

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

AT SHINYANGA

MISC. LAND APPEAL NO. 2 OF 2022

(Arising from Misc. Land Application No. 01 of 2022 of the Kahama District Land & Housing Tribunal originated from Original Land Application No. 39 of 2021 of the Kahama District Land and Housing Tribunal)

HAMU NTOBI @ MAKOYE..... APPELLANT

VERSUS

VICTOR H. BWANA..... RESPONDENT

JUDGMENT

Date: 5th & 27th May 2022

MKWIZU, J:

This appeal arises from the decision of the Kahama District Land and Housing Tribunal which determined the Misc. Land Application No. 01 of 2022 emanating from original Land Application No. 39 of 2021 decided expert in favour of the respondent after the appellants own refusal to defend the application.

It seems the appellant was aggrieved by the *ex parte* decision, he, unsuccessfully filed Land Application No. 01 of 2022 to set aside the expert order. Hence this appeal predicated on three grounds as hereunder:-

- 1. That with prejudice the learned Chairman *erred in law and in fact for ordering ex parte hearing without joining the*

necessary parties (sellers) of the disputed land) contrary to the requirement of law.

- 2. That, the learned Chairman erred in law and facts for failure to grant the application to set aside ex parte judgment and failure to determine the major dispute over the disputed land whilst focusing in the technicalities and loopholes of the law. Hence miscarriage of justice.*
- 3. That, the learned Chairman was bias and incompetent to continue with hearing of the application to set aside ex parte hearing for he was the same person who ordered the ex parte hearing of the land application.*

The appellant was at the hearing represented by Mr. Nestory Ndasu Advocate while the respondent who was according to the records aware of the appeal absent resulting into an *ex parte* hearing against him .

Mr. Ndasu began his submissions by abandoning grounds three of appeal arguing grounds 1 and 2. He complained of the tribunal's order for *ex parte* hearing without joining the necessary parties contrary to the requirement of the law. He relied on Order 10 rule 2 of the CPC and the case of **Twentfourth century vs Tanzania sugar Producers ltd & others**, Commercial Case No. 11 of 2003 (Unreported).

Secondly, the tribunal was blamed for relying on the principle that ignorance of the law is not a defence. Citing Civil Appeal No. 55 of 2017 **Yakobo Magoiga Gichele vs Penina Yusuph**, the learned counsel

insisted that the tribunal should have used the principle of overriding objective and determine the Land dispute on merit. He lastly prayed the appeal to be allowed.

I have cautiously considered the grounds of appeal, counsels' submissions, and the records. There is no doubt that an *ex-parte* judgment was entered against the appellant in Land Case No 39 of 2021. And to get rid of the said decision, Appellant, filed Land Application No 1 of 2022 seeking to set the expert judgement aside. The principle is, and an application of such a nature, the applicant is by the law required to show sufficient reason prevented him from defending the suit.

In his affidavit in support of the application to set aside *ex-parte* judgement, two issues were raised as reasons for not filling the defence, (i) expectations by the appellant to have necessary parties joined in the proceedings and (ii) non-agreement on certain issues by the appellant. Paragraphs 3,4 and 6 are explicitly thus:

3. Kwamba, mapema mwezi wa 10, Mwaka 2021 mleta maombi katika maombi ya Ardhi Na. 39/2021 aliliomba Baraza lako tukufu kuwaunganisha muuzaji wa kwanza na wa pili wa ardhi bishaniwa, kwa maana ya muuzaji wa Ardhi hiyo kwa mjibu maombi na mleta maombi hivyo mleta maombi alitegemea kuwa Baraza lako tukufu lingetoa amri ya kufanyanyika marekebisho ya maombi yaliyowasilishwa na mjibu maombi.

4. Kwamba, tarehe 22.11.2021 pale mleta maombi alipohudhuria katika Baraza lako tukufu Pamoja na Wakili wake huku akitegemea kuwa siku hiyo Baraza lako litatoa amri ya kufanyika kwa marekebisho ya maombi hayo ya Ardhi ili kuwaunganisha

wauzaji wote Ardhi bishaniwa (Necessry Parties), alielezwa kuwa shauri hilo litasikilizwa upande mmoja.

6. Kwamba, kutokana na maelezo yaliyotolewa hapo juu, mleta maombi kushindwa kuwasilisha utetezi wake katika shauri la Ardhi Na. 39/2021 haujatokana na uzembe wake bali kwa kushindwa kukubaliana katika baadhi ya mambo

In his submissions, before the tribunal, appellant counsel argued that the expert decision should be set aside to allow necessary parties joined in the suit and secondly that the appellant was unaware of the effect of not filing a defence. Having considered the application and the proceedings in Land Application No 39 of 2021, the tribunal ruled out that the appellant had no sufficient reason to justify the setting aside of the expert decision. He took into consideration the appellant refusal to file defence and that the blames directed to the tribunal for failure to join necessary parties is not born by the records.

I have revisited the proceedings, it is clear that the respondent(now appellant) in Land Application NO 39 of 2021 had refused to file his defence and he maintained his position even after the advice by the tribunal to engage a lawyer. I will for easy of reference reproduce part of the records in relation to Land Application No 39/2021 as follows:

"22/07/2021

AKIDI

Lekomoi PLS - Mwenyekiti

Muombaji - yupo

Mjibu Maombi – yupo

Karani - Moris

Mjibu maombi: *Mimi sina mpango wa kujibu kwa kuwa mimi simfahamu huyu mwombaji*

Baraza

Mjibu maombi ameelekezwa umuhimu wa yeye kutafuta mwanasheria wa kumpelekea nyaraka hizo ili aweze kuzijibu

SND PAULOS LEKAMOI
MWENYEKITI
22/07/2021

Mwambaji: *Mimi sijawahi kukabidhi mtu yoyote hivyo kama hataki kujibu naomba shauri hili lisikilizwe upande mmoja*

Mjibu maombi:

Mimi sina mpango wa kujibu na sina muda wa kupoteza kuhangaika kujibu na sina mpango wakumtafuta mwanasheria wa kumjibu

Baraza

Kwa kuwa mjibu maombi ameeleza wazi kuwa hana nia ya kujibu maombi haya na kwa kuwa mwombaji amaeomba shauri hii lisikilizwe upandae mmoja inaamriwa.

Amri

- 1. Shauri hili litasikilizwa upande mmoja*
- 2. Kuiskiliza- 02/09/2021*

SND PAULOS LEKAMOI
MWENYEKITI
22/07/2021

26/11/2021

AKIDI

Lekomoi PLS- Mwenyekiti

Petronnela Julius – yupo

Demwikarisa Kileo – yupo wajumbe

Muombaji - yupo

Mjibu Maombi – Ndasa wakili KNY

Karani – Moris

Ndasa, Wakili

Shauri hili linakuja kwa ajili ya kusikilizwa upande mmoja

Mwombaji: *Nipo tayari kusikilizwa na naomba kusikilizwa upande mmoja kwani mjibu maombi alikataa kuwasilisha utetezi wake.*

Ndasa: *sina pingamlzi*

Amri

Shauri hili linasikilizwa upande mmoja kama ilivyopangwa

***SND PAULO LEKAMOI
MWENYEKITI
26/11/2021”***

As stated herein above, this appeal is against the refusal by the tribunal in Land Application No 1 of 2021 to set aside an expert judgement. The appellant counsel was required in this appeal to tell the court why he thinks the appellants application was justified. Instead, the first ground of appeal is a challenge against the substantive decision of the tribunal in Land application No 39 of 2021 blaming the trial tribunal for failure to join necessary parties . According to the records, the order to proceed *ex-parte* by the trial tribunal was given after refusal by the appellant

himself to take party in the proceedings. The proceedings are silence on anything relating to the joinder or otherwise of the necessary parties. Even if, for sake of argument, it is concluded that there was such a failure by the tribunal , which is not the case, here, still this reason would not have justified the appellant refusal to file his defence. This ground is untenable.

Ignorance of law is another reason adduced on why the appellant failed to file his defence. I think, this reason is an afterthought. It is evident that the tribunal took trouble to explain to the appellant the need to have his defence filed and was further advised to engage an advocate for that purpose but he insisted on his decision and that he had no time to west on the matter. Appellant was recorded thus: "***Mimi sina mpango wa kujibu na sina muda wa kupoteza kuhangaika kujibu na sina mpango wakumtafuta mwanasheria wa kumjibu***"

Had it been ignorant, appellant would have listened to the advice given to him by the Tribunal Charman. But he arrogantly refused to listen to any. In any case, ignorance of the law is not a defence (*ignorantia juris non excusat*). This complaint is as well baseless.

The appellant counsel has invited this court to apply overriding objective principle on the matter and allow the appeal. I would straight away say, This is not a fit situation for the application of the oxygen principle. Having failed to give sufficient reason warranting the grant of the application for setting aside the expert judgement, the tribunal was bound to reject the application. In **Mondorossi Village Council and 2**

Others V Tanzania Breweries Limited and 4 Others, Civil Appeal No 66 of 2017(Unreported) the Court of Appeal said:

"we are of the considered view that, the same cannot be applied blindly against the mandatory provisions of the procedural law which go to the very foundation of the case."

Generally, appellant failed to give sufficient reason upon which the application would be granted. While asserting that the non-filing of the defence was not contributed by his negligence, applicant affidavit failed to clear him out and the records brands him careless in prosecuting his cause. That said, an unopposed appeal is dismissed with no order as to costs. Order accordingly.

Dated at Shinyanga this 27th May 2022




E.Y MKWIZU
JUDGE
27/05/2022

Court: Right of Appeal explained


E.Y MKWIZU
JUDGE
27/05/2022