IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[DISTRICT REGISTRY]
AT ARUSHA

LAND APPEAL NO. 8 OF 2020

(C/f the decision of the District Land and Housing Tribunal for Arusha in Misc. Land Application No. 504 of 2017 and Execution Application No. 97 of 2007, Originating from Karatu Ward Tribunal Land Case No. 1 of 2006)

BOAY MISLAY ..... APPELLANT

VERSUS

SONGAY TARMO ..... RESPONDENT

JUDGMENT

24th February & 7th May, 2021.

MZUNA, J.:

The appellant herein, has preferred this appeal against the order of the District Land and Housing Tribunal for Arusha, (the District Tribunal) in Misc. Land Application No. 504 of 2017 delivered on 19/12/2019. In that ruling, the District Tribunal found that the original lower Tribunal was filed at Karatu and therefore had no jurisdiction to deal with the matter. Further that the original lower Tribunal record was missing, consequently it ordered that the mater should start afresh in a Tribunal or court having competent jurisdiction.

This did not please the appellant who decided to lodge 11 grounds in the petition of appeal. Unfortunately, the respondent did not attend and the matter proceeded ex parte. The appellant, an unrepresented fellow had nothing substantial to argue. He insisted that he had been in occupation of the suit land since 2009. He

prayed for the court to adopt the grounds of appeal and ultimately decide the appeal in his favour with costs.

Basically the appeal raises some three points:-

a) *That, the District tribunal erred in law and fact in nullifying Karatu Ward Tribunal and the Execution decisions basing on the Application for extension of time that was filed by the Respondent while it was the same Tribunal which ordered the case to be instituted at Karatu Ward tribunal, thus creating double standards;*
b) *That, District Tribunal erred in admitting the Application while the same was time barred; and*
c) *That, the course taken by the District Tribunal to deal with the application as if it was hearing the main appeal on merits while it was an application for extension of time denied the Appellant the fundamental right to be heard.*

The record shows that the matter was originally filed at Arusha District Land and Housing Tribunal in Application No. 108 of 2006 which after noticing that the value was less than 3,000,000/- ordered for the matter to be dealt with by the Ward Tribunal of Kansay Ward, Karatu District. Mindful of the fact that it was still inoperative, the applicant, then **Mr. Boay Mislay** was advised to lodge it at Karatu Ward Tribunal. He complied. The appellant lodged his claim for land measuring 4¼ acres located at Laja Village, Kansay Ward, at Karatu Ward Tribunal as advised. In its judgment delivered on 25/5/2007, the trial Tribunal declared the appellant as the lawful owner of the suit land. The respondent **Songay Tarmo** was ordered to remove his crops planted thereon. There arose a dispute that the proceedings giving rise to that decision was missing. This prompted the Karatu District Land and Housing Tribunla vides Application No. 74/2016 to strike out the application. Parties were directed to file it at

the Arusha District Land and Housing Tribunal, which according to the Chairperson, was the Tribunal which executed the decree. That order is of 17th March, 2017.

The present appellant filed appeal against the execution application which as above said, the District Land and housing Tribunal for Arusha directed that it had no jurisdiction and thereby ordered for a retrial for want of original record.

From the above record, there are confusion, more so that the original record of the Ward Tribunal was not traced. Under those circumstances, it was ideal for the Tribunal to reconstitute the record by asking parties to bring their documents, even then after a deponed affidavit from the person responsible in handling the files, stating that efforts have been made and chances are that the file cannot be found. There was no affidavit stating that the record was not traced, and that it could no longer be available. His reliance is based on the letter written by the Karatu Ward Executive officer dated 10/12/2019 which shows that the record of the case is nowhere to be found in his office. In the first place, that letter cannot act as a proof that the record can no longer be traced.

Even assuming the course taken was appropriate, still the only remedy in my view, is not nullification of the proceedings and the decisions emanating therefrom, instead, there could have been a reconstruction of the record. The Court of Appeal in the case of **Charles Ramadhan Vs. Republic**, Criminal Appeal No. 429 of 2015 (unreported), had the following to say:-

> *"There is no general rule in our jurisprudence on the way forward when the Court is faced with the problem of missing records of the lower courts as the one in the appeal under scrutiny. When the Court was faced with a similar scenario in the case of* ***Robert s/o Madololyo Vs. the Republic,*** *Criminal Appeal No. 486*

of 2015 (unreported), after having visited the practice obtained in other jurisdictions, it was of the view that the other viable means of remedying the situation, was for the Deputy Registrar of the High Court, to involve other stake holders in the administration of justice, to reconstruct the records."

Surely, both parties ought to have been involved to reconstruct the records. The course taken by the District Tribunal Chairman on the pretext of the missing record in nullifying the lower Tribunal decision is therefore uncalled for. First, there was no enough proof that the record was missing and that it could not be traced. Second, the application for extension of time could be determined by considering the copy of the judgment of the trial tribunal which was annexed in the Application. Having so said, I find merit in the first and third grounds of appeal.

I now turn to the second ground, which was the complaint by the appellant that the application itself was time barred. Although unsubstantiated, this ground was made at a wrong stage. It was supposed to be argued in his preliminary objection raised in the Tribunal, and the same was to be determined in the application. For that reason, whether the application was time barred cannot be argued at this stage because the grounds for the delay in filing the application could best be dealt with at the hearing of the application. I therefore do not find merit in this ground.

Having so said, the way forward for an appeal of this nature was discussed in **Mantra Tanzania Limited vs. Joaquim Bonaventure,** Civil Appeal No. 145 of 2018, where the Court of Appeal held inter alia that: -

"On the way forward, it is trite principle that when an issue which is relevant in resolving the parties' dispute is not decided, an appellate court cannot step

into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter."

It has been insisted by both the Court of Appeal and this Court that Courts are bound to determine what has been placed before them by the parties. I am fortified to this view by the decision in **Zahara Kitindi and Another v. Juma Swalehe & 9 Others,** Civil Application No. 142/05 of 2018 CAT at Arusha (unreported) where Lila, JA, cited with approval the case of **Regional Manager –TANROADS Lindi vs. D.P Shapriya and Company Ltd,** Civil Application No. 29 of 2012 (unreported) a decision which was also applied in the case of **Victoria Real Estate Developmnt Limited vs. Tanzania Investment Bank and Three Others,** Civil Application No. 225 of 2014 (unreported) where the court cautioned that:-

"...it is now settled that a Court hearing an application should refrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..."

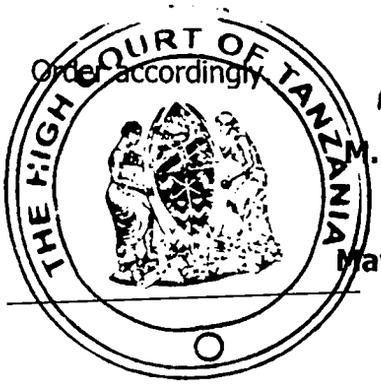
The above holding would equally apply in this appeal. Failure of the District Tribunal to determine the application for extension of time also denied the parties the right to be heard.

It is clear that the case was filed in the trial Tribunal due to the directives of the same District Tribunal. The Execution Application No. 97 of 2007 was as well granted by the same Tribunal. Therefore, the order of the Tribunal nullifying such decisions, is nothing but a nullity. There are no apparent reasons that moved the Tribunal to review its own decisions and vacate them. The order is hereby vacated.

In the circumstances of this case, I hereby quash the decision of the District Tribunal delivered on 19/12/2019 and set aside subsequent orders thereto. I remit the case file to the District Tribunal to deal with the matter before it that is application for extension of time. The allegation that it lacked jurisdiction was made in disregard of another order and is therefore unmerited for. The respondent should pursue his application there.

Appeal is allowed with no order as to costs.

Order accordingly



M. G. MZUNA,
JUDGE.
May, 07, 2021.