

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

REVISION NO. 38 of 2022

*(Arising from the District Land and Housing Tribunal for Temeke at
Temeke in Application No. 20 of 2019)*

HABIBA HAMZA TAMIMU (Administrator for the
Estate of the late LATIFA SHABANI MWIGA) **APPLICANT**

VERSUS

MAGRETH JOHN KIAGO **1ST RESPONDENT**

DENIS SHABANI MWIGA (Administrator for the
Estate of the late SHABANI MWIGA) **2ND RESPONDENT**

RULING

Date of last Order: 21.12.2022

Date of Ruling: 30.01.2023

A.Z.MGEYEKWA, J

This is an application for Revision against the decision of the District Land and Housing Tribunal for Temeke in Land Application No. 20 of 2019 delivered on 27th March, 2019. The application is brought under section 41 (1) (b) of the Land Disputes Courts Act, Cap 216 [R.E. 2019] and sections 79 (1) (c) and 95 of the Civil Procedure Code Cap. 33 [R.E

2019]. The application is supported by an affidavit affirmed by Habiba Hamza Tamimu, the applicant. The application was contested by a joint counter-affidavit deponed by Magreth John Kiango and Dennis Shaban Mwiga, the respondents.

A brief background of the matter goes as; Margareth John Kiango, the 1st respondent institutes a case at the District Land and Housing Tribunal for Temeke against the late Shabani Ramadhani Mwiga. Margareth John claimed that Plot 87 Block 'M' Temeke area in Dar es Salaam City is a joint property of Margareth John Kiango and Shabani Ramadhani Mwiga prayed for a declaration that the transfer and the ongoing process of issuing the certificate of occupancy in the name of the respondent as a guardian of Latifa Shabani Mwiga be termed null and void.

She also prays for an order that the certificate of occupancy be issued in the name of Margareth John Kiango and Shabani Ramadhani Mwiga. The late Shabani Ramadhani Mwiga filed his Written Statement of Defence and filed a notice of admission of the case and he conceded to the application. Hence the District Land and Housing Tribunal proceeded to grant the Land Application No. 20 of 2019.

When the matter came for hearing on 21st November, 2022, the applicant enjoyed the legal service of Mr. Innocent Mwelelwa, learned counsel also holding brief for Mr. Kipeche, learned counsel for the respondents. By the

Court consent parties argued the application by way of written submission. Both parties complied with the Court order.

In his written submission, the applicant's counsel began to narrate the genesis of the matter which I am not going to reproduce in this appeal. Mr. Innocent submitted that the records of the trial tribunal clearly show that the owner of the suit premises was not sued and was not aware of the existing suit which was filed before the tribunal. The counsel for the applicant went on to submit that on 27th March, 2019 when the judgment on admission was entered the suit land was already transferred to Latifa Shaban Mwigwa and the transfer documents were executed since 2005. He added that the registration of the said transfer was already completed and the payment of land rent was made in the name of Latifa Shaban Mwigwa through Shaban Mwigwa, the Guardian of Latifa Shaban Mwigwa.

The learned counsel for the applicant further contended that in 2011, the suit was placed as security by one Jaffari Shaban Mwigwa to Mr. Elibariki Mollel and he affixed the copies of his pictures to the sale agreement with a view of securing a loan and when he failed to repay the loan the late Shaban Mwigwa managed to file an objection proceeding and the Decree Holder made an official search at Temeke Municipality and they were informed that the suit land was owned by Shaban Mwigwa as the Guardian of Latifa Shaban Mwigwa. To buttress his submission, he referred this Court

to a letter with reference No. LD / TM / M/ 387/ 16/ TMJ. Mr. Innocent valiantly argued that the said Application was filed when Mr. Shaban Ramadhan Mwiga was seriously sick and he was attending medical treatment at Regency Medical Hospital. In his view, the deceased was not in a good condition to state that the suit property belonged to Latifa Shaban Mwiga. The learned counsel for the applicant urged this Court to nullify the entire proceeding with respect to Application No. 20 of 2019. To buttress his contention, Mr. Innocent referred this Court to the case of **Paul Bihema v Domina Isamya & Jovita Mizimu**, Land Revision No. 5 of 2020 High Court of Tanzania at Sumbawanga.

Mr. Innocent continued to argue that the suit against the deceased Shaban Ramadhani Mwiga which was lodged by the 1st respondent denied the rights of Latifa Shaban Mwiga as he was not joined as a party. He added that the deceased Shaban Ramadhani Mwiga was sued in his own capacity and not as a Guardian of Latifa Shaban Mwiga who is the lawful owner of the suit land. He went on to submit that the applicant had no avenue to file an appeal against the Judgment on admission because she was not a party to the suit. Thus, in his view, the application is fit for the determination of the rights of the parties. The learned counsel added that this Court quashed the proceedings of the District Land and Housing Tribunal for containing irregularities. Fortifying his submission he cited the

case of **Selemani Hamini & Others v Johari Mikidadi (as an administrator of Mikidadi Mohamed)**, HC Land Division at Dar es Salaam. Mr. Innocent stressed that the cited authority applies squarely on the matter at hand since the Tribunal entered a judgment of admission in absence of the owner of the suit property one Latifa Shaban Mwiga.

The learned counsel for the applicant did not end there, he contended that Application No. 20 of 2019 was brought under Order XXXI Rule 1 to 6 of the Civil Procedure Code, Cap.33 [R.E 2019]. Which governs the suit against a minor. Thus, it was his view that failure to comply with the said provision of the law renders the entire application nullity.

On the strength of the above submission, the learned counsel for the applicant beckoned upon this Court to grant the applicant's application.

In his reply, the 1st and 2nd respondents, Mr. Kipeche, learned counsel for the respondents urged this Court to adopt the joint Counter affidavit to form part of his submission. Mr. Kipeche began to narrate a brief background of the case which I am not going to reproduce in this application. He contended that the applicant's counsel submission is misconceived. Mr. Kipeche argued that the 1st respondent filed a case against the 2nd respondent in Application No. 20 of 2019 and she challenged the acts of the late Shaban Ramadhani Mwiga to register the suit plot in his name as Guardian of Latifah Mwiga while the property was

not his personal property. He contended that the suit property was in the name of Shaban Ramadhani Mwiga by joint efforts of the 1st respondent and her husband. To support his submission he referred this Court to the prayer sought by the 1st respondent in Application No. 20 of 2019.

The learned counsel for the respondent further submitted that the interest of the minor was under the guardianship of the late Shaban Ramadhani Mwiga, the respondent in Application No 20 of 2019. He went on to argue that it is misconceived to state that the applicant and the late Shaban Ramadhani Mwiga were married. He added that the purported marriage was found void from the beginning. He stressed that the suit land was purchased by the joint efforts of the 1st respondent and Shaban Ramadhani Mwiga. Mr. Kipeche argued that the purported Form No. 35 in Annexure ILA refereed by the applicant in paragraph 6 of his affidavit is doubtful since the said Form lacks the seller's signature and the affixed picture is not of Shaban Ramadhani Mwiga. Fortifying his submission he referred this Court to Annexure KRA -2 of the counter affidavit.

Mr. Kipeche forcefully argued that the applicant's submission that the late Shaban Ramadhan Mwiga was seriously ill when the matter was pending at the Tribunal is misconceived. He contended that he is the same counsel who represented the late Shaban Ramadhani Mwiga in Matrimonial

Cause No.1 of 2018 and the late Shaban Ramadhan Mwiga participated fully in the case.

Based on the above submission, Mr. Kipeche beckoned upon this Court to find that there is no any illegality or impropriety in the trial Tribunal judgment, hence, he urged this Court to dismiss the application with costs.

In his brief rejoinder, Mr. Innocent reiterated his submission in chief. Mr. Innocent added that after going through the respondents' counsel submission and the pleadings filed before this Court the central issues for determination is whether the Application No. 20 of 2019 was properly filed before the Tribunal and whether Latifa Shaban Mwiga was joined as a party in the Application No. 20 of 2019. Mr. Innocent stressed that the transfer process was completed since the year 2007 when the consent and approval were granted by the Commissioner for Land. He repeatedly submitted that Latifa Shaban Mwiga was registered as the owner of the suit land but due to the fact that she was a minor, his father was a guardian.

Mr. Innocent continued to argue that it is not true that the respondent challenged the unilateral acts of registering Latifa Shaban Mwiga since the transfer process was already effected in the year 2007. He added that Form 35 was elaborated in the reply to the counter affidavit to the effect that the pictures were fixed by Jaffari Ramadhani Mwiga who is the

younger brother of the deceased Shaban Mwiga when he was borrowing money from Mr. Elibarik Mollel and he failed to repay as a result the suit was lodged at the Resident Magistrate Court at Kisumu and the deceased filed an objection to challenge the sale.

In conclusion, Mr. Innocent beckoned upon this Court to quash the Judgment and Decree of the said suit.

Having gone through the submissions of the applicant it appears that the issue for determination is the ***whether the application is meritorious.***

Starting with the first ground for revision, Application No. 20 of 2019 was lodged without joining the lawful owner one Latifa Shaban Mwiga as a necessary party. The records reveal that the 1st respondent lodged a suit at the District Land and Housing Tribunal against Shaban Ramadhani Mwiga while Shaban Ramadhani Mwiga was a guardian of Latifa Shaban Mwiga (Minor). This fact is proved by an attached document, the Transfer of Offer of a Right of Occupancy dated 19th October, 2005 (Annexure L7).

I fully subscribe to the submission made by the learned counsel for the applicant that the 1st respondent did not abide to the legal procedure in suing a guardian of a minor. It is trite law that all proceedings against a minor shall be instituted in his name. Order XXXI Rule 1 of the Civil Procedure Code Cap.33 [R.E 2019] provides that:-

"1. Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor."

Order XXXI Rule 2 of the CPC Cap.33 provides further that

"2 (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the advocate or other person by whom it was presented.

Furthermore, Order XXXI Rule 4 provides as follows:-

" (4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf ... "[Emphasis added].

Based on the above provisions of the law, it is my considered view that it was not proper for the 1st respondent to sue Shaban Ramadahi Mwiga in his personal name, she was required to sue Shaban Ramadhani Mwiga as the guardian of the minor. Failure to sue Shaban Ramadhani Mwiga as a guardian of Latifa Shaban Mwiga (Minor) renders the whole judgment in admission null and void.

Regarding the second ground on the right to be heard, I fully subscribe to the submission made by Mr. Innocent, learned counsel for the applicant that Latifa Ramadhan Mwiga was denied the right to be heard. The right to a fair hearing of a subject, *audi alteram partem* rule is one of the aspects

of the principles of natural justice as stipulated under Article 13 (6) (a) of the Constitution which reads thus:-

(6) To ensure equality before the law, the state authority shall make procedures that are appropriate or which take into account the following principles, namely: (a) when the right and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and the right of appeal or another legal remedy against the decision of the Court or of the other agency concerned. [Emphasis added].

From the above-quoted text, the available record, and the learned attorneys' submissions, it is clear to me that upon concluding the case to which the necessary party was not a party to the case, without affording her the right to be heard, leave alone a fair hearing. I am in accord with the applicant's counsel that as long as Said Ally Mbiki transferred the right of occupancy to Shaban Mwiga as the guardian of Latifa Shaban Mwiga that means the legally the suit property belongs to late Latifa Shaban Mwiga and she was condemned unheard. Leaving the matter as it is will prejudice the applicant since she has not been given the right to be heard.

As herein above stated, more so on the legal effects of such a serious denial of the individual's right to be heard, this is not the first time this Court and the Court of Appeal of Tanzania have confronted the situation.

See- **Eco Tech (Zanzibar) Limited v Government of Zanzibar**, ZNZ Civil Application No. 1 of 2007 and, **DPP v. Sabina Tesha & 2 Others** [1992] T.L.R 237, from an unbroken chain of authorities. For instance, in **Tan Gas Distributor Ltd v Mohamed Salim Said**, Civil Application for Revision No. 68 of 2011, the Court of Appeal held that:-

" No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

Similarly, in the case of **Patrobert D Ishengoma v Kahama Mining Corporation Ltd and 2 others** Civil Application No. 172 of 2016 which was delivered on the 2nd day of October 2018 the Court of Appeal of Tanzania held that:-

" It is settled law that no person shall be condemned without being heard is now legendary. Moreover, it is trite law that any decision affecting the rights or interest of any person arrived at without hearing the affected party is a nullity even if the same decision would have arrived at had the affected party been heard."

Following the above-said reasons, I invoke the provision of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 which vests revisional powers to this court and proceeds to revise the proceedings of the District

Land and Housing Tribunal for Temeke at Temeke in Application No. 20 of 2019 in the following manner: -

- i. The Judgment, Decree, and proceedings of the District Land and Housing Tribunal for Temeke at Temeke in Application No. 20 of 2019 are quashed and set aside.
- ii. Parties are at liberty to lodge a proper application in accordance with the law.
- iii. Costs upon the 1st respondent.

Order accordingly.

Dated at Dar es Salaam this date 30th January, 2023.


A.Z. MGEYEKWA
JUDGE
30.01.2023



Ruling delivered on 30th January, 2023 in the absence of both parties.


A.Z. MGEYEKWA
JUDGE
30.01.2023

