IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI SUB- REGISTRY

AT MOSHI

LAND CASE REVISION NO. 04 OF 2023

(C/F Application No. 97 of 2017 in 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

Date of Last Order: 07.05.2024
Date of Ruling : 28.05.2024

MONGELLA, J.

The applicants have preferred this application under **Section 43(1)(a) and (b) of the Land Disputes Courts Act** [Cap 216 R.E 2019] seeking for this court to call, examine and revise the record of the District Land and Housing Tribunal for Moshi at Moshi (hereinafter the Tribunal) in Application No. 97 of 2017, so as to satisfy itself on the correctness, legality or propriety of the order issued on 15.10.2020.

The application was supported by the affidavits of the respondents and one Fredrick Kasimu Kaduma. The respondent contested the application as reflected in his own sworn affidavit.

The brief facts of the matter are that: the respondent sued both applicants over 2 acres of land he claimed they trespassed. The applicants denied the claims leading the matter to proceeded to trial. The record shows that after the respondent's case was closed, the matter was adjourned for hearing of the applicant's defence. The record further shows that the hearing of the defence case was adjourned multiple times. Eventually on 15.07.2020, the Tribunal declaring that the applicants deliberately refused to make defence, closed the defence case. An *ex-parte* judgement was then entered on the respondent's favour. In the circumstances, the applicants are hereby seeking for revision of the said order under which the Tribunal closed the defence case.

The application was argued by written submissions whereby the applicants were unrepresented while the respondent was represented by Mr. Bernard A. Chuwa, learned advocate.

The applicants adopting their supporting affidavits and that of Fredrick Kasimu Kaduma submitted that; when the defence case came for hearing, the applicant was sick. He sent his brother one, Fredrick Kasimu Kaduma to report on his illness, however, such report was not recorded in the Tribunal proceedings. That, in the proceedings it is shown that the 2nd applicant was reported stating that she did not want to make defence, she was not ready. They contended that, without regarding the 1st applicant's interests, the chairman closed the defence hearing.

The applicants challenged the trial chairman contending that the 2nd applicant never informed the Tribunal that he did not wish to enter defence. They called the statement alleged by the Tribunal being untrue. In their view, the Tribunal's act of closing the defence case without considering the 1st applicant's interests prejudiced his interests.

The applicants further pointed out that they took efforts to set aside the *ex-parte* Judgement, but the same were futile until Misc. Application No. 38 of 2022 whereby this Court ordered them to file for revision.

Further, they contended that the 2nd applicant had no authority to represent the 1st applicant. They considered the Tribunal's act of closing the case a material irregularity as it acted illegally. In the premises, they called for this court to observe the records according to **Section 79(1) (c) of the Civil Procedure Code** [Cap 33 R.E 2019].

In conclusion, they argued that the 1st applicant was condemned unheard despite glaring evidence of his attendance in court and participation in the case. They added that the right to be heard is a constitutional right, thus the omission to hear the applicant's defence amounted to violation of said right rendering the proceedings a nullity. To buttress their case, they referred the case of **Christian Makondoro vs. Inspector of General Police & Another** (Civil Appeal No. 40 of 2019) [2021] TZCA 30 (22 February 2021)

TANZLII. In the upshot, they prayed for the application to be allowed and the matter assigned to another chairman for proper hearing.

The application was vehemently opposed through a submission by Mr. Chuwa. He had five grounds for his contention being; **first**, that the applicants were fully involved in the proceedings of the trial court. However, he said, on the material day, the 2nd respondent did not state any reason why she was incapable of testifying. As for the 1st applicant, he said that there was no proof produced in the affidavits supporting the application to show that he was sick on the fateful day. In his stance, the court afforded the applicants their constitutional right to defend themselves but they chose not to exercise the same. In the circumstances, he held the view that the applicants are estopped from accessing this court through revision as they did not show any special circumstance for filing the revision.

Second, that the applicants had the option to seek an order to set aside the *ex parte* judgement or even file an appeal. Mr. Chuwa contended that according to **Section 43(1) (b) of the Land Disputes Courts Act**, an application for revision is preferred where there is material irregularity which occasioned injustice and there is no room for appeal. He considered the revision bad in law as the applicants failed to exhaust all available remedies. Arguing further, he submitted that the applicants ought to have filed an application to set aside the *ex-parte* Judgement as set under **Regulation 11(2) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations** GN No. 174 of 2003 and **Order IX Rule 9 of the Civil Procedure Code.** He backed his averment with the following cases:

Moshi Textile Mills vs. BJ De Voest (1975) LRT No. 17; **Hashi Energy T. Limited vs. Khamis Maganga** (Civil Appeal 181 of 2016) [2022] TZCA 517 (26 August 2022); **Yara Tanzania Ltd vs. Db Shapriya & Co. Ltd** (Civil Appeal 245 of 2018) [2020] TZCA 265 (22 April 2020); **Mic Tanzania Ltd vs. Kijitonyama Lutheran Church Choir** (Civil Application 109 of 2015) [2019] TZCA 78 (5 March 2019), all from TANZLII.

Mr. Chuwa insisted that the application was not tenable as it has been preferred as an alternative to an appeal. He maintained that a revision is only sought if the right to appeal has been blocked by judicial process but such is not the case on this matter. He further challenged the applicants on the ground that they did not indicate that their chance of applying to set aside the *ex parte* judgement had been blocked.

Third, he averred that the applicants are wilfully filing multiple cases to block the respondent from enjoying fruits of the *ex-parte* judgement pronounced on 15.10.2020. He considered that an abuse of the court process alleging that litigants have now been in court for 8 years. In his view, the applications were triggered by the respondent's move to execute the *ex parte* judgement of the Tribunal.

He listed the applications filed by the applicants in this Court to wit; Misc. Land Application No. 50/2021 **Abbas Kasimu Kaduma & Lucia Juma Malipula vs. Augustino Japhet Mrema** withdrawn on 10.02.2022; Misc. Land Application 19/2022 **Abbas Kasimu Kaduma**

& Lucia Juma Malipula vs. Augustino Japhet Mrema withdrawn on 24.08.2022 and; Misc. Land Application 38/2022 **Abbas Kasimu Kaduma & Lucia Juma Malipula vs. Augustino Japhet Mrema** for extension of time to file revision, which was granted on 18.07.2023.

He as well listed the applications filed in the Tribunal to include: Maombi Madogo Na. 317/202 **Abbas Kasimu Kaduma & Lucia Juma Malipula vs. Augustino Japhet Mrema** withdrawn on 20.09.2021 and Misc. Land Application 17/2021 **Abbas Kasimu Kaduma & Lucia Juma Malipula vs. Augustino Japhet Mrema**, which is an application for stay.

Fourth, he claimed that the applicants have failed to offer concrete evidentiary proof as to why they failed to prosecute their case on the material day. Mr. Chuwa alleged that the said Fred Kasimu did not appear in court on the material day as no proof has been submitted to show he was present to deliver a message on the 1st applicant being sick. He challenged the applicants' supporting affidavits on the ground that they merely narrated the chain of events without furnishing sufficient explanation or concrete documentary proof on why the court should revise the Tribunal proceedings and the *ex-parte* Judgement. He saw the omission being fatal warranting the dismissal of the application. In support of his stance, he referred the case of **Eqbal Ebrahim vs. Yesseh K. Wahyungi** (Civil Application No. 202/17 of 2022) [2023] TZCA 17859 (21 November 2023) TAZNLII.

Fifth, Mr. Chuwa alleged that the application at hand is time barred. He said that the applicants were in Misc. Land Application No. 38 of 2022, granted an extension of 21 days to file their revision. That, time started running on 18.07.2023 rendering the days to lapse on 08.08.2023. That, the application at hand was filed on 10.08.2023, hence out of time and no reason has been advanced for the delay. Mr. Chuwa finalized his submissions by praying for the application to be dismissed with costs.

Rejoining, the applicants admitted that they filed Misc Application No. 317 of 2020 seeking to set aside the said *ex-parte* Judgment which was withdrawn, and Misc Application No. 50 of 2021 seeking to appeal against the orders under Application No 317 of 2020 as according to **Regulation 11(2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulations)** GN No.174, 2003 but to no avail. That, in the circumstances, the present Application was preferred as there was no other remedy. That an appeal could not be invoked.

They were of the view that the respondent's submissions did not challenge the application, but rather aired complaints without legal basis. They added that the order to file revision was already granted in Misc. Land Application No. 38 of 2022 whereby the court noted that the applicants wanted to address the act of being denied the right to be heard as elaborated in their affidavits. In conclusion, they maintained their prayers for the application to be granted.

I have considered the submissions by both parties. In his submission, the respondent raised a question of time limitation alleging that this matter was preferred out of time. Despite the fact that courts discourage the practice of raising new facts in submissions, this being an issue of time limitation, it is a matter of jurisdiction, thus ought to be addressed taking into consideration that the applicants had the opportunity to respond to the issue in his rejoinder submission. See; **Barclays Bank T. Ltd vs. Jacob Muro** (Civil Appeal 357 of 2019) [2020] TZCA 1875; **Swila Secondary School vs. Japhet Petro** (Civil Appeal 362 of 2019) [2021] TZCA 169; **NBC Limited & Another vs. Bruno Vitus Swalo** (Civil Appeal 331 of 2019) [2021] TZCA 122, all from TANZLII.

Perusing the record, it is evident that this application was indeed filed on 10.08.2024. Such fact is gathered from the stamp annexed on the chamber summons and affidavits filed by the applicants. The receipt however indicates that the payments were effected on 09.08.2023. The Ruling by this Court in Misc. Land Application No. 38 of 2022 was delivered on 18.07.2023. The same granted the applicants 21 days to file their revision before this court.

Computation of time from a specified day or period of time is well provided for under **Section 60 (1) of the Interpretation of Laws Act [Cap 1 R.E. 2019]**. I will herein reproduce the necessary provisions for ease of reference:

> **"60**. (1) In computing time for the purposes of a written law-

(a) N/A

(b) where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period;

(c) where anything is to be done within a time before a specified day, the time shall not include that day.

It is evident on record that the applicants were to file the application within 21 days from the date of the Ruling. In consideration of the above quoted provision, the 21 days are computed from 19.07.2023 ending on 08.08.2023. Since 08.08.2023 was a holiday, that would mean that the same would be excluded as per **Section 60 (1) of the Interpretation of Laws Act** which states:

(e) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day.

The next date was 09.08.2023 which fell on a Wednesday and it was the same date that this application was filed before this court. A matter is considered appropriately filed before the court once necessary fees are paid. As pointed out earlier, the receipt shows that payment of fees was done on 09.08.2023. In that regard, this application was filed on time.

The applicants also advanced another issue in opposing the application in which he claimed that the applicants did not exhaust all available remedies prior to filing this application for revision. According to him, the applicants had the room to file an

application to set aside the *ex-parte* Judgement delivered by the Tribunal or to appeal against said *ex-parte* judgement.

I will refrain from addressing this matter simply because the respondent had in fact raised an objection on this issue in Misc. Land Application No. 38 of 2022 and in a Ruling delivered on 03.03.2023, the presiding Judge, Hon. S. Simfukwe overruled the same for lacking merit. Apparently, the respondent has never challenged the said decision in an appropriate forum to date. It is thus not only strange but also a clear abuse of court process for the same issue to again be raised in this court within this application. Worse enough, this issue was not even brought up in his counter affidavit.

Now moving on to the merit of this application; it is apparent on record that indeed the applicants were respondents in Application No. 97 of 2017 which was filed on 14.06.2017. On 03.09.2019, the respondent's case was closed and defence case was fixed to proceed on 21.11.2019. The hearing was thereafter adjourned to several dates being; 28.01.2020; 09.03.2020; 30.03.2020; 21.05.2020 and 15.07.2020. In all the days of adjournment both applicants appeared in person save for 30.03.2020 and 21.05.2020 whereby the 2nd applicant was absent and 15.07.2020 whereby the 1st applicant was absent.

It was on 15.07.2020 that the Tribunal, in absence of the 1st applicant but in presence of the 2nd applicant, decided to close the defence on ground that the applicants deliberately refused to make their defence. I will hereby reproduce the proceeding of the said day for ease of reference:

"15/07/2020
Coram. Hon J. Sillas- Chairman
Assessors: (i) J. Temu
(ii) J. Mmasi
Applicant:- Advocate Kelvin Joseph (present)
1st Respondent:- Absent
2nd Respondent: - Present in person
T/C: Yustina Mganga

Advocate Kelvin
We are ready for the trial.

2nd Respondent:
I don't want to make defence I'm not ready to do so.

Advocate Kelvin

The 2nd respondent has refused to make the defence and the 1st respondent is absent without a good cause. I see the respondents aren't ready to make the defence.

Therefore, or for that reason I do pray the case to be closed and a judgment be delivered basing on the evidence of the applicant.

That's all.

ORDER

The suit is hereby closed after the respondents deliberately refused to make defence. Assessors are hereby ordered to write the opinions will be read on 10/8/2020.

Hon. J. Sillas- Chairman
15/07/2020"

From the above extract, it is evident that there are no details on record of one Fredrick Kasimu Kaduma being present on the

material day of 15.07.2017 or even reporting on the 1st applicant's illness. There are also no sufficient details on record on why the Tribunal chairman found the applicants had deliberately refused to make their defence. I am of the view that it was only reasonable that the 2nd applicant would have been required to give reasons as to why she was not ready to make defence as that is what is reflected on the proceedings and not that she did not want to make defence. Even if the 2nd applicant had expressly stated that she was not ready to make her defence, that would still not serve as a reason for the Tribunal to close the entire defence case while the 1st applicant was absent.

Further, as the record shows, the applicants had been diligent in entering appearance in court during the entire time the matter was pending in the Tribunal. There was however a series of adjournments made by the Tribunal even when the Corum was met and both parties were present in court. There are also no reasons recorded on why such adjournments were made. In the circumstances, I am of the considered view that with one applicant not being ready to proceed with trial on the material day and another being absent for once, the Tribunal's act of deciding to mark the case closed was erroneous and unjustified. The applicants were denied their Constitutional right to be heard.

It is well settled that any decision affecting the rights or interests of a party reached without such party being afforded the right to be heard is a nullity. This was well stated in **CRDB Bank PLC vs. The Registered Trustees of Kagera Farmers Trust Fund & Others** (Civil

Appeal No. 496 of 2021) [2024] TZCA 94 (23 February 2024) TANZLII whereby the Court of Appeal stated:

> "It is trite law that, any decision affecting the rights or interest of any person which is arrived at without such person being afforded a right to be heard, is a nullity even if the same decision would have been arrived at had the affected party been heard."

See also; **Christian Makondoro vs. Inspector of General Police & Another** (supra) in which the Court expounded:

> "It is cardinal principle of natural justice that a person should not be condemned without being heard. As such, the Court in a number of decisions has emphasised that the courts should not decide on a matter affecting the rights of the parties without giving them an opportunity to express their views before a decision is made by the court."

See also: **Mbeya Rukwa Autoparts and Transport Limited vs. Jestina Mwakyoma** [2003] T.L.R 253;

In consideration of my observation as hereinabove, the Tribunal's order to close the defence case issued on 15.07.2020 and its subsequent *ex-parte* judgement were all a nullity. In that respect, I hereby quash the Tribunal proceedings from 15.07.2020 *and the ex-parte* Judgement issued afterwards and set aside all orders effected therefrom. I order the file in Application No. 97 of 2017 to be remitted to the Tribunal to proceed with defence case and other

procedures thereafter. For interest of justice, I order the case to be finalised before another chairman.

Considering that the error was occasioned by the Tribunal, I order for each party to bear his/her own costs.

Dated and delivered at Moshi on this 28th day of May, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA