

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. LAND APPLICATION NO. 26 OF 2020

(From the Judgment of the High Court of Tanzania at Moshi (Justice S. B. Mkapa, J.) Misc. Land Appeal No. 2/2019, Land Appeal No. 221/2017 Moshi District Land and Housing Tribunal, Original Sanya Juu Ward Tribunal Land Case No. 51/2016)

JOHN BALBALA ----- APPLICANT

VERSUS

EVELINE JOHN ----- RESPONDENT

RULING

MUTUNGI .J.

The Applicant dully represented by Miss Esther Kibanga Learned Advocate is praying before this court for orders as hereunder: -

- (1) An order that the court be pleased to certify a point of law and grant leave to appeal to the Court of Appeal.
- (2) An order that incidental costs abide by the results of this application.

The learned counsel in support thereof averred that the main point of law to be certified in this matter is that, the Applicant was denied the right to be heard by the trial tribunal (Sanyajuu ward tribunal). Giving a brief background, the Applicant's counsel contended the Applicant was on 5/7/2016 before the trial tribunal, informed about the claims brought against him. He refuted the claims and proceeded to raise his concern on the sitting assessors. He alleged and claimed he had no trust in the said assessors.

Despite his concern, the trial tribunal ordered him to file a formal complaint. When the matter was called up again, he was told that since he had failed to file a formal complaint, it meant that he was not ready to proceed and the matter sanctioned to an Ex-parte hearing.

The Applicant's counsel further explained that, the act of forcing the Applicant to file a formal application was not backed by any law. The Applicant was at liberty to use whichever method suited him. Be as it may, the trial tribunal was to cross-examine the Applicant as to why he had not filed a written complaint and thereafter reduce the same in writing with reasons for ordering the Ex-parte hearing. This was

definitely the denial of a right to be heard as per the case of **Fredrick Selengia and another vs. Agnes Maselle [1983] TLR.**

The Applicant's counsel raised yet another point of law to be certified that, the trial tribunal was not properly constituted as per **Section 4 (1) (a) and (b) of the Ward Tribunal Act, Cap 206 read together with Section 11 of the Land Disputes Act Cap 216.** In that regard the coram should mandatorily comprise of a woman. The learned counsel invited the court to the case of **Julius .S. Mshai vs. Daudi Mkumba, Miscellaneous Appeal No. 41/2008 (HCT – Dodoma,** Land Division, where it was emphasized that there should be a list of members in order to ascertain the gender aspect. In the Advocate's settled opinion, this was in due disregard of substantive justice and not a matter of technicalities which can be done away by employing the recently introduced overriding objective principle. To this the learned advocate cited the case of **Njau Enterprises Ltd. vs Blue line and Rock Venture Company Ltd, Civil Appeal No. 69/2017 CAT-Arusha** page 5. Despite the above anomaly, the proceedings were still a nullity since the list of those in attendance when the decision was pronounced, the secretary was among the members. In law, the secretary does not qualify as a member

of the trial tribunal as per **Section 4 (2) of Cap 406 and Section 5 (1) (a – h) of CAP 206.**

In view of the above submission, the learned counsel prayed that, the court should find merit in the Application and proceed to grant the same. The application itself is made in terms of section 47 (3) of the Land Disputes Court Act, No.2 of 2002 [R.E. 2018].

Mr. Gideon Mushi learned advocate submitting in reply thereof, stated, once the trial tribunal had summoned the Applicant, he did immediately notify the tribunal that he had no trust in the Honourable Assessors and dully advised to file a formal application. To the contrary he never filed one and worse still he never entered appearance. Following this scenario, the trial tribunal proceeded to order the matter be heard Ex-parte against the Applicant.

The foregoing notwithstanding, the Advocate expounded that, the Applicant still had an avenue at the District Land and Housing Tribunal to set aside the Ex-parte Judgment. What the Applicant did was to appeal to the District Land and Housing Tribunal in a matter which had to have the Ex-parte Judgment set aside first. All possible means to have the

Applicant appear and prosecute his case were followed. It was thus inevitable not to grant an Ex-parte order. This too was one of the ways of proceedings with the case on merits.

It was the Advocate's further averment that, once the Applicant had twice tried to appeal in the District tribunal, he ultimately had the same dismissed. The Respondent jumped at this chance and filed execution proceedings with the District Land and Housing Tribunal. The execution was accordingly granted and on 14/9/2017 the Tribunal Broker filed his execution report before the District tribunal. It can now be well settled that; the instant application has in due thereof been overtaken by events.

Submitting on the point of law as far as the coram is concerned, the learned advocate called upon the court to refer to the last list on the record. He narrated that one will find the coram was properly composed as required by law only that there was no woman member. One would then ask, whether this amounts to a miscarriage of justice. The learned advocate referred the court to the case of **Jakobo Maginga Kichere vs Penina Yusuf, Civil Appeal No. 55/2017** and the answer would be, the Applicant was not prejudiced in any

way by this omission. The counsel apart from advancing the above reasons in his submission, he also introduced the fact that this is an omnibus application. In that regard, there had to be two laws in support thereof. In conclusion he prayed the application be dismissed with costs.

In re-joinder, the Applicant's advocate reacting on the issue of the omnibus application, submitted the Respondent should have filed a preliminary objection. Now that, they did not do so it will amount to taking them by surprise. The learned counsel proposed, the Respondent had the proceedings for over a year, yet did not bother to raise the objection as early as possible before the application was due for hearing on merits.

The learned advocate contended, there was no room for setting aside an order at the trial tribunal that is why the Applicant had gone through the window of appeal to the District tribunal twice but these appeals were dismissed without hearing them on merits. The Applicant tried to apply for extension of time before this court and the same was struck out. The applicant is still aggrieved that courts should

not entertain Ex-parte hearings but should hear the cases on merits.

The foregoing notwithstanding, execution proceedings are not a bar to subsequent proceedings. The counsel invited the court to find that even though the execution was subject to a nullity. It cannot then be said the application has been overtaken by events. This is why they want to go to the Court of Appeal hence the application should be allowed with costs.

Having summarized the rival submissions the court is guided that an applicant has to establish points of law under the following conditions: -

- a. the case originated from a primary court or ward tribunal
- b. the point to be certified should be that of law

Section 42 (2) of the Act *supra* provides,

“Where an appeal to the court of appeal originates from the ward tribunal, the appellant shall be required to seek for the certificate from the High Court..... certifying that there is a point of law involved in the appeal.”

At this juncture, it is imperative to go through the background of the application before this court. The Applicant was the Respondent in the original matter No. 51 of 2016 before the Sanyajuu ward tribunal. In the wake of his appearance in the tribunal, he raised his discomfort with respect to the sitting honourable assessors. He made it known that he had no trust in the assessors. He was then ordered to file a formal complaint of which he declined and as a result the matter was ordered to proceed Ex-parte.

In the end, judgment was entered in favour of the Respondent herein. As would be expected, the Applicant was dissatisfied hence filed his appeal with the District Land and Housing Tribunal vide Land Appeal No. 221/2017. The said appeal was struck out for being improperly before the tribunal. He then proceeded to file an application for extension of time which was struck out on technical grounds. The Applicant did not stop here but filed yet another application for extension of time to file an appeal which however was rejected for failure to advance sufficient reasons for the delay. What followed is that the Applicant knocked at the doors of this court in Miscellaneous Land Appeal No. 2/2019 which was dismissed on 24/3/2020 and

the same consequently upheld the District Land and Housing Tribunal's decision.

I have had to revisit the grounds of appeal raised in this court in Appeal No. 2 of 2019;

- (i) That, the Honourable Chairman erred in fact and in law for refusing to grant extension to appeal out of time while the Applicant had sufficient reasons.
- (ii) That, the Honourable Chairman erred in fact and in law for refusing to grant extension of time to appeal out of time as the decision of the Ward Tribunal was illegal, null and void.

In answering the two raised grounds in that appeal this court found and was settled for the first ground that, the Applicant had not established good reasons for the delay as was rightly so found by the District Land and Housing Tribunal.

For the second ground, in the said appeal, this court found that the Applicant had denied himself the right of hearing with no good reasons. This court further considered the illegality that, the secretary of the tribunal did sign the judgment. Even though the Applicant had not demonstrated how the same occasioned injustice to him, much so when

the tribunal was properly composed in so far as the coram was concerned.

In the upshot, this court was satisfied that no sufficient reasons had been established for the delay and the appeal was dismissed with no order for costs.

In light of what the court had observed, there are indeed points of law which can be looked into by the Court of Appeal. The Applicant questions his right of being heard and the composition of the trial tribunal. I am satisfied that indeed the application specifically paragraph 13 of the same has merits and the following are the certified points of law: -

- (1) Whether the Applicant was denied his right of hearing by the trial tribunal.

and

- (2) Whether the trial tribunal was properly composed according to the law.

The Respondent's counsel had tried to raise a preliminary point of law through the back door. The court proceeds to warn that, this is not the proper way of raising issues which are based on points of law. The adverse party should never be taken by surprise.

Needless to say, the court finds the issue raised is not fatal as it does not go to the root of the application. Reading through, it is crystal clear that, all that the Applicant was seeking is for the court to satisfy the point of law which the court has already done and more so the Respondent was not prejudiced in anyway. I make no order for costs.



B. R. MUTUNGI
JUDGE
20/10/2020

Ruling read this day of 20/10/2020 in presence of both parties and Miss Esther Kibanga Advocate for the Applicant.

B. R. MUTUNGI
JUDGE
20/10/2020

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
20/10/2020