—ORIGINAL—

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

CIVIL REVISION NO. 07 OF 2019

(Originating from the District Land and Housing Tribunal for Karatu Application No. 24 of 2013 Criminal appeal No.5 of 2019)

MARTIN QAMUNGA..... APPLICANT

Versus

ANNA BURA..... RESPONDENT

RULING

13th July & 6th August, 2021

MZUNA, J.:

Martin Qamunga the applicant herein, has preferred this application against Anna Bura, the respondent, challenging the order of the District Land and Housing Tribunal which dismissed his application as well as refusal to admit his application to set it aside out of time.

The background story shows, the applicant filed Application No. 24 of 2013 in the District Land and Housing Tribunal for Karatu against the respondent. It was dismissed for non appearance on 4.4.2019 (though it purported to have been signed on 4/4/2018). This necessitated him to file application for extension of time to set it aside which however was refused/ not admitted. This, according to him had occasioned a miscarriage of justice hence the present application.

During the hearing, both parties appeared in person and unrepresented. By consent of both parties, hearing of this application proceeded by way of written submissions. The main issue is whether the revision application has merits.

It was the submission of the Applicant in support of the application that he filed an application in the District Land and Housing Tribunal for Karatu (the Tribunal) against the respondent in application No. 24 of 2013. In the due course of the application, the applicant successfully engaged another person to be his true attorney by way of special attorney. That, the matter after passing through different Chairpersons of the said Tribunal, ended up of being dismissed for want of prosecution on 4th April, 2019.

The applicant went on saying that, on 13th May, 2019 the copies of dismissal order were issued to him only to find out that an application to set aside dismissal order was time barred. He decided to file a fresh application to the same Tribunal but such fresh application was rejected contrary to his understanding and Order IX rule 4 of the Civil Procedure Code, [Cap. 33 RE. 2019].

The Applicant further submitted that, the order to dismiss his application by the Chairperson of the Tribunal was tainted with irregularities because the Chairperson dismissed the application with costs on the first day scheduled for hearing which is tantamount to injustice and against substantive

justice rather than being shut up on technicalities. He therefore prayed for this Court to revise it and be allowed to file a fresh application.

In response, the respondent strongly opposed this application because the dismissal order intended to be revised was made under Regulation 11(1)(b) of the Land District Courts (The District Land and Housing Tribunal) regulations, 2002 (GN No. 174 of 2003). That, the remedy available for dismissal made under the said regulation, is provided under sub regulation 2 of the same Regulation. To her, this application of revision is not a proper forum to be followed. She further raised the point of *locus standi* to the Applicant.

She said, since the Applicant has accepted to have engaged an attorney to take control of the application under the Tribunal as it is envisaged under paragraph 4 of the affidavit, then he has no *locus standi* to bring this application. Again, the respondent raised in her submission the question of Res Judicata. She argues that, the same suit land and parties had already been determined by the Karatu Ward Tribunal Application No. 11 of 2007 then went to appeal in the Land and Housing Tribunal of Karatu *via* Land Case No. 23 of 2008 and later the second and third appeal to this court Miscellaneous Appeal No.7 of 2008 and the Court of Appeal Civil Appeal No. 93 of 2013.

She urged this Court to stop him from shopping around courts to file vexatious and frivolous suits as he is not entitled but rather westing time of

the court and costing the respondent unreasonably. The respondent attached to her written submission the said unmarked copies of judgments which for obvious reasons to be advanced in this ruling later will never be considered. Lastly, the respondent asked this Court to dismiss the application with costs.

In his rejoinder, the applicant reiterated his earlier submission in chief. He said, the Land application before the Tribunal was maliciously dismissed and therefore tainted with irregularities which could be cured by way of revision. The applicant faulted the submission by the respondent who sees the remedy available for a dismissal order as an application for setting it aside than this application. He considers the matter as a controversial one, need be finally determined without regard to technicalities.

The applicant also remarked on the issue of *locus standi* that it is misconceived by the respondent because the power of attorney had already been revoked before filing this application. He also submitted that there were no conditions in it, which prohibited him from appearing in tribunal together with the Attorney.

After going through submissions of both parties, the question to ask is whether this application for revision has merit. The application has been preferred under section 43(1) of the Land Disputes Courts Act [Cap.216 R.E.2019]. The applicant moved this court to see whether the District Land and Housing Tribunal for Karatu Application No. 24 of 2013 has an error

material to the merits of the order made therein dated 4th April, 2018 involving injustice and if it so finds revise the same plus costs.

There is a point which should not detain me which has been raised by the respondent, a self-styled objection on issues of *Locus Standi* and *Res Judicata* in regard to this application. It featured during the respondent's submissions whereby she attached copies of judgments from the Ward Tribunal of Karatu to that of the Court of Appeal of Tanzania trying to convince this Court on the point of *Res Judicata*. Though such judgments are court records, yet it has been a well known procedure and law, that submissions are not evidence to be attached with exhibits to be relied upon. This principle of law was stated in the case of **The Registered Trustees of the Archdiocese of Dar Es Salaam vs The Chairman Bunju Village Government and 4 Others,** Civil Appeal No. 147 of 2006 CAT at DSM when it said;

> *"... with respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations and explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence'.*

Going with that line of argument, the alleged issue of *Res Judicata* with due respect which did not feature even in her counter affidavit I dare say is an afterthought.

I say so because, counter affidavit is evidence and therefore the abjection would have been reflected therein upon which I would have been required to determine it on merit. The second point is that, even assuming such points are worth consideration, definitely, ought to have been discussed in Land Application No. 24 of 2013 before the District Land and Housing Tribunal of Karatu to which the present application relates. It was dismissed for want of prosecution. Issue of res judicata fails.

This takes me to the point of whether the applicant has *Locus standi.* According to the respondent, after the applicant had the service of Attorney, he could not latter appear in person. I would refuse to buy the respondent's argument. The law is very clear that when the applicant engaged an attorney, the power of attorney automatically revokes after the applicant enters appearance. This position of law was described in the case of **Parin A.A. Jaffer and Another v. Abdulrasul Ahmed Jaffer and Two others** [1996] TLR 110 where the High Court of Tanzania, Mapigano, J. (as he then was) had this to say;

> *"Where, however, the principal under a power of attorney applies to or appears before a court, his attorney has no locus standi "*

I have the same view. Therefore, looking at this principle of law, the counter argument raised by the respondent fails.

Now to the main issue or point under consideration. This application has been brought in order to satisfy whether there are illegalities apparent on

the face of the record of the Tribunal which could be subject of revision. The applicant prays this Court to revise the dismissal order given by the Karatu District Land and Housing Tribunal in Application no. 24 of 2013 in order to see whether there appears an error material to the merits of the order made therein dated 4thApril, 2019 involving injustice.

Looking at the applicant's submission and the accompanying affidavit, he is not happy with the order of dismissal for want of prosecution. Reading from the record, at the time when the Application was dismissed, the attorney appointed by the Applicant to hand over the Application Land case No. 24 of 2013 was absent. This bare truth emanates from paragraph 4 of the Affidavit and the record of the Tribunal attached to the affidavit. The said paragraph of the affidavit reads;

> *"4. that since then no further evidence was taken until it was dismissed for non-appearance on 4. 4.2019 when the matter was being handled by my attorney whose representation is now revoked."*

The simple issue here is whether, does dismissal for non-appearance create an error material subject of revision?

Section 43(1)(b) of the Land Disputes courts Act, [Cap. 216 R.E 2019] relevant for this application reads:-

> *(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–*

(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, ***if it appears that there has been an error material to the merits of the case involving injustice,*** *revise the proceedings and make such decision or order therein as it may think fit.* **(Emphasis added)**

Reading between the lines the relevant law, it is crystal clear that this court has power to revise the proceedings of the Tribunal which has an error to the merits of the case involving injustice. The applicant in paragraph 5 and 6 says did apply for copy of the dismissal order which however was obtained late and therefore out of the time to file application to set it aside. That efforts to have the application admitted was refused prompting the filing of the present application.

Reading from the annexed ruling it reads was delivered on 4/4/2019 though the Chairman purport to have signed it on 4/4/2018. The applicant has not filed any letter which denied him right to have the application to set aside the ex parte order out of time. In the absence of such letter or affidavit of the officer from the Registry, all what the applicant has said has no document to support him. Reading from the filed counter affidavit, the said application was dismissed on 4/4/2018 which makes the present application which was filed on 27/05/2019 to have no merit. I say so because, dismissing an application for non-appearance had never been an error material to

occasion injustice. There is a well known procedure to follow in order to challenge it.

The land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, regulation 11(1)(b) which the learned chairperson of the Tribunal used in dismissing an application, allows the Tribunal

> *"Where the Applicant is absent without good cause, and hard received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the Applicant."*

That being the case, the chairperson rightly and legally dismissed the application.

The applicant complained of two other scenarios, which to him is the significant error calling for revision like, the rejection of filing a fresh application in accordance to Order IX rule 4 of the CPC [Cap. 33 R.E 2019] and the order for costs given by the chairperson of the Tribunal to be borne by the Applicant.

In the first complaint, issue of filing a fresh suit/application is taken care of by Regulation 11(2) of G.N No. 174 of 2003, which 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 orders set aside, and the Tribunal may set its orders if it thinks fit so to do and in case of refusal appeal to the high Court."*** (underscoring mine).

The above provision provides an option first to apply "*to have the orders set aside*", if the application to set it aside is refused, then a party can appeal to this court.

It is therefore correct to say, the remedy for a person who is aggrieved by dismissal order is to apply in the same court/tribunal to set aside the dismissal order within 30 days. If the order to set aside the dismissal order is allowed, definitely his case will be determined on merits. Should the application to set aside the order refused, the law allows him/her to lodge appeal to this court. The alleged revision application without a document to back up his allegation, with due respect is misplaced. It is an abuse of the court process.

Lastly, I come to the question of costs which was ordered by the learned chairperson of the tribunal. It is true that the provision of the law which the application was dismissed for, does not give power to the chairperson of the tribunal to order for costs. The said provision which is regulation 11(1)(b) of the GN No. 174 of 2003(supra) is silent as it is, on the question of costs. The question now which brinks into my mind is, does this order of costs create an error material involving injustice calling for revision of the whole proceedings? The answer is definitely, no. I say so because, the said provision of the law is saved by Section 30 of the Civil Procedure Code (supra). According to such provision of the law, awarding costs is within the discretion of the Tribunal which at any rate the applicant cannot rely and consider it as irregularity subject for revision though appeallable. I am aware

that in awarding costs to the party, a presiding chairperson of the Tribunal had to assign reasons. This is clearly stated under section 30 (2) of the Civil Procedure Code (supra). This position of the law was well stated in the case of **Hussein Janmohamed & Sons Vs. Twentshe Overseas Trading Co. Ltd** (1967) E.A 287; where it says:

> *"The general rule is that costs should follow the event and the successful party should not be deprived of them except for good cause*

The court further held to do otherwise or *"depriving the successful appellant of his costs and order made was arbitrary and perverse."* I see no reasons to hold otherwise. The order for costs was made as per the law.

Lastly, though in passing, the variance on the order which bares two different dates 4.4.2019 and 4.4.2018 is a mere slip of the pen which could be cured through rectification. The same should be rectified.

That said, this application stands dismissed with costs. Order accordingly.

M. G. MZUNA,
JUDGE.
06/08/2021