

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND REVISION NO. 38 OF 2023

*(Originating from Land Application No.48/2008, before Hon. Sostheness, Chairperson
delivered on 5th July, 2023)*

ZUBERI NASSORO 1ST APPLICANT

MWENYEKITI WA SERIKALI YA MTA A

(SAIDI TUMBO) YOMBO DOVYA 2ND APPLICANT

VERSUS

TUMAINI MWAKALASYARESPONDENT

RULING

26/10/2023 & 08/11/2023

A. MSAFIRI, J.

At the District Land and Housing Tribunal for Temeke, (the trial Tribunal), the dispute was centred on ownership of the piece of land with reference No. TMK/MKW/YDV/ Yombo Dovya Makangarawe, Temeke District (herein as suit property). The respondent Tumaini Mwakalasya had sued the 1st applicant, Zuberi Nassoro together with the 2nd applicant, Mwenyekiti wa Serikali ya Mtaa (Saidi Tumbo) Yombo Dovya respectively, claiming ownership of the suit property.

Having deliberated over the matter, the trial Tribunal found in favour of the respondent and declared that, the respondent is the lawful

Alls.

owner of the suit property. Aggrieved by the said decision, the applicants have lodged this Application for revision.

On 31st August, 2023, the respondent filed a notice of preliminary objection on the point of law to the effect that: -

1. *That this application is not maintainable as the applicants ought to have made an application in the lower tribunal to set aside its ex parte decision.*
2. *That the affidavit in support of the application is fatally defective for it could not have been signed by SAID TUMBO on 9th August, 2023, when in fact died in 2012.*
3. *That the application is nugatory for it has been overtaken by events.*

Hearing proceeded by way of written submissions, whereby the submissions in chief by the respondent was drawn and filed by Jethro Turyamwesiga, learned advocate while the reply by the applicants was drawn and filed by represented by Ms Jane Goodluck Mseja, learned advocate.

Arguing in support of the first limb of objection, the counsel for the respondent submitted that the applicant having failed to appear before the trial Tribunal despite of being duly served, was supposed to apply in the trial Tribunal to set aside its ex-parte order. He referred to Order IX Rule 9 of the Civil Procedure Code, Cap 33, R.E 2019 (the CPC) which provides that; *Alls.*

"In any case in which a decree is passed ex-parte against a defendant, he may apply to the court which passed the decree for an order setting aside the decree as against him upon such terms as to the costs..."

He also cited the cases of **George Mgaya vs Ezekiel Malekelo**, Land Appeal No. 25 of 2021, High Court of Tanzania, at Tanga (Unreported) and **Melkion M. Ndomba vs Helman Edward Komba**, Land Appeal No.11 of 2022, High Court of Tanzania (Land Division) at Songea (Unreported) to bolster his arguments.

Guided by the provision of Section 38(1) and (2) of the CPC, the counsel for the respondent stated further that, since execution is treated as a suit, the applicants were supposed to file an Application to set aside ex parte decision of the lower Tribunal that passed the decision.

In reply thereof, Ms Msami counsel for the applicants submitted that, they are in the right position to file revision in this Court because Section 43(1)(b) of the Land Disputes Courts Act, CAP 216 R.E 2019 directs that, once a person is aggrieved by the order as any proceedings determined by the District Land and Housing Tribunal, may apply for revision in this Court challenging the said execution order so issued. To cement her argument, she cited the case of **Mohamed Makata vs Rukia Mtama**, High Court of Tanzania, at Tanga (Unreported) at page 6.

I have gone through the rival submissions of both parties together with the affidavit and counter affidavit subject to this Application and found that, the applicants are not challenging the *ex parte* judgment or decree of the trial Tribunal, but they are challenging an execution order issued on 5th July, 2023 before Hon. Sostheness, Chairperson. Paragraph 9 of the applicants' affidavit states thus: -

" 9. That, the basis of this application is to exhale the illegality in the Miscellaneous Land Application No.48 of 2008 where the applicant declares that the said execution was filed out of prescribed time and no notice of exertion(sic) of time was granted to the respondent and hence making the whole application bad in law and the District Land and Housing Tribunal lack jurisdiction to entertain the same."

From the above findings, I find that this Court can rightly invoke its revisional powers provided under Section 43(1) of the Land Disputes Courts Act, since the applicants are challenging the legality of the execution proceedings and not the *ex parte* order. I therefore find the first limb of preliminary objection to lack merit and I overrule it.

In the second limb of preliminary objection, counsel for the respondent submitted that, the affidavit in support of the Application is a joint affidavit affirmed jointly by Zuberi Nassoro and Said Tumbo, the affirmation which was done before a Commissioner for Oaths on 9th *Acils*.

August, 2023, at Dar es Salaam. He stated that, Said Tumbo died ten years ago in 2012. It was his submission that the joint affidavit is fatally defective for being sworn by deceased person.

In her reply, counsel for the applicants submitted that, the fact that the 2nd respondent died cannot stand as a preliminary objection as it needs proof and thus needed to be proved in the main Application since it was an error made from the lower court as the execution filed by the respondent described the 2nd applicant in person while he is aware that the administrator of the late Said Tumbo was already appointed. To cement her argument, she cited the case of **Cotwu (T) & Another vs Hon. Iddi Simba Minister of Industries and Trade & Others, (2002) TLR 88** and **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Limited, (1969) E.A 696.**

It is a well established principle of law that, a preliminary objection should be on point of law and not factual matter to be given in evidence during trial. As rightly submitted by the applicants, what amount to a preliminary objection was well defined in the case of **Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Limited** (Supra), that: -

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are

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correct. **It cannot be raised if any fact has to be ascertained** or if what is sought is the exercise of judicial discretion.”(Emphasis added).

In the matter at hand, the proof is required and the evidence needs to be called upon to ascertain the death of the 2nd respondent. It is therefore clear that the facts raised do not fall under the category of being called preliminary objection. I therefore overrule the second limb of preliminary object for lack of merit.

Regarding the third limb of objection, the counsel for the respondent submitted that, the Application at hand has been overtaken by events since execution has already been finally concluded. To cement his argument he cited the case of **Felix Emmanuel Mkogwa vs Andrew Kimwaga**, Civil Application No.249 of 2019, the Court of Appeal of Tanzania.

In reply thereof, the counsel for the applicants argued that, the Application for revision cannot be considered as an action to be waived by the event since it is not an Application to stay execution nor temporary injunction.

Having gone through the rival submissions of both parties, and the case of **Felix Nkongwa vs Andrew Kimwaga** (Supra) cited by the respondent, I find the circumstance in the cited case are different with

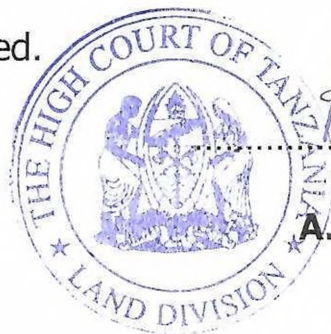
Alls.

the Application at hand. In the cited case, the applicant filed an application for stay of execution, which the Court found that, the decree sought to be stayed had already been executed. That being the situation, the court ordered that there is no decree to be stayed for the application has been overtaken by event.

In the present case, the applicant is challenging execution proceedings on the ground that the Application was tainted with illegality for being filed out of the prescribed time. That being the case, I find this Application to be in the right position, since the provision of Section 43(1) of the Land Disputes Court Act directs that this Court may revise any proceedings determined in the District Land and Housing Tribunal if it appears that there has been an error material to the merit of the case involving injustice.

For the foregoing reasons, I find all the points of preliminary objection raised by the respondent to lack merit. I hereby dismiss them with costs.

It is so ordered.



A. Msafiri

A. MSAFIRI

JUDGE

08/11/2023