IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[LAND DIVISION]
AT ARUSHA

LAND APPEAL NO. 12 OF 2020

(C/f decision of the District Land and Housing Tribunal for Arusha in Misc. Land Application No. 303 of 2019, Originating from Application No. 325 of 2016)

RAMZANALI KASSAM JANMOHAMED ..... 1ST APPELLANT

FATEHALI KASSAM JANMOHAMED ..... 2ND APPELLANT

Versus

RAZIA S. K. JANMOHAMED *(Suing as Executor of Sadrudin Kassam Janmohamed)* **..... RESPONDENT**

JUDGMENT

7th December, 2020 & 5th March, 2021

Masara, J.

The centre of the dispute subject of this appeal is a claim over undisclosed piece of land. In the District Land and Housing Tribunal for Arusha (the trial Tribunal), the Respondent sued the Appellants vide Application No. 325 of 2016. Application No. 325 was fixed for hearing on 16 and 17 July, 2019, in the presence of the 1st Appellant and his advocate. On 16/7/2019, when the case was scheduled for hearing, hearing could not proceed because only the Respondent entered appearance. Both Appellants and their advocate did not enter appearance on that day (it is alleged that the 1st Appellant appeared but late). On the prayer of the counsel for the Respondent, the trial Tribunal ordered the hearing to proceed ex parte on the same day. On 26/7/2019, the Appellants, under a Certificate of urgency, filed Misc. Application No. 303 moving the Tribunal to set aside its ex parte order issued on 16/7/2019. In its ruling delivered on 21/2/2020, the trial Tribunal dismissed the Application with costs for the

reasons that the Appellants failed to show good cause that led them not to enter appearance on the hearing date and that the application was prematurely made. The Appellants were dissatisfied by the decision, they have therefore preferred this appeal on the following grounds:

a) *That, the trial Chairperson of the trial Tribunal erred in law and in fact to order Application No. 325 of 2016 to proceed ex parte without considering the weight evidence adduced by the Counsel for the Appellants hence led to injustice on part of the Appellants;*
b) *That, trial Chairperson of the trial tribunal erred in law and fact by refusing to consider the Appellants' Misc. Application No. 303 of 2019 filed at the trial Tribunal to set aside its ex parte order delivered on 16/7/2019, hence led to injustice on part of the Appellants; and*
c) *That, the Chairperson of the trial Tribunal erred in law and fact for denying the 1st Appellant who is a lay person right to be heard hence led to injustice.*

The Appellants pray that the appeal be allowed by setting aside the ex parte order and an order be made to enable Application No. 325 of 2016 to proceed interparties.

At the hearing of the appeal, the Appellants were represented by Ms. Frida Magesa, learned advocate, while the Respondent was represented by Bharat B. Chadha, learned advocate. On 2/9/2020, Mr. Chadha filed a notice of Preliminary Objections coached in the following terms:

(a) *That, the appeal is incompetent and vague as the impugned decision of the Tribunal dated 21/2/2020 being interlocutory is not appealable by virtue of section 74(2) of the Civil Procedure Code Cap 33 [R.E 2019]; and*
(b) *The appeal is further bad in law for not being accompanied by the Drawn Order of the impugned decision and the so called Ex-parte order dated 16/7/2019.*

On 7/9/2020, Mr. Chadha prayed to withdraw the first point of Preliminary Objection. Both the Preliminary Objection and the main appeal were ordered to be argued simultaneously by filing written submissions.

Submitting in support of the Preliminary Objection, Mr. Chadha contended that the ruling of the trial Tribunal in Misc. Application No. 303 of 2019 is an interlocutory one in the sense that it does not have the effect of determining the dispute in the main application. He submitted further, that appeal against interlocutory orders is barred by section 74(2) of the Civil Procedure Code (CPC), Cap. 33 [R.E 2019]. He defined interlocutory orders as orders of stay, injunction or receiver which are designed to preserve the status quo pending the litigation and ensure that parties might not be prejudiced by the normal delay which the proceedings before the Court usually take. Mr. Chadha added that applications under Order IX of the CPC are dismissed on appeal because interlocutory orders are not appealable. Mr. Chadha referred to a number of decisions to support his view. These are ***Arjun Singh Vs. Mohindira Kumar & Others*** (1964) AIR 993; ***Managing Director, Souza Motors Limited Vs. Riazguiamani and Another*** [2001] TLR 405; ***Kumar Govindji Monani t/a Anchor Enterprises Vs. TATA Holdings (Tanzania) Ltd & Another***, Civil Application No. 50 of 2002 (unreported) and ***Vodacom Tanzania PLC Vs. Planetel Communications Ltd***, Civil Appeal No. 43 of 2018 (unreported). Mr. Chadha also made reference to Regulation 11(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (hereby referred to as "GN. No. 174 of 2003") stating that the Appellants sought to enforce a right which could not come into existence until the main application would have been

decided. On that account, Mr. Chadha prayed that the preliminary objection be sustained and the appeal be dismissed with costs.

Contesting the Preliminary Objection, Ms Magesa contended that the procedure before determining the matter ex parte was to have room for the Appellants to furnish the Tribunal with good cause for their absence. She added that the Tribunal failed to give that room to the Appellants. She was of the view that the law, in terms of Regulation 11(2) of GN. No. 74 of 2003, allows a party who is dissatisfied with the refusal of the Tribunal to set aside ex parte order to appeal to this Court. Therefore, since the Tribunal chairperson refused to set aside the ex parte order, the Appellants were justified to appeal to this Court. She fortified that the order of the Tribunal was not an interlocutory one as contended by Mr. Chadha. According to Ms. Magesa, refusal to set aside an ex parte order is tantamount to denying the Appellants a right to be heard. She made reference tothe decision of this Court in ***Saida Shaban Vs. Adam Somon***, Misc. Land Appeal No. 43 of 2018 (H.C unreported). Ms. Magesa prayed that the Preliminary Objection to be overruled and the appeal be determined on merits.

I have given deserving weight to the Preliminary Objection raised and the submissions by the counsel for the parties both in support and against. The main issue for determination is whether the ruling in respect of Misc. Application No. 303 of 2019 was an interlocutory order/ruling which cannot be appealed against.

I do agree with Mr. Chadha that an appeal cannot lie against an interlocutory order, or an order which has no effect of finalising the matter. This was stated by the Court of Appeal decision in ***Jitesh Jayantilal Ladwa and Another Vs. Dhirajlal Walji Ladwa and 2 Others***, Civil Application for Revision No. 154 of 2020 which cited its previous decision in ***Vodacom Tanzania Limited Company Vs. Planetel Communications Limited*** (supra) holding thus:

> *"In the light of the settled position of the law, it is clear that an interlocutory ruling or order is not appealable save where it has the effect of finally determining the charge, suit or petition."*

However, I do not agree with Mr. Chadha that the ruling in respect of Misc. Application No. 303 of 2019 is an interlocutory order. I hold this view for two reasons. *One*, appeal against such ruling is specifically provided by the law as contended by Ms. Magesa. Regulation 11(2) of GN. No. 174 of 2003 provides:

> *"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 order set aside, and the Tribunal may set aside its orders if it thinks fit so to do,* ***and in case of refusal appeal to the High Court."*** (emphasis added)

From the above provision of the law, it is apparent that an appeal against the decision of the Tribunal refusing to set aside its ex parte order, is provided by the law. Seemingly, Mr. Chadha's assertion in that respect is misguided. *Two,* such a ruling cannot fall in the category of interlocutory orders because treating it so would deprive a deserving party the fundamental right to be heard. It is not uncommon to find that some parties fail to appear in the Tribunal for genuine reasons, which reasons may in some cases be held or considered by a Tribunal to be insufficient

for one reason or another. Therefore, curtailing such a party a right to appeal would jeopardize his fundamental right to be heard.

For the above stated reasons, I am inclined to agree with Ms. Magesa that the Preliminary Objection raised is devoid of merits. It is forthwith overruled. I therefore proceed determining the appeal on merit.

Submitting in support of the first ground of appeal, Ms Magesa contended that she delivered a baby through an operation and that at the time of giving birth, her child was born with yellow fever. At the time the case was fixed for hearing, her child was only 1½ months old, and at the same time she was battling the disease that befell her child. She explained all this to the Tribunal chairperson but yet the ex parte order was not set aside as explained. Ms. Magesa fortified that the Tribunal chairperson failed to accord weight on the evidence adduced by the Appellants as she was misled by Mr. Chadha, counsel for the Respondent.

On the second ground of appeal, Ms. Magesa submitted that the Tribunal chairperson ought to have considered the Appellants' application since she was aware of the situation but she decided to violate the rules of procedure without giving room to her to give reasons for her failure to enter appearance.

Regarding the third ground of appeal, Ms Magesa contended that the first Appellant is an old man to the extent of loosing his memories, therefore the case was in most cases attended by the second Appellant. She maintained that on 16/7/2019 when the case was fixed for hearing, the

first Appellant appeared but a little bit late. That he found the Respondent testifying. Being a lay person, the Appellant stayed silent, and he was never asked anything by the Tribunal Chairperson. She fortified that on the date the case was scheduled for hearing, her child fell sick, so she had no alternative than sending her assistant to give notice of her absence. She invited the Court to allow the appeal by setting aside the ex parte order and letting Application No. 325 of 2016 to proceed interparty.

On his part, Mr. Chadha strongly contested the appeal contending that the advocate for the Appellants' reason that her child was sick was not supported by medical evidence and that the appeal was premature. He cited ***Saida Shabani Vs. Adamu Simon Mwamaka***, Misc. Land Appeal No. 43 of 2018 (unreported) to the effect that medical proof is a prerequisite whenever a person alleges sickness as a reason for defaulting appearance. He concluded that ill health when proven by production of medical documentations constitutes good cause to grant the application, therefore it was mandatory for Ms Magesa to produce medical evidence to prove that her child was at the hospital for treatment.

Countering the second ground of appeal, Mr. Chadha elaborated that the law empowers the Tribunal to proceed ex parte when the Respondent defaults appearance, citing Regulation 11(1) of GN. 174 of 2003. He added that the application was prematurely made as the Appellants still have chance to apply for setting aside the ex parte judgment once hearing is concluded. Mr. Chadha insisted that none of the Appellants sworn an affidavit stating reasons for non-appearance. On that stance, he made reference to ***Bruno Wencesiaus Nyalifa Vs. Permanent Secretary***

Ministry of Home Affairs, Civil Appeal No. 82 of 2017 and ***Regional Manager, TANROADS Kagera Vs. Ruaha Concrete Company Ltd***, Civil Application No. 96 of 2007 (both unreported).

Submitting against the third ground of appeal, Mr. Chadha firmly stated that the affidavit and the record shows that non-appearance by Appellants and their counsel was deliberate, therefore it is not excusable. To that effect he referred to the case of ***Amina Rashid Vs. Mohinder Singh and Another*** [1986] TLR 196. Therefore, in his view, the decision of the trial Tribunal cannot be faulted since the Appellants were given an opportunity to be heard. Mr. Chadha asked the Court to dismiss the appeal in its entirety.

In a brief rejoinder, Ms Magesa contended that she did not inform the Tribunal that she attended Hospital but she informed it that her child was sick on the day of hearing. She made it known prior to the Tribunal that her child was sick as it was born with yellow fever. She was of the view that her application was not premature as the Appellants' advocate adduced sufficient reasons for failure to enter appearance.

Having elucidated the rival submissions by the advocates for the parties, it behoves me to determine whether the Appellants adduced sufficient cause warranting setting aside the ex-parte order issued by the Tribunal on 16/7/2019. There is no dispute that Regulation 11(1) (c) of G.N No. 174 of 2003 gives power to the Tribunal to proceed with a case ex-parte where a respondent is absent on the day of hearing without showing good cause for the non-appearance. Setting aside an ex-parte order/decision

will therefore mount where the Applicant adduces sufficient cause for failure to enter appearance and where there is evidence that a party is not trying to delay justice. In ***Mwanza Director M/S New Refrigeration Co. Ltd Vs. Mwanza Regional Manager of TANESCO Ltd and Another*** (supra), it was held:

> *"In the present application, there was no evidence to suggest that the defendant was behaving in any manner described above; on the contrary, the defendant acted promptly indicating a desire to see that justice prevails by having the matter determined inter parties. The plaintiff will suffer no harm which cannot be adequately compensated if the application is granted and both parties will have an equal chance to be heard on the claim."*

The above has been the practice by courts in ages. In the case of ***Abdaliah Zarafi Vs. Mohamed Omari*** (1969) HCD (PC) Civ. App. 150-D-68, Said J, held:

> *"There are occasions when a court is empowered by law to set aside its own orders. A trial court is empowered to set aside an ex parte decree or an order dismissing a suit passed as consequence of non-appearance so long as the person against whom the decree or order for dismissal of the suit is able to establish that he was prevented by sufficient cause from appearing in court on the material day. The same principle would apply to Appeals dismissed in consequence of non-appearance by the appellant"*

From the record available, the Appellants and their advocate defaulted appearance on 16/7/2019, the date the that Application No. 325 was fixed for hearing. On the very same date, the trial Tribunal ordered the case to proceed ex parte. It is also on record that the Appellants' application to have the ex parte order set aside was dismissed on the ground that the Appellants failed to show good cause for their non-appearance on 16/7/2019.

Paragraph 5 and 6 of the affidavit deponed by the Appellants' advocate in Misc. Application No. 303 of 2019 shows that the advocate informed the Tribunal that she expected to give birth between May and June 2019. That was covered in detail in her written submission in support of this appeal. She added that her child was born with health problems that called for her attention and that at the date the case was fixed for hearing the child was only 1½ months. According to paragraph 6 of the affidavit filed in the trial Tribunal and also in her written submission in support of this appeal, she could not enter appearance on the day of hearing as on that very morning her child fell sick. Having failed to enter appearance, Ms. Magesa did not stay idle, she stated that she sent her office attendant one Flora Samwel so as to give notice of her absence. Unfortunately, she reached rather late. When Flora arrived, she found the case in the midst of hearing.

In this Court's opinion, reasons adduced for non-attendance sufficed to set aside the ex parte order, considering the fact that the Appellants and their advocate were not frequent defaulters. They just defaulted on that single day. It was therefore inappropriate for the Tribunal Chairperson to order the case to proceed ex parte for non-appearance of a single day. The speed for which ex parte hearing order was implemented leaves a lot to be desired. Justice delivery machineries are always urged to ensure that cases are heard interparty. Unreasonable speedy determination of cases is discouraged since it may violate rights of the parties. Cases are to be determined on their merits unless impracticable so to do for some viable reasons. I am guided by a recent Court of Appeal decision in ***Mount***

Meru Flowers Tanzania Ltd Vs. Box Board Tanzania Ltd, Civil Appeal No. 260 of 2018 (unreported) where it was held:

> *"Two, it is settled law that courts should encourage matters to be determined on merit, unless under exceptional circumstances, they cannot... We also associate ourselves with the principle that justice is better than speed."*

One would have expected that after the Tribunal noted the non-appearance on the part of the Appellants and their advocate, and having ordered hearing to proceed ex parte, hearing was to be adjourned to a different date so as to allow the party who did not attend the possibility of setting aside the ex parte order upon giving reasonable grounds for non-attendance. Further, the fact that the advocate for the Appellants had notified the Tribunal of her possibility of being on maternity leave on the date the case was scheduled for hearing and the fact that she indeed gave birth within the same period, the trial Tribunal ought to have exercised latitude and allowed the application to set aside the ex parte order. It is also notable that on the date she was required to appear before the Tribunal she was not only on maternity leave but she had her child sick. Considering the fact that the child was still an infant and since the learned advocate made an effort to notify the Tribunal of her absence without success, I am inclined to hold that these factors constitute sufficient reasons for her non-appearance, which entitled her the setting aside order she had applied for.

Refusing to grant the application to set aside the ex parte order denied the Appellants the right to a fair trial. That is equivalent to denying them the right to defend their case and cross examine the Respondent, which constitutes the cardinal principles of the right to be heard. A right to be

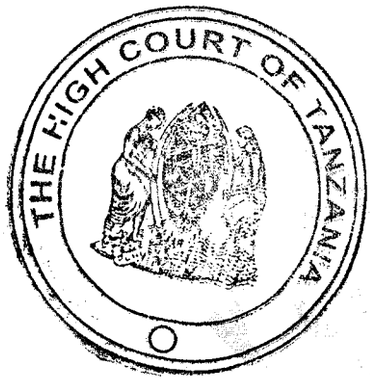
heard is elementary to the extent that dispensing it renders the whole proceeding a nullity. There is a plethora of authorities mandating Courts to observe the right to be heard. See for example: ***Margwe Erro and 2 Others Vs. Moshi Bahalulu***, Civil Appeal No. 111 of 2011; ***M/s Darsh Industries Ltd Vs. M/s Mount Meru Millers Ltd***, Civil Appeal No. 144 of 2015; ***Scan-Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese of Mbulu***, Civil Appeal No. 78 of 2012; ***Abbas Sheralli and Another Vs. Abdul Fazal Boy***, Civil Application No. 33 of 2002; ***Jaffari Sanya Jussa and Another Vs. Saleh Sadiq Osman***, Civil Appeal No. 54 of 1997 CAT Zanzibar, (all unreported) and ***Selcom Gaming Limited Vs. Gaming Management (T) Ltd and Gaming Board of Tanzania*** [2006] TLR 200, to mention but a few.

Therefore, the fact that the case was heard and is still being heard ex-parte, in the absence of the defence from the Appellants, and the fact that the Appellants have no opportunity to challenge the Respondent's evidence, the Appellants are prejudiced and their right to be heard has been violated. The contention by Mr. Chadha that the Appellants' counsel failed to adduce sufficient reasons for failure to prove by medical evidence that her child was sick carries no weight in the circumstances of this case. Her explanations sufficed because she stated nowhere that she took the said child to hospital. After all, sufficient reasons cannot be demonstrated in hard and fast rules, they are dependent on the exigencies of each case.

For the reasons aforestated, I find the ruling of the trial Tribunal to have been a nullity for violation of the right to be heard. Accordingly, the ruling and drawn order in Misc. Application No. 303 of 2019 of Tribunal dated

21/2/2020 is declared to be null and void. The current status of the main Application, that is Application No. 325 of 2016 is not known to me. Therefore, exercising powers conferred to me under section 43(1)(b) of the Land Disputes Courts Act, Cap 216 [R.E 2019], I quash and set aside every order or decision subsequent to the exparte order dated 16/7/2019. I remit back the file to the trial Tribunal in order that Application No. 325 can be heard on its merits interparties preferably before a different chairperson. Considering that none of the parties is to blame on the decision of the trial Tribunal, I direct that each party shall bear their own costs for this appeal.

Order accordingly.



Y. B. Masara
JUDGE
5th March, 2021