THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 27435 OF 2023

(Originating from Misc. land application No. 67B of 2023 of the District Land and Housing Tribunal for Mbarali)

REONARD MDEREFA TANDIKA.....1ST APPLICANT

TISIANA MDEREFA TANDIKA .....2ND APPLICANT

FANYINGI MDEREFA TANDIKA .....3RD APPLICANT

ZAITUNI MDEREFA TANDIKA .....4TH APPLICANT

RUSHINA MDEREFA TANDIKA .....5TH APPLICANT

VERSUS

SAIDI TANDIKA .....RESPONDENT

RULING

Date of hearing: 3/4/2024

Date of ruling: 16/4/2024

NONGWA, J.

The applicants above named, have sought revision of ruling in Misc. Land Application No. 67B of 2023 of the District Land and Housing Tribunal for Mbarali (the DLHT), the court is moved under section 41(1) of the Land Disputes Courts Act [Cap. 216 R: E 2019], Order XXXVII rule

5 and section 95, both of the Civil Procedure Code [Cap. 33 R: E 2019] (the CPC). It is supported by the affidavit of Douglas Keneth Haule advocate for the applicants and resisted by the respondent who sworn the counter affidavit. In addition, the respondent filed notice of preliminary objections.

Background leading to this proceeding briefly is that, the respondent has filed the application christened as Application No. 67 of 2023 in the DLHT against the applicants for trespass of the land measuring 180 acres located at Tambaragosi hamlet, Ukwavila village within the district of Mbarali which is still pending. Meanwhile the respondent filed an application for temporary injunction against the applicants which was registered as Misc. Land Application No. 67B of 2023. That application was in favour of the respondent and the applicants were restrained to cultivate or conduct any agricultural activity in the suit land pending determination of the main application. The decision aggrieved the applicants who preferred the present application.

Earlier on, I pointed out that the respondent filed notice of preliminary objection. As it has been the practice of this court when objection is raised, I ordered the same to be disposed first ahead of the main application. On the hearing date Mr. Douglas Keneth Haule and Yona

Frank, both learned counsels appeared represent the applicants and respondent respectively. The objections go thus;

1. That the application is bad in law for contravening section 79(2) of the Civil Procedure Code [Cap 33 R: E 2019];
2. That the application is bad in law for contravening section 79(1)(a, b and c) of the Civil Procedure Code [Cap 33 R: E 2019]; and
3. That the application is bad in law and incompetent before this honourable court for being made under wrong enabling provision of the law

Mr. Yona informed the court that he was withdrawing the second objection, Mr. Douglas had no objection, hence the second objection was marked withdrawn.

Mr. Yona commenced his submission with the first objection and stated that the decision sought to be revised is interlocutory order and in terms of section 79(2) of the CPC it is not amenable to revision because it has no effect of finalising the suit. Counsel referred the court to the decision of this court in **Hamis Mdida and another vs Registered Trustee of Islamic foundation,** Misc. Land Application No. 31 of 2022. He argued that nature of order test is the one used to determine the effect

of the order and on this he referred the court to the case of **Tanzania Post Corp. vs Jeremiah Mwandi,** Civil Appeal No. 474 of 2020, CoA at Kigoma. He contended, the order is for the applicants to stop doing any activity on the disputed land pending final determination of the main suit, no other right was declared and there is pending case in the tribunal, thus the order issued was not final and conclusive. He referred the court to the case of **Zanzibar Electricity Corp vs Inratech Limited and another,** Civil Appeal No. 100 of 2021, CoA at Zanzibar in which the court insisted that order is final and conclusive if it has disposed all rights of the parties in the main suit.

Arguing 3rd objection on wrong citation of the law, Mr. Yona submitted that the application was supposed to be made under section 43(1) which empowers the court to revise decision of the tribunal and not 41(1) of the Land Disputes Courts Act which deal with appeal.

Regarding Order XXVII rule 5 of the CPC, it was submitted the applicant was supposed to apply to the same tribunal to set aside or discharge the order issued and not to file for revision before this court challenging the order. Reference was made to the case of **Godfrey Kimbe vs Peter Ngonyani,** Civil Appeal No. 41 of 2014, CoA DSM, **Chama cha Walimu Tanzania vs AG,** Civil Application No. 151 of 2008

COA and **Tatu Mgetta and Theopista Erasto vs Mwanza satellite cable tv**, Civil Appeal No. 142 of 2019, CoA at Mwanza in which the court insisted that wrong citation of provision of the law makes the application incompetent and liable to be struck.

With the above submission, counsel for the respondent prayed the application to be struck out with costs.

In rebuttal, Mr. Douglas replied that, there are illegalities and anomalies in the proceedings and the court is not supposed to be tied up with the provision of section 79(2) of the CPC. He said that, the court has to interfere so as to remedy the irregularity emerged in the issuance of the said order. The case of **Chama cha Walimu Tanzania** (supra) and **Tanzania Heart Institute vs The board of Trustees of the NSSF**, Civil Application No. 109 of 2008 were cited to bolster the point that the court may dispense with striking incompetent applicant so as to be seized with record to address the illegalities.

In respect of 3rd objection on wrong citation of the enabling law there was indirect concession from the counsel for the applicants but was quick to point that so long as the court has powers to grant the orders sought then it should ignore the anomaly. Counsel for the applicants cited the case of **MIC (T) LTD and others vs Golden Globe International**

Service limited, Civil Application No. 1/16 of 2017, CoA at DSM to support the argument.

In rejoinder, Mr. Yona stated, counsel for applicant did not make any reply to his submission in the first objection. As to whether there was illegality counsel stated that it cannot be addressed at the stage of hearing objection, the reason he abandoned the second objection and that cases cited by the applicant's counsel was distinguished to the case at hand.

I have impassively considered the application record, objection together with oral argument for and against the objections. First, I have noted that there is no provision under the Land Disputes (the District Land and Housing Tribunal) Regulation G.N 174 of 2003 which bar revision from interlocutory decision or order as opposed to appeal which is prohibited by proviso to regulation 22. However, High Court in exercise of its respective jurisdictions in terms of section 51(1) of the Land Disputes Courts Act [Cap 216 R: E 2019] apply procedure and practice obtained under the CPC.

Having settled that, the first objection by the respondent is premised in section 79(2) of the CPC, which reads;

'79(1) The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercised jurisdiction not vested in it by law;
(b) to have failed to exercise jurisdiction so vested; or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

2) Notwithstanding the provisions of subsection (1), ***no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the Court unless such decision or order has the effect of finally determining the suit.'*** [Emphasize added].

The above bolded phrase has been consistently construed by the Court as having the effect of barring any appeal or application for revision against any preliminary or interlocutory decision or order of the court which does not have the effect of finally and conclusively determining the suit. In **Murtaza Ally Mangungu vs The Returning Officer of Kilwa & Two Others,** Civil Application No. 80 of 2016 [2016] TZCA 2056 (6 June 2016; TANZLII) the court stated;

'In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has

to apply the nature of the order test. That is, to ask oneself whether the decision or order complained of finally disposes of the rights of the parties. If the answer is in affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order.'

Now at hand, the decision subject for revision was made in an application for temporary injunction which in terms of Order XXXVII rule 3 of the CPC has a span of six month or as ordered by the court but usually it last for the period until the finalisation of the main suit. In this case what the chairman did was to order the applicant not to enter and conduct any activity in the suit land. The order of the chairman reads;

'Hivyo maombi haya yamekubaliwa. Wajibu maombi wanazuiliwa kulima au kufanya shughuli yoyote ya kilimo kwenye eneo la mgogoro hadi hapo shauri la msingi litakaposikilizwa na kuamuriwa.'

Literary translated to mean; the respondents are restrained from cultivating or doing any activity of agriculture in the suit land until when the main suit is heard and determined.

From the above inception, the applicants who were the respondents in the tribunal were temporarily restrained from cultivating or doing any activity of agriculture in suit land while awaiting the finalisation of the

main suit between the parties. It is clear therefore, rights of the parties were not finally and conclusively resolved by the tribunal, thus the order is interlocutory not amenable to revision.

Counsel for the applicants strategically avoided to make reply to submission of Mr. Yona on whether the ruling and order was subject for revision in the dictates of section 79(2) of the CPC but persistently maintained that the present application is peculiar and the court has to resolve the illegalities and anomalies committed by the chairman relying on the case of **Chama cha Walimu Tanzania** (Supra) and **Tanzania Heart Institute** (supra).

I have read the two cases cited above and agree with Mr. Yona that the two are distinguishable with the present case. In **Chama cha Walimu Tanzania** case, the applicant had declared a trade dispute with the Government and it issued a strike notice of sixty days. Subsequently, the Attorney General successfully instituted and was granted permanent injunction restraining members of the applicant from calling for and or participating in the planned strike. Having considered if the temporary injunction carried the Hallmarks of finality the Court held as follows;

> *'We have dispassionately read the ruling of the Labour Court and the order extracted there from in the light of the order sought in*

the chamber summons. ***We are of the firm view that the order was not interlocutory. It had the effect of conclusively determining the application.*** *The respondent was unreservedly granted what he was seeking in the chamber summons, as the applicant and its members were unequivocally restrained from "calling for and /or participating in the planned strike".* ***There was no other issue remaining to be determined by the Labour Court. Both in form and substance the issued injunction order carries the hallmarks of finality, as it was not granted pending any further action being taken in those proceedings ...'*** [Emphasize supplied].

In **Tanzania Heart Institute** case, the facts were that on 18th June, 2007, the respondent, the Board of Trustees of the National Social Security Fund (NSSF) instituted in the High Court, Land Division, Land Case No. 158 of 2007 against the applicant. The reliefs sought involved payment of the principal sum of U$ 1,319,371.20, arrears of rent for occupying the respondent's hospital building in Kinondoni District within the city of Dar es Salaam. While the suit was still pending, the respondents served the applicant with a notice of eviction. Following the notice of eviction, the 2nd applicant filed a chamber summons seeking waiver of the eviction notice. The court dismissed the application for waiver of the notice of eviction. The applicant moved the court for an order to call for

the record in order to satisfy itself as to the correctness, legality or propriety relating to the order. The application met objection that it was incompetent because it involves an interlocutory order in respect of which no revision shall lie. The court found that the decision was interlocutory but it refrained from striking the application because **one,** eviction was not sought as one of the reliefs in the main suit, **two,** pleadings were not completed wherein issues were to be framed as a basis for the trial. With the above, the court asked itself what was the basis of the eviction order issued when the suit was still in the process of trial. Then the court held that;

> *'We think the issue is crystal clear and simple, namely that from the reliefs sought in the plaint, it had to be decided by the court following the procedure laid down by the law relating to the trial of suits, whether in fact the applicant owed the respondent the principal sum of U$ 1,319,371.20 as arrears of rent due. Once that is settled, then the execution process would follow leading finally to the eviction after due notice …. **The eviction order surfaces after the dismissal of the application for waiver of the notice of eviction. This is highly irregular and improper as well. It presupposes that the applicant had been adjudged to be in default of paying arrears of rent to the tune indicated in the plaint.** It is elementary that once a plaint has been filed the pleading process has to be completed*

before the trial commences unless the suit is settled outside court or through the Alternative Dispute Resolution mechanism.' [Emphasize added].

I have carefully reproduced facts and holding in the two cases relied by Mr. Douglas with purpose. To be deduced is that in the two cases there existed some illegalities which the court found it necessary to be addressed despite the application being incompetent. The follow up question is does any of the illegality exist in the ruling of the chairman sought to be revised in this application. The answer to the above posed question is found in the affidavit of applicant particularly paragraph 13 which enumerates illegality found in the impugned decision. The said paragraph reads;

'13. that the issuance of temporary injunction against the applicants was impregnated with countless irregularities and curable mistakes into which revision is considered necessary and for purpose of this application the following have been extracted to enshrine those irregularities.

(i) that the respondent did not meet the ingredients of one side injunction order against the applicants

(ii) That the respondent did not use the disputed land for 40 years while the matter is to be proved in the main suit pending in the tribunal

(iii)that the applicant's counter affidavit stated that the respondent is the one using the suit land while a case is in court, it is different from what is sworn in the counter affidavit on para 6

(iv) that the decision of order of temporary injunction relied on misconceived phrase on the last word of paragraph 7 of the applicant's counter affidavit that they agreed that will suffer the loss if a temporary injunction id issued against them

(v) that the whole decision of temporary injunction based on wrong interpretation of paragraph 6 and 7 of the applicant's counter affidavit leaving all away paragraph 2, 3, 4 and 5 which carried the true meaning of opposing the temporary injunction

As raised above, is this an illegality in the impugned decision, what is illegality. In the case of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 [2023] TZCA 137 (23 March 2023; TANZLII) the court deliberated on what amounts to illegality. After making reference to the definition of illegality in Black's Law Dictionary, 11th Edition and also extracted passage from **Keshardeo Chamria vs Radha Kissen Chamria & Others** AIR 1953 SC 23, 1953 SCR 136, a decision of the Supreme Court of India, in which it was decided that;

'... the words 'illegally' and 'material irregularity' do not cover either error of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities which the law prescribes have been complied with.'

Then the court concluded in **Charles Richard Kombe** (supra) as follows;

'From the above definitions, it is our conclusion that for a decision to be attacked on the ground of illegality, one has to successfully argue that the court acted Illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time-barred.'

In this application looking at the purported illegalities, it concerns more incorrect assessment of evidence which cannot by itself render the ruling illegal. The decision to be illegal it must not be authorised by law or not being legally authorized. In **Patrick Magologozi Mongella vs The Board of Trustees of The Public Service Social Security Fund**, Civil Application 342 of 2019 [2022] TZCA 216 (TANZLII; 22 April 2022) the court had opportunity to deal with the meaning of correctness, legality or propriety of any decision and regularity when dealing with the application for revision like the present one. The court stated;

'So, for instance, in determining the legality of a particular decision or order of the High Court, this Court will examine if that decision or order has the quality of being legal; that it has complied with the applicable law or doctrine. As for correctness and propriety of any impugned decision or order, it would involve the same endeavour to determine if it is legal and proper. The inquiry into the regularity of the impugned proceedings will not go beyond examining whether the proceedings followed the applicable procedure and accorded with the principles of natural justice and fair play. None of these endeavours will involve a re-appreciation or re-appraisal of the evidence on record, which, is what the Court does while exercising its appellate authority on a first appeal by re-hearing the case on fact and law and coming up with its own findings of fact. Any suggestion that the Court can re-hear and re- appreciate the evidence when exercising its revisional jurisdiction will obliterate the distinction between the Court's appellate authority and its power of superintendence, respectively, under subsections (2) and (3) of section 4 of the AJA.'

In this application apart from what is posed in paragraph 13 of the affidavit and upon my own perusal of the impugned ruling, I have found nothing which can be termed as illegality, irregularity, incorrectness or impropriety of the decision. It is for this reason the case of **Chama cha Walimu Tanzania** (supra) and **Tanzania Heart Institute** (supra) highly relied by the applicant's counsel are distinguishable to the present

case. There is no any illegality committed by the tribunal in reaching the decision warranting this court to intervene by way of revision on interlocutory decision as happened in the case of Tanzania Heart Institute. The order of temporary injunction did not go beyond what is required by the law of restraining the applicants in conducting any activity in the suit land pending determination and finalisation of the main application. The applicants' discomfort with the ruling and their unpreparedness to comply with the injunction order cannot be taken as illegality for invoking revisionary power in defiance of the mandatory provision of section 79(2) of the CPC which bar revision on any interlocutory decision or order as in this case. That said and done I find the first objection has merits.

Following the above, I find no need to address the remaining objection as it will be for academic with no purpose to serve in the case at hand.

In the end the first objection is sustained, the application is prematurely before this court, thus incompetent. Consequently, it is hereby dismissed with costs.

V.M. NONGWA

JUDGE

16/4/2024

DATED and DELIVERED at MBEYA this 16th day of April 2024 in presence of Mr. Yona Nicholaus Frank for the respondent also holding brief of Dougla Haule for the applicants.

V.M. NONGWA

JUDGE