IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBA DISTRICT REGISTRY)
AT BUKOBA

LAND CASE APPEAL No. 17 OF 2018

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba (the Tribunal) in Misc. Application No. 266A of 2017 & Arising from the Tribunal in Application No. 266 of 2012)

FARAJI ATHUMANI MUGAYE ---------- APPELLANT

Versus

MANAGER OF NATIONAL MICROFINANCE ---------- RESPONDENT BANK LTD (NMB) BUKOBA BRANCH

JUDGMENT

20/05/2020 & 21/05/2020

Mtulya, J.:

The facts related to the present appeal are straight forward. Mr. Faraji Athumani Mugaye (the Appellant) secured a loan for business purposes from National Microfinance Bank Ltd based in Bukoba (the Respondent) on 18th June 2012 to be liquidated on 18th June 2013. However, sometimes in late 2012, the Appellant incurred business loss and could not be able to abide with repayment schedule.

On the 10th November 2012, the Respondent issued the Appellant ten days- notice to settle the payment short of the same the Respondent will attach and sale his house located at Kastamu Kafuti, Omukishenye in Bukoba, Kagera Region.

Following the said notice, the Appellant, on 19th November 2012, rushed to the District Land and Housing Tribunal for Kagera at Bukoba (the Tribunal) and registered Land Application No. 266 of 2012 praying to the Tribunal to declare the loan agreement is null and void for failure to comply with the law of the land. A day later, on 20th November 2012, the Appellant applied and was granted on 21st November 2012, an interim exparte order to temporarily restrain the Respondent or his agents from attaching or auctioning the house.

The order was issued temporarily pending hearing and determination of the Application. The Application was scheduled for hearing twice, on 21st September 2016 and 20th September 2017, and in both callings the Appellant did not register his presence. Based on that the Tribunal dismissed the Application for want of prosecution. The extract from the order reads:

> *The application is hereby dismissed for non-appearance and want of prosecution. That the applicant is making excuses and is delaying the hearing this is the second time. That the respondent is at liberty and sell the suit land to recover his money. It is so ordered.*

The Appellant was not satisfied with the dismissal order and preferred Misc. Application No. 266A of 2017 before the Tribunal. Before the Tribunal, the Appellant, apart from other reasons, argued that he was sick suffering from high sugar and he informed the Tribunal by letter dated 19th September 2017, a day before issue of dismissal order. To the Appellant those were good reasons sufficient to prevent him from attending the hearing. The Tribunal, after hearing the parties, on 12th April 2018 held that the Applicant was not prevented by sufficient cause. The reasoning of the Tribunal is found at page 6 of the typed Ruling in the following text:

> *...none of the medical institution formed such an opinion, the applicant's notice to the tribunal dated 19.09.2017 was not backed up by expert opinion of doctors and even after he had gone to the Bukoba Regional Referral Hospital. They formed no opinion that the applicant was actually sick and that they treated him*

It is from this reasoning, the Appellant approached and knocked the doors of this court praying for an order to quash and set aside the decisions and orders of the Tribunal in Applications No. 266 of

2012 and 266A of 2017. In this court, the Appellant drafted and registered six (6) grounds of appeal.

However, on 20th May 2020, when the appeal was scheduled for hearing, the Appellant appeared in person without any legal representation and argued only one ground of appeal. With regard to other grounds of appeal, the Appellant prayed before this court to adopt them as they were drafted and registered in this court. On the other hand, the Respondent invited the legal services of learned counsel, Mr. Abel Rugambwa to argue the appeal on his behalf. Mr. Abel correctly stated that this appeal is generally attached with six (6) grounds of appeal, but it concerns only one ground, the first. To his opinion, the appeal before this court is specifically about showing good cause on non-appearance of the Appellant on hearing date of his Application No. 266 of 2012 before the Tribunal.

I have had an opportunity to go through the record of this appeal. It is correct and I concur with learned counsel Mr. Abel. The gist of this appeal concerns grievance on interpretation of good cause and this court is invited as a second forum for that purposes. Record shows that when the Appellant filed his Appeal No. 17 of 2018 in this

court, he drafted the ground of showing good cause in the first place. The following text is depicted in the first ground:

> *That the learned Chairman of the Bukoba DLHT went wrong in law and fact to dismiss my application seeking to set aside the dismissal order with costs on the ground that no sufficient reasons have been established when the facts on the grounds reveal the contrary in the case.*

On this ground, the Appellant submitted that he is suffering from sugar and high blood pressure and has been testing every day of his life, and occasionally attending medication in hospitals. The Appellant argued sometimes in August 2017 there were loud announcement within Bukoba Municipality inviting sugar and pressure related patients to attend and consult sugar and pressure specialists at Bukoba Region Referral Hospital on 20th September 2017.

Following the announcement, the Appellant on 19th September 2017 knocked the doors of the Tribunal and was opened. According to the Appellant, on the same day, 19th September 2017, he drafted and registered a letter stating that he was sick and intended to consult specialists on the next day, 20th September 2017. The evidence of the same were tendered in the Tribunal as annexures 'B1'

and 'B2'. However, on the next day, to the Appellant's surprise the Application was dismissed.

Replying on the submission of the Appellant, Mr. Abel did not dispute the letter and evidence tendered in Application No. 266A to justify good cause, but faulted the letter and evidences. Mr. Abel submitted that the letter is confusing as it was prepared on 19th September 2017 stating that the Appellant cannot attend hearing on 20th September 2017 for sugar and blood problems which were high on 18th September 2017. Again, there are no evidences to show that the sugar and pressure went high on 18th September 2017. With regard to evidences tendered, Mr. Abel argued that exhibit 'A' and 'B' were attached without medical expert opinions, either specialist medical doctor or laboratory expert.

To bolster his argument, Mr. Abel contended that the evidences tendered do not speak for themselves and did not convince the Tribunal to decide in favour of the Appellant. Mr. Abel cited page 6 and 7 of the Tribunal's decision and argued that it was correct to do so. To his opinions, Mr. Abel submitted that exhibit 'B2' just shows blood sugar was 9.9 md/L and 'B1' is printed OPD Consultation Fee payment of Tanzanian Shillings Five Thousand (5,000.00/=) only,

without any further explanation, like what was the advice from the medical specialist.

Finally, Mr. Abel submitted that the Appellant was able to pay visits in the laboratory and the Tribunal on 19th September 2017 and hospital on 20th September 2017, but could not be able to attend the hearing at the Tribunal on 2oth September 2017.

On my part, I will start with the final submission of Mr. Abel. It is unfortunate to compare persons' health and life with hearing of cases, of whatever disputes I think human beings have to possess right to life first to be able to contest other rights, such as right to land. To my opinion, the Appellant was right in fighting for his health/ life rather than right to own land/house. He cannot be condemned for struggling for his right to life.

In the present appeal, the Appellant registered his letter a day prior to the hearing. It was supposed to be interpreted as notice of absence, no more. To initiate inquiry on what transpired on the next day in hospital, does not belong to the Tribunal or this court. To my opinion, the Tribunal was not required to go into the details of the disease and what transpired, which some of them are confidential to the privileged. It would have been proper for the Tribunal to inquire

whether the Appellant actually attended or not the said forums. Short of that, he cannot be condemned.

The record of this appeal also shows that the Appellant was vigilant, tentative and regularly attending the Tribunal for his Application. On the 6th February 2018, when the Appellant was drafting Written Submission in Support of the Application, he displayed two important facts, which were not disputed by the Respondent, and it was unfortunate were negatively construed by the Tribunal. These facts are recorded in the following text:

> *Since institution of the main application No. 266 of 2012 and Chamber Application N0. 266A of 2012,* ***I was regularly attending the Tribunal without fail*** *but on 9th May 2017, when the main Application was wrongly scheduled for the hearing for the first time, I was not able to attend the Tribunal due to the reason that my mother had passed away and as such I was very busy attending the burial arrangements. 2. As already said earlier even if it can be taken that 20th September 2017 my main application did indeed came for hearing, still as already said there was no legal*

justification on the part of the Hon. R. E. Assay to dismiss the application as he did ***because the Tribunal was aware of the reasons that had prevented me from attending the Tribunal on the material date.***

(Emphasis supplied).

These facts show that the Appellant, considering his age and sickness, was still interested on the hearing and final determination of his Application. Again, on 30th August 2017, when the Application was scheduled for hearing on 20th September 2017, both parties in the Application were absent, but Appellant with notice. However, the Tribunal dismissed the Application.

To my opinion, I think, institution which are trusted in dispensing justice should not act in that way. I do not see any reasons why the Appellant was denied his right to be heard in substantive right while he was vigilant in pursuing his Application. I have already said elsewhere that right to be heard is a part natural right and constitutional right enacted in the provision of article 13 (6) (a) of the **Constitution of the United Republic of Tanzania [Cap. 2 R. E. 2002]** (see: page 14 in the decision of **TANELEC Limited v. The Commissioner General, Tanzania Revenue Authority, Civil**

Appeal No. 20 of 2018 and **Mbeya Rukwa Auto Parts and Transport Limited v. Jestina George Mwakyoma, Civil Appeal No. 45 of 2002**).

Currently, the issue of right to be heard has attained the status of human rights. There must be sufficient reason to deny it (see page 52 in the decision of **Judge In Charge, High Court at Arusha and The Attorney General v. Nin Munuo Ng'uni [2004] TLR 44**). In the Present appeal, the Appellant prays to this court the right to be heard, and only that. He is not asking the Tribunal or this court to grant him specific favour. That is why this court is required to refrain from being bogged down by legal technicalities at the expense of substantive justice in determining both civil and criminal disputes.

On 30th October 2015 in the decision of **Magdalena Daniel v. Godwin Tabula, Land Case Appeal No. 276 of 2011**, my learned Madam Judge Hon. Kairo in this court, at page 12 stated that:

> *Article 107A (2) (e) of the Constitution of the United Republic of Tanzania 1977, imposes on the courts an obligation to refrain from being bogged down by technicalities at the expense of substantive justice by*

providing that in determining civil and criminal matters court shall administer justice without undue technicalities. This position was reiterated in the case of ***GENERAL MARKETING CO. LTD VS. A SHARIFF (1980) TLR 61*** *where it was held by Biron J, that 'Rules of procedures are handmaids of justice and should not be used to defeat justice'.*

However, before Madam Judge's decision, the Court of Appeal had already learned on the problem of technicalities. In its own words in the precedent of **Nimrod Elireheman Mkono v. State Travel Service Ltd. & Masoo Saktay [1992] TLR 24,** at page 29 stated that:

We would like to mention, if only in passing, that justice should always be done without undue regard to technicalities.

To my opinion, it is substantive justice which determines rights and duties of individuals fairly. That is why, I think, the provisions in article 13 (6) (a) on the right to be heard and 107A (2) (e) on disregard of legal technicalities must be read together. Since some of

constraints, in certain situations, may not invite applicability of our Constitution, the Parliament in 2018 sat to enact provision of section 3A via Written Laws (Miscellaneous Amendment) Act, No. 3 of 2018 to adjust the Civil Procedure Code [Cap. 20 R.E. 2002] (the Code) to introduce the principle of overriding principle.

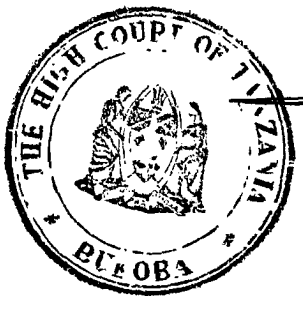
After the modification of the Code, the principle was celebrated in the case of **Yakobo Magoiga Gichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017** and has been invited in several other judicial decisions by this court and our superior court and now labelled as **oxygen principle** supporting parties who in any other case would have been denied their rights by legal technicalities (see: **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA), Civil Appeal No. 35 of 2017, Mandorosi Village Council & Others v. Tuzama Breweries Limited & others, Civil Appeal No. 66 of 2017** and **Njoka Enterprises Limited v. Blue Rock Limited and Another, Civil Appeal No. 69 of 2017**).

For the foregoing cited laws in form of the Constitution, statutes, precedents, and reasons adduced in this appeal, I am moved to say that the Appellant has advanced and displayed good cause or sufficient reason to justify his non-appearance in the Tribunal on 20th September

2017 and must be heard on merit in Application No. 266 of the 2012 registered in the Tribunal. I therefore, restore the dismissed Application No. 266 of 2012 and must proceed from where it was halted/dismissed. For sake of justice and avoidance of bias, it must proceed, heard and determined to the finality by another pair of learned Chairman and honorable assessors.

On the same trend, I quash the proceedings, any orders and set aside ruling emanated in Misc. Application No. 266A of 2017 before the Tribunal. Having said so and considering the disputed is yet to be determined to the finality to distinguish the rights and duties of the parties, I think it is inappropriate to order for costs. Appeal is allowed. However, each side to bear its costs.

It is accordingly ordered.



F. H. Mtulya

Judge

21/05/2020

This judgment was delivered in Chambers under the seal of this court in the presence of the Appellant, Mr. Faraji Athumani Mugaye and in the presence of the Respondent's learned counsel, Ms. Gisera Rugemalira.

F. H. Mtulya

Judge

21/05/2020