which overlapped into the applicant's land.

Therefore, the gist of the dispute was allegations of trespass by the respondent into the applicant's land.

After the decision of the High Court which quashed the DLHT decision, this Court ordered the parties to respect their boundaries.

Then, it came the order of the DLHT dated 29 November 2022. That order was the result of the application for execution filed by the respondent executing this Court's decision in Land Appeal No. 41 of 2022. That order directed the parties to respect their boundaries and in case of failure the broker was appointed to execute the decree.

In my opinion, the order is problematic in two aspects.

One, apart from reminding the parties to respect their boundaries and to appoint Jucaco Auction Mart, the Order did direct the demolition of the fence wall. Further, as per the decision of this Court in Appeal No. 41 of 2022 it was never declared that the applicant trespassed into the respondent land.

Two, the order did not disclose, the "hot" issue of boundaries when it appointed the broker. The Order did not describe the boundaries for the broker to execute.

In addition to that, after being appointed, the broker issued a 14 days notice to applicant as a judgment debtor to divide and hand over the land to the respondent as a decree order. The question is what land was supposed to be divided and handed over?

On this the Order of the DLHT and also the 14 days notice were silent. After that the Broker executed the "decree" where the applicant fence wall was demolished.

Following, the demolition of the applicant's part of a fence wall, and after her complaint to the Chairman of the Tribunal, the DLHT heard the parties and on 8 May 2023, delivered its verdict by dismissing the applicant complaint.

In its Ruling, DLHT held that;

One, at the time when the parties purchased their respective plots, there was no fence wall.

Two, the execution was in good faith for the interest of finalizing the dispute between the parties.

Three, in unsurveyed areas, there must be an open space between the neighboring plots.

Having gone through the order, I have the following observations;

One, in my opinion, the issue that when the parties purchased their respective plots, there was no fence wall was irrelevant. What was important were the boundaries between the applicant and the respondent. At the execution proceedings, it was never disclosed if the applicant did not respect her boundaries to warrant the demolition of the wall.

Two, the overriding principle is, executing court is bound by the terms of the decree as it cannot go behind the decree. I draw the inspiration from the Supreme Court of India in **V. Ramswami Vs T.N.V.Kailash Theyar reported in AIR 1951 S.C,189(192)**, where it was observed that,

"The duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though it has the power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation....."

The interpretation must be governed by pleadings and the judgment.

Therefore, that execution was in good faith in the interest of finalizing the dispute between the parties, I think this, without following the governing procedures is of no merit. Good faith and interest in finalizing a dispute without following the procedure is not a "scapegoat".

Three, the issue that the in unsurveyed areas, there must be an open space between the neighboring plots was not raised neither at the DLHT and at the High Court. That means the executing Court formed its terms to execute which were not in the decree. The decree of this Court in appeal was straight forward that each party to respect the boundaries of their respective land.

Going further in the determination of the application, in my opinion, after the failure of the parties to respect their boundaries, the DLHT, before ordering execution it was suppose to identify and describe the boundaries by engaged the previous owner of the land who sold to both,

the applicant and respondent, and the land surveyors. Taking into account the complaint of the applicant that the demolition was in respect of the wrong place.

Flowing from above, the ruling of the DLHT dated 8 May 2023 was not proper for the reasons I alluded to earlier and also because, the Ruling was a result of a nullity order dated 29 November 2022.

In the upshot, I find that the execution proceedings were vitiated; therefore, a nullity and the resultant Ruling dated 8 May 2023 also a nullity.

Consequently, I quash the execution proceedings and set aside the of the DLHT in Misc. Application No. 546 of 2022 dated 8 May 2023. In lieu thereof, parties are reminded that they are bound by the decision of this Court in Land Appeal No. 41 of 2022, where it was held that;

"The parties are to respect the boundaries of their area".

In case of failure to that, fresh execution proceedings may be filed but in the circumstances of this matter, before the final execution orders the DLHT shall engage the previous owner of the land, who sold to both the applicant and the respondent and the land surveyors, for the proper identification of the boundaries.

In conclusion, application for revision is allowed with costs.

I order accordingly.



A handwritten signature in blue ink, consisting of several vertical and diagonal strokes, positioned above the printed name.

K. D. MHINA
JUDGE
14/11/2023