

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

MISC. LAND APPEAL NO.61 OF 2022

(Arising from Land Appeal No. 10 of 2019 District Land and Housing Tribunal for Karagwe Originating

from Land Case No. 13 of 2018 Bugara Ward Tribunal)

DAMIAN MAKENGE..... APPELLANT

VERSUS

ATHANASI MAKENGE..... RESPONDENT

JUDGMENT

17th and 24th February, 2023

BANZI, J.:

The Appellant, Damian Makenge and the Respondent, Athanasi Makenge are blood brothers and they are battling for a piece of land measuring about 8 acres situated at Bugara area which is alleged to have been left by their father Makenge who died in 1948. In 2018, the Respondent successfully sued the Appellant at Bugara Ward Tribunal claiming for the division of that land which the Appellant was preventing it to be divided between them. After hearing the parties and their witnesses, the trial tribunal ordered the land to be divided to all five children of the deceased.

The Appellant was aggrieved with that decision and he appealed to the District Land and Housing Tribunal for Karagwe ("the DLHT") marshalled with five grounds. On 24th October, 2019, his appeal was dismissed for want of appearance and prosecution. On 23rd January, 2020, the Appellant filed an application to set aside the dismissal order. On 22nd March, 2022 when the application was called for hearing, the Appellant prayed to argue the same by way of written submission because his Advocate was indisposed on that day. The prayer was granted and the Appellant was ordered to file his submission on 5th April, 2022 while the Respondent had to file the reply on 19th April, 2022 and the rejoinder to be filed on 27th April, 2022 which would also be the mentioned date.

On 6th June, 2022 when the matter was called for mention before the presiding Chairman, it was discovered that the Appellant did not file his submission something which prevented the Respondent to file the reply. Mr. Raymond, learned counsel who appeared for the Appellant informed the tribunal that, it was his first appearance and he had no knowledge of the nature of the dispute before the tribunal whether it was an appeal or application. He prayed for extension of time so as to file his submission. Mr. Kweyamba, learned counsel who was representing the Respondent opposed the prayer for extension of time arguing that, it was a delaying technique

used by the Appellant which was causing costs to the Respondent. He prayed for the application to be dismissed for failure to prosecute the case. The prayer made by Mr. Kweyamba convinced the Chairman and the matter was dismissed with costs for want of prosecution. Aggrieved with that decision, the Appellant lodged his appeal before this Court with one ground, thus:

- 1. That, the appellate tribunal erred in law and fact by dismissing the appeal while the appellant was denied the right to be heard for no good and sufficient reason.*

When the appeal was called for hearing, Mr. Raymond Laurent, learned counsel appeared for the Appellant while the Respondent appeared in person unrepresented. Since the Respondent was not fluent in Kiswahili language, he was availed with Mr. Cornel Buberwa to interpret from Kiswahili language to Nyambo language and vice versa.

Arguing in support of the appeal, Mr. Raymond submitted that, the DLHT denied the Appellant with opportunity to be heard. He contended that, on 6th June, 2022 when the matter was called for mention, he appeared for the first time and he prayed to be given time to peruse the proceedings because the Appellant had told him that it was an appeal while in court Mr. Kweyamba stated that it was an application. Therefore, if he would be given

at least seven days, it would not prejudice any party. However, the Chairman was not convinced and dismissed the appeal for want of prosecution. He finalised his submission by praying for the ruling of the DLHT to be quashed and the matter be remitted to the DLHT to be heard afresh. He cited the cases of **The DPP v. Shabani Donasian and Ten Others**, Criminal Appeal No. 196 of 2017 CAT at Tabora (unreported) and **Barnabas William @ Mathayo v. Republic**, Criminal Appeal No. 254 of 2018 CAT at Mwanza (unreported) to support his submission on right to be heard.

In his brief reply, the Respondent submitted that, the Appellant had the habit of wilfully defaulting appearance at the DLHT and he appealed to this Court so that he can take the land forcefully in case he fails to appear. He further submitted that; the Appellant defaulted to file the submission after being given time to do so. He prayed for this Court to uphold the decision of the Ward Tribunal which ordered the suit land to be divided equally among all five children or else, let the matter be heard by the DLHT. In a brief rejoinder, Mr. Raymond reiterated his prayer for the matter to be remitted to the DLHT to be heard afresh on merit.

Having carefully considered the records, the petition of appeal and submissions of both sides, the main issue for determination is *whether it was*

proper for the DLHT to dismiss the matter under the prevailed circumstances.

It is a settled principle that, failure to file written submission on the date scheduled by the Court or Tribunal is as good as non-appearance on the date fixed for hearing. This was stated in the case of **Godfrey Kimbe v. Peter Ngonyani** Civil Appeal No 41 of 2014 CAT at Dar es Salaam (unreported) where it was held that:

"failure to lodge written submission after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case."

It is common knowledge that, an appeal or application can be heard orally or by way of written submission. It is also established practice that, when the appeal or application is argued by written submission, depending on circumstances of each case, after filing a rejoinder, the matter can be scheduled for mention with a view of fixing judgment/ruling date after satisfying that submissions were filed within time. As a matter of practice, on the date of mention, it is when scheduling order is vacated following a prayer from either party by granting extension of time upon establishing reasons for failure to file submission within scheduled time.

In the matter at hand, the proceedings of the DLHT reveal that, on 22nd March, 2022 the Appellant prayed to argue the application by way of written submission whereby, the DLHT granted the prayer and ordered that, written submission by the Applicant/Appellant to be filed on 5th April, 2022, reply by the Respondent on 19th April, 2022 and rejoinder to be filed on 27th April, 2022 and the same date was scheduled for mention. However, on 27th April, 2022, nothing transpired in the DLHT as the record shows that, the matter was before another Chairman who was not the presiding Chairman. On 6th June, 2022 when the matter was tabled before the presiding Chairman, Mr. Raymond informed the tribunal that, he was appearing for the first time and he was not aware of the nature of the matter that was before the tribunal whether it was an appeal or application. He prayed to be given time to file written submission but that prayer was denied and the application was dismissed with costs for negligence.

It is undisputed that, according to the record, Mr. Raymond was appearing for the first time to represent the Applicant/Appellant before the DLHT. Since it was his first to appear after being engaged, obviously, he was not aware of the proceedings from the Ward Tribunal up to the DLHT. Therefore, for lack of knowledge, he could not be able to prepare the written submissions for the matter he was not aware of. That in itself, would be a

sufficient reason for presiding Chairman to vacate the scheduling order considering the fact that, the Applicant/Appellant had a right to be represented by Advocate.

For those reasons, I hereby allow the appeal, by quashing the ruling of the District Land and Housing Tribunal for Karagwe dated 6th June, 2022 and order that, the application for setting aside the dismissal order be heard on merit. Considering the nature of the dispute and the relation of the parties, I make no order as to costs.

It is so ordered.



I. K. BANZI
JUDGE
24/02/2023

Delivered this 24th day of February, 2023 in the presence of Mr. Raymond Laurent, learned counsel for the Appellant and the Respondent in person.



I. K. BANZI
JUDGE
24/02/2023