

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. LAND APPLICATION NO. 137 OF 2022

(C/F Application No. 4 of 2022 District Land and Housing Tribunal of Mbulu at Dongobesh)

PAULO ALFONCY MEFURDA APPLICANT

VERSUS

PAULO AMNAAY BOAMO RESPONDENT

RULING

6th December, 2022 & 10th March, 2023

TIGANGA, J.

The applicant is seeking for extension of time so that he can file appeal to this Court against the decision of District Land and Housing Tribunal of Mbulu at Dongobesh (trial tribunal) in Application No. 04 of 2022, which was delivered on 29th July, 2022.

The application is by chamber summons made under section 41 (2) of the **Land Disputes Courts Act** [Cap 216 R.E. 2019] and section 14 (1) of the **Law of Limitation Act**, [Cap 89 R.E 2019] and is supported by applicant's sworn affidavit. According to his affidavit, he deposed that, he was the respondent in the Application No. 4 of 2022 at the trial tribunal and the matter was decided *ex parte* against him. However, he was present

throughout the trial until when the applicant therein closed his case and when he was called to enter his defence, he said he fell sick and gave notice but the trial court proceeded without him and decided the suit against his favour. Aggrieved with the decision, he wrote a letter to the trial tribunal praying for the copies of proceedings, judgment and decree so that he could lodge an appeal. That, it was until 14th September, 2022 when he was availed with such documents, looked for legal experts to prepare grounds of appeal but since the required time limit by the law had already lapsed, he filed this application on 19th September, 2022. According to the affidavit of the process server, the respondent refused service consequent of which he neither filed counter affidavit nor entered appearance hence hearing continued *exparte* against him.

Hearing of this application was by way of written submission, the applicant was represented by Mr. Stephen Nesphory Magambo. He submitted that, the reason for delay in filing appeal timely was late supply of the copies of judgment and decree which are important attachments in appeal as provided under O. XXXIX Rule 1 (1) of the **Civil Procedure Code** [Cap 33, R.E. 2019]. He also cited section 19 (2) of the Law of Limitation Act regarding exclusion of days lost in making follow ups on the copies of

judgment, decree or orders. He also referred the court to a number of cases including that of **Saida Said vs Saidi Mohamed** [1989] TLR 206 which held that, delay in obtaining copies of judgment, ruling, decree or order constitutes good reason for extension of time.

It was Mr. Magambo's further submission that, there was also an issue of illegality on the impugned decision to be appealed against as the applicant was denied right to be heard. He averred that, the trial chairman proceeded to hear the matter *ex parte* alleging he has defaulted appearance hence he could not defend the case against him. Also, there were no framed issues that enabled the trial tribunal determine the controversy among them. To support this contention on illegality and right to be heard, learned Advocate referred the court to a number of cases including the cases of **VIP Engineering and Marketing Ltd & 2 Others vs Citibank Tanzania Ltd**, Consolidated Civil Reference No. 8 of 2006 (unreported), **Principle Secretary, Ministry of Defence National Service vs Devram Valambia** [1992] TLR 195 and **Mohamed Jawad Mrouch vs Minister of Home Affairs** [1996] TLR 142. He prayed this court to allow the application for extension of time as he runs unopposed.

After going through applicant's submission, the question for determination is whether this application for extension of time has merit. However, it caught my attention that, the main application at the trial tribunal was decided *ex parte* hence not appellable according to Rule 11 (1) (c) and (2) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003**. The proper way for the applicant was to first seek the trial tribunal's leave to set aside *ex-parte* proceeding and judgment so that parties can be heard inter-parties. The above provisions read;

"11(1) On the day the application is fixed for hearing the Tribunal shall-

(a) n/a

(b) n/a

(c) where the respondent is absent and was duly served with notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter ex parte by oral evidence"

*(2) A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), **within 30 days apply to have the orders set aside,***

and the Tribunal may set aside its orders if it thinks fit to do so and in case of refusal appeal to the High Court.” (emphasis added).

The same is also the position under Order IX, R. 9 of the Civil Procedure Code, Cap 33 R.E. 2019 which reads:

"9. In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

In light of the above provisions, the applicant ought to have filed the application to set aside *ex parte* order by giving the reasons for non-appearance at the same trial tribunal which decided to proceed with the determine the matter *ex parte* and if the tribunal would be satisfied with the reasons put forth, would grant the prayers sought and allow him to present

the defence instead of appealing to this Court. Had the trial tribunal denied the applicant such audience and right to be heard, then he would have properly appealed or filed the application for extension of time to appeal. The court of Appeal in the case of **Paul A. Kweka and Hillary P. Kweka vs Ngorika Bus Service & Transport Company Limited** , Civil Appeal No. 129 Of 2002 CAT At Arusha (unreported), struck out the appeal emanating from an *ex parte* judgment by considering it non-appealable. The following was part of the reasoning of the Court of Appeal;

*"The rationale for making the orders non-appellable is not hard to find. **Firstly**, it promotes an expeditious administration of justice, that it ensures timely justice, at the same time making access to justice affordable, that is, less costly. **Secondly**, and more importantly, **it affords both parties in the case equal opportunity to be heard at the full trial.** It would be recalled that the right to a full hearing is one of the basic attributes of the right to equality before the law granted under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. (emphasis mine)*

Subscribing to the position above, the applicant herein has skipped an important procedure beefier commencing the appeal process. He has not been heard on merit the process which has to be done before the same trial

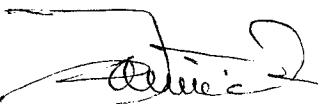
tribunal where the suit was filed so that he can exercise his right to be heard. I hold so because all of the grievances he has deponed in his affidavit cannot be argued by way of appeal since it is a trite principle that new evidence cannot be adduced in appellate stage unless they are additional evidence. He must secure an order to set aside the *exparte* order first and presents his evidence before appealing

For the reasons stated hereinabove, I find this application devoid of merits for being brought before this court prematurely. The application is therefore dismissed with no orders as to cost because it was heard and determined *exparte*. The applicant is advised, if he is still interested to go back to the trial tribunal and file the application for setting aside an expert order which excluded him from hearing.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 10th day of March, 2023




J.C. TIGANGA
JUDGE