IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

HC. LAND REVISION NO. 8 OF 2020

DR. DERICK NYASEBWA ..... APPELLANT

VERSUS

NICHOROUS HAROUN ..... RESPONDENT

JUDGMENT

16th March, & 16th September, 2021

ISMAIL, J.

This ruling is in respect of an application for revision, preferred by the applicant, against the decision of the District Land and Housing Tribunal for Mwanza at Mwanza (Hon. Murirya, C.), delivered on 3rd September, 2020. The application, preferred by way of a Chamber Summons, is made under the provisions of section 43 (1) (b) & (2) of the Land Disputes Courts Act, Cap. 210, R.E. 2019; and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002. Supporting the application is an affidavit sworn by Dr. Derick Nyasebwa, the applicant, and it sets out grounds on which the application is based. The main ground of contention is:

> *"1. This Honourable Court be pleased to interfere and revise the order in Miscellaneous Application No. 151 of 2020 issued on 3rd*

September, 2020, by the District Land and Housing Tribunal for Mwanza at Mwanza."

A brief background, as gathered from the record, is to the effect that these proceedings originally began as an application in the Ward Tribunal (Application No. 63 of 2019) at Butimba. The application was heard and determined *ex-parte*, in the respondent's favour. The Ward Tribunal ordered that the applicant should vacate the suit premises, remove the structure erected thereon and remove all his belongings. The applicant was also ordered to desist from using the road or passage he had allegedly created.

The Ward Tribunal's order was sent for execution by the District Land and Housing Tribunal (DLHT) at which Misc. Land Application No. 151 of 2020 was instituted. The DLHT issued an order which, besides giving orders stated above, it further required the respondent to part with a sum of TZS. 110,000/- christened as the decretal sum. These orders were to be complied within 14 days from the date of the order. It is this order which is a subject of the challenge through these revisional proceedings.

The contention by the applicant is that the decision was ordered to proceed *ex-parte* without affording the applicant an opportunity to be heard, a violation of his constitutional right. He denied that a summons was served on him, requiring him to show cause as to why execution of the order

shouldn't be carried out as prayed. Terming it an act of injustice, the applicant urges this Court to rectify the error by revising and quashing the impugned decision.

The respondent has valiantly opposed the applicant's contention. Through his counter-affidavit, his firm contention is that the applicant was duly served with a summons that compelled his attendance in the tribunal but he spurned it. He took the view that it was never the applicant's intention to appear and challenge the application. The respondent took the view that, the applicant would not have filed the application if he was not aware of the proceedings or the outcome of the proceedings in the tribunal.

Hearing of the matter took the form of written submissions which were to be preferred consistent with the order of the Court issued on 16th March, 2021, in the virtual presence of Mr. Kevin Mutatina, learned counsel for the applicant, and in the presence of the respondent. Whereas the counsel for the applicant complied with the Court order, nothing was heard from the respondent by close of business on 13th April, 2021, the date on which the respondent was to file his submission.

In his submission, Mr. Mutatina reiterated the applicant's sworn deposition. He argued that the impugned decision is shrouded in an error

material to the merits of the case, thereby occasioning an injustice. The learned counsel contended that the respondent's case in the Ward Tribunal was instituted clandestinely, and he did that against the applicant personally, while the adjacent piece of land belongs to a company. With respect to the proceedings in the DLHT, Mr. Mutatina's argument is that the order for payment of the sum of TZS. 110,000/- was irregular, since the matter which was placed before him was purely a land matter in respect of which no claim for monetary compensation would be entertained. He took the view that monetary claims ought to have been preferred through a normal civil case. The counsel's contention is premised on the provisions of section 3 of Cap. 216, and the argument he advanced is that this is the provision which empowers tribunals to deal with matters which are exclusively land related. Mr. Mutatina held the view that the mixture of land and non-land issues is offensive of the cited provision of the law.

The learned counsel further submitted that denial by the DLHT to hear out the applicant offended the cardinal principle of natural justice known as *audi alteram partem,* whose consequence is to render the proceedings void in law. In this respect, the applicant cited the case of ***Ridge v. Baldwin*** [1963] 1 Q.B. 539. He urged the Court to move in and right what he perceives as wrongs in this matter.

Before I delve into the heart of the substantive proceedings, it behooves me to drop a few lines with respect to the respondent's failure to conform to the scheduling order which required him to file his submission by 13th April, 2021. The question that arises from this failure is: what is the resultant consequence of all this? The trite position is that the resultant consequence of this failure is to place the respondent in the same position as that which was stated in the case of ***National Insurance Corporation of (T) Ltd & Another v. Shengena Ltd***, CAT-Civil Application No. 20 of 2007 (DSM-unreported). The Court of Appeal held as follows:

> *"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."*

See also: ***Tanzania Harbours Authority v. Mohamed R. Mohamed*** [2002] TLR 76; ***Patson Matonya v. Registrar Industrial Court of Tanzania & Another***, CAT-Civil Application No. 90 of 2011; and ***Geofrey Kimbe v. Peter Ngonyani***, CAT-Civil Appeal No. 41 of 2014 (DSM-unreported).

It simply that the respondent has forfeited his right of participation in the proceedings, allowing the applicant to have his application considered

without any opposition from the respondent. Inspired by the reasoning in the cited case, I hold that the decision of the Court will only factor in the applicant's unassailed submission whose weight will be assessed shortly.

Two issues arise from the submission made by the applicant's counsel. ***One***, that the applicant was denied the right to be heard on the matter which was filed in the DLHT and, ***two***, that an award of damages, a non-land award, was included in a matter which is purely a land matter. These two issues bring out a broad question as to whether the application is meritorious.

I have unfleetingly gone through the record of proceedings in the DLHT. What comes out of it is that on 8th November, 2019, the respondent filed an application for execution of the decision of the Butimba Ward Tribunal in Land Application No. 63 of 2019. The execution matter sought to enlist the assistance of the DLHT in executing the decision that ordered, *inter alia*, construction of a demolished fence; and transfer of the road from the respondent's piece of land. On 3rd September, 2020, the matter was called for orders and only the respondent appeared. At the instance of the respondent, the DLHT ordered the applicant to re-build the applicant's fence, divert the passage, and payment of the sum of TZS. 110,000/- described as the decretal sum. There is no evidence that the applicant was made aware

of the execution proceedings as no summons was issued, inviting the applicant to appear in court and defend his case. Failure by the DLHT to issue a notice of hearing to the applicant constituted a violation of the cardinal principle of natural justice which requires that a party be given the right and opportunity to be heard, before a determination is made on their rights. It is a principle coined from a Latin maxim, known as *audi alteram partem* meaning in simple terms, ***hear the other side***. In the conduct of judicial proceedings, this right constitutes a responsibility on the part of the judicial and quasi-judicial bodies, to accord a party to the proceedings the right to be informed of any adverse point that the judicial officer is going to base his decision on. In our jurisdiction, the need to conform to this right has been emphasized in many a decision, epic among them being the ***Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma*** [2003] TLR 251, quoted in ***Ausdrill Tanzania Limited v. Mussa Joseph Kumili & Another***, CAT-Civil Appeal No. 78 of 2014 (MZA-unreported); and ***Margwe Erro & 2 Others v. Moshi Bahalulu***, CAT-Civil Appeal No. 111 of 2014 (ARS-unreported). The principle stated in the cited case were encapsulated in the landmark holding of Lord Diplock, propounded in ***Hadmor Productions v. Hamilton*** [1982] 1 ALL ER 1042 at p. 1055, in which it was stated thus:

"Under our adversary system of procedure, for a Judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what is his answers to it".

A more emphatic position was set by the Court of Appeal of Tanzania in ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (unreported), in which it was reasoned as follows:

"We are of the considered view that in line with the audi alteram partem rule of natural justice, ***the court is required to accord the parties a full hearing before deciding the matter in dispute or issue on merit*** *- See* ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.* ***The right to be heard is emphasized before an adverse decision is taken against a party.*** *"*[Emphasis added].

See ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (unreported).

In the instant proceedings, an execution order which was issued by the DLHT was not preceded by any semblance of a process that would be said to conform to this imperative requirement of the law. The applicant was simply given no chance to know of what the respondent had initiated and put up a defence if any, before a decision was made on the manner in which the decision of the Ward Tribunal would be executed. This was a serious infraction and its consequence is adverse, fatal and intolerable. It renders the proceedings before the DLHT a mere farce that cannot pass the test. The net effect of all this is to vitiate the proceedings conducted by the DLHT.

Before I conclude, I feel obliged to say a word or two on the applicant's second limb of his contention. This is with respect to the award of damages to the tune of TZS. 110,000/-. The applicant's contention is that this is a non-land matter which shouldn't have been lumped with a claim related to the right of ownership or use of land. This is an argument which was made by the counsel from the bar. It was not averred anywhere in the supporting affidavit and the trite position is that such allegations carry no weight. This is in view of the fact that in applications which are supported by affidavits, conclusions on any factual point have to be drawn from the averments in the affidavits that support the applications. The rationale for this is that, ***an affidavit is evidence***, unlike submissions which are ***generally meant to***

reflect the general features of a party's case and are elaborations or explanations on evidence already tendered (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others,*** CAT-Civil Application No. 147 of 2006 (unreported). It is on the basis of the foregoing that the argument by the applicant on the question of damages is rejected out of hand.

In the upshot, save for the question of damages, I find the application meritorious and I sustain it. I quash the proceedings in Misc. Civil Application No. 151 of 2020, set aside the order that emanates from the said proceedings, and order that the said proceedings be heard afresh before another chairperson and in the attendance of the applicant.

I make no order as to costs.

It is so ordered.

DATED at **MWANZA** this 27th day of May, 2021.

M.K. ISMAIL

JUDGE

Date: 16.09.2021

Coram: Hon. C. M.Tengwa, DR

Appellant: Mr.Kelvin Mutatina, Advocate

Respondent: Present

B/C: P. Alphonce

Court:

Ruling delivered today in the presence of both parties.

C. M. Tengwa
DR

At Mwanza
16th September, 2021