

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF ARUSHA)**

AT ARUSHA

LAND APPEAL NO. 6 OF 2020

(C/F Civil Appeal No. of 2018 in the District Land and Housing Tribunal of Arusha at Arusha)

DR. MELKIZEDECKI STEPHEN KIMARO.....APPELLANT

VERSUS

TANZANIA JORDANIAN GENERAL

TRADING COMPANY LTD1ST RESPONDENT

AUGUSTINE SHIJA MASONGA2ND DEFENDANT

RULING

23/11/2020 & 11/2/2021

GWAE, J

On 16th December 2019, the District Land and Housing Tribunal at Arusha (DLHT) dismissed the appellant's application for his failure or refusal to bring his material witness to give evidence in support of his application. The basis for dismissal order was that the appellant's medical chit produced by the appellant's counsel evidencing that the appellant was suffering from stroke was designed to delay hearing of the application.

However, the learned chairperson of DHLT was rightly of the view that, a consequential order provided under Order XVII Rule 1 (1) of the Civil Procedure

Code, Cap 33 Revised Edition, 2019 (CPC), was a dismissal for failure to give evidence in support of his case evidence and **not** for want of prosecution.

The DLHT's record reveals that, on the previous session that is a day before the date of dismissal (19/9/2019), the appellant's counsel one Jafari Suleiman sought an adjournment on the two grounds, **firstly**, that the appellant who was a sole witness for his application was suffering from illness emanating from stroke attack and **secondly**, that, there was parties' intention to settle out of the tribunal which was on progress. Following the prayer of an adjournment advanced by the appellant's advocate, the DLHT's chairperson conveniently adjourned the hearing till on the 16th day of December 2019 as the same went unopposed by the respondents' counsel.

However, when the case was called on the 16th December 2019 for either recording parties' settlement or proceed with hearing, the appellant's advocate informed the DLHT that, the intended settlement out of the tribunal went in vain and that, the hearing would not commence due to the appellant's absence pertaining to his illness. The prayer of adjournment advanced by the appellant's counsel was vigorously resisted by the respondents' counsel on the ground that the sought adjournment is intended to delay hearing and that, the respondents' advocate would have been given a notice of such excuse prior to that date fixed

for hearing. The objection by the respondents' advocate (Mr. Audax Vedasto) was sustained as earlier explained.

Aggrieved by the order of the DLHT, the appellant filed his appeal comprised of two grounds, namely; that, the learned trial chairperson erred in law and fact in holding that the medical chit produced in Tribunal to support applicant's application for adjournment was not sufficient and that, the learned trial chairperson erred in law and fact in finding that, the applicant's application for adjournment was intentionally made for delaying progress of the case.

Nevertheless, on the 11th June 2020, the appellant's advocate prayed for a leave of the court to file additional grounds. Leave was granted as sought and the following are the appellant's additional grounds to wit;

1. That, the learned chairperson grossly erred in law by dismissing the application under XVII Rule 1(1) of Civil Procedure Code, Cap 33 R.E, 2019.
2. That, the learned chairperson erred in law and fact when he failed to consider the reason for adjournment adduced by the appellant's counsel

When the respondents were duly served with a copy of memorandum of appeal, the counsel for the respondents issued a notice of a preliminary objection on one point of law which is to the effect that, this appeal is not maintainable in law due to the absence of a decree".

With consensus, the respondents' preliminary objection and appeal were jointly and together disposed of by way of written submission. However, in the course of filing the parties' written submission, the advocate for the respondents added one point of preliminary objection namely; that, the order of the DLHT's is not appealable. I shall thoroughly consider the parties' written submissions as I compose ruling/judgment herein under. In this appeal, I am asked to determine sustainability or impropriety of this appeal and if determined not in affirmative, whether the DLHT's dismissal order was justifiable in the circumstances of the case or not.

Starting with the **1st respondents'** PO, the record of this court vividly reveals that, the appellant has conspicuously filed his memorandum of appeal accompanied with DLHT's ruling dated 16th day of December 2019 and a drawn order bearing the same date. That being the case, I am now to determine whether the order of the DLHT dismissing the appellant's application was capable of extracting a decree or drawn order.

Generally, an appeal emanating from DLHT or District Court or Resident Magistrate's Court exercising its original jurisdiction must be accompanied with a decree as correctly raised and argued by the respondents' counsel and this is in accordance with the requirement of Order xxxix Rule 1 (1) of CPC which provides and for ease of reference the same is reproduced herein under;

"1 (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as the 'Court') or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded".

In the light of the above quoted provision of the law, it is clear that every appeal against a decision of subordinate courts aforementioned when exercising their original jurisdiction must be preferred by way of filing a memorandum of appeal accompanied with a decree. However, this is not the case, to my considered view, when a case is not decided on merit. In our case the matter was not finally and conclusively determined, thus an order ought to be extracted from the ruling was as rightly the case here that is a drawn order accompanying the appellant's memorandum of appeal if the remedy available in his favour was filing an appeal.

If I may pay a look into provision of Order xvii rule 3 of the CPC referred by the respondents' counsel, I am not persuaded to hold that the nature of the order given by the DHLT's chairperson is a decision which is conclusive and final determinant of the dispute between the parties. According to the wording of Rule 3 of Order xvii, there must be evidence which has already been adduced but a party who subsequently fails to further give his or her evidence in support of his

or her case as opposed to our instant dispute where the appellant never adduced any evidence in support of his case.

It follows therefore that, the reliance by the respondents' counsel of Rule 3 Order xvii is not backed by the ruling of the DLHT, equally, the decision of the Court of Appeal cited by the respondents' counsel in **Diamond Trust Bank Tanzania Ltd v. Puma Energy Tanzania Ltd**, Civil Application No. 40 of 2016 where it was held that a matter determined under Order xvii Rule 3 is appealable as of right, thus a decree can be extracted from that decision as distinguishable from an order made under Order xvii Rule 1 (1) of the CPC. The 1st limb of the respondents' objection is therefore bound to fail as I hereby overrule it.

In the **2nd point** of objection, the counsel for the respondents desirously urged this court to strike out this appeal on the ground that the dismissal order made under Order xvii Rule 1 (1) of the CPC is not appealable as provisions of section 74 and Order XL of the CPC do not provide for such remedy, to cement his argument he cited the case of **Kelvin Rodney Zambo vs. UAP Insurance Tanzania Ltd (Formerly Known as Century Insurance Company)**, Revision Application No. 39 of 2019 (unreported-HC) whereas the position taken by the appellant's counsel is that an order dismissing a case for either want of prosecution or want to bring evidence is appealable in law.

In order to safely determine this limb of respondents' preliminary objection perhaps it sounds prudently if provisions of Order XL are reproduced in extenso herein below;

"1. An appeal shall lie from the following orders under the provisions of section 74, namely-

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper court;
- (b) an order under rule 14 of Order VIII pronouncing judgment against a party;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit
- (d) an order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex-parte;
- (e) an order under rule 4 of Order X pronouncing judgment against a party;
- (f) order under rule 18 of Order XI;
- (g) an order under rule 10 of Order XVI for the attachment of property;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

- (l) an order under rule 10 of Order XXII giving or refusing to give leave;
 - (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;
 - (n) an order under rule 2 of Order XXV rejecting an application for an order to set aside the dismissal of a suit;
 - (o) an order under rule 3 or rule 8 of Order XXXII refusing to extend the time for the payment of mortgage-money;
 - (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXIII;
 - (q) an order under rule 3, rule 4 or rule 7 of Order XXXVI;
 - (r) an order under rule 1, rule 2, rule 4 or rule 9 of Order XXXVII;
 - (s) an order under rule 1 or rule 4 of Order XXXVIII;
 - (t) an order of refusal under rule 19 of Order XXXIX to re-admit, or under rule 21 of Order XXXIX to re-hear, an appeal;
 - (u) an order under rule 23 of Order XXXIX remanding a case, where an appeal would lie from the decree of the High Court;
 - (v) an order under rule 4 of Order XLII granting an application for review. Procedure
2. The rules of Order XXXIX shall apply, so far as may be, to appeals from orders.

Having carefully looked at the provisions of Order XL of CPC, equally section 74 of the CPC, I am of the considered view that, none of provisions of

the law which provides for a remedy of an appeal against the order of the DLHT made in terms of Order xvii Rule 1 (1) of the CPC. This appeal is therefore not competent since an appeal is a creature of the statute. The above provisions of the law are found to be silent on the remedy available for an aggrieved party of an order made under Order xvii Rule 1 (1) of the CPC. The appellant would therefore look for or embark into a proper recourse to lodge his grievances as far as the order which aggrieved him is concern instead of filing this appeal.

Since a right to appeal is a statutory right or must be statutorily founded and since the relevant law does not provide for an appeal for a matter dismissed under Order xvii Rule 1 (1) and since the overriding objective does operate as a panacea of all evils and in each and every situation (See a decision of the Court of Appeal in **Diamond Trust Bank Tanzania Ltd v. Puma Energy Tanzania Ltd** (supra), this appeal is thus improper and therefore it deserves to face its usual consequential order which is an order striking it out as opposed to an order dismissing it as proposed by the respondents' counsel.

In the light of the order subject of this appeal, I am justified to adhere to the decisions of this court in Kelvin's case (supra) and in **General Tyre (EA) Ltd v. Amenyisa Macha and Others**, Civil Appeal No. 21 of 2003 (unreported-HC) both cited by the respondents' advocate where it was rightly held that no appeal lies from an execution order. Equally, in this case no appeal lies from the

order made under Order xvii Rule 1 (1) of the CPC when a plaintiff or applicant fails to give sufficient cause for grant of further adjournment and has failed to bring any evidence in support of his case. The nature of the DLHT's Order, to my considered view, inevitably calls for an application for revision as opposed to an appeal.

As this court is empowered, on an application by a party in a proceeding or on its own motion, to exercise its statutory mandate of revising decisions or orders of the District Land and Housing Tribunals in their exercise either original jurisdiction or appellate or revisional powers, under section 43 of the Land Disputes Courts' Act, Cap 216 Revised Edition, 2019, I should now proceed to ascertain correctness of the DLHT's order. Looking at the record as explained herein above, the learned chairperson is found to have hurriedly dismissed the appellant's suit since it is on record that he was sick (suffering from stroke) and that there was notice to that effect which was made orally by the appellant's counsel on the 19th September 2019, that is prior to the date of dismissal order.


Since sickness is one of the grounds for an adjournment of hearing of case or an extension of time (See **Kijiji Cha Ujamaa Manolo v. Hotel** [1990–1994] 1 EA 240) and also **Masoud Seleman v. Jaluna General Supplies Limited**, Misc. Commercial Application No. 171 of 2017 (unreported-CAT), in my view, it was wrong for the DLHT to dismiss the case on the 16th December 2019 while

the reason for an adjournment was clearly given by the appellant's counsel and more so the same reason was previously made known to the tribunal. Principle of fair hearing in this matter is therefore found to have been seriously violated notwithstanding the mission of our judiciary which to the effect that, litigants' cases should be expeditiously heard and determined.

For the foregoing reasons, the 1st respondents' point of objection is hereby overruled and the 2nd respondents' point of objection is accordingly sustained. The appellant's appeal is struck out. However, for the interest of justice and by virtue of provisions of section 43 of Cap 216 (supra), the DLHT's order dated 16th December 2019 is hereby set aside and the same is substituted by an order of adjournment with costs since the appellant or his advocate did not notify the respondents or their advocate prior to the date fixed for hearing in order to avoid unnecessary costs taking into account that the respondents' counsel was from Dar es salaam. The case file shall be expeditiously remitted to the trial tribunal and be heard by a different chairperson.

Order accordingly




M.R. GWAE
JUDGE
11/02/2021