

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 158 OF 2023**

(Arising from the Judgment and Decree of the High Court Land Division, Hon.  
Mgeyekwa J, dated 21 October 2021 in Land Appeal No. 357 of 2020)

**JOHN THOMAS.....APPLICANT**

**VERSUS**

**KAM COMMERCIAL SERVICE.....1<sup>ST</sup> RESPONDENT**  
**NASORO ATHMAN ZONZO.....2<sup>ND</sup> RESPONDENT**  
**REGISTERED TRUSTEES OF ASHURA FOUNDATION.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last Order:02/08/2023*

*Date of Ruling:26/09/2023*

**K. D. MHINA, J.**

This application is brought by way of Chamber Summons made under Section 47 (3) of the Land Disputes Court Act, Cap 216 [R: E 2019] ("the LDCA"). The Applicant, *inter-alia*, is seeking the following orders: -

- i. This Court be pleased to certify that there are points of law involved thus this being the fit case to appeal to the Court of Appeal.*
- ii. Any other relief the Court may deem fit to grant.*
- iii. Costs of the application be provided for.*

The grounds for the application were expounded in the affidavit, which John Thomas, applicant swore in support of the application.

The points of law which the applicants request this Court to certify are eleven and are found in paragraph 6 of the affidavit as follows, I quote in verbatim;

- i. Denial of the right to be heard or the legality and propriety of the judgment delivered without a proper full hearing, arising from not considering the rejoinder submission dated 13/10/2021 filed in consonance with the court order dated 11/10/2021.*
- ii. the legality, correctness of a judgment on appeal not considering or addressing a plethora of the provisions of law alleged to be violated*
- iii. extent of discretion of an inferior court or Tribunal to be bound or not by decisions of superior courts as happened in my case; essentially the value and sanctity of the doctrine of binding precedent; the lower tribunal ignoring binding precedents cited to it or saying nothing upon them and acting contrary to their direction.*
- iv. need, extent and power of the High Court to ensure the doctrine of binding precedent is adhered to. This is because precedents were cited to support complaints but the Tribunal disregarded them and the High Court said nothing on the conduct though submissions made upon it*
- v. consequence of purported public auction conducted in violation of the law regarding public auction sale in execution*

*of court decree or order. The alleged violations the lower courts declined to consider which the court shall be required to decide and direct upon are such as;*

- a. inadequacy or insufficiency of notice of public auction,*
- b. defect in the proclamation of sale which does not show the details of the property as well as the monetary value the recovery of which the sale was ordered,*
- c. lack of valuation report and who between the Broker and Decree Debtor is obliged by law to procure it*
- d. lack of written consent of the Appellant,*
- e. attachment on 7<sup>th</sup> June, 2020 in the absence of the Applicant and at the very same moment sell the house by public auction (attachment and sale done on same day, hour and minute).*
- vi. Upon whom between the one alleging a fact and the one disputing (Respondent) does the burden of proof lie when the fact in issue is in the exclusive knowledge of the Respondent and the correct position of the law in that score.*
- vii. Correctness or wrongness or legality of the application by both lower courts of the legal doctrine of the burden of proof under the Evidence Act. From the decisions, the lower courts have heaped the burden on me to prove the negative that the broker had no brokerage or business licence to do the job contrary to the law and authorities I cited and the lower courts saying nothing in respect of the cited Section 115 of the Evidence Act, Cap 6 R.E 2019.*

- viii. *Failure to correctly interpret and apply the law regarding Sections 110 and 115 of the Evidence Act, Cap 6 R.E 2019. This was in regard to my allegations on illegality of the sale arising from a sale without valuation report and who between the 1<sup>st</sup> Respondent and I had the duty or obligation to have a valuation report to set the forced sale price basis as well as ensure the decree debtor gets a fair price, regard being had that I did not put my house on the block for sale so as to have a readily prepared valuation report*
- ix. *The extent of sanctity of court record as a doctrine notwithstanding, the propriety of value of items for which sale was ordered hitherto unknown when sale was ordered on 23/10/2018, thereafter clandestinely inserted on 22/4/2020 so as to cure specific complaints in my letter and affidavit filed in the Tribunal when sale or partition was already ordered as well as conducted before such value was known. I refer to Annexure A-II (order of sale) dated 23/10/2018 as well as letter from the District Commissioner dated 15/4/2020 attached as Annexure A-12 (letter permitting sale) before value was inserted on 22/4/2020, which the 1<sup>st</sup> Respondent has continued insisting in its affidavits and submissions that it was the one permitting sale, Order for Breaking Door (kuvunja mlango) dated 28/4/2020 made on the same day it wrote to me the unserved letter Annexure A-8 (paragraph 15) and already knowing of the intent to return the available*

*items as per paragraphs above*

- x. *the jurisdiction of Ward Tribunals the to entertain matters of rent and housing, which as far as I have been advised, were then the preserve of the District Land and Housing Tribunals*
- *being functus officio but reopening and entertaining on 4/5/2018 a matter that had already been decided by it to its finality and a final order made, right of appeal explained on 31/8/2017 save execution as shown in the two judgments*
  - *executing its own orders*
  - *executing its own orders arising not from mediation but adjudication contrary to law as the content and coram indicates in the record*
- xi. *basing on the unclear and ambiguous proclamation of sale, the undecided issue by both courts of the conflict of the titles to property, that is; which property was sold as, I stated it as Plot No. 2014 Block B located at Vingunguti and the Respondents clinging on having sold Leseni ya Makazi 1LA000572 Land No. ILA/VNG/MTJ2/74 issued on 13/09/2005 which lasts for 3 years and that, as a result of which I had gone further towards survey thus the land acquiring new and completely different title as Plot No. 2014 Block B Vingunguti, as annexed in the affidavit to the tribunal and while the Respondents insisted on having dealt with property identified as Leseni ya Makazi ILA000572 Land No. ILA/VNG/MTJ2/74*

Responding to the application, despite filing their respective counter affidavits also 3<sup>rd</sup> the respondent countered it through a preliminary objection predicated on the following grounds.

- 1. The application is misconceived and an abuse of court process contrary to section 47(3) of The Land Disputes Courts Act, CAP 216 R.E. 2019.*
- 2. The application is bad in law for containing wrong registry.*

This application was argued by way of written submissions. The applicant was represented by Mr. Amin Mohamed Mshana, learned counsel, while the 3<sup>rd</sup> respondent Mr. Mwombeki Kabyemela, also a learned advocate.

In support of the first limb of objection, Mr. Kabyemela submitted that the application is misconceived and constitutes an abuse of the court process, which stands in violation of Section 47(3) of The Land Disputes Courts Act, Cap. 216 R.E. 2019 which reads that;

*47(3): "Where an appeal to the court of Appeal originates from Ward Tribunal, the appellant shall be required to seek the Certificate from the High Court certifying that there is a point of law involved in the appeal".*

Then he argued that the provision dictates that for any land matter

originating from a Ward Tribunal, an appellant must first secure a certificate indicating the presence of a point of law before being authorized to initiate an appeal in the Court of Appeal.

He stated that the applicability of above provision was elaborated in **Sara Siasi vs. Rozimary Silvesta**, Misc. Land Application No. 145 of 2022, HC Arusha (unreported).

From above he submitted that, at the District Land and Housing Tribunal, the applicant instituted against respondents Misc. Application No. 357 of 2020, contested that the sale of his plot under Order XXI Rule 88(i) of the Civil Procedure Code, Cap 33 R.E 2019.

He argued that this application did not constitute an appeal or revision, as the applicant seeks to assert. Therefore, the cause the applicant's cause of action was to set aside a sale for the immovable property which has been sold in execution of a decree.

Therefore, it was a fresh application instituted on the first instance at the District Land and Housing Tribunal of Ilala, followed by the subsequent appeal through Land Appeal No. 261 of 2020 before the High Court's Land Division.

He concluded by submitting that seeking the certificate of point of law for a matter that did not originate from a ward tribunal constitutes an abuse of court process and give rise to incurable defects, aligning with the precedent established in the case of **Vodacom Tanzania Ltd and Another vs. Winfrida William, as an administratrix of the estate of Pastory Valentine**, Misc. Land Application No. 134 of 2021 (unreported).

On the second ground of preliminary objection, he contended that the application is flawed in terms of proper registry.

He explained that the applicant had indicated that the application had been lodged in the High Court Dar es Salaam Zone at Dar es Salaam. However, the subject matter of this application pertains to a land dispute, thus rendering the High Court Land Division the appropriate registry.

He argued that filing the matter under the incorrect registry constitutes an irreparable defect, as demonstrated in the case of **Vicent Francis vs Rodrick Maimbali**, Civil Appeal No. 6 of 2016 (HC -Bukoba unreported).

In response Mr. Mshana did not dispute the position of law that where the appeal to the Court of Appeal originates from the Ward Tribunal, the law, that is section 47(3) of Cap 216 requires the intending appellant to seek for



certificate on point of law involved from the High Court and that under section 47(2) of Cap 216, where the matter originates from the District Land and Housing Tribunals, the intending appellant seeks for leave rather than certificate on point of law.

However, he argued that in the instant application the whole saga started at the Ward Tribunal for Vingunguti in Shauri Na. 85 of 2017. It is the Ward Tribunal which referred the matter for execution to the district tribunal.

That triggered the applicant to file Misc. Application No. 357 of 2020 at the DLHT

On that he elaborated that main suits in the Tribunals which are termed as Application under Regulation 3(1) of GN. No. 174 of 2003. Therefore, the main suit, did not bear the title of 'Miscellaneous Application'.

He argued that from that fact there was no fresh suit filed at the District Tribunal. Therefore, there was no main suit/application whose dismissal and later appeal to this court is the subject of the present application.

Regarding the second limb of objection, he submitted that was a minor defect which was curable. It was a mere typing error and slip of the pen which could be rectified.

Further, the application was in proper registry and properly served to the respondents who duly appeared before the Court. Therefore, they were not affected and by appearing in the case implied that they had knowledge of the case to be a land.

Mr. Kabyemela filed a rejoinder but I did not see the reason to summarize it, because he basically reiterated what he had submitted earlier, in his submission in chief.

Having considered the pleadings and submissions from both parties through their respective counsel, I will now go straight to the determination of the preliminary objection raised.

In addition to that I will not deal with others issues raised in the submissions because they are irrelevant in the determination of the application.

Issues such as whether the preliminary objection were elaborative and clear as required, I think is of no help and irrelevant in this matter because;

One, the applicant despite raising that issue but he responded to the submissions without requesting the court to order the 3<sup>rd</sup> respondent to clarify.

Two, having gone through the P.O. raised and the submission supporting it, in my view the P.O. were clearly understood.

Having held as above, in deliberation of the first limb of objection, the “wrangle” between the applicant and the third respondent is whether the decision subject to this application for certificate on point of law commenced at the Ward Tribunal or not.

Having gone through the records, this should not detain me long due to the following findings;

From the record, the Land Appeal No. 261 of 2021 before this Court was the appeal to challenge the decision of the District Land and Housing Tribunal for Ilala in Misc. Land Application No. 357 of 2019. The complaint of the applicant in that appeal was the exercise of auctioning the suit property was tainted with illegality, material irregularities, irrationality and fraud. Therefore, from above I have the following;

**One**, as rightly submitted by the counsel for the 3<sup>rd</sup> respondent, Land Appeal No. 261 of 2021 was the first appeal challenging the decision of the DLHT. Therefore, what the applicant filed at the Tribunal was an application to set aside the sale of the suit premises vide Misc. Application No. 357 of 2020. It was after the Tribunal ordered execution against the applicant to proceed vide Misc. Application No. 434 of 2018.

**Two**, admittedly the “saga” between the parties started at the Ward Tribunal for Vingunguti in Madai Na. 85 of 2017. After the determination of that Madai Na. 85 of 2017 since the WT does not have jurisdiction to execute decree it transferred it to the DLHT for Ilala for execution. The DLHT powers to execute WT decision are derived from section 16 (3) of the Land Disputes Court Act, Cap 217. The section reads;

*(3) Where a party to the dispute fails to comply with the order of the Ward Tribunal under subsection (1), the Ward Tribunal shall refer the matter to the District Land and Housing Tribunal for enforcement.*

In the instant application, when the DLHT executed the decree, the applicant, as indicated before, decided to file Misc. Application No. 357 of 2020 challenging the sale of the suit premise.

Therefore, the above facts indicate that the applicant never challenge the decision of the W.T which resulted into execution by way of appeal or revision. There is no decision which quash and set aside Madai Na. 85 of 2017 decided by Vingunguti Ward Tribunal. That makes the decision of the DLHT in Misc. Application No. 357 of 2020, to be the first decision challenging the execution of the DLHT, hence DLHT was the Tribunal of first instance in the matter sought to be appealed to the Court of Appeal. Here the reasoning is simple challenging execution proceedings alone cannot invalidate the decree.

The position could be different if the applicant had appealed to the DLHT against the decision of the WT for Vingunguti in Madai Na. 85 of 2017.

**Three**, as rightly submitted by the counsel for the 3<sup>rd</sup> respondent, even in the decision of the appeal before this Court i.e., Land Appeal No. 261 of 2020, the Court indicated that that was the first appeal. At page 1 of impugned judgment, it was written that;

*"This is the first appeal"*

And at page 2 it was written;

*"The decision from which this appeal stems is the Judgment"*

*of the District Land and Housing Tribunal in Misc. Application*

*No. 357 of 2020”.*

The above, clearly indicate that Land Appeal No. 261 of 2020 is the first appeal, therefore, it quite clear that the application is incompetent for being filed under section 47 (3) of Cap 216 seeking for certificate on points of law as “bridge” to go the Court of Appeal. The section is applicable if the matter originated from the Ward Tribunal in land matters

Therefore, since the first ground alone suffices to dispose of this application. I do not see any point of considering the second ground of preliminary objection, their determination will not change the outcome of this application.

In the upshot, the application before this Court is incompetent for the reasons above. That means the preliminary objection raised by 3<sup>rd</sup> respondent is sustained,

Consequently, the application is struck out with costs.

It is so ordered.



  
**K. D. MHINA**  
**JUDGE**  
**26/09/2023**