

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF
MANYARA AT BABATI LAND REVISION NO. 8 OF 2023 (Originating from Land Application No. 30
of 2018 & Misc. Land Application No. 81 of 2023 District Land and Housing Tribunal for Babati)
MATHAYO MUSSA.....I st APPLICANT FAUSTINI
MUSSA..... 2nd APPLICANT PETER
MUSSA.....3rd APPLICANT VERSUS MICHAEL GILAI SI
SIMON.....1st RESPONDENT ISAYA GILAI SI
SIMON.....2nd RESPONDENT PAULO GILAI SI
SIMON..... 3rd RESPONDENT ESAU GILAI SI
SIMON..... 4th RESPONDENT

JUDGMENT

27th June & 16th July, 2024 KAMUZORA, J Before the District Land and Housing Tribunal for Babati (hereinafter referred to as the trial tribunal), the Respondents sued the Applicants for recovery of piece of land measuring about 3.06 acres situated at Dabil village, Babati district (hereinafter referred to as the suit land). It is on Page 1 of 12 i record that the matter proceeded ex parte against the Applicants and the trial tribunal decided in favour of the Respondents as they were declared lawfully owners of the suit land. Later, the Respondents filed Misc. Land Application No. 81 of 2023 in which they sought to execute the trial tribunal's decision which declared them lawful owners of the suit land. Like the main application, the application for execution was also heard ex- parte. Subsequently, the Applicants were ordered to vacate the suit land. Upon receiving execution order, the Applicants preferred to this court an application for revision seeking this court's indulgency by invoking its revisional powers to revise the two decisions of the trial tribunal. This court was moved under section 41 (1) and 43(1) (b) of the Land Disputes Courts Act [CAP 216 RE 2019], (hereinafter referred to as the LDCA) and the application was supported by the joint affidavit of the Applicants. Only the 1st Respondent filed counter affidavit in contesting the application. As a matter of legal representation, Mr. John Lundu, learned counsel appeared for the Applicants while Mr. Paschal Peter, learned counsel appeared for the Respondents. The counsel for the parties opted to argue the application by way of written submission. In the course of composing the ruling, this court noted two legal issues on the time limitation in filing revision and remedy available where Page 2 of 12 the suit is heard ex-parte. For purpose of according parties their right to be heard, the counsel for the parties were asked to

address this court on the above legal issues. On the remedy available when the case is heard ex-parte, Mr. Lundu submitted that under Regulation 11 (2) of the Land Disputes Court (the District Land and Housing Tribunal) Regulation, GN No. 174 of 2003 (to be referred as the Regulations), a party can apply to set aside ex-parte decision. He however insisted that the Applicant preferred revision application under section 43 (l)(b) of the LDCA for there are errors material to the case. That, the proceedings and judgment of the trial tribunal were tainted with illegalities or irregularities which could only be rectified by way of revision. He explained that while the judgment shows that the disputed land is 3 acres, the land described at paragraph 2 of the application is different and in its final decision the trial tribunal came up with 11 acres which is not reflected in the proceedings at page 23 of the proceedings. He was of the view that since the award differs with the claim, such error is not appealable rather subject to revision. He added that such error was also committed in execution because they handled 11 acres. To him, the only way to rectify such error is by way of revision. On the issue of time limitation, Mr. Lundu submitted that the Applicants became aware of the case on 19/09/2023 when they saw the Page 3 of 12 I Respondents with the Village Executive Officer (VEO) and Ward Executive Officer (WEO) in their farm. He referred Section 4 of the Law of Limitation Act [Cap 89 R.E 2019] (hereinafter to be referred as the LLA) and argued that, the cause of action accrues from the date when the party becomes aware of the matter. To him, the right of action in the matter at hand accrued on 19/09/2023 when the Respondents were seen in the Applicants' farm handing over of the same. Mr. Lundu further added that, the time to file revision under the LDCA is not specified thus, the LLA becomes relevant and at part three of the Schedule, item 21, the time limitation is 60 days. He explained that after the Applicants became aware of the matter on 19/09/2023, they filed this application on 27/10/2023 which is within the 60 days' time prescribed by the law. In reply, Mr. Paschal Peter submitted that where the case heard ex- parte, the same can be challenged by applying to set aside ex-parte judgment to the court that made the ex-parte decision. He referred Regulation 11 (2) of the Regulations and insisted that such provision does not give exception. To him, the remedy available for a case heard ex- parte is to apply to set aside ex-parte decision. He also referred the decision of this court at Arusha in Bo,o Meta Moro and 5 others Vs Thadeus Kwanga, Misc Land Application 174 of 2022 (unreported) in which the above regulation was interpreted. He insisted that a party to Page 4 of 12 the case cannot appeal against ex-parte decision or order before exhausting the available remedy before the lower court thus, the claim that there were issues to be addressed on revision is baseless. On the second point regarding time limitation, Mr. Peter submitted that the application for revision is also time barred. He explained that the provision referred by Mr. Lundu limits revision to 60 days but as per the court's record, the ex-parte judgment was certified on 18/05/2023 and this application was lodged before this court on 27/10/2023 after the lapse 5 months and 9 days. He added that the argument that the Applicants discovered the matter on 19/09/2023 is baseless for the same is not featured in the court's records but raised here in court thus, it needs evidence. He maintained that the application was filed out of time. Mr. Peter further submitted that, Regulation 24 of the Regulations is applicable where a party intends to challenge execution order. He therefore did not agree with the argument that execution order is not appealable. He added that section 74 (l)(i) of the Civil Procedure Code, [Cap 33 R.E] (the CPC) also include execution order as appealable

order. He maintained that execution order cannot be challenged by way of revision rather by way of appeal. In rejoinder Mr. Lundu added that Regulation 24 of the Regulations is inapplicable because it refers the right to appeal and it does not refer Page 5 of 12 execution order. That, section 74 (1) of the CPC, does not provide for the right to appeal against the execution order. He therefore prayed for this court to accept that revision was a proper way to challenge the execution. He invited this court to consider the affidavit of the Applicants at paragraph 5 which reflects the time when the Applicants became aware of the matter. I have considered the records and submissions from counsel for the parties. I agree with Mr, Lundu that under section 43 (1)(b) of the LDCA this court is vested with jurisdiction to revise the proceedings where it is satisfied that there are errors material to the case. However, such powers must be exercised in considering the principle that revision cannot be an alternative remedy where there is other specific remedy available to the parties. In the matter at hand, both the main application and the execution application were heard ex-parte thus, the first remedy available which could have also assisted in determining the so-called error was by applying to set aside the ex-parte decision subject to Regulation 11 (2) of the Regulations. That would have paved the way for the matter to be heard inter-parties and all areas of controversial resolved. Thus, whether there were errors material to the record, the counsel was bound to show if those error could not be rectified if the case is heard inter-parties. The claimed error was on size of the suit land, a fact based on evidence which Page 6 of 12 could be resolved upon hearing the parties. In the case cited by Mr. Peter, B0,0 META Moro and 5 others (supra), this court was faced by akin situation under which the application for revision was preferred against ex-parte decision. The objections were raised that the application was in contravention of Regulation 24 of the Regulations and that the same was time barred. This court being guided by the Court of Appeal decision in the case Dangote Industries Ltd Tanzania Vs. Warnercom (T) Limited, Civil Appeal No. 13 of 2021, Court of Appeal of Tanzania at Dar es Salaam (unreported) held at page 12 that; It is my considered opinion that the proper way forward for the Applicants was/are not to appeal or seek revision but to apply to set aside such an ex-parte order as provided under Regulation 11 (2) of the Land Regulations. This will enable them to be heard inter-partes so that their rights in respect of the suit land can be realized." The Court of Appeal's decision in Dangote (supra) above reads: - "It would appear to us to be the principle in the said authorities that, 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 Page 7 of 12 the lower. He has to exhaust all available remedies to the lower court first." Being also guided by the above decision, it is my settled opinion revision application was wrongly brought as an alternative remedy for the matter which other remedy was available. On the argument by Mr. Lundu that execution cannot be challenged by appeal rather by way of revision, I agree with Mr. Peter that under regulation 24 of the Regulations and decision of this court in 80,0 META Moro and 5 others (supra), execution order can be challenged by way of appeal. See also the decisions of this court in the cases of Enock Marwa Chacha Vs. Yahaya Joseph Giriama Land Appeal No. 18 of 2021, Loid Mbogela & Another Vs. Justine Hamis Fokolo Misc. Land Application No. 450 of 2021 and Khamis

Fungameza Vs. Mwanaharusi M. Maganga Land Appeal No. 49 of 2023 (all unreported). In the case of Transport Equipment Ltd Vs. Devram P. Valambhia [1995] T.L.R. 161 the Court of Appeal expounded on circumstances under which the application for revision can be preferred.

- i. The court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court; Page 8 of 12 ii. Except under exceptional circumstances, a party to proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court; iii. A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave; iv. A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process [Emphasis added Being guided by the above decision revision is not alternative remedy where a right to appeal is available. It is only where appeal processes are blocked when a party can move the court by way of revision. Since Regulation 24 of the Regulations prescribes appeal as remedy for the execution order, it was wrong for the Applicants to move this court by way of revision. I therefore maintain that, before resorting to a revision application as an alternative remedy, a party was bound to appeal against the execution order of the trial tribunal. But in considering that the order itself was ex-parte the party was to first apply to set aside the order. Regarding the time limitation, it is clear that the decision in the main application was delivered on 29/11/2022 while the instant application was filed on 27/10/2023 after expiry of about 11 months. I agree with both Page 9 of 12 counsel that for purpose of time limitation, the applicable law is the LLA. Under part III, Item 21 to the schedule to the LLA, an application like the present one has to be filed within 60 days. There is no doubt therefore that the current application for revision to challenge the decision in Application No. was filed out of time. On the argument by Mr. Lundu that time limitation has to be counted from the time the Applicants became aware, such situation is not covered under the provision of Regulation 11 (2) of the Regulations which governs application to set aside ex-parte judgment. The above provision is clear that where a party is not satisfied with the decision made ex-parte, the remedy is to apply within 30 days to set aside such decision. The law allows an appeal where such application is denied. Unlike in civil suit where the action accrues upon the party being aware of the dispute, in an ex-parte decision, it is assumed that the party was made aware and opted to waive his right to defence. It is therefore upon that party to justify before the court through application that he was not aware of the proceedings. That cannot take the same course as when right of action accrues. I therefore find the argument by Mr. Lundu baseless and maintain that the Applicants were bound to apply to set aside the ex-parte decision and order and if the time to do so had lapsed, the proper way was to apply for extension of time and not to come by way of revision. Page 10 of 12 On the argument based on section 74 (1) of the CPC that it does not provide for the right to appeal against the execution order, this court finds that the said provision is irrelevant to the matter at hand. In my view, the CPC is only applicable to matters not covered under the laws governing proceedings in land disputes. See, section 5 of the CPC which categorically states that its applicability will not limit other

procedures specifically stated under any other laws. The procedures for execution and remedy therefrom are without hesitation well covered under Part V of the Regulations which covers for procedures in execution of decree and orders, specifically Regulation 24. Since the above provision gives right to appeal, that should be considered the first remedy before embarking into any other remedy. In the circumstance, I find this revision incompetent and proceed to dismiss it. Parties are advised to file application to set aside ex-parte decision and order, subject to the law of limitation. Since the points of law resulting to this decision were raised by this court suo motu, no order for costs is made. DATED at BABATI this 16th Day of July, 2024 D.C. K ZORA JUDGE Page 12 of 12

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