

TANZANIA / JUDGMENT

ibrahimu waziri vs gasper mrope 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT PAR ES
SALAAM LAND REVISION NO. 20 OF 2021 (Originating from Misc. Land Application No. 219 of
2020 of the Temeke District Land and Housing Tribunal) IBRAHIMU
WAZIRI..... APPLICANT VERSUS GASPER
MROPE..... RESPONDENT

RULING

Date of last Order: 7/10/2022 Date of Ruling: 4/11/2022 K. D. MHINA, J. By a chamber summons filed under section 43 (1) (b) of the Land Dispute Courts Act, Cap 216 [RE 2019] ("the LDCA") and section 95 of the Civil Procedure Code, Cap 33 [RE 2019] ("the CPC), the applicant, Ibrahim Waziri is moving this Court to revise the decision of the District Land and Housing Tribunal { "the DLHT} for Temeke in Misc. Application No 219 of 2020. The grounds for the application were expounded in the affidavit, in which Ibrahim Waziri, the applicant, swore in support of the application. Briefly, the grounds for complaints centered on two issues: - i One, while sitting as an executing court, the DLHT assumed the jurisdiction of appellate and revisionary and thereby revised the decision of the Ward Tribunal, and Two, the DLHT raised an issue sw/77<2ft/and made its findings without giving the parties the right to be heard. Before going to the merits or demerits of the application, a brief background is necessary to understand better what triggered this application. In Misc. Application no. 219 of 2020 at the DLHT for Temeke, the applicant, filed an application for execution against the decision of the Somangila Ward Tribunal. The mode applied was for the eviction and demolition of the respondent's building located at Dege Area, Kigamboni District. In its decision dated 28 April 2021, the DLHT, suo motu nullified the proceedings and quashed the Ward Tribunal's decision which was before it for execution. This application was urged by way of written submission. While the applicant appeared in person, unrepresented, the respondent was absent despite being duly served by way of publication in the Mwananchi Newspaper dated 12 April 2022. In support of the application, the applicant submitted that the role of an executing Court differs from the appellate and revision Court. The function of an executing court is limited, and its main objective is to ensure that the order given by the trial Court is enforced and carried out justly. He substantiated his submission by citing an Indian case of The Lahore Bank Limited, in Liquidation Vs. Ghulam Jilani, (1924) I.L.R Vol. V,

where it was held that: "Executing Court has no jurisdiction to criticize or go behind the decree, all that concerns it is the execution of the respective decree. And, if the decree should be annulled, that is not the function of the executing Court. Therefore, he argued that the action of the DLHT to shift its powers was illegal. Further, he submitted that the illegal decision could not be left to stand in such circumstances. To cement his position, he cited *Fortunata Edga 3 Kaungua Vs. George Hassan Kambulu*, Misc. Civil Application No. 71 of 2019 (HC- DSM-TanZlii) in which the High Court referred to an Indian Case of *V. Ramaswami Ayyagar and others Vs. T. N. V Kailasa Thevar*

(1951) AIR 189, and held that 7F can be safely concluded that the role of the executing Court is to finalize the Case, that is, to deal with the orders and decree as decided by the trial Court." Therefore, he submitted that the DLHT for Temeke erred in assuming the jurisdiction of the appellate and revisionary Court in execution proceedings. On the second issue, he briefly submitted that DLHT failed to give parties their constitutional rights to be heard after it raised an issue suo motu. Failure to give parties their rights to defend themselves infringed on their fundamental Constitutional rights. To this, he substantiated his submission with several cases, such as;

- (i) *Siri Sangiwa Vs. Abdallah Ahmed Abdallah and another*, Land Appeal No. 166/2021 (HC-Land Division) 4 (ii) *Ex D 8656 Cpt Senga s/o Idd Nyembo & 7 others Vs. R*, Criminal Appeal No 16 of 2018 (CAT) unreported, and (iii) *Abbas Sherali & another Vs. Abdul Sultan Haji Mohamed Fazalboy*, Civil Application No. 33 of 2002, and (iv) *Muro Investments Company Limited Vs. Alice Andrew Mlela*, Civil Appeal No 72 of 2015 In the cited cases, the principle is that the omission to accord the right to be heard to the parties amounted to a fundamental procedural error and occasioned a miscarriage of justice. Having gone through submission by appellant, I now turn to the issues for determining the application. The first question is whether the executing court can go beyond the execution powers and assumes the appellate and revisionary jurisdiction, nullify proceedings, and quash the decision sought to be executed. To start with, The Court of Appeal of Tanzania has defined "Execution" in *Millicom (T) N. V. Vs. James Alan Russel Bell*, Civil Revision No 3 of 2017 (TanZlii) as; 5 "the enforcement of decree or orders by the process of the Court, so as to enable the decree-holder to realize the fruits of the decree." The powers of the executing Court were elaborated in the cited case of *V. Ramaswami Ayyagar* (Supra), which was quoted by this Court (High Court) in *Fortunata Edga Kaungua* (Supra); it was observed that: " the duty of an executing Court is to give effect to the terms of the decree. It has no power to go beyond its terms. Though, it has power to interpret the decree, it cannot make a new decree for the parties under the guise of interpretation". The same principle was pronounced in the case submitted by the applicant of *The Lahore Bank, Limited, in liquidation* (Supra), that the executing Court cannot go behind the decree. If the decree should be annulled, that is not the function of the executing Court. Therefore, flowing from above, it is clear that the executing Court;

- i. Its duty is to give effect to the terms of the decree. ii. It has no power to go beyond the decree
iii. It has no jurisdiction to quash or annul the decree. 6 Based on that, it is quite clear that the chairman of the DLHT exceeded his mandate by assuming revisionary powers when he sat as an executing court and proceeded suo motu to quash the decree he was supposed to execute. Concerning the second issue, the record of the DLHT indicated that in the course of composing the Ruling in respect of execution, the chairman suo motu raised a new issue: the nonjoinder of the vendor and the purchaser in a suit for recovery of land is fatal. The chairman, without according the parties the right to be heard, proceeded to decide the matter by nullifying the proceeding and quashing the decree of the Ward Tribunal. The Court of Appeal of Tanzania has already settled the position of law in several cases. In *Kumbwandumi Ndemfoo Ndossi Vs. Mtei Bus Limited*, Civil Appeal No. 257 of 2018 (TanZlii), it was held that: "Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issue either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the 7 appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the Court. This Court has always emphasized that right to be heard is a fundamental principle of material justice which should be observed by all Courts in the administration of justice. Therefore, a denial of the right to be heard in any proceedings would vitiate the entire proceeding". [Emphasis provided] In this application, it is clear that parties were not accorded the right to be heard on the new issue raised suo motu by the DLHT. As per the cited case above, if the court raises an issue suo motu, it must ensure;
- i. New issue (s) must be placed on record and ii. Parties must be given an opportunity to be heard. Therefore, that omission is so fundamental that it occasioned the miscarriage of justice as the DLHT arrived at its findings without adhering to the principle of natural justice. In *Christian Makondoro Vs. the Inspector General of Police and another*, Civil Appeal No. 40 of 2019 (TanZlii), the Court of Appeal of 8 Tanzania strictly insisted that the right to be heard is the basic and fundamental constitutional right, and its omission nullified the trial. Therefore, the failure of the DLHT to accord the parties the right to be heard vitiated the trial and proceedings before it. Consequently;
- (i) The District Land and Housing Tribunal proceedings for Temeke in Misc. Application, no 219 of 2020, is quashed, and the resultant Ruling is set aside. (ii) The case file be remitted to the District for Temeke for the Application for Execution to be heard de-novo before another Chairman. In the final analysis, I order no costs because none of the parties was 9

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