

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISCELLANEOUS LAND CASE APPLICATION NO. 19 OF 2019

(C/F Miscellaneous Application No. 255 of 2018 originating from Miscellaneous Application No. 238 of 2018 in the District Land and Housing Tribunal of Arusha District)

KALEMBU LENGAISERI AND 9 OTHERS.....APPLICANT

VERSUS

PAULO LAPARAJA NARDA.....RESPONDENT

RULING

12/4/2019 & 17/7/2019

MWENEMPAZI, J.

The Applicants have filed an Application under Section 43(1) (b) of the ***Land Disputes Courts Act, 2002*** and Section 95 of the ***Civil Procedure Code, Cap. 33 R.E. 2002*** praying for the following orders:

- (i) That the Orders issued by the Arusha District Land and Housing Tribunal in Miscellaneous Application No. 225 of 2018 be revised and declared a nullity in law.
- (ii) That the Respondents be restrained from executing the Arusha District Land and Housing Tribunal decision or orders pending the hearing of these revision proceedings.

The Application was accompanied with the supporting affidavit deposed to by Deogratias Melchior Njau, the applicant's counsel.

Briefly the facts of the case are that the Respondent filed an application against the applicants in Arusha District Land and Housing Tribunal, Application No. 163 of 2018 claiming to be the owner of the suit land located in Engarooji Village in Lepruko Ward within Monduli District. Along the said application, he also filed Miscellaneous Application No. 238 of 2018 for temporary injunction, both ex-parte and inter-parties, upon which the Tribunal issued ex-parte order for temporary injunction without any notice to the applicants. On the 1st August, 2018 the Tribunal ordered, in the ex-parte order for temporary injunction restraining the applicants from entering the suit land be served to the applicants but the same was not served as ordered.

On the 13th August, 2018 the Respondents also filed Miscellaneous Application No. 255 of 2018 praying for an order for committing the applicants as civil prisoners on the reasons that they have disobeyed the tribunal's Ex-parte Order. The applicants herein filed Preliminary Objection on the 16th August, 2018 with three points, the first being that the Honourable Tribunal lacked jurisdiction to entertain the Miscellaneous Application No. 255 of 2018 as it is purely a criminal allegation. The preliminary objection raised by the Applicants against Miscellaneous Application No. 255 of 2018 was heard on the 17th August, 2018. The Tribunal overruled the preliminary objection and awarded costs to the Respondent.

A hearing of the application was scheduled. The District Land and Housing Tribunal Suo moto struck out the counter-affidavit sworn by the Applicant's advocate contesting Miscellaneous Application No. 255 of 20 18 on the ground that the advocate was not competent to swear.

On 26th February, 2019 the Arusha District Land and Housing Tribunal gave a ruling in Miscellaneous Application NO. 255 of 2018 ordering the applicants to pay fine to the tune of Tshs. 2,500, 000/= each within 14 days from the date of the order and in case of default to serve a term of six months imprisonment. The Tribunal also ordered the applicants to pay cost of the application. This application is intended to challenge that decision and the applicants pray for reliefs against the decision by the Tribunal.

At the hearing the applicants were being represented by Deogratius M. Njau, learned Advocate and the Respondent was represented by Mr. Mruma, learned Advocate.

The counsel for the applicants submitted starting with a prayer for correction of the first prayer in chamber summons, so that it reads Misc. Application No. 255/2018 instead of Misc. Application No. 225 of 2018. This Misc. Land application No. 19 of 2019 comes from the order made at Arusha District Land and Housing Tribunal in Misc. Application No. 255/2018 originating from Misc. Application No. 238/2018. On 1/8/2018 the tribunal gave an ex-parte Order of temporary injunction restraining the applicants from entering the suit land. On 13/8/2018 the Respondent filed Misc. Application No. 255/2018 praying for an order to commit the applicants as civil prisoners for disobeying the lawful orders of the tribunal. On 26/2/2019 the tribunal gave its ruling in favour of the respondent ordering the applicant to pay fine to the tune of Tshs. 2,500,000/= each within 14 days from the date of the order. In case of default, to serve six (6) months imprisonment. Together with that order, the tribunal ordered the applicants to pay the cost of the application.

The counsel for the applicants submitted further that the applicants were aggrieved by the decision of the Honourable chairman, thus on 7/3/2019 they filed this application under the provisions of Section 43(1)(b) and (2) of Land Disputes Courts Act, Cap 216 and section 95 of the Civil Procedure Code, Cap 33 for revision under certificate of urgency asking this Hon. Court to exercise its revisional powers on the orders issued by Arusha District Land and Housing Tribunal in the Misc. Land Application No. 255/2018 and declare the same as a nullity in law, and that the respondent be restrained from executing the order of the Arusha District Land & Housing Tribunal.

The application is supported by the affidavit of Deo gratius Melkiory Njau, applicant's advocate while we pray to adopt the content therein and the attachments.

The applicants have sought revision on the 1st ground that the Hon. Chairman of the Tribunal did not accord the applicant the right to be heard; he *suo moto* struck out the counter affidavit sworn by the advocate duly instructed by the applicants. Thereafter, he made decision without considering the evidence tendered by the applicants which is contrary to the rules of natural justice.

The rules of natural Justice require, that parties be accorded an opportunity to be heard before the decision is made against them. Mr. Deogratias Melchior Njau referred to the case of **Mabibo Beer Wives and Spirits Ltd. Vs Lucas Mallya Baraka Stoves and another** [2009] 1 EA 284. In this case the proceedings and the decision were declared a nullity by the court of appeal on the reasons that the applicants were not accorded the right to be heard. I will refer page 288 last paragraph

"The respondents in the complaint before the Fair Competition Commission were not given their right to be heard. Surely, that is a violation of the Principle of natural justice.

Furthermore, the Fair Competition Commission did not comply with the mandatory condition under section 70(2)(a) of the Fair Competition Act, which expressly provides that the respondent shall be provided with a reasonable opportunity to be heard. With respect, the Fair Competition Tribunal failed to notice such a serious omission of the mandatory requirement of the law.

In the event, and for the reasons stated above, we nullify and quash the proceedings and decision of the Fair Competition Tribunal..."

Since the right to be heard is the principal of natural justice, by striking out counter affidavit of the applicant, the applicants were denied the right to be heard. It is our prayer that the court will take into consideration the principle in the case of Mabibo Beer. ...

In the case of **Abdallahamani Mponzi V. Daudi Mwilo** [2000] TLR 318 the Court of Appeal invoked its revisional powers and quashed the decision of the court as the applicant were not given the right to be heard. At page 322 the court held: -

"if there is one principle better settled and more revered than any other on the administration of justice it is that no one should be condemned unheard.

The other point is that the applicant raised the Preliminary Objection that the tribunal lacked jurisdiction but the chairman went on in determining the application.

The applicants strongly hold that the disobedience of lawful orders is one of the criminal offences. It is clearly found in the Penal code, section 124 of the Law (Cap 16). This offence, disobedience of lawful orders of the court is tried at the Primary Court. This is according to the **1st schedule of Part I of Magistrates Courts Act, Cap 11 R.E. 2002** which lists offences to be tried by the primary court, this is one of them.

Further to that, the counsel submitted that, Section 4(2) of **Land Disputes Courts Act, Cap. 216** vests jurisdiction in all proceedings of criminal nature under the **Land Act, Cap. 113** and **the Village Land Act** to the Magistrate's Courts established under **Magistrate Courts Act, Cap. 11**, section 4(2) of the Land Disputed Courts Act, Cap. 216 vests/gives only power to the District Land and Housing Tribunal to deal with civil jurisdiction.

The act of the chairperson of hearing the application and making the Ruling amounted to exercising Jurisdiction not vested to him and amounted to serious irregularity leading to injustice such irregularity requires this court to invoke its revisional powers to nullify the proceedings.

The other issue is that the applicants were charged on criminal offence by way of chamber summons and affidavit. Instead of charge sheet. As disobedience of lawful order is a criminal offence requiring proof beyond reasonable doubt. The Honourable chairman convicted the applicants based on chamber application.

The Honourable chairman went further to impose a fine of Tshs. 2,500,000/= to each of the applicants to be paid within 14 days in default to imprisoned for a term of 6 months as civil prisoners. No law was cited giving the chairman power to do what he did; given those grounds the applicants pray that this court may revise the decision of the tribunal and nullify the

ruling and order of the tribunal and order the applicants to be given costs of this application.

The Respondent through the services of Mr. Shabibu Mruma, learned advocate strongly opposes the application. The counsel for the Respondent submitted starting by attacking the prayer by the applicants to revise and nullify the decision of the District Land and Housing Tribunal in Misc. Land Application No. 255 of 2018.

His arguments were that it is true that this court has power to revise any decision from lower courts. The law has given this court power where a party who is aggrieved has no other remedy. The law has given criteria at what time the High Court may revise cases before it. Any decision which does not finalize the decision are subject of revision because the other side has no right to appeal. For example, since one cannot appeal against an interlocutory order, that is when the law allows to apply for revision. This application is one of those which were finalized by the decision. Thus, the side aggrieved was supposed to appeal not to apply for revision in this court.

Regulation 24 of GN No, 174 of 2003 provides as follows:-

"Any party who is aggrieved by the decision of the tribunal shall subject to the provisions of the act, have the right to appeal to the High Court Land Division.

According to this provision the applicants were supposed to come by way of an appeal as the decision of the Tribunal finalized the matter before it. Section 79 (2) of the Civil Procedure Code, Cap 33 R.E.2002 clearly State that position of the law. In the case of **Said Ali Yakut and 4 others Vs. Feisal Ahmed Abdal**, Civil Application No. 4/2011 at page 7.

"where a party has a right of appeal, he cannot properly move the court to use its revisional jurisdiction"

In the circumstances of this application, the applicants had a chance to opt for an appeal, the application misses legs. The Respondent humbly pray that this application be dismissed with cost.

If we assume the applicants have no right to appeal, the law which has been cited by the learned counsel, section 43(1)(b) of Land Disputes Courts Act, Cap 216 R.E. 2002 read together with section 79(1)(a)(b)(c) of CPC, Cap 33 R.E. 2002 the High Court is empowered to make revision where there are errors material to the merit of the case involving Justice. In this case there is no error material to the merit occasioning injustice from the decisions made by the District Land and Housing Tribunal.

Since in the application which is sought to be challenged, the law cited to move the Tribunal gives power to the chairman to issue first injunction and in case of disobedience commit that person in prison as civil prisoner and order that his property be attached and sold [S.68 (c) of CPC]. Therefore, the District Land and Housing Tribunal was right in its decision.

In the case of ***Silent In Hotels Ltd. Vs Interstate Office Services Ltd***, Civil Case No. 464 of 1999, HC at Dar es Salaam the circumstances were similar to this case. The court ordered payment of fine instead of committing the Respondent into prison (imposed punishment by fine). The fine imposed to the applicants was fair. The fine imposed is to be paid to the Government not to the Respondent. Another order was payment of cost.

The learned counsel for the applicant complained that the applicants were not heard. We strongly oppose that argument. For example, in the

order it is explained how respondents were represented. The counsel for the applicant represented them. It is not true that the applicants were not heard. At page 4 of the Ruling last paragraph, the learned counsel played a great role to represent the applicants.

The Tribunal struck out the counter-affidavit due to weaknesses. It is shown at page 2 last para to page 3 first paragraph. Not being given a right to be heard and striking out the counter-affidavit and being able to submit, we argue that the applicants were heard and assisted the tribunal to make a decision.

The case of **Mabibo Beers** the applicants were not given right to be heard. That is why the decision of the lower court was struck out. In the case of ***Abdallaham Mponzi Vs Daudi Mlwilo*** is distinguishable. In this case the circumstances did not require presence of witnesses. It was based on submissions only.

In the argument by the Counsel that there was a Preliminary Objection raised but the chairman proceeded to hear and determine the application. The argument is not true. The Preliminary Objection was heard and dismissed for lack of merit. It was conclusively determined.

On the argument that disobedience is a criminal offence under the Penal Code. The Counsel for the Respondent submitted that there are civil and criminal cases. In these cases, there may be disobedience or contempt of court. In criminal cases the court will deal with them according to criminal law and in civil law, it will be dealt according to civil law.

If an injunction is issued on the argument that the application as supposed to be filed by way of charge sheet, this argument is baseless. The

law requires any application be made by way of chamber summons and supported by affidavit. This was complied with.

On the argument that an injunction was issued *ex parte*. It is true that order was issued *ex parte*. The court is empowered if it is satisfied that giving notice will occasion an undue delay. So, the order was issued according to law. It was issued to take care of loss which would otherwise occur.

In this application the counsel has prayed for two different reliefs. The second relief prayed is bad in law, an omnibus application. Regulation 25 (1) of G.N. No. *174/2003* is the relevant provision to enable the court give an order. It is not cited. In the case of **Rulagalina C.V. Vs. The Advocates committee and cleverly Mtindo Ngarapa** at page 8 2nd paragraph it was observed that it is not proper to have two reliefs in one application. The respondent prays that the relief be struck out and the application be dismissed with costs.

In rejoinder the counsel for the applicants, Mr. Deogratias Melchior Njau, learned Advocate submitted that the learned advocate for the Respondent said this application is incompetent because the applicants have a right of Appeal. He made reference to the case of **Said Ali Yakut & 3 others Vs. Feisal Ahmed Abdul**, *Civil Application No. 4 of 2011, Court of Appeal of Tanzania at Mwanza (unreported)*. This case is totally distinguished. It was an appeal from RM's Court. In the case, the Ruling was made, all parties were represented. The court was exercising the jurisdiction vested to it. The Court of Appeal directed that the proper remedy was to go to court of Appeal by way of Appeal.

It is good that the Counsel for Respondent has admitted that the material irregularity is one of ground to move the court in revision. In our

application, we have argued that the counter-affidavit was *suo moto* struck out. Counter affidavit or an affidavit is an evidence, the learned advocate for respondent has submitted that the applicant's counsel submitted on the case to assist the tribunal. Submissions are never evidence, striking the counter affidavit automatically makes it that there was no defence and thus occasioning injustice. That requires this court to invoke its revisional powers to the decision which was made.

The other point is that in a situation where the applicant was not heard, he cannot appeal. You cannot appeal on matters which you were not given an opportunity to be heard. The learned advocate has referred this court to section 79(1) of the CPC, Cap. 33; the applicants submitted that this section fits to this application. As a matter of jurisdiction, the learned advocate has referred to section 68 (1) of CPC, Cap 33, as the one granting powers to the chairperson as the one issue the orders.

This court was referred to section 3 (1) and (2) of the District Land and Housing Tribunal, Cap. 216, giving the powers to the District Land and Housing Tribunal and in the Applicants' submission in Chief they cited section 4 (1) of the same Law that the District Land and Housing Tribunal have jurisdiction in civil matters only.

In the case of **Silent in Hotels Ltd.** (supra) it is the high Court which is vested with power on both civil and criminal matters while the District Land and Housing Tribunal only civil matters. Also, that case, cannot give the District Land and Housing Tribunal Jurisdiction to entertain criminal matters. As a result, this court has to intervene what was done in this case.

The fine has to be paid to the court is not objected. However, that gives the matter a nature of criminal offence. That pins the matter to criminal

jurisdiction. The advocate does not object that obedience of lawful order is criminal offence; it was thus submitted by the applicants that the tribunal had no power to entertain the application.

The counsel for the applicant submitted that in the two cases that have cited, that of **Mabibo Beers** and that of **Abdulrahman**, the court used its revisional powers to cure irregularities which are almost the same with what the applicants are also praying in this case.

By striking out the counter affidavit the applicants were denied the right to be heard and this should to be intervened by this court. Regulation 24 (1) of G.N 174/2003 and 25 of G.N. No. 174/03 deals with appeal and stay of executions.

The counsel submitted in conclusion that their prayers are basically based on Misc. Application No. 255/2018 and are by no way omnibus. The advocate submits that Section 95 of the CPC cures the situation and of course it is the prayer pending the hearing of this application of which it has been heard. They reiterated that this court be pleased to revise Misc. Application No. 255/2018 and declare it a nullity with costs.

I have read the record and also heard the parties in the application through their counsels. No doubt the complaint emanates in the ruling in the application No, 255 of 2018. That was an application under Regulation 4 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003, G.N. NO. 174 of 2003 and section 68(c) of the Civil Procedure Code, Cap. 33 R.E.2002. The Respondent prayed for an order committing the applicants herein as civil prisoners for disobedience of a lawful of the Tribunal dated 1st August, 2018. The order essentially was restraining the applicants from entering the suit property.

The impugned ruling ordered the applicant to pay a fine of Tshs. 2,500,000/= each within 14 days or serve six (6) months imprisonment. This application relies on the three grounds as explained by the counsel for the applicant, namely: -

1. The applicants were not given the right to be heard as the counter affidavit deponed by their counsel was struck out *suo moto* by the Honourable Chairperson without first hearing them and also depriving them an opportunity to be heard.
2. That the tribunal lacked jurisdiction to issue orders as the same were falling within the domain of the criminal court.
3. The applicants were charged with criminal offence by way of chamber summons and affidavit instead of charge sheet.

I will start by the last two points. Disobedience of the lawful order is a crime pronounced by section 124 of the Penal Code, Cap. 16 R.E. 2002. The provisions of law read as follows:

"A person who disobeys any order, warrant or command duly made, issued or given by a court, an officer or person acting in any public capacity and duly authorized in that behalf, is guilty of an offence and is liable, unless any other penalty or mode or proceeding is expressly prescribed in respect of that disobedience, to imprisonment for two years."

In this case, the application was made by way of chamber summons and an affidavit. The prayers are clear, first, to dispense with the issuance of notice to the applicants, and two, that the respondents be committed as civil prisoners for disobeying the lawful order of the tribunal.

It is quite clear; a criminal offence commences to be dealt with by reporting to the police and followed by investigation by the police. This is according to the provisions of section 9 and 10 of the Criminal Procedure Act, Cap. 20 R. E. 2002. This is followed by drawing a formal charge under the provisions of section 128 and 129 of the Criminal Procedure Act, Cap. 20 R. E. 2002. This is the duty of the Magistrates Courts Act, Cap. 11 R.E. 2002 and clearly it is stipulated under section 4(2) of the Land Disputes Courts Act, Cap. 216 R. E. 2002 which provides that:

*"Magistrates' Courts established under the Magistrates' Courts Act * shall have and exercise jurisdiction in all proceedings of a criminal nature under the Land Act * and the Village Land Act "*

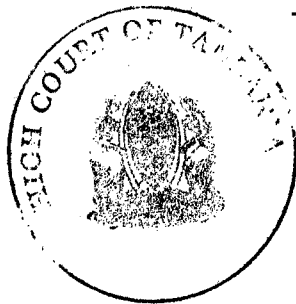
Committal as a Civil Prisoner is made in execution of decree for payment of debts. According to order XXI Rule 28 and Rule 35(1) of the Civil Procedure Code, Cap. 33 R.E..2002 every decree for payment of money including to a decree for the payment of money as an alternative to some other relief, may be executed by detention as a Civil Prisoner of the Judgement debtor or by attachment and sale of his property or both. What is important in this case, committal to civil prison is subject to due process being adhered to (Refer. **Eurafrican Bank (Tanzania) Ltd vs. Tina and Company Limited and Two others**, Commercial Case. No. 80 of 2006, High Court of Tanzania (Commercial Division) at Dar es salaam). In my view, the applicants are right to argue that the tribunal had no jurisdiction to deal with the disobedience of the order of the Tribunal as it did.

As to the first argument that the applicants were not given the right to be heard when the counter affidavit by applicant was struck out of the record, page two of the impugned ruling reads:

"before I embark on discussing about submissions presented before me by the learned counsels, I wish I should first ask myself about whether or not Mr. Deogratias Melkior Njau was competent to swear the said counter affidavits in reply to the application in which he is an advocate of a party from one side"

I have reviewed the proceedings; I could not appreciate what has been submitted by the counsel for the respondent that the applicants were heard on the issue and they were represented. The order given was adverse to them and they had a right to be heard before the counter affidavit was struck out. Hence it was right for them to complain for not being heard on the specific issue.

Under the circumstances and for the reasons stated the application has merit. The proceedings are nullified as prayed and ruling is quashed and the emanating order set aside. In general, therefore the application is granted with costs. It is ordered accordingly



T. MWENEMPAZI

JUDGE

17/07/2019