

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LAND APPEAL NO 15 OF 2022

(Arising from Miscellaneous Land Application No 327 of 2021, Originally Land Application No.211 of 2019 District Land and Housing Tribunal for Moshi at Moshi)

**BJUNKO INVESTMENT LIMITED.....APPELLANT
VERSUS**

ESTHER PHILEMON	1ST RESPONDENT
JARED NAHUM MERO.....	2ND RESPONDENT
HENRY RAIMOS MERO	3RD RESPONDENT
JOHN BENJAMIN MERO	4TH RESPONDENT
EDWARD NAHUM MERO	5TH RESPONDENT
ELISA MERO	6TH RESPONDENT
RABISON NAIMAN MERO	7TH RESPONDENT
LAZARO KIMARIO	8TH RESPONDENT

JUDGEMENT

Last Order: 21/12/2022
Judgment: 27/01/2023

MASABO, J.:-

On 20th December 2019 the appellant herein filed Land Application No. 211 of 2019 before the District Land and Housing Tribunal for Moshi (the trial tribunal) over a parcel of land allegedly trespassed into by the respondents. On 17/5/2020, the tribunal dismissed the application after it observed that she defaulted appearance four times. Aggrieved by the dismissal order, she went back to the tribunal with Miscellaneous Application No. 327 of 2021 seeking for restoration. This application was dismissed with costs after the tribunal observed that there was no proof that Mr. Kamani who was appearing on her behalf had authorisation to

represent her. Aggrieved, she has moved this court armed with the following grounds;

1. The trial chairman erred in law and facts in dismissing Miscellaneous Land Application No 327/2021 on the ground that the applicant has never appeared in court while his advocate/representative was always present whenever that application was scheduled;
2. The trial chairman erred in law and facts in condemning the appellant's advocate unheard when he held that there was no proof showing that the advocate had been authorized to represent the appellant.
3. The trial chairman erred in law and facts in dismissing Land Application No. 211 of 2019 on reasons that the applicant had not appeared for four times while the chairman himself was not present in almost all those days and the said application was always adjourned by a clerk of the tribunal.
4. That, the trial chairman erred in law and facts in deliberately avoiding to restore and hear Land Application No. 211/2019 which he had dismissed without legal justification thus leaving the dispute among the parties unsettled and escalating.

This appeal was heard by way of written submission. The appellant was represented by Mr. Erasto Kamani, learned counsel while the respondents appeared in person, unrepresented. Supporting the appeal, Mr Kamani submitted jointly on the grounds of appeal. He argued that, the dismissal order was misconceived as the applicant's advocate/representative was always present whenever the application was scheduled. He elaborated

further that the said application was adjourned several times and the adjournment was in most cases caused by the trial tribunal itself. Surprisingly, on 23/02/2022 when the said application was scheduled for mention the trial chairman dismissed the same citing two reasons namely, the appellant's default appearance and failure by her counsel to render proof that he was duly instructed to represent the appellant. Mr. Kamani opined that, this was a misconception. In fortification, he cited the provision of section 30 of the Land Dispute Courts Act [Cap 216, R.E. 2019] and Rule 13 (1) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003 which provide that, a party can be represented by his advocate or any other representative. Thus, he argued, it was not proper for the trial chairman to dismiss the application based on the reason above as the appellant's advocate always appeared in court in representation.

Regarding the counsel's failure to render proof of representation, Mr. Kamani submitted that there is no legal requirement to that effect. Moreover, he argued that such proof, if necessary, ought to have been obtained from the filed in support of the application. In this affidavit which he personally deponed on 19/05/2021 and filed in the tribunal on 17/06/2021, he deponed that he had been authorised by the Executive Director of the appellant to represent the company. He reasoned that, the affidavit is a reliable legal proof. Hence, a letter showing that he had been authorised to represent the appellant was unnecessary and with no legal basis.

The counsel contended further that, even Land Application No 211 of 2019 on which Miscellaneous Land Application No. 327 of 2021 originated was wrongly dismissed because on several occasions the chairman was absent as a result, the application was on numerous occasions adjourned by the tribunal clerk. The chairman resumed on 20/12/2019 and on that date, he dismissed the application after he observed that the applicant had defaulted appearance four days which he did not specify. Besides, he did not cite the law upon which he dismissed the application. Alternatively, Mr. Kamani submitted that even if it is assumed that the applicant did not appear for those four days, it was wrong to act on those days as the tribunal was not duly constituted. Fortifying his argument, he cited section 23(1) of the Land Disputes Courts Act and reasoned that, the tribunal cannot be constituted by a clerk of the tribunal. It was argued further that, the omission to state the law upon which the application was dismissed, was a fatal irregularity.

In conclusion, Mr. Kamani prayed the court to allow the appeal with costs, quash and set aside the dismissal orders in Miscellaneous Land Application No. 327 of 2021 and Land Application No. 211 of 2019. Also, he prayed this court be pleased to order that Land Application No. 211 of 2019 be heard on merit before another impartial chairman.

In their joint reply, the respondents submitted that the appellant's advocate failed to give sufficient reasons as to why the appellant defaulted appearance before the trial tribunal in both applications hence the dismissal orders. They also challenged the learned counsel for his failure to present the proof. They argued that, section 30 of the Land Dispute

Courts Act and Regulation 13 (1) of the Land Dispute Courts Regulations cited by Mr. Kamanl do not state whether an advocate can represent a party without that party entering his appearance in the entire proceedings. They concluded that in the circumstances of the case, it was correct for the trial chairman to dismiss the application as the appellant consistently defaulted appearance and his advocate was always praying for adjournment on clumsy reasons and when asked to procure the attendance of the applicant he failed.

They further submitted that, since the appellant failed to set his foot in the tribunal from when Land Application No 211 of 2019 was instituted, it was doubtful whether the counsel was indeed instructed as claimed. Thus, the dismissal of the application was justified. Similarly, in Land Application No. 327 of 2021 he never set his foot in the tribunal. Therefore, there was a good justification for the dismissal orders in both applications. In conclusion, they argued that, the appeal be dismissed and the dismissal orders in Land Application No 211 of 2019 and Misc. Land Application No 327 of 2021 be upheld with costs.

Having gone through the rival arguments by the parties and the tribunal's records, I will now proceed to determine the appeal. The gist of the appeal is default appearance before the tribunal. The appellant's complaints are that, her applications were unfairly dismissed on the grounds of default appearance whereas she was dully represented by an advocate who entered appearance on her behalf. It has also been argued that the tribunal's decision to disregard the counsel's appearance on reasons that

he did not produce proof of instruction was a lucid misconception as there is no legal requirement to that effect.

Before embarking on the grounds which I have been called upon to determine, it is pertinent, at this outset, to state that, while reading the submissions filed by the parties, I observed that, the submissions rendered have spanned cross the dismissal order in Land Application No. 211 of 2019 and in Miscellaneous Land Application No. 327 of 2021. My determination will, for obvious reasons, not traverse that far. I will, exclusively, deal with the dismissal order in Miscellaneous Land Application No. 327 of 2021 against which the instant appeal was filed. The dismissal order in Land Application No. 211 of 2019 is not a subject of this appeal. As the same has not been placed before me, any attempt to determine it will be tantamount to usurping the powers I am not clothed with.

Moving on to the dismissal order in Miscellaneous Land Application No. 327 of 2021 I will, for convenience and easy of reference, reproduce the relevant part of the proceedings to show what transpired before the tribunal on 23/2/2022 a date on which the application was dismissal.

"Mdaiwa1

Kwa niaba ya wenzangu napenda kueleza Baraza hili kwamba mdai hajawahi kufika katika Baraza hili tangia shauri hili lifunguliwe. Liliwahi kufutwa kwa sababu ya kutoonekana kwake na amerudisha na haonekani pia. Tunaomba shauri liondolewe.

Wakili Kamani

Mdai yupo Sudani

AMRI

Shauri hili dogo lililetwa hapa tarehe 17/6/2021 kuomba kurudisha baada ya shauri la msingi namba 211/2019 lililosajiliwa hapa tarehe 20/12/2019 na kufutwa mnamo tarehe 17/05/2022 takribani miaka miwili kufuatia kutoonekana kwa mdai tangu alete shauri hili hapa.

Ameleta maombi haya madogo tangu tarehe 17/6/2021.

Mdai hajawahi kuonekana hali inayoonyesha kwamba anawasumbua wadaiwa.

Pamoja na hilo **Wakili Kamani hajaonyesha barua ya kuonyesha kuajiriwa kumwakilisha mdai.**

Hivyo kutofika kwa mdai na **kukosekana kwa uthibitisho wa Wakili kuajiriwa kunaonyesha wazi kwamba hayupo makini katika kuendesha shauri hili.**

Hivyo nalifuta kwa gharama. [emphasis mine]

It is the appellant's assertion that, the finding above was marred by three irregularities. *First*, the application was wrongly dismissed for default appearance as she was duly represented by a counsel who was present in court and addressed the court on the material date. *Second*, the requirement for an advocate to provide proof of instruction was misconceived. *Third*, even if there was a sufficient ground for dismissal of the application, it ought not to have been dismissed on that day as it had come for mention, not hearing. Thus, it was prematurely dismissed.

Two key things are decipherable from these proceedings: *one*, it is crystal clear that, on 23rd February, 2021 when the 1st respondent prayed for dismissal of the application for default appearance of the applicant and the application dismissed forthwith, it had come for mention. And, *two*, on that day, the appellant's advocate was present and he told the trial Tribunal that his client was in Sudan but the chairman found it fit to

dismiss the application for non-appearance of the applicant and failure by her counsel to produce proof that he was indeed instructed. Therefore, the *first* issue to be answered is whether it was proper for the chairman to dismiss the application for reasons of default appearance of the appellant whereas there was a counsel appearing on his behalf. The **second** one is whether the failure to produce proof of instruction constituted a good cause for dismissal of the application and the *third* is, whether it was proper to dismiss the application on the date fixed for mention.

To resolve the first two questions, I will now turn to the provisions on appearance of parties before the trial tribunal as set out under Section 30 of the Land Disputes Courts Act Cap 216 which provides that;

30. Proceeding of the District Land and Housing Tribunal shall be held in public and a party to the proceedings may appear in person or by an advocate or any relative or any member of the household or authorized officer of a body corporate. [emphasis added].

Also relevant, is the provision of rule 13 (1) of the Land Disputes Court Regulation, which states that;

"13.-(1) The parties to the proceedings may during the hearing of proceedings be represented by an advocate or any other representative" [emphasis mine].

These two provisions are concise. They entertain no other interpretation than that, a party in a land matter before a District Land and Housing Tribunal may, like in an ordinary suit, appear in person or through an

advocate and such appearance if done by an advocate is as good as appearance by a party himself.

Regarding the requirement to produce proof of instruction, I partially subscribe to Mr. Kamani's view as I am not aware of any law that requires an advocate who appears in court or tribunal representing a party to a suit to render proof of his instruction other than endorsing his name, signature and stamp on the documents filed in court. However, I am correspondingly unaware of a law precluding the presiding court or tribunal from requiring such prove. In view of that, I am of the firm view that for purposes of control of proceedings, the presiding court/tribunal may, depending on the circumstances of a particular case, require such proof. When so required, the advocate must comply by rendering the proof produce the said proof. Failure to produce is a contemptuous act susceptible to consequences. Looking at the circumstances of the present case I am convinced that the chairman was justified in demanding the proof considering that the applicant, who according to Mr. Kamani, was in Sudan is a cooperate being not a natural person. Besides, even if there was a misdirection on the chairman, the counsel was duty bound to abide by it as it was a lawful order by the tribunal.

In his argument in support of the appeal Mr. Kamani has argued that his failure to render the proof did not warrant the dismissal order considering that the proof was readily available in the tribunal and could be accessed through the affidavit he deponed and filed in support of the application. Looking at the affidavit accompanying the chamber summons for Misc. Land Application No. 327 of 2021, I have observed that, it was deponed

by Mr Kamani and through paragraph 2 of this affidavit he deponed that he has been duly instructed by the Appellant's Executive Director, one Pedro, to represent the applicant. Since the law regards an affidavit as a substitute of oral evidence (see **Uganda vs Commissioner of Prisons, Ex-parte Matovu [1966] EA514 at 520**), it is obvious that whoever wished to challenge it ought to produce credible evidence to the contrary through oral testimony or an affidavit in reply/counter affidavit as opposed to mere submissions from the bar. As there is no such evidence on record, I am of the considered view that, the tribunal misdirected itself by requiring Mr. Kamani to bring fresh evidence while paragraph 2 of the affidavit stood unchallenged. Needless to emphasize, it was a lucidly error for the chairman to discredit Mr. Kamani and to proceed to dismiss the application based on averments made by the respondents from the bar as disposition made in an affidavit cannot be challenged/discredited by mere averments from the bar.

Turning to the date on which the application was dismissed, it has been argued, in favour of the appellant that, the application was erroneously dismissed on a date set for mention and in so doing, the tribunal offended the provision of rule 11 (1) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations which provides that:

"11.-(1) On the day the application is fixed for **hearing** the tribunal shall-

- (a) n/a
- (b) where the applicant is absent without good cause, and had received notice or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant;"

In my scrutiny of the record, I have observed that it coincides with the submission rendered by Mr. Kamani. It has demonstrated that, prior to the dismissal order, the application was adjourned on 3/11/2021; 22/11/2022; 3/12/2022, 8/12/2021; 15/12/2021; and 8/2/2022. The respondent and the applicant's counsel entered appearance on these dates. As the record is silent on the reasons for adjournment, I unable to draw a conclusion that the appellant was solely responsible for the multiple adjournment. I am, under the premises, constrained to agree with her that she was wrongly condemned.

Besides, even if she was the one responsible, the dismissal order could not have issued as the application was still at mention stage when it was dismissed on mention 23/2/2021. I, therefore, respectfully, differ with the respondent's view that the dismissal was in good order because, as per the foregoing provision, a dismissal order on ground of default appearance by the applicant can only issue if the applicant defaulted appearance on the date of hearing, not otherwise. This position was articulated by the Court of Appeal in **Mrs. Fakhria Shamji Vs. The Registered Trustees of The Khoja Shia Ithnasheri (Mza) Jamaat**, Civil Appeal No. 143 of 2019 CAT at Mwanza (unreported). Dealing with a similar issue, the Court underscored that:

"With due respect, we find the Judge misdirected himself by giving the said order. Considering it was a "mention" date and not the date set for the hearing of the PO, the order was unnecessary. Although the term "mention" is not provided for in our CPC, but it has been a well-established practice that there is difference between a "mention" and "hearing" date. Guided by the decision in **Mr. Lembrice Israel Kivuyo**

(supra), that dismissal can only be made on a hearing date and not "mention" as most parties consider a "mention" day as a day for necessary orders, including scheduling of a hearing date, which was not the case in the instant matter."

In the premises, therefore, the dismissal order was unnecessary and unjustified.

Based on the foregoing, I find merit in the appeal and agree with the appellant's counsel that the dismissal order in respect of Misc. Land Application No. 327 of 2021 was engrossed in multiple fatal illegalities. The appeal is thus allowed and the dismissal order is quashed and set aside. It is further directed that, the case file should be remitted back to the trial tribunal for it to proceed with the hearing and determination of the application on merit before another chairman.

As the anomalies sustained were occasioned by the tribunal, I find it fair and just for each party to bear its respective costs. Order accordingly.

It is so ordered.

Dated and delivered in Moshi this 27th day of January, 2023.



X

Signed by: J.L.MASABO

J.L. MASABO
JUDGE
27/01/2023