

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO.1 OF 2020

(Arising from Misc. Land Application No.222 of 2016, Maswa District Land and Housing Tribunal)

KANONI BUNDALA SITTA.....APPELLANT
VERSUS
DAUDI DITTU MOHOYELO..... RESPONDENT

JUDGMENT

20th October & 8th December, 2020

Mdemu,J.:

This is an appeal from Land Application No.222 of 2016 in which, the District Land and Housing Tribunal of Maswa denied the Appellant herein from setting aside the dismissal order in Land Appeal No.8 of 2011. Briefly, the Appellant appealed to the District Land and Housing tribunal of Maswa challenging the decision of the Ward Tribunal regarding ownership of the suit land. According to the affidavit of the Appellant in land Application No. 222 of 2016, the appeal aforementioned was dismissed on the 2nd day of November, 2016. The dismissal order also indicates so.

On 5th of December, 2016, the Appellant moved the District Land and Housing Tribunal of Maswa to have the dismissal order set aside. Upon receiving the application, and in the course of replying to the affidavit, the Respondent herein raised four preliminary objections in the tribunal as hereunder:

1. *That, the chamber application is time barred.*

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2. *That, the affidavit in support of the chamber summons is bad in law as the verification clause has not been signed contrary to rule 15(3) of Order VI of the Civil Procedure Code, Cap.33*
3. *That, the affidavit in support of the chamber application is bad in law for it does not contain the seal of the Court.*
4. *That, the name of the drawer is not endorsed contrary to section 44 (1) of Cap.341 R.E.2002*

The application was heard by the Chairman only on the first preliminary objection that, the application is time barred. The tribunal upheld the preliminary objection thereby, dismissed the application on 18th of November, 2019, hence, the instant appeal on the following two grounds:

1. *That, the trial chairman erred in law and fact by failure to overrule the preliminary objection filed by the Respondent after ascertaining that the Respondent failed to prove his objection in accordance with the law.*
2. *That, the trial chairman erred in law and fact in the sense that, no reasons for the takeover of trial after the first trial chairman failed to conclude the proceedings.*

I heard the Appellant and the Respondent appearing in persons on 20th of October, 2020 when this appeal came for hearing. Along with adopting the two grounds of appeal as part of his submission, the Appellant submitted also that, the trial chairman did not give more weight to the objection in land Application No.222 of 2016. He added that, there was a case heard by this court (Luhangisa, J.) who

ordered land Appeal No.8 of 2011 be heard by the District Land and Housing Tribunal of Maswa.

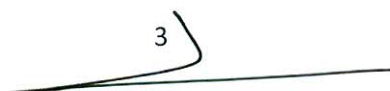
He added that, at the hearing of that appeal, the appeal then got dismissed for want of prosecution on 2nd of November, 2016, hence, an application for restoration. It was his further submissions that, the application for restoration got dismissed on 18th of November, 2019. In his opinion, he stated the appeal be allowed also on the ground that, there was no reason for taking over the proceedings assigned by Mr. Kanyerinyeri who succeeded Chairman Ilanga. He rested his submissions this way.

In reply, the Respondent submitted first his reply to the petition of appeal to form part of his submissions. He thereafter replied that, there was no wrong committed by the trial Chairman in dismissing the application because, had the Appellant encountered some challenges for non appearance, he would have stated so. In all, he would have applied to the tribunal in time for restoration of appeal.

With respect of the judgment of this court (Luhangisa J.), the Respondent conceded that, this court ordered the appeal be heard by the District Land and Housing Tribunal of Maswa, but as the Appellant did not attend, then the tribunal proceeded to dismiss the appeal. He added that, the Appellant had no justification for non-appearance. It is on those premises, the Respondent urged me to dismiss the appeal for want of merits. In rejoinder, the Appellant had nothing useful save for banking on what he submitted in chief. This was all from the parties.

Taking the two grounds of appeal and the ruling of the tribunal dismissing the application for being time barred, the main contention therefore appears to revolve around whether, the application for restoration of the dismissed appeal for

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want of prosecution was time barred. Now going to the first ground, which thus resolves the issue raised above, the Appellant complained that, the Respondent did not prove that the application to have the dismissed appeal restored, was out of time. For easy of reference, it is pertinent to reproduce what the Respondent submitted when prosecuting the preliminary objections on time limitation. He submitted the following as seen at last page of the typed proceedings:

Order

Hearing of the preliminary objection commence

Respondent's submission

That the application is time barred and therefore I pray to be dismissed with costs. As for the 2nd, 3rd, 4th and 5th, the court to take them as they appear and decide in the dictates of the law

In this, I agree with the Appellant that, the Respondent stated nothing on what he said that the application is time barred. What he did was just re-stating the preliminary objection. It is to say, was the Application out of time as to require the trial chairman to sustain the preliminary objection? In **Regulation 11 (1) (b) (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 GN.No.174 of 2003**, regarding time limit to apply for restoration of dismissed appeal, it is provided that:

11(1) on the day the application is fixed for hearing, the tribunal shall-

a) N/A

b) *Where the Applicant is absent without good cause and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the Applicant*

c) *N/A*

*(2) A party to an application may, where he is dissatisfied with the decision of the tribunal under sub regulation (1), **within 30 days apply to have the orders set aside**, and the tribunal may set aside its orders if it things fit so to do and in case of refusal, appeal to the High Court. (emphasis mine)*

According to the record, land appeal No.8 of 2011 was dismissed on 2nd of November, 2016. Application for restoring that dismissed appeal was filed on 5th of December, 2016, which was almost after 33 days from the date the decision dismissing the appeal was made. Having those facts and the law as quoted above, the learned chairman made the following observations as at page 2 of the ruling:

" A close look of the applicant's application provides to the effects that, the land case No. 8/2011 was dismissed on 2/11/2016 and this application was filed on 5/12/2016 which is one month and three days from the date of the dismissal order. The import of regulation 11(2) of G.N No.174/2003 clearly provides that, an application to set aside dismissal order should be filed within 30 days from the date of an order. Being that the case, at this juncture, I am ready

into associate with the Respondent who appeared in person, unrepresented that, this application is time barred.

I do not think, if, under the circumstances, the position of the learned trial chairman need be disturbed. The Appellant filed his application out of time and as alluded by the learned chairman at page 3 of his ruling, he ought to have sought leave of the tribunal to have time extended to have an application to set aside the dismissal order. He did not do that and instead right away instituted the move to set aside the order.

As this was not an application for extension of time, the tribunal had no opportunity to determine whether there was sufficient cause on the delay or not. Going by what is prescribed in **Regulation 11(2) of GN No.174 of 2003** just quoted above, the Appellant would only have appealed to this court upon refusal by the tribunal to set aside the dismissal order. The tribunal simply declared him time barred to make that application and further directed him to move the tribunal to enlarge time. He did not do so and instead, he rushed to this court on appeal. In my view, this was not proper and premature.

Having this in mind, the second ground on the successor chairman's failure to assign reasons on the taking over, should not detain me. However, I should comment on one thing. As submitted by the Appellant, two chairman heard the preliminary objection. They were Mr. Ilanga and Mr. Kanyerinyeri. I think I should reproduce part of the proceedings as hereunder; Mr. Ilanga commenced this way:

18/01/2017

CORAM

Ilanga M.T.-Chairman

Applicant-Present

Respondent-Present

T/Clerk-T.Kabume

Respondent

The applicant is time barred because he filed this application out of 21 days. The Applicant ought to file his application within 21 days but he did not do so. I pray the application be dismissed with costs. I pray also to withdraw the preliminary objection No.2 to 5. That is all.

Applicant

I have filed this application to pray the court to extend time with which to file an application for setting aside the dismissed order. I pray the preliminary objection be dismissed and the application be heard and determined on merits. That is all.

Order. Ruling on 24/02/2017

Signed

Ilanga M.T.

18.01.2017

The ruling was not pronounced on 24th of February, 2017 as ordered. The record is silent on this, but later on 5th of March, 2019, Mr. Lekamoi presided over the matter. He did not however go any far as on 13th of August, 2019, one Kanyerinyeri took over and is recorded on the later dates as hereunder:

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"25.10.2019

CORAM

J.F. Kanyerinyeri –Chairman

Applicant- Present

Respondent- Present

T/Clerk- S.Allen

Order

Hearing of the preliminary objection commence

Respondent's submission

That the application is time barred and therefore I pray to be dismissed with costs. As for the 2nd, 3rd, 4th and 5th, the court to take them as they appear and decide in the dictates of the law

Applicant's reply to P.O

My application is not time barred as contended by the Respondent herein and in respect to the 2nd, 3rd, 4th and 5th objections, I pray the court to decide in the dictate of the law."

From what transpired, it was wrong in the first place not to deliver the ruling after Mr. Ilanga had heard the preliminary objection and reserved the ruling. As the preliminary objection got heard save for final determination for failure to compose the ruling, Mr. Kanyerinyeri was not justified to hear the same preliminary objection. What would have happened was for the predecessor chairman to be

recalled to compose and ultimately deliver the ruling. In any other case, his successor could have composed the ruling or on resumption of the hearing of the preliminary objection afresh, could have recorded reasons for so doing.

It was not proper for the two chairman to conduct proceedings the way they did. Nonetheless, with or without, the same would not make the application No.222 of 2016 in time and that, as there was no leave of the court for enlargement of time, it would not also make an order of the tribunal dismissing the application for being time barred illegal. Having said so, this appeal is accordingly dismissed for want of merits. Each part to bear own costs, it is so ordered.


Gerson J. Mdemu

JUDGE

8/12/2020

DATED at SHINYANGA this 8th day of December, 2020.




Gerson J. Mdemu

JUDGE

8/12/2020