

TANZANIA / JUDGMENT

Land Revision No

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TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA ARUSHA SUB REGISTRY AT
ARUSHA LAND REVISION NO. 25859 OF 2024 (C/F Misc. Application No. 109 of 2023 in the
District Land and Housing Tribunal for Arusha at Arusha) OLAIS
OSUJAKI..... APPLICANT VERSUS WITNESS
OSUJAKI..... RESPONDENT

RULING

10/06/2024 & 22/07/2024 NDUMBARO, J I am called upon to examine and revise the supplementary order issued by the District Land and Housing Tribunal dated 14/02/2024 for purposes of satisfying its correctness and propriety. This court is moved by the provisions of section 43 (1) (a) (b) and (2) of the Land Disputes Court Act Cap 216 R.E 2019 and section 79 (1) (b) and (c) of the Civil Procedure Code [Cap 33 R.E 2019]. Principally, the applicant filed a suit at Sokoni II Ward Tribunal restraining the respondent from using a road that crosses in front of his house and that she should use the road that was extracted for her to pass. On the other hand, the respondent maintained that the road which i she is restricted by the applicant to use has been in use for a very long time even before the death of her mother who was the original owner. She also contended that the applicant is her son as he was born by her late sister who was in occupation of the house used by the applicant now, and that during her lifetime they have all be using the said road without any problem. After hearing of the parties evidence together with their witnesses, the trial tribunal was of the finding that the applicant failed to prove his case as the evidence tendered sufficiently established that the road that the applicant restricts the respondent to use has been in use for a long time even before the death of the applicant's grandmother who actually is said to be the original owner of the premise. It was further stated that even the allegation of the applicant that he has extracted another road for the respondent to use was unfounded as his own witnesses testified on the contrary. Therefore, it was ordered that the respondent had all the rights to use the road that is in dispute, in alternative, the applicant was to extract a new road for the respondent to pass. Dissatisfied with the decision of the trial tribunal the applicant filed his appeal to the District Land and Housing Tribunal for Arusha at Arusha. Unfortunately, he was the losing party as the tribunal up held the findings of the trial tribunal. Still aggrieved by that decision the applicant filed an appeal to this court which also upheld the decisions of the tribunals below. As a result, the respondent herein filed an execution to the district land and housing tribunal where a court broker was appointed to execute the order

of Sokoni II Ward Tribunal. Nevertheless, on 31st January 2024 the appointed Court Broker wrote a to the District Land and Housing Tribunal informing the tribunal that execution could not be carried on as there were structures found in front of the gate which needed to be demolished for the road to be opened. The report of the Court broker also stated that the applicant had shown them another road measured 4 meters which he was ready to give to the respondent. Following this report, the tribunal issued a supplementary order. In this order, the tribunal directed execution to proceed and execution should include also demolition of the structures found in the said road. It is this order which has moved the applicant to file this application challenging its correctness and propriety. In his sworn affidavit, the applicant stated that, the said order intends to demolish his properties including his house. He went further to state that he has already created another road which the respondent can use to reach to her home. According to him, the supplementary order cannot be executed and if the supplementary order is left unrevised the applicant will suffer irreparable loss. In opposing this application, the respondent filed her counter affidavit. She strongly opposed the applicant's argument that his residential house will be demolished. The respondent averred that, the residential house in which the applicant is residing with his family is not near to where the road is to be created. The respondent also stated that the execution order of the tribunal was in compliance with the decision of the Ward Tribunal. The respondent also insisted that there is no road created by the applicant for her to access her house, she also maintained that it is not true that the order of the Ward Tribunal is not executable and that she is the one who stands to suffer more than the applicant as she has failed to access her house through the main gate since 2015. When the matter was called on for hearing, the applicant was represented by Mr. Kennedy Mapima, the respondent on the other hand was represented by the learned counsel Mr. John Mushi. The application was argued orally as follows; The applicant's counsel submitted that the order of the tribunal is not in conformity with the decree. Mr. Mapima went on expounding that, the decision of the Ward Tribunal directed for the opening of the road or in alternative to create another road for the respondent to pass, and there is nowhere the decree ordered for demolition of the structures. The learned counsel further stated that there was no need for the tribunal to issue a supplementary order as the applicant had already complied with the Ward Tribunal's order by creating a road to the respondent. Responding to the applicant's submission, Mr. Mushi argued that the applicant's complain on the demolition has already been dealt with by both the District Land and Housing Tribunal as the 1st appellate tribunal and the High Court as the 2nd appellate tribunal where his appeals were all dismissed for want of merit. The counsel went further to state that, the application at hand reiterates what has already been dealt with by the tribunal and this court where his complaint on demolition of his properties was completely disregarded. In fact, it was his contention that the applicant was wrong to challenge the same thing in execution. Mr. Mushi went further to state that the issue of demolition was dealt with and it was decided that the ward tribunal's decision was 5 executable and if it involve demolition of the house of the applicant it will be at his own risk because he did so knowing that the matter was still before the court. The counsel also added that, if the applicant was dissatisfied with the decision of this court, the best option was for him to challenge it at the apex Court, but since he has not done so, the decision of this court is still valid and the applicant cannot come again in this court by way of revision. As to the allegation that the

applicant has already created another road, the learned counsel submitted that the same is not correct as there is any proof to that, he therefore maintained that the supplementary order was correct as whatever is attached to the road should be removed including structures. Mr. Mushi thus maintained that the supplementary order was correct and that it is the respondent in this case who is suffering more than the applicant. In his short rejoinder, Mr. Mapima submitted that the applicant herein challenges the execution order and not the decision of the Ward Tribunal. He further stated that what the applicant complains is that the supplementary order differs from the decree of the ward tribunal and therefore it cannot be executed. According to him the tribunal gave a demolition order which was not in the Ward Tribunal. The learned counsel also stated that the tribunal also failed to show the extent of the demolition. Having summarized the parties' submissions, it is now time for this court to determine whether there is any irregularity in the supplementary order dated 14/02/2024. As a brief background giving rise to this application has already been given above, for this court to be in a better position to decide on the alleged irregularity in the supplementary order, I find it apposite to have the said order reproduced in extenso hereunder; "AMRI YA NYONGEZA YA KUFUNGUA BARABARA KWA KUBOMOA MAJENGO AU NA VITU VYOTE VILIVYOMO NDANI YA ENEO LA BARABARA HIYO. KWA KUWA Baraza h iii kwa amri ya tarehe 24 Januari 2024 lilikuamuru kutengeneza/kufungua barabara i/iyopo katika eneo na mipaka kama i/ivyoe/ezwa kwenye amri hiyo; KWA KUWA kwa mujibu wa taarifa yako yenye Kumbu. Na. UFM/HM/NR/AR/012/2023 ya tarehe 31 Januari, 2024 Amri hiyo haikuweza kutekelezeka kwa sababu ya uwepo kwenye eneo husika banda ia ngombe na nyumba ya udongo yenye vyumba vitano na sehemu ya nyumba ya block vyote vikiwa n i maii za mshinwa tuzo; NA KWA KUWA shauri hiii Mishawahi kupe/ekwa katika Mahakama Kuu ya Tanzania - Masja/a ya Arusha kupitia rufaa Na. 11/2023 ambapo, pamoja na mambo mengine, mrufani katika rufaa hiyo (mshindwa tuzo kwenye baraza hiii) aiiiaiamikia kutotekelezeka kwa uamuzi wa baraza ia kata ia Sokoni II na kwamba utekelezaji huo ungehusisha ubomoaji wa nyumba yake ya makazi. Na KWA KUWA PIA kwenye hukumu yake iiyotoiwa tarehe 17 Oktoba 2023 Mahakama Kuu ya Tanzania haikutiiia maanani maiaiamiko hayo ya mshindwa tuzo na hivyo rufaa yake iitupiiiwa mabii kwa gharama. HIVYO BASI unaamriwa kufungua barabara hiyo kwa kubomoa kiiia kitu, ikiwemo majengo, kiiichomo ndani ya eneo ia barabara kwa mipaka iiyoainishwa kwenye amri ya awaii ya tarehe 24 Januari 2024 ambayo itasomwa pamoja na amri h ii na kuiacha barabara hiyo ikiwa wazi;" As already started above, the above supplementary order was issued by the tribunal following of the report of the court broker who informed the of his failure to execute the order of the tribunal dated 24 January 2024. For purposes of this ruling, I find it also suitable to have the said order reproduced hereunder; 'AMRI YA KUTENGENEZA BARABARA 8 KWA KUWA Baraza hiii lilielekeza kwa amri ya tarehe 21/11/2023 kuwa Mshnda tuzo ateleze mwenyewe uamuzi wa Baraza la Kata la Sokoni II, kwa kutengeneza barabara nje ya tango (gate) la kuingiia kwake ambayo itanyookea kwa mdaiwa (Magharibi mwa boma la mdai) ndaniya siku 14. NA KWA KUWA amri hiyo haikuteke/ezwa na muda a/iopewa mshindwa tuzo kutengeneza barabara hiyo umekwisha. UNAAMRIWA kutengeneza barabara nje ya lango (gate) la kuingia kwa mshinda tuzo ambayo itanyookea kwa mshinda tuzo magharibi mwa Boma la mshindwa tuzo). Barabara hiyo itengenezwe katika mipaka ifuatayo; Kaskazini - Witness Osujaki Kusini- Olais Osujaki Mashariki - Barabara Magharibi - Barabara Kuu ya Idara ya Maji" Lastly, this court also

had time to go through the judgment of the Sokoni II Ward Tribunal, and again, for easy of reference I which to have part of the holding reproduced hereunder; "Kutokana na ushahidi huo wa upande was Mdaiwa Witness Osukaj, Baraza iinaamua na kutamka wazi kuwa barabara Mdai Olais Osujaki anayodai kuwa 9 mdaiwa asipite ni haiiii kabisa mdaiwa Witness Osujaki kuipita kwani ilifunguliwa hapo zamani na mama yake mdaiwa ambaye pia n i bibi yake na mdai. Vinginevyo mdai anashauriwa amfungulie mdaiwa Witness Osujaki barabara nje ya iango (gate) ia kuingia kwake ambayo itanyookea kwa mdaiwa (Magharibi mwa Boma ia mdai) (emphasize is mine)." Back to the application at hand, it is the complaint of the applicant that the supplementary order herein be revised as it intends to demolish his properties and that he has already created another road for the respondent herein. With due respect, I find the applicant's complaints misplaced and inappropriate. I am saying so for reasons to follow; the records show that before this revision to challenge execution has been filed, the applicant herein on several occasions has tried to challenge the decision of the Ward tribunal stating that the order is not executable as it will involve demolition of his properties. In the first place, the applicant filed his appeal to the district land and housing tribunal and among others, the applicant complained that the trial tribunal issued an order which was not capable of being executed. The tribunal dismissed the applicants appeal and upheld the decision of the trial tribunal. On the complaint of demolition of his properties, the tribunal was of the 10 finding that the applicant constructed the said properties at his own risk and that, cannot stop the execution process. More so, I have also perused the records of the 2nd appeal filed by the applicant in this court, for a second time, the applicant also complained that the order of the trial tribunal was not executable. Just like in the 1st appellate court, the 2nd appellate court also dismissed the applicant's appeal and upheld the decision of the trial tribunal. That being the case, I am now of the view that since this complaint has already been discussed by this court through land appeal No. 11 of 2023, the applicant cannot come again in this court complaining over the same thing in execution by way of revision. It suffices to say that this court is functus official. It should also be noted that the decision of this court which dismissed the applicant's appeal is still valid, and since this court up held the decision of the trial tribunal then it is the trial tribunal's decision which still stands. I have also observed the complaint by the applicant that the tribunal ought not to have issued the supplementary order for the reason that he had already created a road to the respondent. Again, it is the finding of this court that this complaint had already been dealt with in the appeals filed by the applicant against the decision of the trial ii tribunal and it is unfortunate that the complaint was also dismissed for lack of sufficient evidence. It is therefore my firm view that the applicant cannot again bring the same complaint at the stage of execution, if at all the applicant was dissatisfied with the finding of this court he ought to have challenged it by way of an appeal to the Court of Appeal. This court cannot therefore give an order or direct otherwise over a matter which has already been determined by this court. Another complaint raised by the applicant is that the supplementary order is different from the decree or order of the trial tribunal. I have had time to go through the trial tribunal's judgment and its order, the execution order and the supplementary order, it is unlucky that I could not see the difference in what the trial tribunal ordered and what was ordered in execution. It should be noted that, the trial tribunal in its judgment, gave an order for the applicant to create another road in front of the

respondent's gate for her to pass which shall be on the northern side of the applicant's house. If one reads carefully the execution order dated 24th January 2024, it actually reflected what the trial tribunal ordered. Equally, it is the finding of this court that even the supplementary order did not alter the decree of the trial tribunal as the same was 12 meant to give additional orders to the previous order following what was observed by the court broker in the locus in quo. Since the order to be executed is for the applicant to create a road for the respondent to pass and as the issue of demolition of the properties found in the said road has already been dealt with by this court, it is my firm finding that the tribunal under the principle of whatever is in the land cannot be separated from that land (quicquid plantatur solo solo cedit), it was justified and correct to issue the supplementary order. In the event, this court finds no irregularity in the supplementary order. Consequently, the application is dismissed for want of merit, execution at the DLHT to proceed from where it ended. Each party to bear its own costs. It is so ordered. D. D. NDUMBARO JUDGE 22/ 07/2024 ORDER: Parties and their respective counsel shall appear before the

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