

TANZANIA / JUDGMENT

Walangi Ginaku Kamuzora J

COURT
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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 2822 OF 2024 (Arising from Land Application No. 6 of
2024 before the District Land and Housing Tribunal of Babati at Babati) WALANGI
GINAKU..... APPLICANT VERSUS GIDANYAHSI
GIDAGWANGU..... RESPONDENT

RULING

25th June & 05th July, 2024 KAMUZORA, J This is an application for revision brought under the provision of section 41(1) and 43(1)(a), (b) and (2) of the Land Disputes Court Act [Cap 216 RE 2019]. The Applicant herein prayed for this court to call for records of the District Land and Housing Tribunal and satisfy itself as to the correctness, legality, regularity and propriety of the ruling and order made on 31/01/2024 in Miscellaneous Land Application No 6 of 2024. The brief background of this case as can be gathered from the record is that, the Respondent successful sued the Applicant before the District Land and Housing Tribunal (herein to be referred as the trial tribunal) in Land Application No. 73 of 2020. After the appeal to the High Page 1 of 14 court vide Land Appeal No 143 of 2022 which was also to the Respondent's favour, the Applicant lodged a notice of appeal to the court of appeal. He also sought and was granted leave by this court to appeal to the Court of appeal vide Mise. Land Application No. 67 of 2023. The Applicant further lodged a notice of motion before the court of appeal seeking for an order staying the execution of the High court decision pending determination of an appeal before the court of appeal. While the Applicant was busy struggling to challenge the decision, the Respondent initiated the execution proceedings before the trial tribunal vide Mise. Land Application 234 of 2022 which was however dismissed for non-appearance. He later initiated new execution proceedings vide Mise. Land Application No 9 of 2023 but the same was never determined. The trial tribunal upon receiving a concern regarding the existence of an appeal before the court of appeal stopped the execution. The modality used is a matter of controversial in this application as it will be demonstrated later. After a long silence, the Respondent initiated new execution proceedings vide Mise. Land Application No. 6 of 2024 and this time, he was successfully granted execution order by the trial tribunal. The said order is the subject of this revision. Page 2 of 14 The Applicant in this application is faulting the order of the trial tribunal on account that Mise. Land Application No 6 of 2024 was res judicata for Mise. Land Application No 234 of 2022 and Mise. Land Application No. 9 of 2023 were filed over the same matter. That, the trial tribunal disregarded the Applicant's

objection against the execution That, the application for execution was determined despite existence of notice of appeal to the court of appeal and notice of motion to the court of appeal seeking stay of execution. He also claimed that the order issued in Mise. Land Application No. 6 of 2024 had no description of the suit land subject to execution but that fact was not argued in the submission in support of application thus it will not be considered. When the matter was called for hearing, Mr. Festo Jackson appeared for the Applicant while Mr. Philemon Maige appeared for the Respondent. Counsel for the parties opted to argue the application by way of written submissions and they both complied to the submissions schedule. In his submission in support of the application the counsel for the Applicant pointed out that Mise. Land Application No 6 of 2024 was res judicata due to the existence of Mise. Land Application No 234 of 2022 and Mise. Land Application No 9 of 2023 which were filed over the same matter. He argued that since Mise. Land Application No 234 of 2022 was Page 3 of 14 dismissed for non-appearance the remedy available was to set aside dismissal order and not to refile a fresh application as required by Regulation 11 (2) of the Land Disputes Court (the district land and housing tribunal) Regulations, GN No. 174 of 2003 and Order IX Rule 6 (1) of the Civil Procedure Code Cap 33 R.E. 2019. He also referred the decision in Golden Palm Limited Vs. Cosmas Properties Limited, Civil Application No. 561 of 2019 CAT (unreported) and Davis Jonathan Mkony Vs. Equity Bank Tanzania Limited and 2 others, Land Case No. 123 of 2021, HC (unreported). The counsel for the Applicant further submitted that Mise. Land Application No 6 of 2024 was determined without considering the objections raised by the Applicant against such execution. He explained that when the Applicant was served with the application for execution, he raised four points of preliminary objection. The trial tribunal ignored the objections and proceeded to determine the application. He was of the view that the trial tribunal was bound to determine the objections raised before embarking into the determination of the application for execution. The counsel for the Applicant also submitted that, application for execution was improperly determined due to the existence of initiated appeal process to the court of appeal. That, the trial tribunal was notified of the existence of appeal process to the Court of Appeal for the purpose Page 4 of 14 of challenging the decision passed by the trial tribunal and the high court and an application for stay of execution which is now registered as Civil Application No 676/02 of 2023. That, such application was adjourned to give chance to the Respondent to file counter affidavit, hence yet to be determined. He was of the view that, since there was appeal and application process, the application for execution should not have been entertained for it intended to defeat the initiated process. He referred to the Court of Appeal decision in CRDB Bank PLC Vs. Finn W. Perterson and 3 others, Civil Application No. 367/17 of 2017. He insisted that initiating execution while there is an appeal in progress intended to interfere and frustrate dispensation of justice in an application for stay of execution and appeal which are still pending before the court of appeal. He also referred to the decision of the High Court in International Commercial Bank (T) Limited Vs. Yusufu Mulla, Commercial Case No. 108 of 2018 (unreported) and prayed for the court to grant the application with costs. The reply submission by the counsel for the Respondent shows that they are aware that the Applicant sought for leave to appeal to the court of appeal. He however argued that while seeking for leave to appeal, the Applicant did not make any formal application for stay of execution as required under Order XXI Rule 27 of CPC and Regulation 24 and 25 (1) of Page 5 of 14 the Regulations

which requires the judgment debtor to apply for stay of execution. Reference was made to the case of Stanslaus Nganyagwa Vs Seif Hamoud and another, Civil Application No. 110/12 of 2017, CAT (unreported). He insisted that, an appeal does not operate as stay of execution. That since the Applicant did not apply for stay of execution before the trial tribunal, it was correct for it to proceed with execution. That since the same was granted, this application for revision is overtaken by event thus, the same be dismissed with costs. In rejoinder, the counsel for the Applicant's counsel reiterated the submission in chief and added that, the argument that the Applicant did not make formal application for execution is wrong for there is clear records showing that the Applicant filed application for execution which was registered as Civil Application No. 676/02 of 2023. That, the Respondent was served with a copy of application thus, aware of its existence. That, since the application is still pending for determination, it was not proper for the trial tribunal to determine the execution application. On the case of Stanslaus Nganyagwa (supra) cited by the Respondent, the counsel for the Applicant submitted that the same is distinguishable to the matter at hand for it referred to the matter where Page 6 of 14 the Applicant applied for stay of execution without attaching the notice of appeal which is not the issue in this application. I have considered the pleadings and the submissions by the counsel for both parties and indeed, three issues need determination by this court;

1. Whether Mise. Land Application No 6 of 2024 was res judicata,
2. Whether the trial tribunal disregarded the Applicant's objection,
3. Whether, it was proper for the application for execution be determined despite existence of notice of appeal to the court of appeal and notice of motion to the court of appeal seeking stay of execution. Starting with the first issue on whether Mise. Land Application No 6 of 2024 was res judicata, this court finds that the principle on resjudicata was misinterpreted by the counsel for the Applicant. A matter becomes res-judicata if it is determined to its finality on merit. The Applicant agreed that the two previous applications were never determined on merit. While Mise. Land Application No 234 of 2022 was dismissed for non-appearance, Mise. Land Application No. 9 of 2023 seems to have been struck out and the same time adjourned sine die. The Order of the trial tribunal read; "Shauriinaondoiewa (sine die)" When asked to address the court on their understanding of the above order, both counsel for the parties considered the above order as Page 7 of 14 adjournment sine die. But, in my view, the wording used creates confusion as to whether Mise. Land Application No. 9 of 2023 was struck out or adjourned by the trial tribunal. However, be as it may be, still the order made in Mise. Land Application No. 9 of 2023 do not create a notion that it was determined on merit thus, it cannot be said that Mise. Land Application No 6 of 2024 was res judicata referring to orders issued in the above two applications which were basically filed on the same subject matter but was never determined on merit. Although the Respondent claimed that the execution has already taken place, the proceedings in Mise. Land Application No. 6 of 2024 do not reflect such fact. The record shows that, after the tribunal chairman issued the execution order, he appointed the court broker for the purpose of executing the order. However, there is no execution report from the court broker notifying

the tribunal on the compliance of its order. Although this revision was basically intended to address the legality of the order in Mise. Land Application No. 6 of 2024, this court encountered other inconsistencies in other previous proceedings hence, called upon the counsel for the parties to address this court on the correctness, legality regularity or propriety of the proceedings and orders in the previous two applications; Mise. Land Application No 234 of 2022 and Mise. Land Application No 9 of 2023. This was so necessary for the Page 8 of 14 purpose of putting the records clear in considering that this court is bound to correct the records by way of revision. For that reason, I invoked revisionary powers of this court under section 43 of the Land Disputes Courts Act, Cap 216 RE 2019 in which the records in the above two applications were also called and put under scrutiny. In his submission, Mr. Festo Jackson agreed that the trial tribunal was wrong to dismiss Mise. Land Application No. 234 of 2022 without considering the requirement of Regulation 23 of the Land Disputes Courts (the District Land and Housing Tribunals) Regulations, GN No. 174 of

2003. That, the provision gives powers for the chairman to order execution where the judgment debtor was unable to comply to the decree and not to dismiss the application. He urged this court to order for restoration of Mise. Land Application No. 234 of 2022 which was wrongly dismissed. The counsel for the Applicant also submitted that, since Mise. Land Application No 9 of 2023 was referring to the same matter, it cannot stand upon restoration of Mise. Land Application No. 234 of 2022. That, similarly, Mise. Land Application No. 6 of 2024 cannot stand for being incompetent for it referred to the same matter that was wrongly dismissed Mise. Land Application No. 234 of 2022. He was of the view that, Mise. Land Application No. 234 of 2022 be restored and this court be pleased Page 9 of 14 to direct the trial tribunal to make proper execution order in that application. In reply, Mr. Philemon Maige conceded to the submission by the counsel for the Applicant in respect of the execution procedures under Regulation 23 of the Regulations. He also submitted that the trial tribunal erred in dismissing Mise. Land Application No. 234 of 2022 for it was supposed to grant execution order after the lapse of 14 days. For Mise. Land Application No. 9 of 2023, he submitted that the same was adjourned sine ofc thus, it was wrong to file a fresh Mise. Land Application No. 6 of 2024. He was of the view that the Respondent was supposed to notify the tribunal that the matter before the high court was finalised for the chairman was bound to make execution order in Mise. Land Application No. 9 of 2023. He however changed the gear and agreed with the prayer by the counsel for the Applicant that, Mise. Land Application No 9 of 2023 should also be disregarded and Mise. Land Application No 234 be restored and determined for it was improperly dismissed. From the above discussion, both Mr. Jackson and Mr. Maige are in agreement of the existence of procedural irregularity in the proceedings and orders of the trial tribunal in Mise. Land Application No. 9 of 2023 and Mise. Land Application No. 6 of 2024. They also suggest the same remedy Page 10 of 14 that the proceedings and orders in the above applications should be quashed. They also agree that only a dismissal order in Mise. Land Application No. 234 of 2022 should be set aside to allow execution to start afresh in compliance to

Regulation 23 of the Regulations. Regulation 23 of the Regulations govern execution process of the tribunal decrees and orders. The said provision reads; "25 (1) A decree holder may, as soon as practicable after the pronouncement of the judgment or ruling, apply for execution of the decree or order as the case may be.

- (2) An application for execution of order and decrees under sub- regulation (1) shall be made in the appropriate forms prescribed under the second Schedule of these Regulations and shall indicate the mode in which the execution is sought to be carried out.
- (3) The chairman shall upon receipt of the application, make an order requiring the judgment debtor to comply with decree or order to be executed within the period of 14 days
- (4) Where after the expiration of 14 days there is no objection or response from the judgment debtor, the chairman shall make execution order as he thinks fit.
- (5) The chairman shall, where there are objections from the judgment debtor, considered the objection and make such orders may be appropriate. Provided that hearing of objections under this sub-regulation shall be limited to the subject matter of the objections." Page 11 of 14 The above provision does not raise a requirement for parties' appearance before the chairman could issue execution order. It is only when an objection is raised, the parties will have a chance to address the chairman before an order for execution is made. I therefore agree with the argument by the counsel for the parties that the order dismissing Mise. Land Application No. 234 of 2022 was made in forgetfulness of the execution procedures set under Regulation 23 of the Regulations, GN No. 174 of 2003. Based on the above regulation, the Chairman upon receipt of the application for execution was supposed to make an order requiring a judgment debtor to comply with the decree or order to be executed within 14 days. After the lapse of 14 days, if no action was taken by the judgment debtor, the chairman was bound to issue execution order as he thinks fit. There is no provision which require the chairman to issue such order in the presence of any of the parties. Thus, instead of dismissing Mise. Land Application No. 234 of 2022 for non-appearance, the chairman should have issued execution order after expiration of 14 days upon which the judgment debtor was unable to comply to the order. Non-appearance in the circumstance of this case could not trigger dismissal of the application for execution unless there was an objection raised that needed hearing of parties before making execution order subject to sub-regulation
- (5) of the above Regulations. In case of objection from the judgment Page 12 of 14 debtor, the chairman was supposed to consider the objection and make appropriate order as may be appropriate. The record in Mise. Land Application No. 234 of 2022 shows that there was objection against the execution and the counsel for judgment debtor was present at the time the application was dismissed. If the Applicant did not enter appearance, the chairman could have allowed the counsel for the judgment debtor to address the trial tribunal on the objection raised in the absence of the Applicant and not to dismiss the application for execution. The question that follows is whether, it was proper to institute a fresh application. In the footing of the above provision, institution of a fresh application was not a

proper remedy. Since the first application (Mise. Land Application No. 234 of 2022) was wrongly dismissed, I agree with the proposal made by the counsel for the parties that the two subsequent applications (Mise. Land Application No 9 of 2023 and Mise. Land Application No. 6 of 2024) could not stand as they were improperly filed before the trial tribunal hence, the proceedings thereto are hereby nullified and orders arising therefrom are set aside. For the purpose of clear records, the dismissal order in Mise. Land Application No. 234 of 2022 is also set aside, save for the proceedings. Page 13 of 14 Having concluded that subsequent applications to Mise. Land Application No. 234 of 2022 were wrongly filed before the trial tribunal, there is no need for determination of other issues on whether the trial tribunal disregarded the Applicant's objection or whether, it was proper for the application for execution to be determined despite existence of notice of appeal to the court of appeal and notice of motion to the court of appeal, seeking stay of execution. I say so because those issues were raised in considering the order made in Mise. Land Application No. 6 of 2024 whose proceedings are nullified. In the upshot, the application is allowed by nullifying and setting aside the trial tribunal's proceedings and rulings or orders in Mise. Land Application No. 9 of 2023 and Mise. Land Application No. 6 of 2024. In addition, dismissal order of the trial tribunal in Mise. Land Application No. 234 of 2022 is also set aside save for the proceedings which is remitted back and the trial tribunal is directed to comply to the requirement of Regulation 23 of the Regulations. In considering the circumstances of this case in which such errors cannot be blamed on the parties, I make no order as to costs. DATED at BABATI this 05th Day of July, 2024 (fl II I I D.C. KAMUZORA JUDGE Page 14 of 14

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