IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 27 OF 2020

(C/F The District Land and Housing Tribunal for Arusha in Application No. 180 of 2015)

ZEBEDAYO MUYALEI LAIZER ..... APPELLANT

VERSUS

FINCA (T) LTD ..... 1ST RESPONDENT

NUTMEG AUCTIONEER & PROPERTY MANAGERS CO LTD ....2ND RESPONDENT

ABRAHAMU SINGEEN ..... 3RD RESPONDENT

JUDGMENT

25/2/2022 & 20/5/2022

ROBERT, J:-

The Appellant, Zebedayo Muyalei Laizer, filed an action at the District Land and Housing Tribunal for Arusha seeking a declaratory order that the 1st and 2nd Respondent's action of demolishing a house located on the suit land was illegal and unlawful, compensation of the demolished property, eviction order against the third Respondent and costs of the case. At the

end of the case, the trial Tribunal dismissed the matter for lack of merit. Aggrieved, he preferred this appeal challenging the trial Tribunal decision.

Briefly, the Appellant's case, according to the Amended Application filed at the District Land and Housing Tribunal on 19/6/2017, reveals that, in the year 2010 the Applicant bought a piece of land located at Mianzini, Sekei area in Arusha Municipality. Thereafter, the 1st Respondent without any notice or order allowing her to take over the suit land unlawfully hired the 2nd Respondent to evict the Appellant from the suit land and demolished a house erected thereon. Having demolished the said house, the 1st and 2nd Respondents unlawfully and illegally proceeded to sell the suit land to the 3rd Respondent.

In the course of proceedings at the trial Tribunal, the 1st and 2nd Respondents failed to file their respective Amended Written Statements of Defence within time as ordered by the trial Tribunal and therefore only the Appellant and the 3rd Respondent were heard on the case. The 3rd Respondent disputed the Appellant's claims and contended that he lawfully purchased the suit property from the first Respondent through the 2nd Respondent in a public auction at a bid price of TZS 5,000,000/= having emerged as the highest bidder. He stated that the Appellant's claims were

unfounded and prayed for the case to be dismissed. He also prayed for a declaratory order that that the 3rd respondent is a lawful owner of the suit land, the appellant herein to be ordered to vacate the suit land, pay damages and to pay costs of the case.

The trial Tribunal made a finding that on 6th of November, 2014 the Appellant herein took loan of TZS 3,000,000/= from the first Respondent and placed the suit land as security for the loan, the fact which he didn't disclose in his pleading. Having failed to meet his obligation under the contract, the 2nd Respondent acting on the instructions of the 1st Respondent sold the suit land in public auction to the 3rd Respondent. The Court decided that there was no sufficient evidence to prove that the appellant herein had repaid the loan which he admitted to have received from the first Respondent. Hence, there was no reasonable cause to hold that the sale of the suit land by the 1st and 2nd Respondents to the 3rd Respondent was illegal. The case was therefore dismissed with costs. Aggrieved, the Appellant filed a petition of appeal to this Court armed with three grounds of appeal which I take the liberty to reproduce as follows:-

(1) That the trial Chairman erred in law and in fact not to consider the Petitioner's evidence adduced

(2) *That the trial Chairman erred in law and in fact to ignore and not to consider the annexures annexed to the application*

(3) *That the trial Chairman erred in law and in fact not to enter default judgment against the 1st and 2nd respondent who did not file their written statement of defense.*

The appeal was disposed of by way of written submissions as prayed by the parties and ordered by this Court. Parties in this suit were represented by Mr. Samson Rumende and Mr. Charles Abraham, learned counsel for the Appellant and 3rd Respondent respectively. The 1st and 2nd Respondents did not enter appearance in this appeal as the case proceeded in their absence at the trial Tribunal.

Highlighting on the grounds of appeal, Mr. Rumende started his submissions with the third ground of appeal which faults the trial Chairman for failure to enter a default judgment against the 1st and 2nd Respondents who did not file their Written Statements of Defence. He argued that, the 1st and 2nd Respondents having been served with the Appellant's Amended Application did not file their respective Written Statement of Defence as required under Regulation 7(1)(a) of the Provisions of Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, G.N. No. 174/2003.

He submitted further that, the cited Regulations do not provide for what needs to be done in the circumstances involving multiple Respondents and some of them fails to lodge their Written Statement of Defence. He opined that, in the said circumstances the Tribunal should invoke the provisions of the Civil Procedure Code specifically, Order VIII Rule 14(1) and 16 as well as Order XV Rule 2 of the Civil Procedure Code.

He maintained that, since there was more than one Respondents in the case, it was impossible to order for ex-parte proof against the Respondents who failed to file their Written of Defence under Order VIII Rule, 14(1) of the Civil Procedure Code, Cap. 33 R.E. (2019). Hence, the Tribunal should have fixed a date for mediation under Order VIII Rule 16 of the Civil Procedure Code, Cap. 33 R.E. (2019) in respect of the Defendant who filed his Written Statement of Defence and pronounce Judgment against the Respondents who failed to file their Written Statement of Defence under Order XV Rule 2 of the Civil Procedure Act.

He submitted further that the 3rd Respondent's evidence was not sufficient to show that he was the rightful owner of the suit land without evidence of the 1st Respondent who would have testified that the Appellant defaulted to pay the loan and therefore breached the loan agreement.

In response, the learned counsel for the Respondent argued that, it is true that the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 is silent on the effect of the Respondent's failure to file his Written Statement of Defence but the answer to that is provided by the Civil Procedure Code which carters for situations where other procedural laws are lacking in civil cases.

With regards to the question at hand, the learned counsel argued that the Trial Tribunal could not order for the default Judgment under Order VIII Rule 14 of the Civil Procedure Code, Cap. 33 (R.E. 2002) while there was another party in the name of the 3rd Respondent who filed his Written Statement of Defence and appeared to defend the suit. Hence, under the cited provision, the chairman had a discretion to make other orders as he thinks fit.

He argued further that, what the Hon. Chairman did was in compliance with Order IX Rule 11 of the Civil Procedure Code, Cap. 33 (R.E. 2002) which provides that, where there are more than one Defendant and one or more of them appear and the others do not appear, the suit shall proceed and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the Defendants who do not

appear. He explained that, in the instant case the application was dismissed hence there was no essence to issue a default judgment against the 1st and 2nd Defendants.

On the issue that the trial Chairman failed to fix mediation, he maintained that the Appellant's contention is irrelevant because the provisions of regulation 8 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, which is applicable under the circumstances, requires the matter to be fixed for hearing once the written statement of defence or Counter-affidavit has been filed.

On the question that the evidence of the 1st Respondent was required in order to establish that the Appellant defaulted to pay the loan and therefore breached the loan agreement, the learned counsel argued that, it was not the duty of the Respondents to prove ownership of the disputed land but the duty of the Appellant herein. He argued that the burden of proof lies on the party who alleges anything in his favour as required under section 110 and 111 of the Law of Evidence Act, Cap. 6 (R.E.2002).

Coming to the 1st and 2nd grounds of appeal, the learned counsel for the Appellant submitted simultaneously that, the trial Tribunal ignored or

failed to consider the Appellant's application and its annexures. He maintained that, the Appellant does not dispute that he had a loan agreement which he paid as agreed. The trial Tribunal should have made reference to the documents annexed to the application. He argued that, the appellant's testimony at the trial Tribunal made reference to annexures attached to the application filed at the Tribunal which the Hon. Chairman ignored and did not make reference to.

To indicate the importance of annexures in the determination of suits he made reference to a number of cases namely, Castelino Vs Rodrigues (1972) E.A. 223, 225; JERAJ Sharrif & Co VS Chotai Fancy Store (1960) E.A. 374 at page 375; Godrej Consumer Products Ltd vs Target International (T) Ltd, Misc. Application No. 54 of 2019, H/C, Dar es salaam (unreported); and TUICO vs Mbeya Cement Company & National Insurance Corporation (T) Limited (2005) TLR 41.

Replying to the arguments raised in these grounds, the learned counsel for the Respondent submitted that, the trial Chairman considered evidence of both sides even the annexure of the Applicant's application to come to his decision but he was not bound to decide based on the Applicant's annexure because it is the duty of the trial Tribunal to consider

whether the said annexure are relevant in the case at hand. He argued that, this is witnessed at page 2 of the impugned judgment where the Hon. Chairman cited the case of **Abdallah Abass Najim vs Amin Ahmed Ali (2006) TLR 55** that, "It is now settled that annexure to the pleading cannot form a basis in making decision".

He argued that, the cases cited by the Appellant's counsel are irrelevant as the trial Tribunal perused the Applicant's application together with the attached annexure and found that the said application and its annexure failed to prove the Appellant's allegations. He maintained that, the Appellant failed to consider that, the issue of loan agreement was not in dispute, the Appellant was required to prove that he paid the said loan and that is why the Chairman narrated at page 6 of the impugned judgment that:-

> *"...there is no any sufficient evidence on record proving that the applicant had ever repaid the loan which he admitted to receive from the 1st respondent..."*

Based on the arguments made, he submitted that this appeal lacks legs to stand on and therefore needs to be dismissed with costs.

In a rejoinder, the learned counsel for the Appellant reiterated the arguments in his submissions in chief and maintained that the appellant's duty in this matter was to prove that the suit land belonged to him and not to prove the payment or non-payment of his loan from the first Respondent as that was not one of the issues framed before the trial Tribunal.

From the submissions of parties and records of this matter, I am now in a position to make a determination on the merit of this appeal by examining the grounds of appeal in the order adopted by parties in their respective submissions.

Starting with the third ground of appeal, the question for determination is whether the trial Tribunal was at fault for not entering a default judgment against the 1st and 2nd Respondents for failure to file their Written Statement of Defence. The proceedings of the trial Tribunal indicate that on 6/6/2017 the Tribunal gave an order directing parties to amend the pleadings by writing the proper names of the 1st and 2nd Respondents by 19/6/2017. However, by 11/12/2017 the 1st and 2nd Respondents had not filed their respective Amended Written Statements of Defence. The trial Tribunal refused a prayer for extension of time to file the

amended written statement of defence and therefore only the Applicant (Appellant herein) and the 3rd Respondent were heard on the case.

The Appellant's argument is that since the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 which prescribes the practice and procedure governing the proceedings at the District Land and Housing Tribunal is silent on what should be done where one or some of the Respondents fails to file their respective Written Statements of Defence, the Tribunal should have invoked the provisions of the Civil Procedure Code, Cap.33 (R.E.2019) specifically, Order VIII Rule 14(1) and 16 as well as Order XV Rule 2 and enter a default judgment against the 1st and 2nd Respondents.

It is not disputed that, the provisions of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 are silent on the consequence of non-filing of the Written Statement of Defence. It is also agreed that under section 51 (2) of the Land Disputes Courts Act, the provisions of the Civil Procedure Code are applicable at the District Land and Housing Tribunal where there is inadequacy in the Regulations governing proceedings at the District Land and Housing Tribunal. However, it should also be noted that the 1st and 2nd Respondent's failure to file their

respective written statements of defence occurred in 2017 hence, the applicable provisions are of the Civil Procedure Code, Cap. 33 (R.E. 2002) and not the provisions of Civil Procedure Code, Cap. 33 (2019), as proposed by the learned counsel for the Appellant.

Reading Order VIII, Rule 14 along with Order VIII, Rule 5 of the Civil Procedure Code, Cap. 33 (R.E. 2002) it is clear that even though the Court is empowered to pass judgment on the ground of non-filing of the written statement of defence, still the discretion of the Court has been preserved to pass any other order as it may think fit under Order VIII, Rule14 or the Court may in its discretion require any particular fact mentioned in the plaint to be proved as laid down in Order VIII, Rule 5 of the CPC. Order VIII Rule 14(1) of the Civil Procedure Code, Cap. 33 (R.E.2002) reads as follows:-

> *"Where any party has been required to present a written statement under sub-rule (1) of Rule 1 or a reply under rule 11 of this Order and fails to present the same within time fixed by the Court, the Court shall pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit."*

Order VIII, Rule 5 of the Civil Procedure Code, Cap. 33 (R.E.2002) provides that:

> *"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against the person under disability:*
>
> *Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."*

It is evident from the facts of this case that the Appellant's claims are largely connected to the ownership of the land in dispute which was sold to the 3rd Respondent who had filed his written statement of defence and was ready to proceed with the case. The Appellant prayed for eviction of the 3rd Respondent from the land in dispute. In the circumstances, it would not be possible for the trial Tribunal to grant a default judgment in respect of the claims sought by the Appellant without proof of the said claims after hearing of the 3RD Respondent's defence. Hence, the trial Chairman cannot be faulted for using his discretion under the law to proceed with the hearing of the case and decide on the Appellant's claims at the end of the case.

The Appellant also faulted the trial Tribunal for not invoking the provisions of Order VIII Rule 16 of the Civil Procedure Code, Cap. 33 (R.E.2019) and proceed with mediation between the Appellant and the 3rd Respondent after completion of the pleadings. As noted earlier, the applicable Code in this case is Cap. 33 (R.E.2002). However, Order VIII, Rule 16 of Cap. 33 (R.E.2019) is the old Order VIII, Rule 15 of Cap.33 (R.E.2002) which was minimally amended and renumbered after introduction of the new Rule 15 vide G.N. No. 381 of 2019. Since Order VIII, Rule 15 of Cap.33 (R.E.2002) is the applicable provision in the circumstances of this case, the trial Tribunal was not required to proceed with mediation as proposed by the learned counsel for the Appellant. The said provision reads as follows:-

> *"As soon as the written statement of defence or, if there are more defendants than one, the last written statement of defence, and the reply (if any) thereto, or the last reply if there are more Plaintiffs than one, or other pleadings have been presented, the case shall be deemed to be ready for hearing and a day shall be fixed by the Court accordingly unless the provisions of Order IX and X apply to the case."*

Further to this, as rightly argued by the learned counsel for the 3rd Respondent, the provisions of the Land Disputes Courts (the District Land

and Housing Tribunal) Regulations, 2003 which governs the proceedings at the District Land and Housing Tribunal did not require the trial Chairman to conduct mediation. Regulation 8 of the cited Regulations requires the Chairman to fix the date of hearing once the written statement of defence or the counter-affidavit has been filed.

On the basis of the foregoing reasons I find no merit in the third ground of appeal.

Coming to the first and second grounds of appeal, the Appellant faulted the trial Tribunal for failure to consider the evidence adduced by the Appellant and to ignore or not consider the annexure in the Appellant's application. Proceedings of the trial Tribunal indicates that, the main issue framed for determination of this case was whether sale of the suit land by the 1st and 2nd Respondents to the 3rd Respondent was illegal and to what reliefs are the parties entitled.

The Appellant was the only witness in his case, although he did not state in the pleadings that the disputed property was placed as security for loan, he testified as PW1 and informed the Tribunal that, he was granted a loan of TZS 3,000,000/=by the 1st Respondent. He recalled to have repaid

the loan but he was told he still owed the 1st Respondent TZS 1,030,000/=. He stated that he was indebted to them they had to tolerate him as he couldn't fail to repay the loan. He described the suit property as a house located Sekei area measuring 17 meters by 14 meters. He received a letter from 2nd Respondent saying he is indebted to the 1st Respondent at a tune of TZS 22,000,000/=and warned him that if he fail to repay the debt his house would be sold.

During Cross-examination he explained that he received a letter from the 1st Respondent on 17/6/2015. He was reminded to pay the loan. He signed the letter on 22/6/2015. When he went to the 1st Respondent to get his bank statement he was put under custody. He stated that he knows the 3rd Respondent as his neighbour who bought the disputed property from the bank.

He testified during re-examination that he placed the disputed property as security for loan. During inquiries by the Tribunal, he stated that the house was valued at TZS 18,000,000/=, he was asked to put it as security and agreed with it. When he showed them the house he intended to apply for a loan of TZS 16,000,000/=. His wife also signed on the agreement as a witness. However, he went further and stated that he

didn't know if the house was placed as security in the contract. That it was written in very small font which he couldn't see.

This Court is in agreement with the trial Chairman's evaluation of the evidence brought before him and his decision that there was no reasonable cause for the Tribunal to hold that the sale of the suit land by the 1st and 2nd Respondents to the 3rd Respondent was illegal. The trial Tribunal was right in its finding that the evidence adduced was not sufficient to establish that the Appellant had repaid the loan which he admitted to have received from the first Respondent after placing the disputed property as security for the loan.

Further to this, the Appellant's argument that the trial Tribunal erred by not taking into consideration the annexures attached to the application is untenable. The annexures were not admitted by the Tribunal after being objected by the learned counsel for the 3rd Respondent which means they were not admitted in evidence and therefore they could not form the basis of the decision of the Tribunal.

On the basis of the analysis above, it is clear that the trial Tribunal took into consideration evidence adduced by the Appellant in arriving into its decision. I therefore find no merit in the 1st and 2nd grounds of appeal.

Consequently, I find no merit in this appeal and I hereby proceed to dismiss it with costs for want of merit.

It is so ordered.

K.N.ROBERT
JUDGE
20/5/2022