IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 29 OF 2022

(Originating from the Katavi District Land and Housing Tribunal in Misc. Land Application No. 364/2022)

LUCAS M. MALYANGO ..... APPELLANT

VERSUS

VICENT MASHENENE ..... RESPONDENT

JUDGMENT

24/04/2023 & 12 /05/2023

MWENEMPAZI J.

The appellant is aggrieved by the decision of the District Land and Housing Tribunal allowing the respondent to file an application to set aside an exparte Judgment in Application No. 8 of 2015. He has raised grounds of appeal as follows:

1. That, the trial tribunal erred in law to grant the orders which were not sought by the Respondent in his Chamber application.
2. That, the trial tribunal erred in law and fact to entertain the application which was overtaken by events as execution was already granted by

the same tribunal and the tribunal broker was on the process of executing the tribunal orders.

3. That the trial tribunal erred in law to entertain the application which was supported by the incurably defective affidavit.
4. That, the trial tribunal erred in law to hold that the Respondent has established a good cause for extension of time for the delay of six (6) years.

The appellant prays that the appeal be allowed; the Ruling and drawn order of the trial tribunal in Miscellaneous Land Application No. 364 of 2022 be quashed and set aside; the respondent be condemned to bear the costs of the appeal; and any other relief(s) that this Honourable court shall deem fit and just to grant.

At the hearing the appellant was being represented by Mr. Laurence John, learned advocate and the Respondent was being served by Ms. Sekela Amulike, learned Advocate. Hearing proceeded viva voce, and their submissions were as hereunder shown. In his submission in chief, Mr. Laurence John, learned Advocate prayed to drop grounds 3 and 4 and submitted on the ground 1 and 2.

On the first ground of appeal, the counsel for the appellant submitted that the tribunal erred in law to grant an order which was not sought by the respondent. It is a legal position that parties and the Court are bound by pleadings. It is explained in **Barclays Bank Tanzania Ltd Vs. Jaco Miro Civil Appeal No. 35 of 2019, Court of Appeal of Tanzania at Mbeya** at page 11 – 12 wherein the Court while citing a passage in an article by Sir Jack I. H. Jacob bearing the title "The Present Importance of Pleadings" first published in Current Legal Problems (1960) that for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The court as well is bound by the pleadings of the parties as they are themselves and it will be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties".

In the chamber application by the applicant (respondent herein) he applied to set aside ex parte judgment out of time. The applicant also prayed for cost of the application. The enabling provision was cited section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019. The ruling of the tribunal granted extension of time to set aside ex parte judgment.

That order was not prayed anywhere in the application which was supported by an affidavit it is a legal position as explained in the case of **Dr. Emil Lebabu Woiso Vs. July Maarufu and 3 Others,** Land case No. 84 of 2016, High Court of Tanzania at Dar es Salaam at page 10 paragraph 2.

> *"...it is the law that the Court cannot grant a relief that was not prayed for".*

Also, in the case of **Eckson Mtabya Vs. Maiko Mitabya,** Probate Appeal No. 06 of 2020 High Court of Tanzania ta Mbeya.

> *"The Court is not your mother to grant what is not pleaded or asked for".*

That was raised *suo moto* without giving parties chance to be heard contrary to the legal stand. In the case of Mbeya **Rukwa Autoparts Vs. Justina George Mwakyoma** [2003] TLR 251 where the Court held that it is not allowed for the court to raise an issue suo moto without involving parties.

On the second ground that the tribunal erred to entertain the application which had already overtaken by events.

In the tribunal there was application No. 18/2022 which intended to execute decree of the tribunal issued in application No. 8 of 2022. The application was finalized on 30/5/2022, the application was granted.

Once execution is granted no other application may be granted by the same tribunal. In the case of **Lupyana Fredrick Timothy Kaduma (Personal Representative of Timothy Kaduma) Vs. Samwel Massawe and Another,** Misc. Civil Application No. 183 of 2021, High Court of Tanzania at Dar es Salaam where at page 9 – 10 the Court discussed the issue. At the end the application was dismissed.

Also, in the case of **Yusto Levilian Kaijage Vs. Abdi Mshangama, Land Revision No. 7 of 2022, High Court of Land Division at Dar es Salaam** also at page 9 – 10. The Court discussed the issue. At the end the application was dismissed.

The tribunal was also seen to be functus officio. The tribunal had already granted an application for execution thus it could not grant an application to see aside exparte judgment refer **Bibi Kisoko Medard Vs. Minister of Land Housing and Urban Development and Another** [1983] TLR 250 where it was held:

"In the matter of judicial decision once decision has been made and made known to parties, the tribunal is rendered functus officio".

The Counsel prayed therefore that the appeal be allowed, ruling and drawn order in Misc. Civil Application No. 364 of 2022 be quashed and set aside, cost be borne by the respondent and also prayed for any other order and or relief this court may deem it just to grant.

In reply to the submission in chief Ms. Sekela Amulike, learned Advocate prayed to respond as follows:

On the first ground of appeal, she submitted that it is not true that the order issued was not applied for. The application made in the tribunal was under section 14(1) of Law of Limitation Act, which gives the tribunal power to extended time. The court has power to grant. The prayer was to *"set aside exparte judgment out of time".* The counsel has overlooked the last words "out of time" the Court has power to extend time. Thus, it is not correct to argue that the applicant did not pray for an order.

The authorities supplied are distinguishable to the present case. The case of **Eckson Mtabya Vs. Maiko Mtabya** (supra) the applicant did not apply for an order to be appointed as co – administrator. In this case, the

respondent prayed for an order to set aside an exparte Judgment out of time. Also, the case of **Dr. Emil Lebabu Woiso** is different to the present circumstances.

The counsel has submitted that the extension of time *suo moto* is not true but the effect is to return the matter so that parties may address the issue so that each party is given a right to be heard.

On the second ground of appeal that execution had already been done and finalized. Execution had not been effected to render any application *functus officio.* Even in the second ground it is termed the execution was "in the process". Regulation 3 of GN. 174/2003 provides for execution process. At that level the execution is finalized.

To say issuing of an order is finalization it is not correct. As that were not at all an objection proceeding. The case of **Lupyana Fredrick Thimothy Kaduma** (supra) at page 6. At page 5 execution is completed at closure. Before the Court can entertain an application. It is our prayer that the discretion of the tribunal be honoured as it did not misdirect itself. The counsel prayed that the appeal be dismissed with cost, the file be remitted back for other application to be heard and determined.

Mr. Laurence John, learned advocate for the appellant rejoined by submittin as follows: On the first ground, he submitted that the counsel has cited the law, section 14(1) of Law of Limitation Act. There is difference between enabling provision and the prayer made. The current trend, what is being prayed for is what is being considered. The counsel for the appellant insisted that the prayer made was to set aside an ex parte judgment.

The application was to set aside ex parte judgment and not extension of time. The respondent's counsel is suggesting remitting back the file for the same to be heard.

The whole application is invalid and the proper course is to allow the respondent to file proper application to be heard according to law. Since the argument for extension of time is not seen in the application, returning the case will prejudice the appellant.

On the second ground of appeal the counsel has not cited the case law or precedent that an applicant will not be allowed to file any application when execution is closed. The case law we cited are on "grant of execution" did not closure of execution. The tribunal which had already granted execution, it was lacking jurisdiction to set aside ex parte judgment. The counsel for

the appellant submitted that they agree that granting extension of time is discretion of the Court but it must be prayed for. In the impugned decision the discretion was exercised unreasonably without being asked. He prayed this court to interfere with the proceedings of the tribunal to be set well and the appeal be allowed.

I have heard an opportunity to read the record and hear the submissions by the counsels for both sides. The appellant in an appeal has complained in the 1st ground of appeal that the trial tribunal granted orders which were not sought by the Respondent in his chamber summons. He has also insisted that the applicant's prayer in the chamber summons was for an order to set aside an exparte judgment out of time. However, the tribunal chairman granted an extension of time to set aside exparte judgment. The counsel for the appellant has submitted that the legal position in the case of **Dr. Emil Lebabu Woiso Vs. July Maarufu and 3 Others,** Land Case No. 84 of 2016, High Court of Tanzania at Dar es Salaam at page 11 paragraph 2 that:

> *"...it is the law that the Court cannot grant a relief that was not prayed for..."*

It has been argued that the relief granted was raised by the Court suo moto without giving chance to the parties to be heard. Buttressing his point, he cited the case of **Mbeya – Rukwa Autoparts Vs. Justina George Mwakyoma [2003] TLR 251** where the Court held that it is not allowed to raise an issue suo moto without involving parties. The appellant prayed the appeal to be allowed.

The Respondent as we have seen herein above, submitted that the application is made under section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019 which gives power to the tribunal to extend time. The prayer which was made was "to set aside exparte judgment out of time" the counsel argues that it is not correct to say the applicant did not pray for an order.

The counsel also distinguished the authorities cited by the counsel for the appellant to support his case. Also the counsel denied that an extension of time was granted suo moto also she came up with a suggestion that the application be taken back to the trial tribunal so that each party may address the issue which will accord them a right to be heard. The suggested way forward, that is to return the matter for rehearing is being opposed by the counsel for the appellant. He has suggested quashing the ruling and setting

aside an order and the respondent be ordered to file fresh and proper application according to law.

I have also perused the chamber summons and I see the application was made under section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019. The provision according to the case of **Parin A. A. Jaffer and Another vs. Abdulrasul Ahmed Jaffer and two others [1996] TLR 110** empowers the Court to extend time. In the case it was held:

> *"Section 14(1) of the Law of Limitation Act permits the Court the power, suo moto and for any reasonable or sufficient cause, to extend time".*

In another case **Ramadhani Nyoni Vs. Ms. Haule & Company Advocates [1996] TLR 71** High Court the applicant is required to raise reasonable and sufficient cause for the discretion of the Court to be exercised.

In this case the applicant applied for extension of time to apply for setting aside an exparte judgment. I get this understanding from the enabling provisions and the nature of submissions made by the counsel for the respondent in the District Land and Housing Tribunal (page 4 -5 of the typed

proceedings of the trial tribunal). The counsel for the applicant (the respondent herein) capitalized the reasons for application on the illegality of the proceedings. An excerpt of the proceedings reads:

> *"Katika kesi hii, muombaji anaomba kuongezewa muda, anaomba kiapo chake viwe sehemu ya maamuzi sababu ya msingi ya mwaka 8/2015 ina makosa ya kisheria...katika kesi hiyo wazee wa baraza hawakushiriki kama inavyotakiwa maoni yao hayakuoneshwa wala kuzingatiwa na Mwenyekiti wa Baraza. Jambo hilo ni kinyume cha sheria".*

In the ruling, the honourable chairman of the District Land and Housing Tribunal made the findings as follows:

> *"Maombi haya yanakubalika, mwombaji anaruhusiwa kuleta maombi ya kutengua hukumu ya upande mmoja".*

In my opinion, reading the contextual theme of the application as such cannot be said the order issued or relief granted was different from the prayers in the chamber summons; to hold that way will be to intentionally deny what actually transpired in the District Land and Housing Tribunal and take back what had already been decided and that is a misuse of important

resources of the Court, particularly time. Proceedings show the appellant's counsel in his submission was deviating away from the application for extension of time not the respondent. I would rather hold that with the advent of oxygen principle, the words 'out of time' may safely be understood extension of time when read together with the submission and the enabling law cited on the chamber summons. In the case of **Ramadhani Nyoni Vs. Ms. Haule & Company, Advocates** (supra) the Court presumed an application to be that of extension of time despite lack of clarity. I take it as doing away with technicalities which situation is not as in this present case, the present case is which is clear in the law cited and submissions made. Under the circumstances the first ground fail. The same is dismissed.

As to the second ground of appeal that the tribunal erred in law and fact to entertain the application which was overtaken by events as execution had already been granted by the same tribunal and the tribunal broker was in the process of executing the tribunal order.

The counsel for the appellant has submitted that the reason that the order had already been overtaken by events is that the execution order had already

been issued. That however is denied by the respondent respondent's counsel, however she admits it was in execution process.

I have read the cited cases above and also the submissions. Issuing an order of execution is not execution of the said order. It is in my view, the case was still in the process of execution. Since under the circumstances of the present case there was only an order issued, that is not execution per se I think and opine that the tribunal chairman acted properly as there were other processes pending. Hence, I find the second ground with no merit. I therefore dismiss.

Under the circumstances, the whole appeal has no merit. It is dismissed with costs.

It is ordered accordingly.

Dated at Sumbawanga this 12th day of May, 2023.

T.M. MWENEMPAZI

JUDGE