

TANZANIA / JUDGMENT

machoke francis vs muhoni kitege

2023 tzhc 23022 28 november 2023

COURT
TZHCDECIDED
28 November 2023

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IN THE HIGH COURT OF TANZANIA MUSOMA DISTRICT REGISTRY AT MUSOMA CIVIL REVIEW NO. 01 OF 2023 (Arising from Decision of the High Court of Tanzania at Musoma in Misc. Civil Revision No. 3 of 2023, Originated from Misc Land Application No. 1090 of 2022 of the District Land and Housing Tribunal for Mara at Musoma) MACHOKE FRANCIS..... APPLICANT VERSUS MUHONI KITEGE..... RESPONDENT

RULING

25 October & 28 November, 2023 M, L KO MBA. J.: This court under Order XLII Rule and Section 95 of the Civil Procedure Code, Cap 33 is moved to review Revisional Order by this court (F. H. Mahimbali, J.) issued on 20/02/2023 (the revision order) where all proceedings, order, decrees and directives issued by Sirori Simba Ward Tribunal and District Land and Housing Tribunal for Mara were quashed for being tainted by illegalities. Applicant herein is praying for review on the following grounds;

- (i) That, there is an apparent mistake and error on the face of record that led the judge to set aside the award issued by the District Page 1 of 11 Land and Housing Tribunal for Musoma at Musoma In Misc. Application No. 1090 of 2022 for being tinted with illegalities. (ii) That there are some new Important matter and evidence that due to the reasons beyond the control of the applicant was not produced at the hearing of application No. 3 of 2023 that was brought before your Honorable Judge to quash and set aside the (sic) proceedings, order and decree and any directives issued by trial Ward Tribunal and the District Land and Housing Tribunal for Musoma at Musoma and Its execution or appellate level for being vitiated with illegality. And asking this court to;
- (a) That this honorable court be pleased to vacate its order of quashing and set aside the proceedings, order and decree or any directives issued by a trial Ward Tribunal and the District Land and Housing Tribunal for Musoma at Musoma.

- (b) That Misc. Civil Revision No. 03 of 2023 be dismissed with cost for being frivolous and abuse of court process. A brief history of the matter is like this; the applicant herein successful sued the respondent over a piece of land (whose size and value were uncertain) via Land case No. 3 of 2019 at Sirori Simba Ward Tribunal (the trial Tribunal). From record it seems the matter was decided ex-parte. While respondent then was busy in court corridors to set aside that order, Page 2 of 11 applicant too was busy in executing the decree of the trial Ward Tribunal at the District Land and Housing Tribunal. There from arises a series of application and appeal including application No. 365 of 2020, Application No. 91 of 2021, Misc Land Application No. 1090 of 2021, Application No. 189 of 2022, Application No. 230 of 2022, Land Appeal No. 77 of 2022, Misc Land Application No. 32 of 2022, Misc Land Application No. 05 of 2023, Civil Revision No. 01 of 2023 and Misc. Civil Revision No. 03 of 2023. Some of these applications are pending in courts and tribunal. In Misc. Civil Revision No. 03 of 2023 this court (Mahimbali, J.) when asked for revision by the respondent herein, he ordered and directed the matter to start afresh before a competent court of jurisdiction as per current legal regime governing administration and adjudication of the land matters in Tanzania. He further proceeded to order all pending applications and cases before this court (Misc Land Application No. 32 of 2022, Misc Land Application No. 5, Civil revision No. 1 and Land Appeal No. 77) as well as other pending matters before the DLHT connected with the former award by Sirori Simba Ward Tribunal were affected by revision order and were marked redundant. The revision order did not end there, it set aside sale of land belonging to the respondent herein in respect of all purported Page 3 of 11 execution resulted from chaotic legal processes. The purported buyer (s) were to be refunded their purchase price. The said revision order confused the applicant herein hence this application, he prayed this court to review the said order as read from reproduced grounds for review, there was some evidence which was not produced during revision, which, according to the applicant might change the position of this court and vacate its order. At the hearing of this review, applicant was represented by Mr. Majid Kangile, learned Advocate and the respondent stood solo, without any representation. Due to complexity of the matter, it was agreed hearing to be by way of written submission. I thank parties for their adherence to filing order. In his submission Mr. Majid for applicant submitted that in its order, Revision No. 3 of 2023, this honorable court resolved that the respondent was denied his fundamental right to be heard before the District Land and Housing Tribunal for Musoma at Musoma as the execution was granted while there is a pending application for stay in the same tribunal. In clarifying what happened, Mr. Majid submitted that applicant on Page 4 of 11 05/08/2022 filed execution No. 189 of 2022 and respondent filed stay via Misc Application No. 230 of 2022 on which was dismissed on 31/10/2022 for lack of merit after being entertained inter parties. It was his further submission that on 29/11/2022 respondent filed another stay of execution in the same Tribunal via application No. 332 of 2022. He said this application was abuse of the court process as there was nothing pending in that tribunal for execution and the applicant herein filed preliminary objection resisting entertainment of application No. 332 claiming it to be res judicata. Respondent further was given right to be heard in case No. 03 of 2019 contrary to what was analysed in the revision order, together with other documents Mr.

Majid submitted that respondent herein filed preliminary objection to Ward Tribunal which was overruled so he was aware of the existence of the matter in the Ward Tribunal. Mr. Majid is of the position that revision order could have given different position should the Judge who made that order be acquainted with all facts and reviewing the same is among the way of administering justice properly and pray this court under Order XLII rule 5(1) of the CPC to revise the said Page 5 of 11 decision as order to start the matter afresh will increase chaotic legal process and submitted that litigation must come to an end as justice denied is justice delayed and boost his submission by *Dominic Ishengoma vs. Geita Gold Mine*, Civil AppI No. 146/8 of 2020. Respondent as lay person in law was brief that the applicant was aggrieved by revision order in Misc Land Application No. 1090 of 2021 but to his surprise, the whole submission has nothing concerning Application 1090 of

2021. What he remembers concerning his case with the applicant is that, he lost in Land Case No. 3 of 2019 which was heard ex-parte and applied to DLHT to set aside the said ex-parte order issued by Sirori Simba Ward Tribunal via Misc. Application No. 30 of 2020 where he lost again with directive that the order may be issued with the same Tribunal. Respondent submitted that for his ignorant he filed again Application No. 361 of 2020 at DLHT applied for time to set aside ex-parte order where he lost. It was his submission that while he was in court struggling to set aside the ex-parte order, Applicant filed Application No. 906 of 2019 to execute the decree awarded to him via Land Case No. 3 of 2019 followed by the bill of Cost in Misc. Application No.1090 of 2021 which is the subject of Applicant's Application for review. Respondent further adduced that on Page 6 of 11 06/12/2021 via Application No. 91 of 2021 the Sirori Simba Ward Tribunal vacated its ex-parte order issued in Land Case No. 03 of 2019 before the execution of Misc. Application No.1090 of 2021. He lamented that chairman of DLHT ignored the decision by the Sirori Simba Ward Tribunal which vacated its decision in Case No. 3 of 2019. Respondent pointed that applicant's submission in this review did not challenge the set aside decision by the Sirori Simba Ward Tribunal in Land Case No. 03 of 2019 and Application No. 365 of 2020. He wonders how can applicant's claim still be valid without feet to stand on. He prays this court to dismiss the application with costs. I am called upon to review the revision order by this court in Misc. Civil Revision No. 3 of 2023 where proceedings, order, decrees and directives issued by Sirori Simba Ward Tribunal and District Land and Housing Tribunal were quashed for being tainted by illegalities and asked to vacate the said order. It was the submission by the applicant that the Revision Order was arrived after being resolved that respondent was denied his fundamental right, right to be heard. The fact which was not revealed during hearing of the Page 7 of 11 said revision which this court agreed is that, respondent filed stay via Misc Application No. 230 of 2022 on which was dismissed on 31/10/2022. Counsel for the applicant further submitted that respondent filed again application for stay to the same tribunal (application No. 332 of 2022) which was filed on 29/11/2022, he was silent on whether it was determined to finality apart from the fact that respondent filed Preliminary Objection complaining that it was abuse of court process as nothing was pending in the tribunal. Regardless of assertion on the legality of the application, the same was supposed

to be determined but was not or else each part decide not to disclose what was the merit. There is no proof that Application No. 332 of 2022 was determined. I find respondent was denied his right over application No. 332 of 2022. Moreover, from the order I find there were three issues which parties were probed by the court. One; the action of the DLHT to proceed with execution while there was application for stay, two; about coram of trial ward tribunal members, three; legal status of the award which was vacated by the trial tribunal. I shall focus on the second issue about coram of the members at trial ward tribunal. Applicant herein had legal Page 8 of 11 representation by an Advocate whose response to the second issue as featured in the judgement was as follows; 'I regard to the coram of membership at the trial Ward Tribunal changing, Mr. Mahemba admitted that was irregularity in the proceedings as there was additional of the trial Tribunal members un-procedurally.' The response of the respondent on the issue of members of tribunal was; 'I regard to improper coram of the members, he nodded head that it was equally improper inviting other strange members in the midst of the proceedings and proceed with the hearing unlawfully. In any way their participation led to some proceedings before the trial tribunal which obviously influenced the decision of it.' In the case of Seif Khamis Seif vs Nassormohamed Ibrahim (Civil Appeal 99 of 2021) [2022] TZCA 372 (17 June 2022), the Court of Appeal discussed the importance of fully participation of the members of the tribunal during the hearing of the case. The Court held that; 'It is evident that neither of the assessors participated throughout the trial of the petition. Mr. Mkanga and Mr. Hassan who participated in the determination of the rights of the parties had the disadvantage of not having heard and seen all the witnesses for both sides. They could not therefore Page 9 of 11 effectively give fair and just opinions which would enable the Tribunal to justly determine the petition. See also the cases of John Masweta vs. General Manager MIC (T) Ltd, Civil Appeal No. 113 of 2015 and Mariam Ally Ponda vs Kherry Kissinger Hassan [1983] TLR 2. Although it was the position of the applicant's counsel in Misc. Revision No. 3 of 2023 that the irregularity is not fatal since those additional members were not participated in decision making, but I prefer to join hand with the respondent views that in any way, the participation of the additional members led to some proceedings before the trial tribunal which obviously influenced the decision of it. Section 11 of the Land Disputes Courts Act and section 4 of the Ward Tribunal Act provide for the composition of the Ward Tribunal to consist of not less than four nor more than 8 members. That means the coram of the tribunal can consist of 4, 5, 6, 7 or 8 members when hearing of the case. Although not stated, but I am of the views that the gist of the said sections is that the specific said numbers of members should sit to determine a case at fully. That is to say, if they sit 5 members, they have to be the said 5 members to the finality of a particular case they determine. Page 10 of 11 I am concurred with the respondent contention that though they were not involved at the decision making, but their participation in the hearing of the case may have influence in the final decision at some point. Contrary to the applicant's counsel position, not only the effect of the participation of additional members should directly seen in the decision making, their involvement in hearing, examining the witnesses may have led to different standpoints for those who participated in making decision. Therefore, in

anyhow, their involvement is fatal. And it is my views that, the said irregularity alone is sufficiently to render the who procedure and even the subsequent one, a nullity. I find the trial tribunal proceedings was tainted by irregularity as concede by both parties. I find no reasons to depart from the decision of this court in Misc. Civil Revision No. 3 of 2023. This application is devoid of merit and I dismiss it with costs. It is so order 0 M. L. Komba a JUDGE 8th November, 2023 Page 11 of 11

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