IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 674 OF 2022

(Arising from the decision in Land Revision No. 28 of 2022 by Hon. Kadilu, J., dated 26 September 2022)

NASSORO JUMA NASSORO .....APPLICANT

VERSUS

MOHAMED ISSA HINCHA .....RESPONDENT

R U L I N G

Date of last Order:07/12/2022
Date of Ruling:09/02/2023

K. D. MHINA, J.

This Application was brought under Sections 78 (a) and (b); Order XLII Rule 1 (a) and (b) of the Civil Procedure Code [Cap. 33 R. E. 2019] ("the CPC").

The Applicant is applying for a Review of the decision of this Court in Land Revision No. 28 of 2022, dated 26 September 2022.

The Applicant has highlighted the errors in the Application as follows:

1. *The procurement of the decision was illegally done by this Court after being misguided by the counsel for the Respondent in rejoining submission and accepting the fact adduced that the Respondent owned a portion of land in the disputed area while, in fact respondent owned nothing in the disputed land;*

2. *The order dismissing the applicant's application for revision on the ground of res judicata was entered into by the Court by*

quoting the Land Application No 598 of 2018, unaware of the fact that such the ruling and subsequent orders of the Tribunal were quashed by the order of the High Court in Land Revision No 46 of 2020 before Mgeyekwa Judge;

3. *The Court made its decision in this matter without appraising itself of the Court record in High Court Land Revision No. 46 of 2020, whereof the matter of Res Judicata had been raised by the same counsel for the respondent on his submission in the counter affidavit, but the court did not entertain it and proceed to quash it;*

Before embarking on the merits or demerits of the Application, it is essential to give brief facts giving rise to the present application for review. The parties had a land dispute before Mabwepande Ward Tribunal commenced in 2016. But they decided to settle that dispute amicably out of the Tribunal and registered the deed of settlement to mark the end of that dispute. The parties agreed that the respondent should remain with his land measuring three (3) acres, and the applicant should be given the remaining parcel of land.

After that, the applicant filed several applications before the District Land and Housing Tribunal for Kinondoni at Mwananyamala. The applications were Misc. Application No. 38 of 2018, Land Application No. 598 of 2018, Misc. Application (Execution) No. 645 of 2019 and Misc. Application No. 928 of 2019.

Aggrieved with the DLHT decision in Execution No. 645 of 2019, the respondent filed Land Revision No. 46 of 2020. This Court, on 19 November 2021, quashed the Tribunal decision, ordered a re-trial of the execution proceedings, and directed the Tribunal to execute in accordance with the Ward Tribunal's order based on the settlement deed. This Court held that;

> *"I have scrutinized Form No. 3 of the District Land and Housing Tribunal for Kinondoni, whereby one Mohamed Issa Hincha was the applicant and Nassoro Juma Nassoro was the respondent. In paragraph 3, orders and awards were as follows;*

i. *Applicant be declared owner of the three acres land farm located at Mabwepande.*
ii. ..... *Be it as may be, the above prayers are completely the opposite of what was stated in the Deed of Settlement. The applicant had submitted new prayers to the District Land and Housing Tribunal for Kinondoni which acted on completely new prayers made by Mohamed Issa Hincha not what was stated in the Deed of Settlement. The Deed did not pronounce the winner but the dispute was amicably settled by consent of both parties who signed the deed of settlement. The three acres were given to the applicant but it is awkward to see the respondent prayed to be declared the owner of the three acres which were already given to the applicant".*

When the matter was remitted back to the DLHT to comply with the orders given by the High Court in Land Revision No. 46 of 2020, the Tribunal appointed the Court broker, who duly measured the area and allocated it to the parties accordingly. On 6 June 2022, the Tribunal issued an order directing the parties to respect boundaries demarcated by the Court Broker.

Dissatisfied, the applicant filed again in this Court an application seeking for this Court to revise that decision of the Tribunal vide Land Revision No. 28 of 2022. In that application, the issue of res-judicata was raised by the respondent in his counter affidavit in the following manner;

> *"The issue of ownership of the landed property was alread adjudicated and determined by a court of competent jurisdiction that is, Mabwepande Ward Tribunal through a Deed of Settlement dated 12.2.2017 signed by both parties and their witnesses which marked the dispute to an end and each side remained in his land. Further that, this case is functus officio because it was heard and determined by the same court before Mgeyekwa, J., in Land Revision No. 46 of 2020."*

After hearing the parties, this Court (Kadilu. J) dismissed the application for being res-judicata.

Undaunted and believing there were errors on the face of the record, the applicants approached this Court, but this time by way of Review.

At the hearing of this Application Kessy Ngau, learned Counsel, represented the applicant, while Mr. Peter Madaha, also a learned counsel, represented the respondent.

When invited to submit on the grounds for review, Mr. Ngau argued that the applicant was dissatisfied with the decision dated 26 September 2022 delivered by Kadilu, J, who held that the matter application was res-judicata.

On the first ground, he argued that the decision was procured illegally after the respondent misguided the Court. He stated that the respondent raised an issue suo motu at the rejoinder stage; therefore, he could not respond. He believed that if he had been able to respond, the court would not have arrived at that decision.

On the second ground, he submitted that the impugned decision was declared res-judicata based on the decision of the DLHT in Land Application No. 598 of 2018. He argued that in referring that decision of the DLHT constituted an apparent error because this Court had already quashed that decision in Land Application No.46 of 2020.

Further, the decision (Land Revision No. 46 of 2020) directed the DLHT to re-rehear the application afresh (trial de-novo). Therefore, to refer to the matter which was already quashed was an illegality.

Regarding the third and last ground, he submitted that the issue of res-judicata was already decided in Land Revision No. 46 of 2020, and this Court dismissed that issue.

In response, Mr. Madaha vehemently resisted the submission by arguing that the first ground lacked merit because the Court heard both parties. He further submitted that the respondent raised the point of res-judicata in his counter affidavit, and both parties were heard when submitted on that issue. Therefore, the decision is proper.

On the second ground, he submitted that the basis of holding that Land Revision No. 28 of 2022 was res-judicata was the decision of this Court in Land Revision No. 46 of 2020. Therefore, Land Application No. 598 of 2018 before the DLHT was not the basis for declaring Land Revision No. 28 of 2022 as res-judicata

Further, the trial ordered in Land Revision No. 46 of 2020 was in respect of execution proceedings only and not on the land ownership issue.

On the last ground, Mr. Madaha submitted that because the Court did not have jurisdiction, it was proper for the Court to hold that the matter was res-judicata.

In a brief rejoinder, Mr. Ngau submitted that it was true that the issue of res-judicata was raised in the counter affidavit, but the problem was when the counsel for the respondent was submitting in the rejoinder, he introduced the new issue, which was the Land Application. No 598 of 2018 by the DLHT.

Further, in respect of the second ground, he submitted that it was not true that Land Revision No. 46 of 2020 before this Court and Land Application No. 598 of 2018 at the DLHT conclusively determined the matter.

Having gone through the memorandum of review and oral submissions by the parties, the entry point in this application is Order 42 Rule 1 (1) (a) and (b) of the CPC, which empowers this Court to review its own decision. The Order read that: -

> *"1. (i) Any person considering himself aggrieved: -*
>
> *(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) By a decree or order from which no appeal is allowed,*
>
> *and who from the* ***discovering of new and important matter or evidence*** *which after the exercise of due diligence, was not within his acknowledge or could not be produced by him at the time when the decree was passed or order made,* ***or error apparent on the face of the record or*** *for* ***any other sufficient reason****, desires to obtain a review of the decree passed or order made against him, may apply for a review of* ***Judgment*** *to the Court which passed the decree or made the* ***order.***
>
> **[Emphasis provided]**

It is trite that for an application for review to succeed, a party applying must establish any of the grounds under Order 42 Rule 1 (1) (a) and (b) of the CPC.

Further, in a number of cases, the Court of Appeal of Tanzania has already developed some fundamental guidelines when dealing with applications for review.

In **Abbas Kondo Gede vs. The Republic**, Criminal Application No. 75/01 of 2020 (Tanzlii), the Court of Appeal of Tanzania held that:-

> *"There mere fact that the Court did not agree with the applicant on the grounds of appeal cannot constitute an apparent error on the face of the record to justify review."*

Further, the Court held that;

> *"Review is not to challenge the merits of the decision. A review is intended to address irregularities of a decision or proceedings which caused injustice to a party".*

Again, in the **Grand Alliance Ltd vs. Wilfred Lucas Tarimo and four others,** Civil Application No. 229 of 2020. (TanZLII) the Court of Appeal provides for the scope of the review applications. On page 14, it held that:-

> *"It should be emphasized that the scope of our mandate in the instant application is limited within the impugned decision. In review, the Court has no powers to venture into any other record beyond the impugned decision".*

In **Executive Director Golden Sands Hotel Ltd Zanzibar vs. Attorney General of Zanzibar and another**, Civil Application No. 4 of 2016 (Tanzlii), the Court held that:-

> *"It is clear that the Court has power and unfettered description to review its own decision, but the said power and discretion should be exercised within the* ***specific benchmarks." [Emphasis provided]***

Those benchmarks were;

One, *"The Court.....should not by any means open to revisiting the evidence and re-hear the appeal."*

Two, *"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error without engagement in elaborated argument to establish it."*

Flowing from above what I gleaned from above and as per the cited decision of the highest court on the land is;

1. A party applying for review must establish any of the grounds under Order 42 Rule 1 (1) (a) and (b) of the CPC is Order 42 Rule 1 (1) (a) and (b) of the CPC.
2. Dissatisfaction with the decision cannot constitute an apparent error on the face of the record.
3. Review intends to address the irregularities and not challenge the merits of the decision.
4. In review, the court has no power to venture into any other record beyond the impugned decision.

5. The court cannot revisit evidence and rehear the appeal.
6. A review is by no means an appeal in disguise.

I now turn to the applicant's grounds for review and test if they pass the above guidelines and benchmarks.

In the first ground of review, the complaint was on the procurement of decision. That decision was illegally procured by this Court after being misguided by the counsel for the Respondent in rejoining submission and accepting the fact that the Respondent owned a portion of land in the disputed area.

While in the memorandum of review, the counsel raised a ground as above, but in his oral submission before this Court, he changed the story; instead of substantiating what he raised in the memorandum, Mr. Ngau stated the counsel for the respondent during rejoinder he introduced the new issue which was the decision of Land Application. No 598 of 2018 by the DLHT.

From the above;

One, it is quite clear that the counsel for the applicant submitted what was not contained in the review and did not substantiate what was contained in it. When submitted, he abandoned what was included in the memorandum of review, and instead, he introduced a new fact in respect of the first ground of review.

In this, I wish to remind that the "rules of the game" requires parties to abide by their pleadings. See **Paulina Samson Ndawavya vs. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (Tanzlii).

Therefore, the remedy is to disregard the submissions that the applicant's counsel improperly introduced and submitted.

Second, even if we consider the ground raised in the memorandum of review, it still falls short of the benchmark and guidelines indicated above. The reason is that in the impugned decision, nothing was submitted and accepted by the Court because the respondent owned a portion of land in the disputed area while the respondent owned nothing in the disputed land. Therefore, the ground was not at issue, which was never determined by this Court in the impugned judgment.

Third, even if we consider what was raised in the submission, the reason/ground is still devoid of merits. Looking at the impugned decision and for clarity, I wish to quote pages 4 and 5 when the Court summarized the respondent's counsel submission in chief;

> *"The learned counsel stated further that this point was raised by way of preliminary objection in Land Application No. 598 of 2018 before the District Land and Housing Tribunal for Kinondoni in which Hon. R.L Chenya sustained the objection (Chairman) sustained the objection and dismissed the application with costs".*

From the quoted part of the impugned decision, it was quite clear that the issue was raised in the submission in-chief and not in the rejoinder as claimed by the counsel for the applicant.

On the second ground of the application, the applicant stated it was illegal for this Court to quote the Land Application No 598 of 2018, unaware of the fact that such the ruling and subsequent orders of the Tribunal were quashed by the order of the High Court in Land Revision No 46 of 2020 before Mgeyekwa Judge.

This ground should not detain me long because;

One, what was quashed in Land Revision No 46 of 2020 was Execution No. 645 of 2019 and not Land Application. No 598 of 2018. This is reflected on page 2 of the impugned decision.

Two, in Execution No. 645 of 2019, the High Court quashed execution orders only. The issue of what was agreed in the Deed of Settlement was not disturbed.

Therefore, the second ground also lack merits.

On the third ground, the allegation was that this court made its decision without appraising itself of its prior decision in Revision No. 46 of 2020, whereof the matter of Res Judicata had been raised, but the court did not entertain it and proceeded to quash it.

On my side, having gone through the impugned decision, nowhere did the counsel for the applicant raised the issue, and the court gave any determination that the issue of res-judicata was already decided in Land Revision No. 46 of 2020, and it was dismissed.

Therefore, after scrutiny of the grounds of the application, it is quite clear that the applicant is challenging this court's decision. It is the dissatisfaction with the merits of the Court's decision.

As alluded to earlier, in **Abbas Kondo Gede** (Supra), the intention of the Review is not to challenge the merits of the impugned decision but instead intending to address irregularities of the impugned decision, which caused injustice to a party.

In the application at hand, the applicant, on both grounds, fails to point out the irregularities or apparent errors in the face of the record. He only raises grounds for complaints on what was decided by the Court. In this, I wish to quote **Tanganyika Land Agency Ltd and seven Others vs. Manohar Lal Agrawal,** Civil Application No. 17 of 2008 (unreported), where the Court of Appeal of Tanzania held that:-

> *"For matters which were dealt with and decided upon, the fact that one of the parties is dissatisfied with the outcome is no ground at all for review. To do that, would, not only be an abuse of the court process, but would result to endless litigation".*

Therefore, since the review is by no means, an appeal in disguise and dissatisfaction with the outcome of the decision cannot be ground in the application for review. There are remedies for dissatisfied litigants.

Flowing from above, the applicant has failed to satisfy the requirement for a review under Order 42 Rule 1 (1) (a) and (b) of the CPC, it is therefore, this application is not tenable.

For the reasons above, I find no merits in this application, and consequently, I dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 09/02/2023.

K. D. MHINA

JUDGE