

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 563 OF 2023

*(Arising from Application No.276 of 2022 in the District Land and Housing Tribunal
for Temeke at Temeke)*

LIBERATO MMBANDO.....APPLICANT

VERSUS

PENTECOSTE CHRISTIAN CHURCH BUZA.....RESPONDENT

JUDGEMENT

Date of last Order: 01/11/2023

Date of Judgement: 15/11/2023

MWAIPOPO, J:

The applicant herein, Liberatus Mmbando, has filed an application for revision against Pentecoste Christian Church Buza, the respondent herein. The application is made under Sections 41 and 43(1) (a) and (b) of the Land Disputes Court Act Cap 216 (R.E 2019) and Sections 79(1) and 95 of the Civil Procedure Code Cap 33 (R.E 2019) and it contains the following prayers;

(a) That this honourable Court be pleased to call for and examine records of the proceedings of the District Land and Housing Tribunal for Temeke at Temeke in Land Application No. 276 of 2012 as there exist serious irregularities that amount to exceptional circumstances in the conduct of the Tribunal proceedings which call for the immediate intervention of this court before justice is irretrievably hijacked.

(b) Costs be provided for

(c) Any other orders and relief(s) as the Honourable Court may deem just and proper to grant.

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The application is supported by the affidavit of Liberato Mmbando, the applicant. The application was heard orally on the 1st of November 2023, whereby Mr. Andrew Magai Learned Advocate appeared for the applicant while Ms. Martha Mohamed Learned Advocate, appeared for the respondents.

Arguing in support of the application, Mr. Andrew Magai Advocate prayed for this court to adopt the contents of the affidavit and his reply to counter affidavit to form part of his submissions. He went on submitting that, the Applicant was the 2nd Respondent and Decree holder in the Land Application no. 191/2012 filed before the District Land and Housing Tribunal hereinafter to be referred to as DLHT. The matter was heard by Hon. L. Chenya, Chairman and the judgment in respect of the said case was delivered on the 21st of December 2021, in the Applicant's favour. That, following the determination of the said application, the Applicant was declared the lawful owner of the suit premises and the trial Tribunal ordered the Applicant to continue owning the said piece of land in dispute undisturbed. Further, in the same judgement, the Tribunal also declared the 1st Respondent as the lawful owner of the area in dispute. (He referred the Court to Annex LM-1, which is a copy of the Judgement and Decree of the Trial Tribunal forming part of the Affidavit).

Following the decision of the Tribunal in Land application no. 191/2012, the Respondent herein filed an application for execution of the Decree on 21st July, 2022 being Miscellaneous Application no. 276/2022, claiming before the Tribunal for an order for an appointment of a surveyor to measure and survey the landed premises of the parties and fix boundaries or demarcations thereto. The Respondent further prayed for the tribunal to hand over the suit property to the Respondent and restrain the Applicant from neither entering nor accessing the landed property of the Respondent (See annex LM-2 copy of the Application for execution). The matter was placed before Hon. Chinyele.

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The counsel went on submitting that, on 7th November 2022, Hon. Chinyele granted prayers sought by the Respondent and ordered a surveyor from Temeke Municipality to measure both areas, survey, demarcate and mark the boundaries of the landed properties of the parties herein. The Tribunal further ordered the parties to provide all necessary documents pertaining to ownership of their landed properties, so as to facilitate the exercise. The Tribunal further ordered the Surveyor from Temeke Municipality to work in collaboration with Kabango General Enterprise to accomplish the task. However, during the course of the exercise, Hon Chinyele gave another order on the 5th of May 2023 to the effect that the decision in Land application no. 191/2022 should be maintained and ordered the surveyor to measure and hand over the area and its Report. The Counsel contended that the order directed to the Court broker was too vague and unclear as to who it was directed to unlike the order given on the 7th November 2022.

The counsel further submitted that on the 2nd August 2023, the Tribunal vide Hon. Chinyele issued an order to Adili Court Broker company, to survey the area and handover the disputed property to an anonymous person. It further gave an order for the submission of the Report to the Trial Tribunal. (See annexLM-3, a copy of the Ruling and proceedings of the Tribunal and para 7 of the Affidavit). It was the submission of the learned counsel, that this order was vague as it did not state to whom it was directed to and to whom the Report should be handed over to.

However, despite the anomaly stated above, and in compliance with the said order, on the 25th of August 2023, Adili Court Brokers proceeded to serve an Applicant with a 15 days' Notice to vacate from the premises which he lawfully occupied by virtue of the Judgement and Decree so pronounced and which is still valid and intact todate. That contrary to the decision in Land application no 191/2012 by Hon Chenya, which declared the Applicant the lawful owner and ordered him to stay undisturbed in the premises, he was served with a notice of eviction from a court broker requiring his immediate eviction and

condemned him as a trespasser on his own lawfully acquired property. The said notice further demanded him to hand over the property to the Respondent herein.

He added that during the course of the exercise and after it was completed, Hon Chinyele gave another order on 5th May 2023, stating that the decision in Land Case No.191/2022 would be maintained and that a court broker would go to measure, survey and hand over the area and its report. However, the counsel argued that this order was vague as it was not clear as to whom it was directed.

Based on the trend of events as narrated above, it was the submission by the counsel for the Applicant that Courts are enjoined to implement or execute decrees and judgment which are before the court however, he noted that, the application for execution by the Respondent did not reflect what transpired in the tribunal's Judgement in the main case as there was no any issue relating to the boundaries. The tribunal pronounced the Applicant as the lawful owner of the area and should not be disturbed. However, the Application for Execution no. 276/2012 is contrary to the decision for the Tribunal in Land Application no. 191/2012. The reliefs sought are different from what was determined in the main case as there was any dispute regarding the boundaries between the parties herein and the court never discussed such an issue. He amplified further that, the Applicant has never trespassed in the area of the Respondent, thus the orders given by the Tribunal geared towards measuring, surveying the area and prohibiting the Applicant to enter into the area of the Respondent have never been determined and decided before by the Tribunal. He alluded that these are issues to be dealt with in another land case, where both parties will have to be heard based on evidence adduced and orders be given. He amplified further that the act of the Tribunal prepare two distinct decisions or orders arising from the same case was wrong. He finally ended his submissions by praying for the Court to analyse the decision of the tribunal in Execution Application No.276 of 2012 so that all the orders

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arising from the said application be dismissed as the decision given by Hon. L. Chenya is still valid since it has never been appealed against.

In response, Ms. Martha Advocate prayed for the Court to adopt the counter affidavit sworn in by Mr. Shedrack Saimon Kyando to form part of her submission. She implored this Court to note that both parties herein were the respondents in Land application No.191 of 2012 and that on page 11 of the Judgement the Court pronounced both parties to continue owning the land. She submitted that the Tribunal declared the 1st respondent (who is the Respondent herein) to be the lawful owner of the area in dispute. The decision of the Tribunal was based on the fact that the 1st Respondent (respondent herein) sold the area to the Applicant and thus the Tribunal declared the parties, including the Applicant to continue owning their pieces of land undisturbed.

She further argued that with regard to the submission of the Applicant and orders given in the execution case No. 276 of 2022; starting with the order which was delivered on 7th November 2023, to Surveyor Temeke Municipality and Kabango General Business (T) Ltd, she informed the Court that; the said order could be implemented and feedback was given to the Tribunal.

With regard to the order of measuring, surveying and handing over of the area to the Respondent as well as prohibiting the Applicant to enter into the area of the current Respondent, she submitted that; these prayers are not illegal or null and void since the main case had already been heard and the Tribunal ordered the Respondent to continue occupying the area while the area in dispute is big and the current Respondent sold the piece of land to the Applicant and part of it remained with the Respondent. Therefore, the Tribunal was correct in the manner in which it was executing the decision in Application No.191 of 2012 vide the application for execution in 276 of 2022. She contended further that the Application for Execution no. 276/2022 reflects what was decided in Land Application No.191 of 2012. She asserted that apart

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from the Court declaring that the Applicant should continue to own his land undisturbed, it did not declare him as the owner of the whole land.

Arguing against the issue of controversy of ownership of the land between the parties in the instant Application and the Application for execution, the counsel for the Respondent stated the arguments by the Counsel for Applicant are irrelevant and immaterial as she submitted that filing another case to affirm the issue of ownership is a wastage of time and court's resources and will delay justice to the parties. She contended that the Land Application no 191/2012 dealt with such issues and both parties were respondents therein.

With regard to the orders; the Applicant submitted to the Court that the Tribunal prepared 3 orders that of 7th November 2022, 5/6/2023 and 2nd August but he did not cite any law prohibiting the said orders to be made by the Tribunal. He asserted that in application for Revision one must cite an irregularity or contravention of the law. She thus prayed for the matter to be dismissed with costs and the execution case no. 276/2022 to proceed so that the Respondent can remain with his area.

In rejoinder submission, the counsel for the Applicant reiterated his submissions in chief and stated that the Respondents have added up new issues in the Application for execution which were not decided in the Land Application. The issue of ownership by the Applicant is clear and no demarcation issues were raised during the determination of the Land Application no. 1919/2012.

The principle of *functus officio* prohibits parties and courts to change their decisions unless reviewed or appealed against. The Tribunal has changed orders without being moved by parties. The issue of demarcation is a new issue which needs to be resolved in a court of law. He further contended that the Affidavit has raised all the irregularities. The counsel for the Respondent has failed to justify his submissions with proof. Finally, he implored the court to dismiss the Application for execution with costs.

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Having critically examined the rival submissions from the Counsel for both parties, the only issue for determination is whether the present application for revision has merit.

The Applicant seeks this Hon Court to examine the Proceedings of the District Court and Housing Tribunal for Temeke in Land Application No.276 of 2022, as there exist serious irregularities, which need immediate intervention of this Court. The records of the trial tribunal reveal that the applicant was the 2nd Respondent in the trial Tribunal and the Respondent herein was the 1st Respondent in the trial Tribunal whereby both the Applicant herein and the Respondent were Decree holders from a decree arising from the same judgment. The decree of the Trial Tribunal reads as follows;

IT IS DOTH HEREBY ORDERED THAT;

- a) *The 1st respondent has accordingly performed his contract of exchange.*
- b) *On that note, 3^d party is ordered to give vacant possession of the suit house with immediate effect and be handed over to the applicant.*
- c) ***The 2nd and 3^d respondents shall continue owning their piece of land undisturbed. (emphasis mine)***
- d) ***The 1st respondent is now declared the lawful owner of the area in dispute. (emphasis mine)***
- e) Since the applicant has knocked the doors of the Tribunal for assistance and since the 3rd party was the leader of the 1st respondent now both the 1st respondent and the 3rd party are condemned to pay for the costs.

Following the delivery of the Judgement and Decree above cited, the Respondent herein (Pentecoste Christian Church Buza) applied for execution of the decree in Land Application No.191 of 2012 through Miscellaneous Application No.276 of 2022, whereby the Applicant herein was the Respondent. In the said application for execution, the Respondent herein prayed for the Tribunal to appoint a surveyor to measure and demarcate his

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area from the area of the Respondent (Liberato Mmbando, the applicant herein). Further, after the completion of the exercise, the area be handled over to the Respondent and the Applicant be barred to enter into the area of the Respondent.

These prayers were granted by the Tribunal, vide its decision dated 7th November 2022, whereby the Tribunal appointed a surveyor from Temeke Municipality to undertake the exercise in collaboration with Kabango General Business Ltd. Both the Applicant and the Respondent herein were also ordered to submit all relevant documents proving their ownership to in order to facilitate the exercise.

Similarly, in the course of perusing the file I noted that, on the 5th of May 2023 and as stated by the Applicant in his submission, the parties herein appeared before Hon. Chinyele, Chairmain for further orders. The Tribunal reiterated its order dated 2nd August 2023 cited herein above and stated that the broker would go to survey, measure, hand over the area and submit a report. However, the order was too general as there was no any mention of the specific broker or the person to whom the land would be handed over to.

I further perused a document entitled LM-3, which is an order of the court, dated 2nd August 2023, ordering a broker by the name of Adili Auction Mart to survey the area and submit a report to the Tribunal upon completion of the exercise. Apart from the order, I noticed LM-4 in the file, which is an eviction notice from Adili Auction Mart, directed to the Applicant to vacate the area within a period of 15 days and hand over the area to the applicant, otherwise the notice stated that the Applicant would be forcefully evicted.

Having gone through the records of the trial tribunal arising from the impugned proceedings in Misc. Application no 276/2012 as analysed above, this Court rightly concurs with the arguments put forth by the counsel for the Applicant that the execution process done by the Respondent herein does not reflect what transpired in the Tribunal and the Judgement of the Tribunal in

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Land Application no 191/2012; that an Application no. 276/2023 for execution filed by the Respondent is tainted with irregularities on the face of it since it does not match, reflect or support the contents of the Judgement and Decree of the same Tribunal in Land Application no. 191/2012 (decided by Hon. Chenya), which specifically declared ownership to both parties herein and further ordered the Applicant to continue **owning** the land **undisturbed**. Both parties herein were thus declared Decree holders therein.

Suffices to state that, as rightly submitted by the Applicant, there was no any issue relating to the boundaries or demarcation determined in Land application no. 191/2012. The judgment and decree of the trial tribunal is clear that the Applicant herein was to remain in his piece of land undisturbed and was not declared a trespasser. Neither did the Tribunal in the said Judgement ordered him to hand over his area to the Respondent since the Respondent was equally declared a lawful owner of the land in dispute.

Further, it is my firm position that the 15-day Notice served to the Applicant to vacate the premises is also tainted with irregularity since it does not match with the decree in Land Application no. 191/2012. For this position, I am guided by the case of **The Registered Trustees of Tanzania Society for Prevention of Cruelty to Animals (TSPCA) v Blue Horizon Tanzania ltd Misc. Commercial Application** No. 191 of 2018, Commercial Division at Dar es salaam where Mkeha, J had this to say;

*".... The order sought to be executed is not clearly traceable from the decree, but the joint venture agreement of the parties. That renders the purported order un-executable in terms of the above cited statutory and case law authorities..... the **executing court can only give effect to what was decreed by the trial court and not otherwise**". (emphasis is mine)*

Secondly, the records relating to the impugned Application for execution, such as LM-5, which is a decision of the Tribunal dated 7th November 2022,

said Notice had an effect of turning the Applicant a trespasser in the Land, which he bought and was supposed to continue owning it undisturbed.

These are irregularities, which taint the proceedings of impugned Application for Execution no. 276 of 2022 with all the Decisions and orders made under it.

From these findings I hold that this Application for revision at hand has merit, thus the Proceedings in Miscellaneous Land Application No.276 of 2022 and orders emanating from it in the District Land and Housing DLHT are hereby declared null and void for the reason that they are tainted with irregularities as analysed herein above. The said application for execution does not reflect what transpired in the Judgment and decree of the Tribunal in Land Application No.191 of 2012.

In the upshot, exercising the powers under the above cited sections, I proceed to quash the proceedings of the DLHT for Temeke at Temeke in Land Application no. 276/ 2022 and set aside all orders made therein.

The Respondent to bear costs of this application.

It is so ordered.

DATED at DAR ES SALAAM this 15th day of November 2023.



S.D. Mwaipopo
S.D. MWAIPOPO,

JUDGE,

15/11/2023

The Judgement delivered this 15th day of November, 2023 in the presence of Learned Advocates Andrew Magai for the Applicant and Martha Mohamed for the Respondent, is hereby certified as a true copy of the original.



S.D. Mwaipopo
S.D. MWAIPOPO

JUDGE

15/11/2023