IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND REVISION NO. 09 OF 2022

(Arising from Land Application No. 317 of 2018 and Execution No. 542 if 2020 before Kinondoni District Land and Housing Tribunal at Mwananyamala)

MANASE RUBEN.....APPLICANT

VERSUS

BASTON ERICK MONGI.....1ST RESPONDENT
JAMES JUMA.....2ND RESPONDENT

Date of Last Order: 15.02.2023
Date of Ruling: 24.03.2023

RULING

V.L. MAKANI, J

This is an application by MANASE RUBEN seeking to revise the proceedings, judgment and decree of Kinondoni District Land and Housing Tribunal at Mwananyamala (the **Tribunal**) in respect of Land Application No. 317 of 2018 and Execution No. 542 of 2020. The applicant has also asked the court to be reinstated in the landed property described as Plot No. 743 Block E, Sinza Area registered with CT No.28561 (the **suit property**), costs of the application and any other order this court may deem fit and just to grant.

The application is made under section 43(1) (a) (b) and (2) of the Land Disputes Court Act No. 2 of 2002 and is supported by the affidavit of the applicant. The 1st respondent filed a counter-affidavit to oppose the application. The 2nd respondent did not file any counter-affidavit. The application proceeded orally, and the applicant was represented by Mr. Mapembe, Advocate, while the 1st respondent had the services of Mr. Iddi Mrema, Advocate. The 2nd respondent appeared in person.

Submitting in support of the application Mr. Mapembe prayed to adopt the contents of the affidavit of the applicant to form part of his submissions. Mr. Mapembe gave a brief background of the matter. He said the applicant instituted Land Case No. 247 of 2014 in this court (Hon. Mzuna, J) suing the 1st respondent & 3 Others (Twiga Bancorp Limited, Kisaula Investment Limited and Property Masters Limited). The matter was seeking to challenge the sale of the suit property. In this case the 1st respondent as a defendant filed a written statement of defence and raised a counterclaim that he be declared the lawful owner of the suit property. He also sought for vacant possession. He said the case was, on 11/08/2017, dismissed on

account that there was no case against the defendants, and the counterclaim remained pending. Mr. Mapembe said the applicant being dissatisfied with the decision in Land Case No. 247 of 2014 filed a Notice of Appeal to the Court of Appeal. Since there was the Notice, the applicant prayed for the counterclaim to be stayed, pending the matter at the Court of Appeal to be concluded. He said on 20/07/2020 (before Hon. Opiyo, J) the court ordered the counterclaim to be adjourned sine die.

Mr. Mapembe said to the applicant's surprise the 1st respondent instituted Land Application No. 317 of 2018 at the Tribunal suing the 2nd respondent James Juma, claiming that he is the rightful owner of the suit property and the 2nd respondent a trespasser. The decision of the Tribunal was in favour of the 1st respondent, and he was declared the lawful owner of the suit property and was given vacant possession and damages. He said the applicant was not a party in the case at the Tribunal and so the only available remedy is revision which the applicant has filed herein. He relied on the case of **Attorney General vs. Oysterbay Villas Limited & Another, Civil Application NO. 168/16 of 2017 (CAT-DSM)** (unreported).

Mr. Mapembe pointed out the errors which the court must observe while granting the application. He said while the counterclaim in respect of Land Case No. 237 of 2014 was pending before this court vide the orders of stay, the 1st respondent through the backdoor instituted Land Application No. 317 of 2018 at the Tribunal. He said the reliefs prayed in the counterclaim are similar to those prayed for in the case at the Tribunal. He said the 1st respondent and his advocate were aware of the Notice of Appeal to the Court of Appeal and the that the counterclaim was stayed but they intentionally filed a suit similar to the counterclaim in the Tribunal. He was of the view that the acts of the 1st respondent amounted to forum shopping as was held in the case of **Hector Sequiraa vs. Serengeti Breweries Limited, Civil Application No. 395/2018 of 2019 (CAT-DSM)** (unreported). He further said the 1st respondent instituted Execution No. 542 of 2020 and evicted the 2nd respondent who is a relative of the applicant. He prayed that the judgment and decree in Land Application No. 317 of 2018 and Execution No. 542 of 2020 of the Tribunal be quashed and sent aside and the applicant be reinstituted as the lawful owner of the suit property and the application be granted with costs.

Mr. Mrema adopted the contents of the counter affidavit of the 1st respondent and all the attached annexures records and proceedings in the High Court and Tribunal. Mr. Mrema prayed that he straightens the background. He said in Land Case No. 247 of 2014 the 2nd respondent was not a party and the court decided in favour of the defendants including the 1st respondent who was the bonafide purchaser of the suit property. He said the 1st respondent purchased the suit property from Twiga Bancorp through a public auction. The decision was to the effect that the applicant herein did not have a case against the defendants in that he has failed to challenge the sale. He said the decision has not been challenged to date as there is only a Notice of Appeal and a letter requesting for proceedings but there is no Memorandum of Appeal that has been filed in the Court of Appeal but since there were no steps by the applicant at the Court of Appeal this court suo mottu summoned the parties and the 1st respondent decided to withdraw the counter-claim because there was already a decision by the Tribunal that the 1st respondent was owner of the suit property. He said when the prayer for the withdrawal of the counterclaim was made, Mr. Living Raphael Advocate who was appearance on behalf of the applicant on that date (05/05/2022) did not object to the said prayer. He said since there was no objection,

and he was the one who filed the Notice of Appeal it meant that he was aware that there was no pending appeal at the Court of Appeal.

As for substantive submissions, Mr. Mrema said the cause of action at the High Court and the Tribunal were different. While at the High Court in Land Case No. 237 of 2014 the cause of action was to challenge sale of the suit property, at the Tribunal in Land Application No. 317 of 2018 it was trespass. He said the 1st respondent did not use the back door as alleged but the filing of the application at the Tribunal was his right because he purchased the suit property bonafide. He said he could not have remained silent and depend on the order of the court of adjournment *sine die* because the 2nd respondent was not a party to the suit at the High Court, he was a stranger and if he had not done so then the stranger would have taken his right. He said the applicant has failed to show the court what is his interest that has been breached by the decision of the Tribunal. He said if the applicant had interest in the suit property or is the owner of the suit property then he would have challenged the decision of this court in Land Case No. 237 of 2014 by way of an appeal which has not been pursued.

Mr. Mrema also disputed the alleged fact that the 2nd respondent is the relative of the applicant. He said during the Execution No. 347 of 2019 there were settlement meetings where it was revealed that the 2nd respondent was not a relative, but a buyer of the suit property and he has already paid TZS 60,000,000/= in the account of Kisaula Investment where the applicant is director. He said there was a Deed of Settlement between the 1st and 2nd respondents, but the latter failed to comply with the settlement because he said he could not pay twice in respect of the same property. He said the 2nd respondent told them that he was expecting that the TZS 60,000,000/= already paid to Kisaula Investment would assist in the settlement but the account of Kisaula Investment was frozen by the Bank to avoid any tricks. He said the 2nd respondent told them that he trespassed into the suit property because he did not want to lose his money. He concluded that the 2nd respondent did not live in the house as a relative but as a purchaser of the suit property.

Mr. Mrema said the **Certificate of Title No. 28561**, Plot 743, Block E, Sinza Area which all along had been the suit property was changed

during the transfer from the Bank to the 1st respondent and it now reads as **Certificate of Title No. 147671**, Plot 743, Block E, Sinza Area in the name of the 1st respondent. He said the previous **Certificate of Title No. 28561** does not exist but the Plot and Block remain the same. He pointed out that according to the law in sections 2 and 40 of the Land Registration Act CAP 334 RE 2019 read together with the case of **Amina Majid Ambari vs. Ramadhani Juma, Civil Appeal No. 35 of 2019 (CAT-Mwanza)** (unreported), when two persons are competing on land, the one with the Certificate of Title is taken to be the owner unless proved that the Certificate of Title was obtained unlawfully. He said if the applicant still wishes to claime ownership of the suit property then he ought to have challenged the decision of Land Case No. 237 of 2014 and not pursue this revision which he is also not a party.

Mr. Mrema went on saying that the applicant has prayed for the orders that Execution No. 542 of 2020 be quashed and set aside, but the 1st respondent has never filed Execution No. 542 of 2019 but Execution No. 847 of 2020 and since the application to quash the said execution order is out of time and without leave for extension of time then the order

sought cannot be granted. He asked the court to look into paragraph 17 of the counter affidavit because the applicant has attempted to challenge Land Application No. 317 of 2018 by filing several applications such as Misc. Applications No. 550 of 2019, 584 of 2020 and 585 of 2020 seeking to be joined in as a party, investigation of Land Application No. 317 of 2018 and stay of execution of the same Land Application No. 317 of 2018. These applications were not pursued by the applicant hence were dismissed for want of prosecution by the Tribunal on 26/02/2022 and they have not been restored. He said even in Land Application No. 317 of 2018 the applicant never filed written statement of defence or entered appearance. His advocate only appeared once, and the 2nd respondent did not enter appearance. Mr. Mrema said this application shows that the applicant does not want the case to end as it has no merit. He prayed for the application to be dismissed with costs.

The 2nd respondent supported the application. He said Counsel for the 1st respondent has no duty to choose his relatives. He said he have been evicted and he no longer lives in the house. He supported the application and prayed for it to be granted with costs.

In rejoinder Mr. Mapembe reiterated the main submissions and emphasized that since the applicant was not a party to Land Application No. 317 of 2018 at the Tribunal the only remedy is the present application for revision. He said the applications pointed out by Counsel for the 1st respondent were properly abandoned because they were not the proper course to challenge the said application. He said in Land Case No. 287 of 2014 no one won and **Annexure LLA 3** collectively shows that the matter is before the Court of Appeal He said according to Rule 89 of the Court of Appeal Rules there is room to challenge the Notice of Appeal which was filed in 22/08/2017. Mr. Mapembe said the applicant is not aware of the change of Certificate of Title from No. 28561 to 147671. He said the change was not proper because the 1st respondent filed another suit in the Tribunal while knowing there was an order of the court for adjournment sine die. He said the declaration by the Tribunal that the 1st respondent is owner of the suit property means the right of the applicant has been infringed while there is a pending appeal at the Court of Appeal whose decision is yet to be delivered. He said the issue of Deed of Settlement between the 1st and 2nd respondents and the payment of TZS 60,000,000/= are all submissions from the bar and are not supported by pleadings. He said the cases cited by the 1st respondent specifically **Amina Majid**

Ambari (supra) is not relevant to the present case. He went on stating that the counterclaim was withdrawn on 05/05/2022 after the 1st respondent was successfully declared the owner of the suit property by the Tribunal. He said the application for revision was filed on 01/04/2022 and it was before the 1st respondent withdrew the counterclaim. He said as for the claim that there was no leave for extension of time in respect of the execution application, he said one cannot leave such a prayer as against the main Land Application No. 317 of 2018. But he said, if the court finds the application is improperly before the court, then it be pleased to determine this main application for revision. He reiterated his prayers for the application to be granted.

I have listened to the rival submissions by the learned Counsel for the parties. I am grateful for the background they have provided to enable the court to get a clear picture of what transpired. The main issue for consideration is whether this application is meritorious.

It is not in dispute that there was Land Case No. 237 of 2014 in this court whereas it was decided that the applicant had no case against the 1st respondent, Twiga Bancorp Limited, Kisaula Investment

Limited, and Property Masters Limited. In this case the applicant was challenging the sale of the suit property, but the court stated that the applicant (then the plaintiff) had no case before the court. Essentially the decision was meant to state that the 1st respondent and others were allowed to proceed with the sale in accordance with the law. This decision has not been appealed against. It is still valid as the there is no order to the contrary. There is no proof whatsoever that the applicant has taken any essential steps at the Court of Appeal after the filing of the Notice of Appeal. And there is not even an order of stay on the record. So, in principle, the decision in Land Case 237 of 2014 remains a valid decision in existence.

It is also not in dispute that the 1st respondent filed Land Application No 317 of 2018 at the Tribunal against the 2nd respondent for trespass in the same suit property. This application was ex-parte and in favour of the 1st respondent where he was declared the lawful owner of the suit property. The application was filed while the was a pending counterclaim at the High Court in respect of the suit property raised by the 1st respondent himself. The application was also filed while there is a pending Notice of Appeal at the Court of Appeal

challenging the decision in Land Case No. 237 of 2014. The counterclaim was withdrawn after the decision of the Tribunal and after the filing of this application for revision.

Now, with the above background was it proper for the 1st respondent to file Land Application No. 317 of 2018 at the Tribunal. In my considered view this was not proper because this has led to confusion in the proceedings in respect of the suit property. Mr. Mrema claims that the subject matter at the Tribunal was trespass, but the reliefs are similar to what was prayed for in the counterclaim. Indeed, the counterclaim was adjourned *sine die* following the filing of the Notice of Appeal to the Court of Appeal by the applicant. However, the matter at the Tribunal being in respect of the same reliefs as in the counterclaim, the proper course of action for the 1st respondent would have been for him to question the status of the intended appeal there being a Notice of Appeal which in practical terms is barring all the other actions from continuing. The applicant herein is alleging that the Notice of Appeal and the appeal are still pending at the Court of Appeal. Indeed, this is the case since there is no order by the Court of Appeal to the contrary. The 1st respondent would

have, according to Rule 89(2) of the Court of Appeal Rules, 2009, prayed to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time. In the case of **Hussein H. Kinonda vs. Edna Msangi, Misc. Land Application No.485 of 2020** it was observed by the court that:

> *"In my view, which is a rule well settled already in a number of authorities, a notice of Appeal until withdrawn by the Order of the Court remains operative"*

It is apparent therefore that the Notice of Appeal filed by the applicant on 22/8/2017 is still operative as there is no order of withdrawal or otherwise. In that respect the filing of Land Application No.317 of 2018 at the Tribunal regarding the same subject matter as that in the counterclaim and the entertainment of the said application has amounted to gross procedural irregularity on the part of the Tribunal and any application for execution thereto is also irregular.

The 1st respondent has alleged that the counterclaim has been withdrawn. But according to the background it is apparent that the

counterclaim was withdrawn after the decision of the Tribunal. This as correctly observed by Mr. Mapembe was getting another order in respect of the same subject matter from the backdoor. This is surprising because the 1st respondent had other remedies as the decision in Land Case No. 237 of 2014 was practically in their favour, and they had every right to proceed in whatever manner as there was no order for stay and a Notice of Appeal is not a bar to any execution. Therefore, the filing of another case at the Tribunal was quite irregular and a redundant exercise, and in my view, has twisted the proceedings even further. Further, I understand that the 1st respondent may and has alleged that the 2nd respondent was not party to Land Case No.237 of 2014. But for the same reasons stated above, I still find that the 1st respondent could have obtained remedies within Land Case No. 237 of 2014 without filing a fresh suit at the Tribunal to avoid confusion and unnecessary multiplicity of cases and contradicting decisions on the same subject matter. The 1st respondent therefore ought to have observed the correct procedure and forum. In that regard, the decision of the Tribunal in Land Application No. 317 of 2018 is hereby quashed and set aside.

The applicant also asked the court to reinstate the applicant in the suit property. This prayer is misplaced as this court cannot give such an order at this stage where it has not taken any evidence. In any case, the applicant was not a party to the said application and as observed above, there is still pending a Notice of Appeal on the same subject matter. This prayer is thus misconceived and it is hereby dismissed.

In the result the application is granted to the extent that the decision of the Tribunal in Land Application No. 317 of 2018 and the resultant Execution No.542 of 2020 are quashed and set aside. For avoidance of doubt, the prayer to reinstate the applicant in the suit property is hereby dismissed. The applicant shall have costs of this application.

It is so ordered.

V.L. MAKANI
JUDGE
24/03/2023