

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL No. 30 OF 2022

(Originating from Miscellaneous Application No. 151 of 2021 of District Land and Housing Tribunal for Manyara Babati)

ELIA MICHAEL SHINGADED A..... APPELLANT

VERSUS

RAJABU OMARI..... RESPONDENT

Date: 29/9/2022 & 5/10/2022

BARTHY, J

JUDGMENT

The appellant Elia Michael Shingaded a had brought this appeal seeking to challenge the decision of the District Land and Housing Tribunal (tribunal) on its decision delivered on 9/2/2022 before Hon. H.E. Mwi h a v a ; whose decision had dismissed the application to set aside the order the judgment of Land Matter No. 77 of 2014 of the said tribunal dated 26/8/2016 which was heard and determined *ex-parte*.

Aggrieved with the ruling of the tribunal, the appellant is now before this court advancing the following grounds of appeal;

- 1. That, the whole ruling and drawn order in Miscellaneous Application No. 169 of 2021 involves serious irregularities and painted with illegalities.*



2. That, the Trial Tribunal failed to properly evaluate evidence hence arrived into a wrong verdict.

He thus prayed for his appeal to be allowed, the proceedings, drawn order and the ruling of the Trial Tribunal be quashed with costs.

The transitory background of this matter is that, Elia Michael Shingadede filed the application as the next friend of Gidabunay Gashari who is of unsound mind. The appellant before the tribunal had sought to set aside the dismissal order dated 26/8/2016 on the basis that Gidabunay Gashari was of unsound mind since 2005. He argued before the tribunal that he was diagnosed with the condition in the year 2013 and he submitted the medical report dated 23/12/2019 and 13/1/2020.

He added that the appellant who was then the applicant was never notified to appear before the tribunal and there are errors on the decision of the tribunal.

The respondent before the tribunal vehemently contested the application on the basis that there was no proof Gidabunay Gashari was of unsound mind; he pointed out to medical reports tendered was of recent five years after the decision of the tribunal was delivered. The records were said to be just letters and not real medical report. The respondent thought there was no reason advanced by the applicant to justify his absence for the whole period of delay to file his application.

The tribunal therefore found there was no sufficient reason to set aside its decision and dismissed the application with costs.

During the hearing of this matter, the appellant informed this court he enjoys the remote assistance of the legal aid and prayed the appeal be

dispose by way of written submission; whereas the respondent enjoyed the service of Mr. Erick Mbeya advocate. The parties dully complied to the schedule of the court to submit their written submissions timely.

In the appellant's written submission made by his counsel Mr. Erick Mbeya, submitting in support of the appeal, before embarking in addressing the grounds of appeal he thought for leave to amend the first ground of appeal under Order XXXIX, Rule 2 of the Civil Procedure Code [Cap 33 R.E. 2019] (CPC), claiming there was a typing error on the case number reading Miscellaneous Application No. 169 of 2021, instead of Miscellaneous Application No. 151 of 2021.

He went on to state that the amendment will not have any adverse effect to the respondent. He cited the case of **Sibonike Anyingisye Mwasalemba v. Teofile Kisanji University (TEKU)**, Misc. Civ Application No. 2 of 2020 High Court of Mbeya (unreported).

He went on to address the matter at hand with respect to the background of this matter. Submitting on the first ground of appeal he argued that the matter was assigned to Hon. F. Mdachi who he ordered the application to be argued by written submission. However, the records of the tribunal shows that its decision was composed and delivered by Hon. E.E. Mwihava without assigning any reason to it.

Mr. Mbeya expounded that, the provision of Order XVIII, Rule 10(1) of the CPC requires the reasons to be assigned for succession of adjudicators. Failure to do so was said to be an irregularity. In the case of **Mirage Lite Ltd v. Best Tigra Industries Ltd**, Civ Appeal No. 78 of 2016 CAT at Dar es salaam (unreported), the court nullified the proceedings and ordered the matter be heard before another judge. See

also **Joseph Wasonga Otieno v. Assumpter Nshunju Mshana**, Civ Appeal No. 07 of 2016 CAT at Dar es salaam (unreported).

It was further submitted that, the impugned ruling had contravened with Order XXXIX, Rule 31 of the CPC as it did not have points for determination, decision and the reason for decision. Therefore, claiming the appellant was not afforded fair hearing as he was not notified on the matter and there was non-joinder of the parties and the decision itself of Application No. 77 of 2014 was said to be a blank cheque.

To buttress his argument, he cited the case of **Bahati Moshi Masabile T/A Ndono Filing Station v. Came Oil (T)**, Civ Appeal No 216 of 2018, HC at Dar es salaam and **Tanzania Air Services Ltd. v. Minister for Labour and 2 others** [1996] TLR 217 where the court had insisted on giving reasons to the decision.

The appellant's counsel further argued that, Hon. Chairperson of the tribunal disregarded the evidence before him on the medical records without any proper evaluation and analysis which were sufficient to prove the illness of Gidabunay Gashari.

Mr. Mbeya concluded by calling this court to re-evaluate the evidence of the tribunal on merit. The reference was made to the case of **Ndizu Ngassa v. Massisa Magasha** [1999] TLR 202.

On the respondent's reply submission made by Mr. Abisai Swai the counsel on legal aid with Legal and Human Right Centre, on his written submission he countered that, on the prayer made to amend the petition of appeal, particularly on the first ground of appeal to read Miscellaneous Application No. 151 of 2021, instead of Miscellaneous Application No. 169 of 2021 was contrary to the law.

He argued that, the cited provision of Order XXXIX, Rule 2 of the CPC provides for application for leave to amend memorandum of appeal to argue on another ground of appeal which is not in the memorandum of appeal. He contended that; the appellant had moved this court to grant leave to amend his petition of appeal basing on wrong citation of the law.

Mr. Swai was of the firm view that, wrong citation on the provision of law renders the matter incompetent as the court will not be properly moved. See the case of **Hussein Mgonja v. Trustees of the Tanzania Episcopal Conference**, Civ Revision No. 2 of 2002, CAT cited in the case of **Wilfred John v. Paulo Kazungu**, Misc. Civ Application No. 152 of 2019, High Court.

Again, in the case of **China Hana International Co-operation Group v. Salvand K. A. Rwegasira** [2006] TLR 220, the CAT held that, citing the wrong and inapplicable rule is not a technical failing but it goes to the root of the matter.

Mr. Swai amplified his point that, this court is not properly moved and therefore the leave cannot be obtained. He went further to state that the respondent was not a party to Miscellaneous Application No. 169 of 2021. Therefore, the appeal is incompetent and ought to be dismissed.

In alternative, arguing on the grounds of appeal, with respect to the first ground of appeal, the counsel for the respondent retorted that, the change of hands of the adjudicators did not affect the delivery of justice as both parties were heard. He dwelt on the principles of overriding objective for this court not to be tied up to legal technicalities and focus on justice as per s. 3A and 3B of the CPC.

A handwritten signature in blue ink, appearing to read 'A. Amy', is written over a horizontal line.

He went on to state that the appellant is relying on legal technicalities to delay the respondent to access his right. As the decision on Miscellaneous Application No. 151 of 2021 was properly determined and the reason for the said decision was addressed and the chairman cited the case of **James Funke Gwagilo v. Attorney General** [200] TLR 16L.

He further stated, the tribunal was only to determine if there was valid reason to extend time to file the application to set aside the *ex-parte* order and not determine the matter on merit.

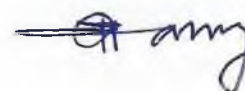
Again, he counter argued that, the tribunal evaluated the evidence and found the evidence did not suffice to explain reasons for delay from 2015 as the proof was for the period from 2019 to 2020. He went on to state that, a party is required to account for each day of delay as so held in the case of **William B. Nusu v. Respurces International T Limited**, Misc. Application No. 178 of 2019, HC at Dar es salaam.

To conclude, he prayed this court not to allow this appeal for lacking merit.

Mr. Mbeya the learned counsel for the appellant rejoined his submission by challenging the reply submission stating it was untrue, unfounded and it had intended to frustrate dispensation of justice.

He as well maintained his submission in chief, in addition he stated the case of **Hussein Mgonja (supra)** is distinguishable with this case as the respondent had failed to underscore the essence of the amendment sought.

He also maintained that there was no right of fair trial because there was the change of adjudicators without addressing the reasons. He retorted that, overriding objective cannot be used to shield non-compliance of



mandatory terms. See the case of **T.G. World International Ltd v. Carrier Options Africa (Tanzania) Ltd**, Civ Appeal No. 73 of 2021, High Court at Arusha, **Jeremiah L. Uledi Hassan v. Murji Hasnein Mohamed**, Civ Appeal No. 2 of 2021, CAT at Mwanza and **Kunsindah v. Leila John Kunsindah**, Civ Appeal No. 260 of 2017 CAT at Mwanza.

He again recounted that the chairperson of the tribunal on his impugned ruling never addressed the exhibits and left the issue unresolved.

The rest of the arguments were a parallel square with his argument in chief and he maintained the prayers sought.

Having gone through the rival written submissions from both sides, also venturing the documents revolving around this appeal, before addressing the grounds of appeal, I find it is best to address the issue brought up by the counsel for the appellant on his written submission in chief. He had prayed to this court for leave to amend or rephrase first ground of appeal under Order XXXIX, Rule 2 of the CPC. The provision sought to move the court reads;

The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground. [Emphasis is supplied].

The counsel for the appellant Mr. Mbeya had sought leave to rephrase the first ground appeal to read Miscellaneous Application No 151 of 2021 instead of Miscellaneous Application No 169 of 2021 claiming to have been caused by typo errors.

Mr. Swai the counsel for the respondent retorted that the provision used to move this court was wrong. He was of the view that the cited provision is for leave to amend his petition of appeal or argue another ground of appeal. He thus argued the appeal is incompetent as the respondent has never been a party to the present case.

From the issue that has arisen, the court will have to address as to whether the application to amend or rephrase the ground of appeal was properly brought before this court.

Without glitching or mincing words, the counsel for the appellant had brought the application for leave to amend the petition of appeal on the written submission in support of the grounds of appeal. Thereafter, he went ahead to address the court on the ground of appeal making reference to Miscellaneous Application No. 151 Of 2021 throughout his submission in chief.

The provision of Order XXXIX, Rule 2 of the CPC clearly provides that the leave has to be sought first for the court to amend the memorandum of appeal. The appellant did not obtain the leave of the court to amend the petition of appeal and particularly the first ground of appeal which was meant to challenge Miscellaneous Application No. 151 of 2021 instead of Miscellaneous Application No. 169 of 2021.

It is therefore clear that, the appellant implied had already amended the petition of appeal and argued without the leave of the court, which is in

violation of Order XXXIX, Rule 2 of the CPC. In the same vein, in the case of **Inter-consult Ltd versus Nora Kasanga and Another**, Civil Appeal No. 79 of 2015 (unreported) this court had once considered amending memorandum of appeal without leave or an order of the court to be fatal irregularity which has affected the competence of the that appeal and could not be rectified.

In the same manner, the irregularity in this appeal goes to the root of the entire appeal and it cannot be rectified at this stage. The leave to amend the memorandum of appeal was not obtained, therefore the parties in Miscellaneous Application No. 169 Of 2021 do not relate to the parties in this matter.

Considering the decision in the case of **Juma Busiya v. Zonal Manager, South Tanzania Postal Corporation**, Civil Appeal No. 273 of 2020, Court of Appeal of Tanzania at Mbeya, where it was held that:

"The principle of overriding objective cannot be applied blindly to cure every failure to comply with the mandatory provision of the law."

The irregularity is fatal and stems from incompetent appeal, the arguments, provisions of laws and case authority cited by Mr. Mbeya the counsel for the appellant cannot salvage this appeal from the predicament. I therefore agree with Mr. Swai that the present appeal and the application leave to amend the appeal contravene with the requirement of the law. The only remedy from limbo is to strike the appeal with costs.

It is so ordered.

DATED at Arusha this 5th October, 2022.



**G.N. BARTHY
JUDGE
5/10/2022**

Judgment delivered in the presence of Mr. Steven Magambo for the appellant and Mr. Juma Rajabu for the respondent.

**G.N. BARTHY
JUDGE
5/10/2022**