

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOSHI DISTRICT REGISTRY)

AT MOSHI

LAND CASE APPEAL NO. 03 OF 2019

(C/F Misc. Land Application No. 300 of 2018 Formally Land Application No. 111 of 2018 in the District Land and Housing Tribunal for Moshi)

AMON A. MOSHA.....APPELLANT

VERSUS

KONDE INTERNATIONAL.....RESPONDENT

JUDGMENT

Last order: 30/05/2020

Date of delivery: 22/07/2020

MWENEMPAZI, J:

The appellant together with three others were sued for breach of contract by the respondent at the District Land and Housing Tribunal for Moshi in Application No. 111 of 2018. The application was heard ex-parte after failure by the appellant to file written statement of defence (WSD). After the ex-parte proof the tribunal entered judgment in favour of the applicant and the appellant herein was ordered to pay rent arrears and vacate the suit property. Aggrieved by the decision, the appellant through Application

No.300 of 2018 prayed before the tribunal for an order to set aside the ex-parte judgment and for the matter to be heard inter-parties. The Tribunal dismissed the application hence the appellant preferred an appeal before this court against the ruling. He has advanced the following six grounds of appeal: -

1. That, the tribunal's chairman erred in law and in facts for preparing a ruling of Misc. Land Application No. 300 of 2018 and thereby dismissing it without hearing the same.
2. That, the tribunal's chairman erred in law and in facts for stating in his "purported ruling" that the appellant refused to file the written statement of defence while he was told that a written statement of defence had already been received in the registry of the tribunal and the appellant was in the process of filling it and he actually filed it on that date.
3. That, the chairman of the tribunal erred in law and in fact for ordering the 8 No. 111/2018 to proceed ex-parte for the reason that the appellant had failed to file written statement of defence while he was still within 21 days within which he had been ordered to file it.

4. That, the trial chairman erred in law and in fact for allowing Application No.111/2018 relying on invalid lease agreement and unreliable weak oral evidence.
5. That, the tribunal chairman erred in law and in fact for not finding that the applicant does not exist and even if it exist, it had no locus to file Land Case No. 111/2018.
6. That, the trial chairman erred in law and in facts for not finding that even a person who appeared in the tribunal and identified himself as the applicant is not known and had no power or authority to appear for the applicant.

The appeal was heard by way of written submissions. The appellant's submission was prepared by Mr. Erasto Kamani learned advocate while the respondent's submission was prepared by Konde International.

In his written submissions in support of the appeal, the learned counsel for the appellant submitted with respect to ground number one that the appellant had, on 12/12/2018, filed in the District Land and Housing Tribunal a Misc. Land Application No.300/2018 praying for setting aside an ex-parte judgment which the tribunal had pronounced on 12/11/2018 in Land Case No.11/2018. He submitted further that the said application

No.300/2018 was never mentioned or heard. That according to records of the tribunal five days later the respondent applied for execution of that Judgment via Misc. Land Application No.303/2018. The learned counsel further argued that according to rules of practice and procedure the trial chairman was supposed to first dispose of an application for setting aside an ex-parte judgment before hearing an application for its execution. However, the trial chairman opted to hear the application for execution of ex-parte judgment leaving an application for setting it aside unheard. He further contended that when the application for execution was set for hearing the trial chairman was reminded by the appellant that there was an application for setting aside the ex-parte judgment that was still pending but the trial chairman unjustifiably proceeded to hear an application for execution and granted it while ignoring the application for setting aside the ex-parte judgment which was still pending in the tribunal. After ordering execution of the ex-parte judgment the trial chairman composed a ruling for Application No.300/2018 without hearing it. It was the learned counsel's view that the act of composing a ruling for an application which has never heard is contrary to the rules of practice and it is a clear indication of miscarriage of justice.

Arguing grounds number two and three together the learned counsel submitted that the appellant was required to file written statement of defence within 21 days on or before 24/9/2018. That on the mentioned date, the appellant's written statement of defence had already been received by the tribunal but to the appellant's surprise when he appeared before the chairman on that same date he was informed that the Land Application No. 111/2018 had proceeded ex-parte. The learned counsel submitted that it was not proper for the tribunal to order ex-parte proof while the appellant had already submitted his written statement of defence to the tribunal registry and he was in the process of paying for the same as he was still within time.

With respect to fourth ground, the learned counsel submitted that the trial chairman erred in law and in fact by relying on invalid lease agreement and unreliable oral evidence to arrive to its decision in Application No.111/2018. He argued that the lease agreement which was annexed by the applicant as Annexure A2 was unreliable because first it was not signed, secondly the agreement does not show if the respondent Konde International was the owner of the land which was the subject matter in the agreement also the agreement does not show that it is Konde International that leased the

suit land to the appellant. The learned counsel argued further that despite those anomalies the tribunal trusted the witness and the documents he tendered. He also submitted that it was wrong for the tribunal to order Konde International be paid Tshs. 4,000,000/= as rent for the suit land while it was not the owner of the suit land and did not enter into lease agreement with the appellant and therefore did not have *locus standi* to institute Land case No.111/2018.

With respect to fifth ground of appeal the learned counsel submitted that Konde International does not exist as there is no evidence on record that there is a company known as Konde International in this country.

Concluding his submission, the learned counsel for the appellant submitted that Edga Exaud Mushi who appeared in the tribunal as the applicant in the Land Case No. 111/2018 did not explain as to how he is related to Konde International Company or in which capacity he was appearing. In view of his submission, the learned counsel argued that the tribunal's ruling in Misc. Land Application no.300/2018 as well as proceedings and Judgement in Land Application No.111/2018 are null and void. He thus prayed for the same to be quashed and set aside.

Responding to the submission the respondent submitted with respect to ground number one that it was not proper for the appellant to bring his grievances of another case into this appeal. He argued that if the appellant was aggrieved with what had happened in the application to set aside ex-parte judgment he could have appealed against that decision because the practice and procedure requires every case to be determined on its own merit.

With regards to ground two he submitted that it was the duty of the appellant to comply with courts' schedule as time waits for no one. He further submitted that the tribunal is not to blame rather it was the appellant's mistake who failed to utilize time given and expected to finalise on the final day.

With respect to fourth ground of appeal, the respondent submitted that during hearing the respondent being a legal person was represented by one Mr. Edga Exaud who is one of the partners in Konde International. He further submitted that what was submitted as exhibit was not made to prove its authenticity rather to show the existing relationship between the appellant and the respondent in order to draw the line of ownership of the

suit land. He also submitted that if the appellant was not stubborn, he could have the chance to challenge the document during the hearing.

Moving on to ground number five the respondent submitted that the submissions made by the appellant are just words of a dying horse because he has no proof as to the existence or non- existence of Konde International.

Concluding his submission, the respondent submitted that most of what was submitted by the appellant are arguments which were supposed to be adduced during the hearing at the trial tribunal therefore he prayed for the appeal to be dismissed with cost.

Now in determining this appeal based on the grounds of appeal, parties submission and records from the trial tribunal the issues for determination before me is whether the decision/ruling in the Misc. Application No. 300 of 2018 was properly procured. According to the records from the District Land and Housing Tribunal on 7th December 2018 the Appellant here in filled Misc. Application No. 300 of 2018 praying for setting aside ex-parte judgement and decree which was passed on 12th November 2018, the respondent here in filed his counter-affidavit on 20th December 2018 but before that on 13th December 2018 the respondent herein through Misc.

Application No. 303 of 2018 filed an application for execution of the ex-parte decree. There is nowhere in the record of the tribunal showing that the Misc. Application No. 300 of 2018 was heard as there is no proceedings for the same. However, there is a ruling of the said Misc. Application No.300 of 2018 in which the tribunal chairman gave his decision based on the chamber summons and affidavit of the applicant and the counter affidavit filed by the respondent therein. I must admit that this is not a proper procedure. According to regulation 8(1) of the ***Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003*** the chairman of the tribunal is required to fix a date for hearing of the application once a counter affidavit has been filed. Therefore, the act of the tribunal chairman to give a ruling before hearing the application is irregular and it defeats justice. A right to be heard has been emphasized in a number of courts' decisions as a fundamental rule of natural justice. For example in the case of ***Nangole v Kiruswa (Civil Appeal No. 129 of 2016) [2016] TZCA 129; (20 October 2016)***, the court of appeal while citing yet another unreported Civil Application No. 33 of 2002 of ***Abbas Sherally and Another Vs. Abdul Fazalboy***, went further and observed that:-

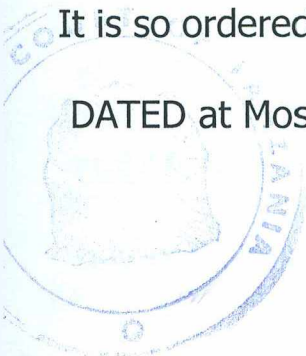
"The right of a party to be heard before adverse action or decision is taken against such party... is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

I subscribe to the above holding, but to add more, in the circumstances of the case at hand, not only the right to be heard was denied to the parties but also the decision arrived at was wrongly procured as the parties were not given a chance to defend what they alleged in their pleadings.

I therefore find merits in this appeal, and proceed to nullify and quash the tribunal's ruling dated 17th January 2019 with respect to Misc. Application No.300 of 2018 and set aside the decree issued by the trial chairman. I hereby order re-hearing of the application by another presiding chairman.

It is so ordered.

DATED at Moshi this 22nd day of July 2020.




T. MWENEMPAZI
JUDGE