

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

LAND REVISION NO. 5 OF 2023

(Arising from District Land and Housing Tribunal of Moshi at Moshi in Land Application No. 4/2018, Land Application No. 66 of 2022 and Misc. Land Application No. 63 of 2023)

JULIUS JOSEPH MCHOMVU.....APPLICANT

Versus

JULIUS THADEUS MCHOMVU.....RESPONDENT

RULING

18th & 28th March, 2024

A. P. KILIMI, J.:

The applicant has moved this application for revision under section 43 (1) (b) of the Land Disputes Courts Act, Cap 216 R.E. 2019 and section 79(10) (c) of the Civil Procedure Code, Cap 33 R.E 2019) praying for the following orders:

1. This Honourable court be pleased to revise whole proceedings, ruling and orders in Land Application No. 4 of 2018 and its Order No. 63 of 2023 District Land and Housing Tribunal Moshi.
2. This Honourable Court be pleased to grant costs of this application and
3. Any other reliefs deem fit and just to be granted.

Opposing the application the respondent filed a counter affidavit and a notice of preliminary objections based on three grounds as follows;

1. That the application is hopelessly time barred.
2. That the application is bad in law as it abuses court process for being filed against various decisions based on different applications of different times with different prayers thus making it omnibus.
3. That the application is bad in law for abuse of court process as the prayers prayed are more or less the same to Misc. Land Application No. 75 of 2018 and Misc. Land Application No. 145 of 2022 as both determined about dissatisfaction the *ex-parte* judgment and decree of Land Application No.4 of 2018.

On 12th February, 2024 when parties appeared for hearing, the respondent was unrepresented whereas the applicant enjoyed the service of Mr. Gabriel Shayi learned advocate, and it was agreed the above be disposed by way of written submission.

Arguing to support the first point of preliminary objection concerning time limitation for filling this application. It was respondent's submission that since 16th day of July, 2018 to 18th day of August, 2023 when this application was filed it has been five years and thirtytwo days. He argued that based on the Law of Limitation Act, [Cap 89 R.E 2019] under Item 21 of the first schedule the time limitation for instituting this kind of

application is 60 days. He thus contended that this application has been filed out of the required time of 60 days. It was his further submission that the law of limitation requires under section 3(1) that the application be dismissed.

On the second point of the preliminary objection which objected the application for being omnibus, the respondent submitted that this application is seeking this court to revise the decision in Land Application No. 4 of 2018 as well as Land Application No. 63 of 2023. He argued that the former application and the latter which is execution proceedings have different prayers, time and remedy hence said, the same cannot be switched under a single application. He further submitted that the prayers prayed leaves a court to do what he referred to as forum shopping and that the court would be left with an assignment of choosing each decision to each application. He was thus of the view that the two applications cannot stand in one revision proceedings.

Finally submitting on the third point of preliminary objection the respondent submitted that the application is bad in law for abuse of court process as the applicant is seeking redress following his dissatisfaction from the *ex-parte* judgment in Land Application No. 04 of 2018. The

respondent argued that this is abuse of court process because the applicant had already tried a number of times to challenge the *ex-parte* decision by filing various applications but all have been dismissed for want of prosecution. It was his submission therefore that the applicant had already exhausted the remedy against the application as he wished but he decided to abandon the same hence the present application is an abuse of court process. He was thus of the view that since the mode deployed by the applicant is unauthorized under the law, therefore, it was his prayer this court to find merit on the objections and dismiss the application with cost.

In his reply to the first point of preliminary objection regarding the application being time bared, the applicant stated that the application was timely filed. Explaining the reasons, the applicant averred the execution orders in Misc. Land Application No. 63/2023 at the District Land and Housing Tribunal was delivered on 31st May 2023 and that he received the copy of the order on 13th June 2023. Therefore, calculating from the day, he received the order to the date when this application was filed is 11th August 2023, thus, he said it is 59 days which was still within the 60 days required by the law.

Responding to the second and the third preliminary objections together, the respondent submitted that he was the one who instituted the Misc. Land Application No. 75 of 2018 and the Misc. Application No. 145/2022 at the District Land and Housing Tribunal. That soon thereafter he was seriously beaten by a group of people who injured his eye which caused him to undergo surgery. Submitting further the respondent stated that he entered into an agreement with the respondent on 10th January 2020 for settlement of *ex-parte* judgment No.4/2018 whereas the respondent surrendered ten million shillings (10,000,000/=) which he owed him, for that reason he submitted that it was his belief that the land conflict between them was concluded.

It was the applicant's further submission that in 2022 the respondent filed a Misc. Application No. 66/2022 in the District Land and Housing Tribunal for the execution of a decree in Land Application No.4/2018 which was heard *ex-parte*, but was not granted due to some irregularities hence it was struck out and the respondent was advised that if he was still interested in the matter, he could re file subject to time limitation.

Moreover, the applicant submitted that the respondent did not comply with the order rather he filed Misc. Land Application No. 63/2023 for appointment of a court broker to execute Land Application No. 4/2018. He contended further that the application was heard *ex-parte* without service of summons to him. He argued that the tribunal heard the application without considering the order of illegalities in Misc. Application No. 66/2022 and proceeded to appoint a court broker for execution of a decree on 31/5/2023.

Following the irregularities explained above, it was the applicant's prayer that the two applications that is Misc. Land Application No. 66/2022 and the Misc. Land Application No. 63/2023 filed by the respondent at the District Land and Housing Tribunal be declared null and void. He further prayed that this court finds the preliminary objections raised lacking merit and dismiss them then this land revision be heard.

Briefly in his rejoinder, the respondent pointed out that the respondent's submission contained several annexures as evidence against the legal principle that submission is neither a substitute of evidence nor is it an affidavit. Considering the principle, it was the respondent's submission

that the appended annexures in applicant's written submission and its substantiation in the submission part be expunged in the record.

Responding on the issue of time limitation, it was the respondent's submission that the applicant had not denied the fact that the application for revision has also mentioned Land Application No. 4 of 2018 as one of the judgments this court has to make revision alongside with several applications. He argued that being a joint and cumulative applications need to be revised as prayed by the applicant, thus the application faces the consequence of being out of time since the Land Application which is sought to be revised its decision was delivered on 16th July, 2018. Therefore, he argued that filing the revision application in 2022 without an order for extension of time, it definitely becomes unprocedural hence the application should be dismissed with costs.

Having gone through parties' rival submissions for and against the preliminary objections the issue for determination is whether the objections raised have merit.

To start with first point of preliminary objection, the law under Item 21 to the schedule of the **Law of Limitation Act**, [Cap. 89 R.E 2019]. Provides for an Application under the Civil Procedure Code, the Magistrates'

Courts Act or other written law for which no period of limitation is provided in the Act or any other written law, to be made within 60 days. In the application before this court the applicant has requested this court to revise whole proceedings, ruling and order in Misc. Land Application No. 4/2018 and its order No. 63 of 2023 in the District Land and Housing Tribunal Moshi. However, I have noted in his submission the applicant is saying about Land Application no. 66 of 2022, in my view of the prayer sought this application was not included, I have perused the chamber summons moving this court, orders sought is to revise proceeding, ruling and orders in Land Application No. 4/2018 and Land Application No. 63/2023 only. Therefore, the applicant prayed nothing in respect to Land Application no. 66 of 2022 in this court.

In respect to the remaining applications above, in my perusal it contains two decisions of which the applicants seek to be reviewed by this court. The first is Land Application No. 4/2018 which was decided and its decision delivered on 16/7/2018 and the second one is an order for execution emanating from the same application above which was issued by the tribunal on 31/5/2023.

For the Land application no. 4 of 2018, I concede with the argument of the respondent that the application is hopelessly out of time, since its ruling was delivered on 16/7/2018 which is almost five years beyond prescribed time limit of 60 days as the law cited above provides, therefore without an order for extension of time the same cannot be entertained in this court. I therefore find merit on the first point of preliminary objection and it is therefore sustained in respect to Land application no. 4 of 2018.

In respect to the remaining Land Application No. 63/2023, which I wish to consider it in relation to objection number 3 wherein the respondent claimed abuse of court process by the applicant when he filed Misc. Land Application No. 75 of 2018 and Misc. Land Application No. 145 of 2022 as both determined about dissatisfaction with the *ex-parte* judgment and decree of Land Application No.4 of 2018.

First, in my view of the application in a whole, though the applicant said he was supplied with the order 13/5/2023 the same was not proved by any attachment as evidence of receiving it. What the applicant's counsel submitted and tried to annexed documents cannot be evidence in the eyes of law. This is because, submissions are not evidence, they are there to

reflect the general exposition of the party's case. In the case of **Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman, Bunju Village Government & 11 Others**, Civil Appeal No. 147 of 2006 (unreported) it was observed that;

"Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

In view thereof, even those attached to the submissions cannot be taken as evidence to prove any fact alleged to exist.

Secondly, this Land Application No. 63/2023 was never challenged after being heard *ex-parte*. This is evidence by Mr. Gabriel Shayo submitted that in this matter the tribunal appointed the court broker without proper service of application and summons to the applicant, hence he insisted that was violation of the right to be heard which is protected by article 13 (6) of the Constitution of the United Republic of Tanzania 1977 as revised from

time to time. The same was deposed by the applicant in his affidavit at paragraph 6 and for this purpose I find apposite to reproduce as follows;

*"That, **I was not served summons for hearing an ex-parte order** in application no. 63 of 2023, which was entered in favour of the respondent Julius Thadeus Mchomvu"*

[Emphasis added]

From the above, I am settled that the applicant in respect to this Land Application no. 63 of 2023 is challenging why this matter was heard *ex-parte* and at the end the tribunal issued an order of appointing a court broker. In Accordance with Regulation 11(1)(2) of the **Land Dispute Courts (The District Land and Housing Tribunal) Regulations, GN No.174 of 2003** provides that;

"11(1) on a day the application is fixed for hearing, the tribunal shall;

- (a) N/A*
- (b) N/A*
- (c) Where the respondent is absent and was duly served with the notice of hearing or was present when the hearing date was fixed and has not furnished the tribunal with good cause for his absence, **proceed to hear and***

determine the matter ex-parte by oral evidence.

- (2) ***A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub regulation (1) within thirty days apply to have the orders set aside, and the tribunal may set aside its orders, if think fit to do so and in case of refusal, appeal to the High Court.***

[Emphasis supplied].

From the excerpt above of the law, the facts that the applicant is challenging *ex-parte decision*, as depicted in the said objection the same cannot be challenged in this court. This is because, it is a trite law where the defendant intends to challenge both the order to proceed *ex-parte* and the merit of the findings in the *ex-parte* judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the *ex-parte* judgment first. This principle is based on the long-standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. (see **Dangote Industries Limited Tanzania vs Warnercom T. Limited** [2022] TZCA 34 (TANZLII)).

On the whole, on account of what I have endeavoured to discuss hereinabove, I find merit in the two objections raised and are hereby sustained. In the circumstances the application is struck out. Considering the nature and parties to this matter no order as to costs granted. It is so ordered.

DATED at **MOSHI** this 28th day of March, 2024



**A. P. KILIMI
JUDGE**

Court: - Ruling delivered today on 28th day of March, 2024 in the presence of Mr. Shayo G.M. for the Applicant and in absence of the Respondent.

Sgd; **A. P. KILIMI
JUDGE
28/03/2024**

Court: - Right of Appeal duly explained.

Sgd; **A. P. KILIMI
JUDGE
28/03/2024**