

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 26113 OF 2023

BETWEEN

JANE DAVID MUSHI (As Administratrix of the Estate of

the late DAVID MUSHI.....APPLICANT

VERSUS

RASHID KITWANGA

(As administrator of the estate of the late

ABDALLAH MSHAM KITWANGA..... RESPONDENT

RULING

Date of last Order: 18/3/2024

Date of Ruling: 18/4/2024

A. MSAFIRI, J.

This is a ruling on an application made under Section 89 (1) and 95 of the Civil Procedure Code, Cap. 33 R.E 2019. The applicant is praying for the restitution orders of the Court that the respondent be ordered to vacate all that farm constituting ten (10) acres at Madale Area, Kinondoni District, Dar es Salaam and provide vacant possession thereof to the applicant. She prays further that demolition order be issued to remove all structures erected

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thereon upon reversal of the decree of this Court by the Court of Appeal of Tanzania and later on by this Court in Land Case No.316 of 2010.

The application is supported by an affidavit of Wilson Edward Ogunde, advocate of the applicant. The respondent Rashid Kitwanga, also affirmed a counter affidavit to contest the application.

By order of the Court, the hearing of the application was by way of written submissions. The submissions in support of the application was drawn and filed by Mr. Wilson Edward Ogunde, learned advocate for the applicant while the submissions in opposition of the application was drawn and filed by Mr. Alex Mashamba Balomi, learned Senior Advocate, and Mr Saiwello T.J Kumwenda, counsels for the respondent.

Before going through the submissions of the rival parties, I find it pertinent to narrate albeit briefly, the background of this matter. I have gathered from the affidavit and counter affidavit by the parties that initially the respondent instituted Land Case No. 316 of 2010 before this court against the late David Mushi. That the respondent claimed that he is the lawful owner of the farm located at Madale Area, Kinondoni District, Dar es Salaam (herein suit property). He claimed that the late David Mushi has trespassed into the suit

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property. He prayed for the orders of vacant possession, damages and costs. The case was heard before Hon. Wambura, J and the judgment was delivered on 27/11/2015 declaring the respondent as the lawful owner of the suit property and ordered the applicant to give vacant possession. After that judgment, the respondent successfully applied for execution of decree in Land Case No. 316 of 2010 by Misc. Land Application No. 20 of 2016 and the court (by Hon. Mahimbali, DR as he then was), granted the said application by ordering eviction of the applicant on 27/4/2016. By the order of the Court, the respondent was put in possession of the suit property.

Meanwhile, the applicant (who was the defendant in Land Case No 316/2010), being aggrieved, lodged an appeal before the Court of Appeal against the judgment of this court by Hon. Wambura, J. The appeal was successful to the extent that the proceedings of this court from the stage reached prior to 05/5/2015 (defence case) in the above said case was quashed and set aside. Therefore the judgment, decree and all subsequent orders were also quashed and set aside. The Court of Appeal ordered for retrial from the said stage.

The Land Case No. 316/2010 was remitted to this Court for retrial which was conducted before Hon. Mgeyekwa, J (as she then was) and after hearing, *Alls*

this time the plaintiff's case (respondent) was dismissed in entirety on 28/10/2022. The respondent has currently lodged an appeal in the Court of Appeal having being dissatisfied with that decision and the saga continues.

In the instant application, as said earlier, the applicant seek to be restored to the original position parties they were before the judgment and decree of Hon. Wambura,J.

Mr Ogunde, counsel for the applicant submitted that the decision of Hon. Wambura, J of 27/11/20215 was reversed by the Court Of Appeal. That without the said decision, the respondent would not have been put in possession of the suit property. Since that decision was quashed and set aside by the Court of Appeal, the only way parties shall be put in the position each one occupied before the said decision is by way of restitution.

Mr Ogunde submitted further that at paragraph 2 of the respondent's counter affidavit, the respondent admits the fact that he took possession of the suit property following the judgment and decree of this Court (Hon. Wambura,J). He argued that since the judgment and decree which gave the respondent the right to be in possession of the suit property was reversed, *Alls*

then the parties should revert to their original position and this can be done through restitution under Section 89 of the CPC.

To cement his points, the counsel cited the case of **Farid F. Mbaraka & Another vs Domina Kagaruki & Another**, Civil Appeal No. 293 of 2022, CAT at DSM (Unreported). He prayed that the application be granted as prayed.

On reply, Messrs. Saiwelo Kumwenda and Alex Balomi who drew and filed the respondent's response submissions, contested the application and argued that the same is misconceived and is devoid of merit and it should be dismissed with costs. They gave out the following reasons for their contest;

First, the counsels for respondent argued that the application is wrongly made under Section 89(1) of the CPC because the applicant has not satisfied the requirement of the said provisions. That Section 89 of the CPC provides for the reinstatement by the court of the first instance where the contested decree is varied or reversed. That the decision of Hon. Wambura,J was not reversed or varied but it was quashed and set aside meaning that there was

Alles

no decree anymore. They believe that this is not the spirit of Section 89 of the CPC.

Second, the counsels were of the view that the applicant has never been the decree holder in the varied or reversed decree. That there is no decree granting the applicant the reliefs he is now seeking in the current application while the respondent took possession of the suit property as there was no applied or granted stay of execution. That the applicant did not file a counterclaim therefore he cannot be granted the relief of restitution or ownership of the suit land as such reliefs would arise from the pleadings and proof during the hearing.

The counsels believes that there could have been a counterclaim where the applicant could have proceed with his counterclaim despite the reversed or varied decree. That the Court of Appeal did not confer any ownership to the applicant.

They submitted further that even after the matter was remitted for retrial before Hon Mgeyekwa, J(as she then was), her judgment did not declare the applicant the lawful owner of the suit land but only that the land did not belong to the plaintiff (respondent). They contended that the ownership of

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the suit land cannot be attained by way of restitution in the instant application.

Third, the counsels for the respondents raised a kind of an objection where they submitted that the affidavit which supports the application was not signed or verified by the deponent therefore it contravenes Order XIX of the CPC and hence it cannot be acted upon by the court.

The counsel for the applicant rejoined and reiterated his submissions in chief. On the issue of the defectiveness of the affidavit which was allegedly not signed by deponent, Mr Ogunde submitted that the omission does not make the affidavit incurably defective as the court has discretion to order for amendment which will augur way with the principle of overriding objectives.

On the issue raised by the counsels for the respondents that the applicant did not file a counterclaim during the trial, Mr Ogunde averred that the law under Section 89 of the CPC does not support this argument by the counsels for the respondents. He reiterated his prayers.

Having gone carefully through the submissions by the applicants and the affidavit and counter affidavits, the pertinent issue is whether this instant application has merit. *Alls.*

As observed earlier, this application was brought under Section 89(1) of the CPC. For purpose of clarity, I will reproduce herein below:-

89 (1) where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed and, for this purpose, the court may make any orders, including orders for the refund of costs and for payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal. (emphasis mine).

It is not in dispute that the rival parties in this application were also parties in the Land Case No.316 of 2010 before this court. It was not disputed by the respondent that prior to his institution of Land Case No 316 of 2010, the suit land was in possession/ occupation of the applicant. This was the reason the respondent, then as the plaintiff, instituted the said suit, claiming that the late David Mushi has trespassed into the suit property. He prayed for the orders of vacant possession, damages and costs. *Alle*

It is also clear and not in dispute that after obtaining a decree in his favour where he was declared the lawful owner of the suit property, the respondent applied and successfully executed the said decree whereby the applicant was ordered by the court to vacate the suit land. This was by the court order of 27/4/2016 vide Misc. Land Application No. 20 of 2016 by Hon. Mahimbali, DR as he then was. By this order, the respondent was put in possession of the suit property.

However, after the decision of the Court of Appeal which quashed and set aside the judgment and decree by Hon. Wambura, J, the respondent did not have any claim of ownership of the suit land. Even after the retrial which was ordered by the Court of Appeal, the decision of Hon. Mgeyekwa, J did not grant ownership to the respondent. As correctly observed by the counsels for the respondents, the Hon. Trial Judge held that it was apparent that the land does not belong to the plaintiff (respondent).

It is my view that the circumstances falls rightly under the provision of Section 89(1) of the CPC. This is for the reason that all the evidence shows that the applicant was previous occupier of the suit land before he was ordered by the court to vacate the same after the judgment of the court declared the respondent the owner of that suit land. Since that judgment

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was nullified, the applicant is entitled to benefit over the suit land by way of restitution.

The Black's Law Dictionary, 8th Edition defines the term "*restitution*" as "*the return or restoration of some specific thing to its rightful owner or status*".

Here the applicant seeks the court to restore him to the previous status or the original position he was before the order of the court of vacant possession. Since that order was nullified by the Court of Appeal and until now there is no any order which has declared the respondent the owner of that suit land, then the applicant is entitled to the order of restitution which he seeks in the instant application.

I have considered the arguments by the counsels of the respondent that the Court of Appeal order did not reverse or varied the judgment and decree by Hon. Wambura, J but the same was quashed and set aside. With respect to the counsels, I find this only a twist of words. Whether the decree was reversed/ varied or quashed and set aside, it has the same effect of putting the position back to the way it was i.e. before this court has declared the respondent the lawful owner of the suit land. As of now, there is no any.

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judgment or decree which gave or gives the respondent the claim or right of ownership over the suit land. This gives the applicant the right to seek for restitution under the provisions of Section 89 of the CPC. The applicant need not have filed a counter claim during the trial as the judgment and all subsequent orders were nullified by the Court of Appeal. I therefore have disregarded the arguments of the learned counsels for the respondent.

For the above analysis and reasons, I grant this application.

Before I proceed to assess the orders which are sought in the chamber summons, I will first determine an objection which was raised by the counsels for the respondents on the issue of defectives of the affidavit. It is the principle of law that the preliminary objection cannot be raised in the submissions by the parties in court. There is a set procedure upon which any party who wants to raise an objection has to adhere either by filing a notice of preliminary objection or raising it in the preliminaries in order not to catch the other party by surprise. The practice of raising an objection in the submissions is not acceptable in our jurisprudence and it is frowned upon by the courts. For that reason I have disregarded the objection.

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In the chamber summons, the applicant is seeking for the orders that first; the respondent be ordered to vacate the suit property and provide vacant possession to the applicant, and demolition order be issued to remove the structures thereon. Second; the applicant prays for an order that the respondent be ordered to pay general damages to be assessed by the court following eviction which was carried out by the respondent, and the interest at the rate of 7% and costs of the application.

On the prayer for payment of general damages to be assessed by the Court, the applicant left the assessment of general damages to the discretion of the Court, as he did not propose how much to be awarded.

In the case of **Anthony Ngoo and Another vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014, CAT at Arusha, (unreported), the Court of Appeal held that;

“The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of general damages.”

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Basing on the said principle set in the referred case herein above, this Court has to assess the general damages basing on the evidence brought in the affidavit and counter affidavit.

Section 89(1) of the CPC gives this court powers to grant refund of costs, payment of interest, damages, compensation and mesne profits which are properly consequential on the variations or reversal.

In his affidavit, the counsel for the applicant has stated that the respondent entered the disputed land in total disregard to the order of the court of maintenance of status quo ante, the act which occasioned psychological torture, mental anguish and inconvenience to the applicant in which he is entitled to general damages. The counsel pointed that the general damage should attract interest to cover for devaluation and inflation.

In his counter affidavit, the respondent has vehemently denied the averment by the applicant and stated that the said status quo was preventing the respondent from doing anything into the suit land, the order which he had absolutely adhered.

According to the attached documents in the affidavit, the court (Mahimbali, DR as he then was), vacated its previous order of eviction/ demolition issued

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on 27/4/2016 and in its place, ordered maintenance of status quo ante pending the outcome of the applications and appeal which was filed in this court and the Court of Appeal respectively. However it is obvious that the order of maintenance of *status quo ante* was not adhered to by the respondent as he continued on taking possession of the suit land as per his statement at paragraph 2 of his counter affidavit.

At paragraph 5 of the respondent's counter affidavit, the respondent claims that the order of *status quo ante* was preventing him from doing anything into the farm in dispute. However, the purpose of the order of maintenance of status quo ante is not to prevent the party from doing anything on the disputed property. The purpose of the said order is to put back the position as it was before the dispute happened.

This is derived from the **Black's Law Dictionary, 9th Edition** which defines the word "*status quo ante*" to mean the situation that existed before something else occurred.

Therefore in the existing dispute, the order of the court meant that the respondent was not to take vacant possession of the suit land until the outcome of the applications and the appeal to the Court of Appeal. However

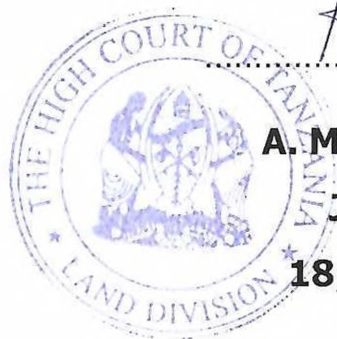
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the respondent went on and took possession of the suit land. It is my view that the acts of the respondent has caused damages to the applicant as he was the previous occupier of the suit land.

I find that the applicant has managed to establish that he is entitled to the general damages. I therefore, having assessed the evidence as herein above, grant the applicant the general damages of TZS 80,000,000/= plus the interest rate of 7% per annum to be calculated from the date of this decision to the date of full payment. In awarding the above amount, I have considered that the respondent took vacant possession of the suit land since 2016. As of the order of demolition, I hesitate to order the same as this is within the applicant's power to act.

In upshot, the application is granted to such extent, with costs.

It is so ordered.



A. MSAFIRI
A. MSAFIRI

JUDGE

18/4/2024