

TANZANIA / JUDGMENT

waryoba malima vs magesa makaranga 2 others 2024 tzhc 423 22 february 2024

COURT
TZHCDECIDED
22 February 2024

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IN THE HIGH COURT OF TANZANIA MUSOMA SUB-REGISTRY AT MUSOMA MISC. LAND
APPEAL NO. 60 OF 2022 (Arising from the decision of the District Land and Housing Tribunal for
Mara at Musoma in Misc. Land Application No. 02 of 2022, Originate from Land case No. 07 of
2011 at Bisumwa Ward Tribunal, Misc. Land Application No 313 of 2012 in the District Land and
Housing Tribunal for Mara at Musoma BETWEEN WARYOBA
MALIMA..... APPELLANT VERSUS MAGESA
MAKARANGA..... 1stRESPONDENT JOSEPH SAMSON
KHAN..... 2ndRESPONDENT JOSINA TRIBUNAL
BROCKER..... 3rdRESPONDENT

JUDGMENT

id* & 22nd February, 2024 M. L. KO MBA, J.: This is an appeal against the decision of District Land and Housing Tribunal for Mara at Musoma (the DLHT) in Misc. Land Application No. 02 of 2022 where appellant herein requested the DLHT to review on how execution was done by Court broker, the 2nd and the 3rd respondent herein in Land Case No. 07 of 2011, part of the land which was liable for execution to be returned to the appellant and cost of the case. The DLHT dismissed the application with costs. Page 1 of 10 A brief background giving rise to this appeal can be summarized as follows; The appellant herein instituted the Land Suit against the 1st respondent herein and one Nyabakanga Nyasebwa before Bisumwa Ward Tribunal. It was decided that boundaries between the appellant and 1st respondent herein were fine but the dispute was seen between the appellant and one Nyabakanga Nyasebwa. From submission it was said the 1st respondent herein filed execution proceedings via application No. 313 of 2021 originating from Land Case No. 07 of 2011 which upon being rejected by the DLHT, the appeal at High Court Mwanza allowed him to proceed with execution and the process was complete in 2021 by the 2nd respondent who is the principal officer of Josina Tribunal Broker on 22/02/2021. The appellant herein was annoyed by the said execution and decided to apply for revision via Application No. 02 of 2022 which was dismissed as hinted earlier hence this appeal which has three grounds;

1. That, the District Land and Housing Tribunal for Mara erred in law to hold that the appellant did not single out the size of the encroached land in execution of the judgment of the trial court.
2. That, the District Land and Housing Tribunal for Mara erred in law for upholding the execution which was erroneous conducted by the court broker without considering the judgment of the trial court. Page 2 of 10
3. That, the executing court was wrong in issuing two execution order one conducted by Dommy court broker and another by Josina Court Broker and the court did not identified the land for which execution was to be conducted and the modes of execution was not dear and was not in accordance to the decision of the trial court in Land Case No. 7/2011. During the hearing of this appeal, it was discovered that 2nd and 3rd respondent who is one and the same person failed to appear and upon proof of service of summons tendered, this court under Order IX rule 8 ordered the matter to proceed ex-parte against the 2nd and 3rd respondent subject to be informed. The appellant was represented by Mr. Daudi Mahemba, the learned advocate while on the other hand the respondent fended for himself. It was Mr. Mahemba who pulled the curtain and pray to join and submit in all grounds of appeal jointly. It was his submission that the chairman of the DLHT misdirected himself by failure to consider the application by the appellant who objected execution which was done by the 2nd and 3rd respondents on the fact that execution did not adhere to judgment in Land Case No. 07 of 2011 at Bisumwa Ward tribunal. It was his further submission that execution was done in 22/02/2021 by evicting the appellant from the disputed land and demarcate the area. He said, judgment of the trial tribunal did not order appellant herein to vacate the disputed land rather, he was a Page 3 of 10 winner and 2nd respondent Chabakanga Nyasebwa was judgment debtor. To his surprise, he said Magesa Makaranga filed execution No. 313 of 2012 at DLHT where upon rejected he appealed to HC Mwanza where he succeeds and proceed with execution. The DLHT ordered appellant herein to be evicted from the disputed land and it was done by the 2nd respondent herein. Mr. Mahemba submitted that the ward tribunal did not order the appellant to be removed from the land rather he had a dispute with one Chabakanga Nyasebwa who was ordered to vacate the disputed land. He maintained that execution done by the 1st respondent herein was contrary to judgment of ward tribunal. Counsel further complained of the schedule of execution which directed the tribunal broker that while performing his duty will be directed by the 1st respondent herein. He said they apply for revision and the DLHT dismissed the application on the ground that appellant failed to indicate size of his land which he claims to be exceed during execution. It was position that in Land Case No. 07 of 2011 there was nothing to execute between the parties herein as it was decided the land of the two has no demarcation issues. Page 4 of 10 From his submission, Mr. Mahemba requested this court to trace all records and read them thorough so as to assist in composing judgment which will end the longtime litigation between the parties. He prayed this court to find the execution was improperly done and restore original demarcation. He prayed his appeal to succeed with costs. Battling the appeal, the 1st respondent submitted that it is true they had a case at Bisumwa Ward

tribunal where it was decided the two (appellant and 1st respondent) had no legal issues regarding the land and the boundaries. But one day ward tribunal officers cut his piece of land and allocated it to appellant that's why he, the respondent filed execution proceeding after having been assured by this court (Mwanza Sub-Registry). He confirmed that execution of judgment in Land case no. 7 of 2011 was done and he was given his land and put his demarcation. Further respondent submitted that in application for revision no. 02 of 2022 he lost as he failed to indicate size of the land which was improperly involved in execution. He prayed this court to find the appeal has no merit. Page 5 of 10 During rejoinder, Mr. Mahemba insisted that ward tribunal did not order any person among the two to be evicted and was not proper for the DLHT to evict the appellant. Upon hearing both parties I observed that the complaint is rooted on the size of the land in a purported execution order. Following that observation, this court invited both parties to address on the size of land involved in Execution Application No. 313 of 2012. Respondent informed this court that he doesn't know the size of the land which was handled to him by tribunal broker even in application for execution he did not mention the size. Mr. Mahemba was of the submission that the tribunal broker was not given the size of the land subject to execution rather it ordered the tribunal broker to execute as the trial tribunal decide in Land case No. 07 of 2011 while assisted with the respondent. He too submitted that execution order has no size neither description of the land subjected to execution. After hearing the parties, it is my duty to analyses whether the appeal is properly before this court. I shall start with the issue of the size of disputed land as was the base of the decision of appellate tribunal. It has been said in several occasions that in determining land disputes, Page 6 of 10 lower tribunals must assure themselves with size, location, demarcation and value of the land is known. That is the requirement of the law in Regulation 3 (2) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (the regulation) and precedents in Daniel D. Kaluga vs. Masaka Ibeho & Four Others, Land Appeal No. 26 of 2015; Rev. Francis Paul vs. Bukoba Municipal Director & 17 Others, Land Case No. 7 of 2014, Martin Fredrick Rajabu vs. Ilemela Municipal Council and Another, Civil Appeal No. 197 of 2019 and Aron Bimbona vs. Alex Kamihanda, Misc. Land Case Appeal No. 63 of 2018. As submitted by the respondent who was said to be the decree holder, he doesn't know the size of land which he claims to be given by the DLHT, the executing tribunal and the Hon. Chairperson of the tribunal was trapped on. It is on record when appellant herein applied for revision at the executing tribunal which later on the application for review was filed on the same tribunal, respondent attached schedule of execution in his affidavit while insisting that execution was done as per order of the executing tribunal. I have read the schedule of execution and I found it has no size of the land to be executed and it is too broad Page 7 of 10 that appellant herein has to be evicted from the disputed land. From the above cited presidents that was not right as it is not known exactly what the respondent applied to executing tribunal. When Hon. Chairperson entertain an application No. 02 of 2022 ought to know size of the land involved in execution before tasked the appellant herein to identify the size of his land which was wrongly executed. As the issue of size of the land is among the ground which was argued jointly by both parties, I too joined all grounds and focus on the

size of the land and the merit mattered by the trial tribunal. It is in record that several applications and appeal were filed since Land Case No. 07 of 2011 was decided. So far as each and every application and appeal trace its root in Land case No. 07 of 2011, this court traced the case file No. 07 of 2011 in vain even the District Land and Housing Tribunal for Mara at Musoma (executing tribunal) had no record. One may wonder how does the DLHT execute the decision of the trial tribunal without having original file. These irregularities cannot be left in court record bearing in mind that this is court of record and it has the duty to make sure all lower courts and tribunals adhere to the law. See Marwa Mahende vs Republic [1998] T. L.R 249, Adinardi Iddi Salimu and Another vs The Republic, 3 Criminal Appeal No. 298 of 2018 (unreported) and Page 8 of 10 Adelina Koku Anifa and another vs Byarugaba Alex, Civil Appeal No. 46 of 2019. In the later case Court of Appeal had this to say; '..where the tower court may have not observed the demands of any particular provision of law in a case, the court cannot justifiably dose its eyes on such glaring illegality because it has the duty to ensure proper application of the laws by the subordinate courts and or tribunals...' I find this court too has the duty of supervising lower tribunal, as the case at hand, to make sure it abides to laws and procedure. The executing tribunal herein was supposed to execute the decree as pronounced by the trial tribunal and not otherwise. From the above analysis, I hereby quash the judgment/ruling/orders and set aside all proceedings of the executing tribunal originating from Land Case No. 07 of 2011. I proceed to struck out this appeal as it originates from nullity proceedings. As the Land Case No. 07 of 2011 was initiated without knowing the size of the land of parties neither demarcation of each piece of land involved, I too quash the decision and nullify proceedings of the same. What is the way forward. Parties should live as if nothing happened in the years 2011 and any interested party in the dispute may initiate fresh and proper suit in competent forum in accordance to laws regulating Page 9 of 10 land matters. Considering the nature of this case I make no order as to cost. It is so ordered. DATED a this 22th day of February, 2024. M. L. KO MBA Judge Page 10 of 10

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Prepared on 12 October 2026 · Esheria