

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

LAND APPEAL NO. 61 OF 2020

*(Arising from the ruling of Maswa DLHT in Misc. Land application No.120 of 2020
delivered on 17th November, 2020)*

MATHIAS MARCO..... APPELLANT

VERSUS

SIMON BUJASHI..... RESPONDENT

JUDGMENT

4th & 13th August, 2021

MKWIZU, J:

This is an appeal emanating from the decision of the District Land and Housing Tribunal (DLHT) for Maswa in Misc. Land Application No 120 of 2020. In that application, present appellant had sought for an order setting aside *ex-parte* judgment given against him in Land Application No.83 of 2017 but his application was dismissed. Discontented, appellant, exercising his rights under Regulations 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunals) Regulations, GN No. 174 of 2003 came to this court with a three-ground memorandum of appeal which can safely be condensed into two grounds that:

- 1. That, the tribunal Chairperson erred in law and in fact in holding that annexure in Applicant's Affidavit was not tendered as exhibit*

2. That, the tribunal's dismissal of the application was without justification because appellant had sufficient reasons to warrant the grant of the prayers in the application.

Before going into the analysis of the grounds of appeal, I find it oppressing to lay the background of the matter. In 2017, respondent filed at the DLHT for Maswa Land Application No 83 of 2017. All parties were made aware of the dispute. On 12/10/2017, Respondent, now appellant filed as required the written statement of defence. It seems, he defaulted appearance which led to the issuance of summons through a substituted service via Nipashe Newspaper. Having noticed the summons in Nipashe newspaper, appellant appeared before the tribunal on 18/3/2020 but the matter could not proceed into hearing. It was adjourned to 30/4/2020. On the later date, appellant also did not appear, chairperson ordered for an ex-parte hearing which was conducted on 2/6/2020.

To rescue the situation, appellant filed at the same tribunal the refused application for setting aside ex-parte judgement hence this appeal.

At the hearing of this appeal, appellant had the services of Mr Marthias Mashauri advocate while the respondent was in person without legal representation.

Submitting for the appeal, Mr. Mashauri argued that the tribunal erred in holding that applicant was required to tender in evidence the annexure to

the affidavit. He was of the view that, the matter before the tribunal was an application in which the facts are proved by an affidavit and the attachments therein and that there is no room for tendering evidence during submissions. Mr Mathias explained further that appellant had attached a medical chit in his affidavit (paragraph 8) and therefore it was not necessary for the same to be tendered in court as exhibit in an application of such a nature. Thus, it was wrong for the tribunal chairperson to dismiss the application on the ground that the proof of illness was not tendered as exhibit. He on this point cited the case of **Bruno Wencenslaus Nyalifa V. the Permanent Secretary Ministry of Home Affairs**, Civil appeal No 82 of 2017 (unreported) Page 8-10.

On his second point Mr Mathias said, the tribunal erred in holding that applicant's application was without sufficient reasons. Mr Mathias contended that, applicant had a genuine reason, that he was sick and therefore the dismissal order was without merit. He prayed for the appeal to be allowed.

Responding to the appeal, respondent was brief, he said, appellant's application at the tribunal was unsubstantiated. Appellant failed to adduced reasons convincing the tribunal to set aside the *ex-parte* judgment.

I have with a serious note, evaluated the records, grounds of appeal as well as the parties' submissions for and against the appeal. Indeed, this appeal is deserving. I will explain.

As explained in my introductory part of this ruling, this appeal arises out of the ruling dismissing an application for setting aside an *ex-parte* judgment. In that ruling, the dismissal of the application was necessitated by the finding by the tribunal chairperson that the medical chit, attachment to the affidavit, was not tendered as exhibit. Citing a list of authorities to support his stand, the chairperson said, I quote for convenience;

"I have travelled throughout the applicant's application and found some medical chit as contended by the learned counsel, however, I am not ready to purchase his argument since the said medical chits were not tendered and admitted as evidence. It is the settled law in our jurisdiction that a mere attachment of annexure to the pleadings do not make the same evidence to prove what is pleaded and which it purport to support unless the same is admitted in evidence..."

...I am not ready to associate with the applicant's counsel that his client was sick on the material date...as I have state above the said medical chit were not admitted as evidence thus cannot form part of the proceedings...

In the light of the foregoing above, however I am inclined to hold that the applicant has not paraded any sufficient cause to warrant this tribunal to set aside an exparte judgment dated 5.08.2020..."

Reading the quoted part of the tribunal's decision, the only reason for disallowing the application was non tendering of the medical chit as evidence to prove that at the hearing date, the applicant was sick. The tribunal chairperson committed an error. A serious error so to say. It should be noted

here that, what was before the tribunal was an application to set aside an *ex-parte* judgment.

I have perused the entire Land Disputes Court Act, Cap 216 re 2019. There is no any provision providing for modality of an application to set aside the *ex-parte* judgment at the DLHT. The only resort is section 51 (2) of the same at where the DLHT is directed to apply the regulations made under section 56 or the CPC in case of any lacuna. The section reads;

"51 (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code."

I have also perused the regulations made under sections 56, that is The regulations are silent on the modality and procedure for the filing of an application for setting aside *ex-parte judgment*. Meaning that the provisions of the Civil Procedure Code Cap 33 RE 2019 are applicable via section 51 (2) of Cap 216 above under which Order. XLII rule 2 of the Civil Procedure Code, requires all applications to be by way of a chamber summons supported by affidavit.

The applicant's application at the DLHT was by way of a chamber summons supported by an affidavit. However, it was dismissed for failure to justify his absence at the time of hearing on account that the medical chit attached to his affidavit was not tendered as exhibit. Similar error was committed by a judge in **Bruno Wenceslaus Nyalifa V The permanent secretary,**

Ministry of Home Affairs and Another, Civil appeal No 82 of 2017 where, like in this case, the application was dismissed for failure by the applicant's counsel to tender as exhibit documents which were attached to the affidavit in support of the application. In allowing the appeal against such a decision Court of Appeal held *inter alia* that;

"We agree with the appellant's counsel that from the nature of the proceedings, the learned judge erred in disregarding the documentary evidence annexed to the appellant's affidavit on the ground that the same were not tendered at the time when the appellant counsel was making his oral submissions.

...This is for obvious reason that, affidavit is evidence and the annexure thereto is intended to substantiate the allegations made in the affidavit. Unless controverted therefore, the document can be relied upon to establish a particular fact..."

Equally, the trial tribunal in this case, was wrong to disregard a medical chit-attachment to the affidavit on the reason that it was not tendered in evidence when his counsel was making his oral submissions in court. As a general rule, an affidavit is a substitute to an oral evidence. Meaning that, unless contradicted, the facts in an affidavit filed in court in support of a chamber summons is an evidence which the court or tribunal ought to consider in making its decision. The medical chit, attached to the affidavit formed part

of the evidence by the appellant and therefore it ought to have been acted upon.

The second ground of appeal was faulting the tribunal's finding that appellant had no sufficient reason to warrant the grant of the application. I have evaluated the application and the decision emanating therefrom. The applicant's reason for his non-appearance on the hearing date was illness and the tribunal's refusal of the application was due to the fact that the medical chit – proof of the alleged illness was not tendered in evidence. Having concluded affirmatively that the tribunal did an error in disregarding the attachment meant to prove that the appellant was sick, I will move ahead to look into the same, to see if the illness claimed was proved or not. Annexure MM1 is an outpatient records of the appellant who attended the hospital from 16/5/2020 complaining of chest tightness, chest pain, dry cough, headache, dizziness and loss of appetite. He was treated and advised to return for review after fourteen days. The same annexure shows that, appellant was again attended on 29/5/2020 where he was advised to go KHC for management and chest x-ray.

The trial tribunals ex-parte hearing was conducted on 2/6/2020, two days after the appellant's last attendance to the hospital as per medical chit presented. Taking into account the details of the medical chit and the appellant's averment in paragraph 8 and 9 of the affidavit in support of his chamber summons at the trial tribunal and the fact that appellant was on


medication until 29/5/2020, I am convinced that appellant's absence on the hearing date was with a sufficient cause.

The appeal is for that reason meritorious. It is allowed. The *ex-parte* judgment is set aside and parties are to go back to the trial tribunal for determination of the main dispute inter parties. Costs to be in the course.

Order accordingly.


E.Y MKWIZU
JUDGE
13/8/2021

COURT: Right of Appeal explained.


E.Y MKWIZU
JUDGE
13/8/2021

