IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI.

Misc. Land Application No. 38 of 2022

(C/F Application No. 97 of 2017 of the District Land and Housing Tribunal for Moshi at Moshi)

ABBAS KASIMU KADUMA .....1ST APPLICANT

LUCIA JUMA MALIPULA ..... 2ND APPLICANT

VERSUS

AUGUSTINO JAPHET MREMA ..... RESPONDENT

RULING

28.02.2023 & 03.03.2023

SIMFUKWE, J.

Before this court, is an application for extension of time to file Revision against the *ex parte* decision of the District Land and Housing Tribunal in Application No. 97 of 2017 delivered on 15th day of October,2020. The application has been filed under **section 14(1) of the Law of Limitation Act Cap 89, R.E 2019** and any other enabling law.

The application is accompanied by affidavits of both applicants and an affidavit deponed by one Fredrick Kasimu Kaduma (1st applicant's brother and 2nd applicant's mother). The Respondent through his counter affidavit resisted the application. He also raised four grounds of Preliminary Objections to the effect that:

1. *The application is bad in law for it is premature filed against an ex parte judgment. (sic)*
2. *The Revision lacks merit for it has been filed before exhaustion of other court remedies including application of setting aside ex parte order.*
3. *The application is bad in law for it lacks foundation as the Tribunal judgment followed all due process thus no procedural impropriety.*
4. *The affidavit of Fredrick Kasimu Kaduma is bad in law for there are paragraphs not verified under the verification clause.*

Hearing of the preliminary objections was by way of written submissions. The applicants were unrepresented while the respondent enjoyed the service of Mr. L. Mashabala, learned counsel.

Mr. Mashabala on the outset opted to submit on the first and second grounds of objections and dropped the last two grounds of objection.

Submitting on the first point of objection the respondent submitted that under **Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2022**, the remedy available against an exparte judgment is to file an application to set aside the same. Thus, the applicants ought to exercise such remedy before resorting to the high court to challenge the judgment which was entered *ex parte*. He made reference to the case of **Moshi Textile Mills vs de Voest [1975] LRT 17** to buttress his position.

The learned counsel insisted that since the applicants failed to appear and defend their case before the trial Tribunal, being aggrieved with that

decision, they ought to apply for setting aside the exparte judgment and not to apply for revision before this court.

On the second point of objection, the learned counsel argued that, the application for revision lacks merit for it has been filed before exhaustion of other remedies including application for setting aside exparte order as provided for under **Order IX Rule 9 of the Civil Procedure Code** (supra). The learned counsel referred to the case of **Caritas Kigoma vs KG Dewsi Ltd [2003] TLR 420** in which the Court of Appeal observed that:

> *"While reason for failure to appear on the date of hearing the case is relevant to an application to set aside an exparte judgment, it is irrelevant to an application for extension of time."*

In addition, Mr. Mashabala made reference to the case of **Harsh Energy (T) Ltd vs Khamis Maganga, Civil Appeal No. 181 of 2016** in which the Court of Appeal held that:

> *"It is apparent from the reproduced rule that the remedy available to a party who is aggrieved by a default judgment passed by the trial court is to apply to set it aside."*

The learned counsel went further by citing the case of **Yara Tanzania Limited vs DP Shapriya and Company Limited, Civil Appeal No. 245 of 2018** in which the Court of Appeal underscored that:

> *"To recap, it is now settled that when a party is aggrieved with an exparte, summary or default judgment of the High Court, he must first exhaust the alternatives or remedies available in the High Court*

before coming to this court on revision or appeal. If this is not done, the revision or appeal to the court will be rendered misconceived and prone to be struck out."

Mr. Mashabala also condemned the applicants for adducing in their affidavits the reasons for failure to appear on the date of hearing which is irrelevant to this application since they were required to account for days of delay to file the application. He opined that, since the applicants did not exhaust the remedies against the ex parte judgment then, this application is incompetent and it should be dismissed with costs.

In his final remarks, Mr. Mashabala averred that this application should be dismissed with costs since the courts as well as tribunals are required to promote compliance of laid down procedures which govern suits, application and proceedings.

In their reply, the applicants adopted the contents of their counter affidavit. Responding to the first limb of preliminary objection, the applicants did not dispute the fact that the only remedy to those aggrieved with an *ex parte* judgment is to make an application to set aside such *ex parte* judgment as per **Regulation 11(2) of GN 174 of 2003.**

They contended that, paragraph 26 and 27 contained in the affidavit of the 1st applicant states that on 18/12/2020 after discovering that he was out of time, he filed an application for extension of time to set aside the exparte judgment. However, the same could not be finalized due to biasness and poor handling of the case by the presiding Chairman whom after being told by the 1st applicant that he had no trust in him, the matter was withdrawn on 20/09/2021 instead of reassigning it to another

Chairman. As a result, he filed an application for extension of time to file revision before this court. The applicant was of the view that the remedies before the trial tribunal were exhausted as per paragraph 28 of the 1st applicant's affidavit. That, after the denial of the said application, he decided to file another application before the High Court.

The applicants referred to paragraphs 4 and 5 of the affidavit of one Fredrick Kasimu Kaduma who stated that due to the sickness of the 1st applicant he was sent to inform the tribunal about that though his report was not indicated in the record.

Also, the applicants referred to paragraph 6,7, 8 and 9 of the 2nd applicant's affidavit and argued that the allegations that the 1st applicant didn't want to defend himself were not true and that the tribunal ordered the defence to close their case while the 1st applicant was not present and was reported sick.

It was further submitted that the 1st applicant was condemned unheard despite the glaring evidence of the attendance and participation in the case since the 2nd applicant had no authority to represent the 1st Applicant. Hence, the tribunal had acted illegally with material illegality as per section **79(1) (c) of the Civil Procedure Code** (supra).

It was elaborated that an act of closing defence case without hearing the parties is a nullity and it was in violation of basic fundamental constitutional right to be heard as per the case of **Christian Makondoro vs The Inspector General of Police and Attorney General, Civil Appeal No. 40 of 2019**.

In conclusion, the applicants prayed the preliminary objections to be overruled and the application be heard on merits.

I have very well considered the affidavits and the rival submissions for and against the raised objections. From the raised objections, the contentious issue is ***whether this application is bad in law for being filed prematurely before exhaustion of available remedies before the trial tribunal?***

The learned counsel for the respondent was of the opinion that an application for extension of time to file revision is unmaintainable since the applicant had not exhausted the available remedy of setting aside the exparte judgment. The applicants concurred that the remedy for the party who is aggrieved by an *ex parte* judgment is to file application to set aside that judgment. However, they opined that the 1st applicant was condemned unheard as he was reported sick. Moreover, it has been alleged that there was an application which was filed but it was marked withdrawn after the applicants had informed the trial chairman that they had no trust in him. Thus, the tribunal acted illegally with material irregularity.

I join hands with both parties that the available remedy against an ex parte judgment is for the aggrieved party to file an application to set aside the impugned ex parte judgment. This is in accordance with **Regulation 11(2) of Land Disputes Courts (The District Land and Housing Tribunal**), GN No. 174 of 2003.

However, an application for revision should not be used alternatively with an application to set aside *ex parte* judgment. These are two different

things. Revisional powers in land matters are governed by **section 43(1)(b) of the Land Disputes Courts Act, Cap 216 R.E 2019** and not **section 79(2) of the Civil Procedure Code** as propounded by the applicant. As a matter of reference **section 43(1)(b)** (supra) reads:

> ***43****.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-*
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> *"May in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion,* ***if it appears that there has been an error material to the merits of the case involving injustice,*** *revise the proceedings and make such decision or order therein as it may think fit."* Emphasis added

In the case of **Ruth Makaranga vs Salum Ayub, Civil Application No.363 of 2021, [2022] TZCA 562** while elaborating the concept of Revisional powers, the Court of Appeal had this to say:

> *"It is trite law that* ***revisional jurisdiction of the Court is exercisable in matters which are not appealable to the Court*** *with or without leave or where the appellate process has been blocked by a judicial process."* Emphasis added

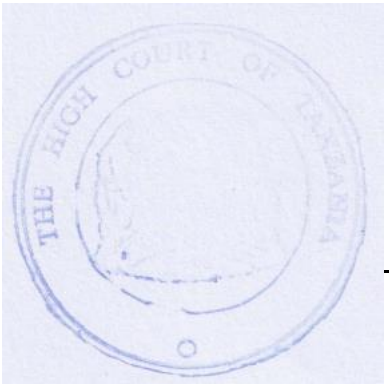
From the quoted provision above, the law is settled that an application for revision is preferred where there is material irregularity which occasioned injustice and where there is no room for an appeal.

In the situation at hand, it seems the applicants are aggrieved by *the ex parte* judgment which is not appealable. The available remedy to them according to the facts of the case, was to apply for revision against the impugned ex parte judgment. However, since the applicants were out of time to file the said revision, they had to file the instant application for extension of time to file revision. In the premises, I am of settled opinion that the applicants were justified to file the instant application so that they may be granted leave to file an application for revision out of time. The provision of **section 43(1)(b) of Land Disputes Courts Act** (supra), fits the circumstances of this case.

Having discussed as such, the two raised grounds of objection are answered in a negative. Hence, I hereby overrule the preliminary points of objections raised with costs. The application for extension of time to file revision should proceed on merit.

It is so ordered.

Dated and delivered at Moshi this 3rd day of March, 2023



X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE