

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

~~LAND APPEAL NO. 72 OF 2020~~

(Arising from Land Application No. 23 of 2018 at Bukoba District of the District Land and Housing Tribunal (DLHT) for Kagera at Bukoba)

PROJESTUS RWEYEMAMU PETRO.....APPELLANT

VERSUS

HELIOS TOWER TZ LTD.....1ST RESPONDENT

VODACOM TZ LIMITED.....2ND RESPONDENT

STEPHANO A. MASOYO.....3RD RESPONDENT

JUDGMENT

09/05/2022 & 01/07/2022

E. L. NGIGWANA, J.

This appeal emanates from the decision of the District Land and Housing tribunal (DLHT) for Kagera at Bukoba in Land Application No. 23 of 2018 handed down on 3rd day April 2020.

The brief facts leading to the present appeal are as follows; the Appellant, Projestus Rweyemamu Petro alleged that he owned a piece of land located at Bugengere Village, Nyakibimbiri Ward within the District of Bukoba in Kagera Region, and that, in July, 2007, the 2nd respondent trespassed into the said land and successfully erected a telecommunication Tower therein which was named IBWERA TOWER. He further alleged that, later on, the said Tower with its liabilities was transferred to the first respondent HELIOS TOWERS TANZANIA LTD whereas, on 12th day of July

2017, he issued a demand notice for payment of rent arrears to VODACOM TANZANIA LTD but his claims were not met.

The appellant took an action of instituting a suit in the DLHT against HELIOS TOWERS TANZANIA LTD seeking for orders; a declaration that the ~~respondent had trespassed into his land; payment of Tshs. 148,200,000/=~~ being rent arrears, General damages, costs of the suit and any other relief(s) at the discretion of the tribunal. The 2nd and 3rd respondents were joined in the matter as third parties.

The issues which were framed and agreed upon for determination were coached as follows;

- (i) Whether the applicant (now appellant) is the lawful owner of the suit land.*
- (ii) If issue No. 1 is answered in affirmative, whether the respondent is entitled to be indemnified by the third parties.*
- (iii) Reliefs the parties are entitled to.*

After a full trial, the first issue was answered in the negative. The suit ended being dismissed with costs.

Aggrieved by the decision of the DLHT, the appellant has preferred this appeal on the following grounds:-

- 1. That the tribunal erred in law and fact to proceed with the hearing of the case exparte in disregards of the grounds of absence of the counsel for the appellant.*
- 2. The tribunal erred in law and fact to deny the appellant's rights to representation and thereby dismissed the appellant's case.*

3. *The tribunal erred in law and fact to proceed with the defence while the appellant had not yet closed his case.*
4. *The tribunal erred in law and fact to conclude that the appellant legally sold the suit land to the 1st respondent (3rd party) Stephen ~~Masoyo.~~*

When the appeal came for hearing, the appellant appeared in person and unrepresented, Mr. Makaki Masatu, learned advocate appeared for the 1st respondent, Mr. Libent Rwazo learned advocate appeared for the 2nd respondent who also held brief for Mr. Erick Rutehanywa, learned advocate for the 3rd respondent but with instruction to proceed.

Since the appellant is a lay person who is not represented, it was agreed that the appeal be disposed by way of written submissions. The scheduling filing order was duly set in place. The same was complied with by all parties except the 3rd respondent.

It is trite that filing written submissions is tantamount to a hearing, and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing. It should be noted that the consequences of failure to file written submissions is similar to those of failure to appear and prosecute or defend, as the case may be. See the case of **Brighton Mponji (Administrator of the Estate of the Late Theodora Masheyo versus Simon Paulo**, Misc. Land Case Application No. 708 of 2020 and **P. 3525 LTCOL Idahaya Maganga Gregory versus Judge Advocate General**, Court Martial, Criminal Appeal No. 2 of 2002 (unreported). In the

instant case, the 3rd respondent's failure to file the written submissions simply means, the 3rd respondent has waived his right to defend the case.

Submitting on the 1st ground of appeal, the appellant stated that his advocate vide letter with reference **No. BINA/CHP/BDCLHT/02/019 dated 12/12/2019** informed the tribunal that he would not be able to attend the case on 16th and 17th December, 2019 as the dates fall within the "Court vacations" and would be traveling for another "special assignment of the firm" and thereof proposed for the hearing to be fixed three or four days consecutively after 31st January, 2020. He further stated that despite the letter, the trial Chairperson fixed the hearing of the case on 16th and 17th January, 2020.

The appellant further submitted that; on that basis, his advocate by another letter with reference **No. BINA/CHP/BDCLHT/01/020 dated 14th day of January, 2020**, requested for the adjournment referring the first letter. He added that his advocate in alternative, requested for the tribunal to avail time to the appellant to find another advocate to represent him if the tribunal diary cannot accommodate dates after 31st January 2020. He further stated that despite the reasons advanced by his advocate, the tribunal proceeded ex-parte in the absence of his counsel despite the fact that and he duly informed the trial tribunal that he was not ready for the hearing.

Submitting on the 2nd ground of appeal, the appellant stated that as a lay person, he was denied the opportunity to engage another advocate to represent him; and for that matter, the respondents were not cross-

examined to verify the truth before the application is being dismissed. He made reference to the case of **Mohamed Kitwana versus Mohamed Mangaro, (PC)** and Civil Appeal No. 193 of 2004

As regards the 3rd ground of appeal, he submitted that the trial tribunal was well aware that the appellant's case was on and there was one more witness to testify before it. He added that, since the appellant had not yet closed his case, the procedure adopted by the tribunal of closing the appellant's case without the appellant's consent was quite irregular; hence he was denied the right of hearing.

The appellant ended his submission by urging the court to find merit on the grounds of appeal and allow the appeal with costs, and further order for a trial **de novo**.

Arguing on the 1st ground of appeal, Mr. Makaki Masatu, learned advocate for the 1st respondent submitted that, the hearing of the case was never conducted *ex parte* as alleged by the appellant. He further stated that it is on record at a page 36 of the proceedings that the tribunal, after it rejected reasons for non-appearance of the appellant's advocate in terms of the provisions of Regulations 13 (1) & (2) of the Land Disputes Courts (The District Land and Housing tribunal) Regulations, GN No. 174 of 2003, required the appellant to proceed with the hearing of his case.

The learned advocate added that, having so required, the appellant told the court that his witness was not around, thus the hearing was adjourned to 16 & 17th January 2020, thus it is factually incorrect to allege that the case was heard *ex parte*, as *ex parte* hearing happens when the hearing is

held in the absence of the other party to the proceedings which is not the case in this matter as the appellant was present throughout the hearing of the case as shown in pages 35,36 and 50 of the proceedings.

Arguing on the 2nd ground, Mr. Makaki submitted that it is on record that, following the tribunal's order rejecting the prayer for adjournment by the former counsel for the appellant in terms of Regulation 13 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 the appellant was required to proceed himself. The only thing the appellant told the court was that his witness did not come to court; accordingly the hearing was adjourned on account of absence of witness for the appellant.

He added that, nowhere in the proceedings did the appellant's request was denied time to hire another advocate. That the case of **Mohamed Kitwana versus Mohamed Mangaro, PC**, Civil Appeal No. 193 of 2004 cited and relied by the appellant is distinguishable with the facts of this case, in terms of Regulations 13 (2) of the Land disputes Courts (supra), and in the circumstances and conduct of the Advocate for the Appellant, the tribunal was justified to make the order it made.

Arguing the 3rd ground of appeal, Mr. Makaki submitted that it is trite law that courts have power to control proceedings which includes the power to close cases for parties in the proceeding. He made reference to the case of **Milded Julius Kisamo versus Footloose Tanzania Ltd & Another**, [2021] TZHCD 14 where the High court (Maige, J. as he then was) marked the defense case of the 1st defendant closed upon said defendant's failure to comply with the court order.

On his side Mr. Libent Rwazo, learned advocate for the 2nd respondent, arguing on the 1st ground of appeal submitted that looking at page 35 of the proceedings, when the matter came on 16th and 17th December 2019 the advocate for the appellant was absent with notice but the trial tribunal ruled that the reasons assigned in the notice of absence were not sufficient to justify the advocate's absence, therefore the appellant was required to prosecute his case, and the appellant informed the tribunal that he had no witness on that day. Mr. Rwazo added that, the matter was adjourned to come for hearing on 16th & 17th January, 2020. That the appellant never informed the tribunal that he could proceed with the hearing, and on 16/01/2020 the Appellant's counsel did not show-up, and the appellant brought no witness. He further argued that in such a situation, the tribunal had no choice but to close the appellant's case, Mr. Rwazo further stated that it is a principle that courts should exercise firm control over proceedings as clearly said in the case of **Tanzania Breweries Ltd versus Edson Dhobe & 19 Others**, Misc. Application No. 96 of 2000 (unreported).

He added that the appellant had already established his case in the presence of his counsel and testified in full, thus the subsequent order that required him to proceed himself was not prejudicial to the Appellant.

Arguing on the 2nd ground of appeal, Mr. Rwazo submitted that representation of parties before the tribunal is not mandatory as per **Regulation 13 (1) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, G N. No. 174 of 2003.** He

added that a party may appear himself and lead evidence to establish his case.

He also argued that after the Tribunal's order that the Appellant shall proceed with his case, the matter was adjourned to 16 & 17/01/2020 thus if the appellant had an intention to seek another representation, time was enough for him to do so, therefore, he cannot blame the tribunal that he was not afforded an opportunity to hire another advocate. The learned counsel further stated that the case of **Mohamed Kitwana (supra)** is distinguishable under the circumstances of this matter in two ways **One**, in the matter at hand the matter was in the trial and was not dismissed after an order that required the appellant to proceed unrepresented but rather the matter was adjourned so as to afford the appellant to bring his last witness unlike in the cited case in which the appellant preferred an appeal because he was not afforded an opportunity to present his argument in support of his appeal. **Two**, in the cited case, the appellant was not given an opportunity to present his submissions in support of his appeal while in this case at hand the appellant was given an opportunity to ask questions to defence's witnesses but had no questions to ask them; therefore the cited case is not applicable in the circumstances of this case. The learned counsel added that according to the records at page 41, 42, 43, 44, 47, 48 and 50 it is clear that on various dates during the hearing of defence, the Appellant was given an opportunity to cross-examine the defence witnesses but refused to do so, for instance, at page 47 when the Appellant was given an opportunity to contradict the testimony of DW1 he replied "***I have nothing to say***".

He added that it is settled law that failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness evidence and it will be difficult to suggest that the evidence should be rejected. The learned counsel made ~~reference to the case of **Paulina Samson Ndawavya versus Theresia Thomas Madaha**~~, Civil Appeal No. 45 of 2017 CAT (unreported) at page 20 cited with approval the case of **Shadrack Balingo versus Fikiri Mohamed, TANROAD and Attorney General**, Civil Appeal No. 223 of 2017 (unreported). He invited the court to find the 2nd ground of appeal devoid of merit.

Arguing the 3rd ground of appeal Mr. Rwanzo submitted that the court has power to close the party's case if the said party's has failed to produce evidence or cause attendance of a witness despite having been given time to do so. The learned counsel referred the court to Order XVII Rule 3 of the Civil Procedure Code Cap. 33 R: E 2019. To support this position the learned counsel made reference to the case of **Umoja wa Chama cha Waendesha Pikipiki and 21 Others versus Levinson Levelian and Two Others**, Civil Appeal No. 17 of 2020 (unreported). Where it was held; *"The records show that the Defendants were given time to adduce evidence, they did not appear for two times to give their evidence in court without notice and reasons, the facts which justifies the court to invoke its powers under cited law to wit; Order XVI Rule 3 of the CPC"*

The learned counsel strongly argued that the tribunal was justified to invoke its powers to close the Appellants case and opens the defence case, because the appellant was using delaying tactics.

I have earnestly gone through the rival submissions by parties and the record of the trial Tribunal and the grounds of appeal. The 1st ground should not detain me since it is apparent from the records and submission of the parties that throughout the hearing of the case, the appellant was present in person, therefore, the issue for determination is whether the appellant was accorded a fair trial.

Regulation 13 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 provides that;

"The parties to the proceedings may during the hearing of the proceedings be represented by an advocate or any other representative"

Regulation 13 (2) of the same Regulations provides that;

*"Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the tribunal **may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate"***

Regulation 51 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003 provides;

"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"

Reading regulation 51(1), there was no need to make reference to the Civil Procedure Code as done by Mr. Rwazo, learned advocate because Regulation 13 (1) and (2) herein above sufficiently regulates the procedure to be observed by the tribunal when faced with the circumstance like the ~~one transpired in the matter at hand.~~

The records speaks louder that initially, the appellant had the legal services of Mr. Respicius Ishengoma, learned advocate. After the testimony of two witnesses, that is to say the Appellant (PW1) and Dalius Rwegasira (PW2), the Appellant through his advocate informed the trial tribunal that the appellant had the last witness to call.

The matter was adjourned to come for hearing on 16 & 17/12/2019. As per records, and submissions by the parties, the learned advocate for the Appellant entered no appearance on that dates but sent a notice of absence to the trial tribunal.

The tribunal ruled out that in the notice of absence there was no sufficient reason sufficing the adjournment of the matter hence ordered that Appellant should proceed himself with this case.

It is unfortunate that before reaching that decision, the Appellant was not accorded an opportunity to make any reply as to whether he was ready to proceed himself or whether he had the intention of engaging another advocate. Let the record speak for itself;

"Date: 16/12/2019

Corum : R. Mtei-Chairman

T/C: Mizambwa

Applicant: Present

Adv Masatu for the respondent

The matter is coming for hearing. We are ready and we have one witness. The letter which is a notice of absence has not disclosed sufficient reasons for his nonappearance. In the last time I agreed that the matter should continue today for hearing .Since the advocate for the applicant is absent and no reasons have been assigned let the applicant proceed himself,

Tribunal

"..... I do agree with the submission by advocate Masatu that the applicant should proceed himself with this case. It is so ordered.

Sgd R.Mtei

Chairman

16/12/2019

Applicant: *My advocate has not come.*

Adv.Masatu: *It seems that the applicant does not intend to prosecute his case, but we leave it for the decision of the tribunal.*

Adv: Laurent: *we pray for adjournment so that the applicant can bring witness.*

Tribunal: *Let the matter be adjourned so that the applicant can bring his witness"*

Sgd R.Mtei

Chairman

16/12/2019

The records do not reveal under which provision or regulation the said order was made.

The records further show that the matter was adjourned to come for hearing on 16/01/2020 whereas on 16/01/2020, the applicant appeared and informed the court that he was not feeling well.

At the same time, there was a letter dated 14/01/2020 referenced **BINA/CHP/BDCLHT/02/020** from the applicant's advocate requesting for an adjournment, that the matter be adjourned to come for hearing after 31/01/2020, or in alternative, that the applicant be availed time to find another advocate. The letter was received by the tribunal on 15/01/2020 it was stamped "**Received**"

In that respect, Mr. Masatu, learned advocate urged the Tribunal to **dismiss the case for want of prosecution since the applicant did not bring his witness.** On his side, Advocate Laurent at page 38 of the typed proceedings had this to say;

"I concur with the advocate for the respondent (Mr. Masatu) but if this honorable Tribunal finds appropriate, let the case on the part of the applicant be closed"

Again, the tribunal Proceeded to close the appellant's case without according him a right to make a reply as to whether he was ready to close his case or otherwise. The tribunal ruled as follows;

"I do agree with advocate Laurent that the applicant's case be marked closed and proceed with the defense hearing because the applicant has no reason for why he has not brought his witness. He ought to have prepared his witness, for the said reason, I hold the applicant's case is marked closed and we proceed with defence hearing. It is ordered so"

Sgd R.Mtei
Chairman
16/01/2020

The record shows that, throughout the defence hearing, when the applicant was asked as to whether he had an objection to the admission of exhibits, he replied as follows;

"I have nothing to say in the absence of my advocate"

The record also revealed that the applicant did not cross examine all three defence witnesses. Let the record speak for itself;

"Cross examination by Applicant: Nil"

The tribunal reacted as follows;

"The applicant has refused to cross-examine the witnesses on the ground that that was to be done by his advocate, and in the absence of his advocate, he cannot say anything"

It is trite that the right to legal representation is a fundamental ingredient of a right to a fair trial. Absence of an advocate on reasonable grounds constitutes sufficient ground for adjournment.

However, a refusal of further adjournments will certainly be justified and the hearing can then proceed without the party being legally represented and if the plaintiff refuses to proceed with the, **the matter will definitely be dismissed for want of prosecution, (See Regulation 13 (2) of the Land Disputes Courts (The District Land and Housing Tribunal)**

Regulation, 2003) and if the defendant refuses to proceed with the hearing, the matter will proceed ex-parte, and if the plaintiff has already closed his/her case, but the defendant refuses to proceed with the hearing or to close the defence case, the court has the power to close the ~~defence case and proceed with the composition of the judgment.~~ See **Miled Julius Kisamo versus Footloose Tanzania Ltd & Another** (Supra).

In the matter at hand, though the proceedings are silent in respect the law or regulations which were considered by the Chairman before making the orders, Mr. Masatu Makaki and Mr. Rwazo during the hearing of the appeal submitted that the orders were given in compliance of Regulation 13 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003.

However, it should be noted that, the decision that the appellant should proceed himself with the hearing of his case was arrived by the Tribunal without according him a right to make a reply whether he was ready to proceed himself or he had the intention to engage another advocate. Again, the tribunal reached the decision of closing the appellant's case without according him an opportunity to respond whether he was ready to do so voluntarily or otherwise, considering that two witnesses had already testified thus, there was non-compliance of Regulation 13 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2003.

Furthermore, it is not proper to blame the appellant who is a lay person that he had refused to cross-examine the defence witnesses since the

words "**I have nothing to say**" by the appellant cannot be interpreted to mean refusal to cross-examine witnesses.

Considering what transpired in the trial tribunal, it is apparent that the decision was reached arbitrarily contrary to rules of justice because the appellant was denied the right to be heard, the irregularity which rendered the trial unfair. The Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Transport Ltd Versus Jestina George Mwakyoma**, [2003] TLR 251 had this to say;

"In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;

- (a) *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."*

In another case, Abbas **Sherally and Another Versus Abdul Fazalboy**, Civil Application No. 33 of 2002, the Court of Appeal emphasized the importance of the right to be heard as follows:

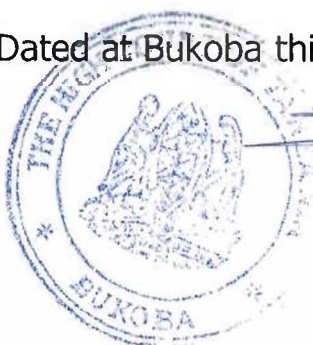
"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same

decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "

Now, being guided by the herein above cited authorities, it is apparent that the decision of DLHT giving rise to this appeal cannot be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. This suffices to nullify and put to rest the impugned decision and, for that matter, I refrain from taking any stand with respect to the 4th ground of appeal.

In the upshot, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the proceedings of the DLHT from page 16 to 53 of the typed proceedings covering dates from 27/11/2019 to 03/04/2020, quash and set aside judgment and orders thereto. Having done so, the case file is remitted to the DLHT to be assigned to another Chairman and new set of assessors. Given to the fact that the anomaly was caused by the Tribunal, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 1st day of July 2022.



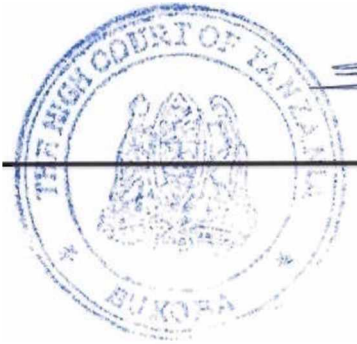
E. L. NGIGWANA

JUDGE

1/07/2022.

Judgment delivered this 1st day of July 2022 in the presence of the Appellant in person, Mr. Masatu Makaki, learned advocate for the 1st respondent, also holding brief for Mr. Libent Rwazo, learned advocate for

the 2nd respondent who is absent, Ms. Tumaini Hamidu, B/C but in the absence of the 3rd respondent.



E. L. NGIGWANA

JUDGE

1/07/2022.