

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB- REGISTRY
AT SHINYANGA**

LAND APPEAL NO. 11 OF 2023

*(Arising from land Application No 31 of 2022, Originating from Misc.Land
Case No. 197 of 2021 and original land Appeal No. 49 of 2015 at of
District Land and Housing Tribunal at Shinyanga)*

HAMIS JOSEPH DADI.....APPELLANT

VERSUS

HALIMA BUSHIRI.....RESPONDENT

JUDGMENT

13th & 29th February, 2024

MASSAM, J.:

This dispute started from the year 2014 when the appellant here in filed a suit at Ngokolo ward tribunal claiming to be a lawful owner of a plot No 324 Block "PP" located at Mageuzi street, Ngokolo ward within Shinyanga municipal, after he had been bought the same from the late Khasim Mohamed. The ward tribunal declared the respondent to be a lawful owner claiming to had been given the same by her late brother Khassim Mohamed.

The appellant was aggrieved by the decision of the ward tribunal and he filed an appeal No 49/2015 where the matter was heard ex-parte on the part of the respondent and the appellant was declared a lawful

owner. He then filed an application No 197/2021 for execution, that's when the respondent herein made an application for extension of time to set aside ex-parte judgement reached against her claiming that she was not served with summons to enter appearance, the tribunal for the second time heard the application ex-parte against the appellant and granted the respondent who was the applicant 30 days to file an application to set aside ex-parte judgement.

The appellant was aggrieved again, he then filed an application No 31/2022 to set aside ex-parte judgment entered against him on 28/01/2022 ordering the appeal to be heard inter-parties but the same was not granted by the tribunal chairman hence this appeal with five (5) grounds of appeal to wit;

- 1. That, the learned trial chairman erred in law and fact in denying the appellant's application for setting aside ex-parte order on allegation that the appellant did not tender medical records proving that he was sick while the fact is that, the appellant was not sick but his father who was admitted at Bugando hospital.*
- 2. That the learned trial chairman erred in law and fact in holding that, on 28/02/2021 the appellant and the respondent were*

both present in court while the fact is that none of them were in court on that date.

- 3. That, learned trial chairman erred in law and fact in allowing one Abdallah Hamis who is alleged to be the son of the respondent to submit in court on behalf of the respondent while there is no power of attorney granted to him by the respondent.*
- 4. That, learned trial chairman erred in law and fact in holding that, the appellant's application for setting aside an ex-parte order was filed after expiration of thirty (30) days hence time barred without giving the appellant right to be heard.*
- 5. That, learned trial chairman erred in law and fact in setting aside an ex-parte judgement in Land appeal NO 49/2015 and ordering the appeal to be heard inter-parties while the application filed by the Appellant before the trial tribunal was on setting aside an ex-parte order which denied the appellant right to be heard in Misc. land Application No. 197/2021.*

When the matter was called for hearing, it was argued orally, the appellant appeared in person and the respondent was represented by Mr. Abdallah Hamisi with power of attorney.

Arguing in support of his grounds of appeal, the appellant submitted that, he was aggrieved with the trial tribunal's order to start a case afresh because there was no proof of service and that the respondent represented her without following the procedure. He contended that, the respondent was served but did not appear hence ex-parte judgment against her, where he proceeded with execution No 197/2021 and he was later handed over the land and during this time the respondent was not attending at the tribunal. He added that during the hearing of application No 31/2022 he did not attend but the respondent's son appeared without power of attorney to represent his mother therefore, he prays the decision on Application No 31 to be set aside.

On his reply Abdallah Hamisi with power of attorney submitted that, he has nothing to add and let this court to determine this appeal.

The appellant had no rejoinder.

Having heard the parties for and against this appeal, I will start to determine the complaint as hereunder.

The appellant in the present appeal is against the restoration order for inter party hearing pronounced by the District Land and Housing Tribunal for Shinyanga at Shinyanga (the tribunal) in Misc. Application

No. 149 of 2021 (the misc. application), originating from Land Appeal No. 49 of 2015.

In that misc. application 149/2021 the tribunal ruled that I quote:

"Ni wazi wito haukufika na wapeleka wito tajwa hawakuwa na mamlaka ya kufanya kazi hiyo. Naruhusu maombi haya mleta maombi alete maombi ya kuweka kando hukumu upande mmoja ndani ya siku 30....."

Aggrieved with that order, the appellant filled another misc. Application No 31/2022 praying the tribunal to set aside order for restoration with the grounds of his non-appearance that he was attending his father who was sick and was admitted at Bugando Hospital.

Regarding the 1st ground this court will refer to the Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (the Regulations), which provides that:

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.

In line with that provision, it is also settled that a party who wants to set aside any ex-parte judgment or order must give sufficient cause as to why he/she did not appear before the court during hearing. In this appeal, the tribunal was of the view that the appellant herein gave his reasons for his non-appearance that he was attending his father who was admitted at Bugando Hospital, but he did not satisfy the tribunal with sufficient evidence to prove that his father was indeed sick and that he was attending him. The term sufficient cause is not yet defined see the case of **Tanga Cement Company Limited Vs Masanga and Amos A. Mwalwanda**, Civil application No.6 of 2001 where it held;

"What amounts to sufficient cause had not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

However, there are factors that are used to determine whether the applicant has shown good and reasonable cause such as the length of the delay, whether or not the delay has been explained away, diligence

on the part of the applicant and whether there is an illegality in the impugned decision. See **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported).

In addition, the applicant has to account for each day of delay. In the instant case, the applicant's reason for delay is his father's sickness, The law is well known that sickness is a good cause because it is beyond human control as elaborated in the case of **Emanuel R. Maira vs The District Executive Director of Bunda, Civil Application No. 66 of 2010** (unreported) when the Court of Appeal held:

"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."

It was the duty of the appellant to prove to the tribunal that his father was sick and he was at Bugando hospital attending him, But, sickness can be proved by medical records regarding the fact that his father was admitted at Bugando where they produce medical records of their patients contrary to traditional healer whom affidavit would prove the same See **Toga Fueta v. Eva Pwele, PC Civil Appeal No. 26 of**

1983, High Court of Tanzania (HCT), at Dar es Salaam (unreported) that followed the case of John Chuwa v. Antony Giza [1992] TLR 233.

Therefore, the appellant was ought to give his father's medical reports and travelling tickets to prove to the tribunal that he was sick and that he went at Bugando Hospital to attend him. Refer the case of **Christina Alphonse Tomas vs Saamoja Masingija (Civil Application 1 of 2014) [2016] TZCA 289 (21 April 2016)** as cited in **Nowa Shibanda vs Mwajuma Mwakonde. (Misc. Land Appeal 34 of 2019) [2020] TZHC 1985 (29 July 2020).**

So failure of the appellant to produce the said proof make this court to believe that the said reasons was not true, so I accordingly, agree with the tribunal that the appellant did not prove that his father was sick hence this ground has no merit.

In regard to the 2nd and 3rd ground, will be urged jointly though with different grounds which are to the effect that the learned trial chairman erred in law and fact holding that, on 28/01/2021 both parties were present while they were not, and on the 3rd ground in allowing one Abdallah Hamisi to represent the respondent without power of attorney. It has come to my attention that the appellant has misplaced these

grounds as whatever he is complaining on these two grounds are facts from the Misc. application No. 197/2021 and not Misc. application No 31/2022 (which he is appealing to) as these facts were not discussed, therefore I will not dwell my time to discuss these grounds.

Regarding to the 4th ground that, the learned trial chairman erred in law and fact in holding that, the appellant's application for setting aside an ex-parte order was filed after expiration of thirty (30) days hence time barred without giving the appellant right to be heard.

Again, Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003 (the Regulations), provides that:

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.

The judgement of the tribunal at page 3 reads that;

"lakini pia baada ya kupitia maombi haya, maombi haya yaliletwa barazani hapa tarehe 25/02/2022 ni sawa ni

ndani ya muda lakini hayakulipiwa ada ya baraza mpaka tarehe 31/03/2022 kupitia control No 991175513088 kupitia bank ya CRDB na hivyo kuwa nje ya muda wa siku 30 za kutakiwa kuleta.”

I have taken time to peruse the file and the attached fee receipt which was paid on 31/03/2022 via CRDB bank as said by the tribunal chairman, it's the principle of law that the document is lodged when the fee for lodging is paid. This position was reached in **Issack Sebegele Vs Tanzania Portland Cement Co Ltd, Civil Application No 25/2002 (Unreported)** and the case of **Msasani Peninsula Hotels Ltd and 6 Others vs Barclays Bank Tanzania Ltd and 2 Others, Commercial case No 43 of 2005, DSM (Unreported)**.

On the other hand, the appellant complained that he was not given right to be heard on this matter that he was out of time to file application to set aside the exparte judgement, after exhaustive perusal of the trial tribunal proceedings the appellant was supposed to file for extension of time where his right to be heard could have been exercised but the same was not done, contrary, this was not the reason why the trial tribunal quashed the appellant's application, the main reason was

failure for the appellant to prove that his father was sick, thus this complain has no place in this appeal.

On the last ground that, learned trial chairman erred in law and fact in setting aside an ex-parte judgement in Land appeal No 49/2015 and ordering the appeal to be heard inter-parties while the application filed by the appellant before the trial tribunal was on setting aside an ex-parte order which denied the appellant right to be heard in Misc. land Application No. 197/2021.

Regarding this ground the appellant is complaining that the tribunal erred to grant restoration order in application No 49/2015 while he was not given right to be heard in Misc. application No 197/2021. As I have said earlier on ground 2 and 3 the applicant is misplacing his grounds of appeal as the appeal before this court is on Misc. application No 31/2022.

However, it is clear that the law is now settled that no appeal shall lie against an interlocutory decision or order unless such decision or order had an effect of finally determining the suit. The 9th Edition of Blacks Law Dictionary defines an "interlocutory order" to mean:

"An order that relates to some intermediate matter in the case, any order other than the final."

In **Seif Sharif Hamad v. S.M.Z., [1992] TLR 43**, it was held that this Court has no jurisdiction to entertain an appeal challenging an interlocutory order.

The question to be asked is how do you know if the order is interlocutory or not? The same was explained in **Murtaza Ally Mangungu v. The Returning Officer of Kilwa and two Others, Civil Application No. 80 of 2016** and **Peter Noel Kingamkono v. Tropical Pesticides Research, Civil Application No. 2 of 2009** (both unreported) and seeking to answer the same, it stated that:

*"In view of the above authorities, it is therefore apparent that in order to know whether the order is interlocutory or not, one has to apply **"the nature of the order test"**. That is, to ask oneself whether the judgement or order complained of finally disposes of the rights of the parties. If the answer is in the affirmative, then it must be treated as a final order. However, if it does not, it is then an interlocutory order."*[Emphasis added].

From the order in Misc application No 31/2021 by the tribunal had no effect of finally determining the suit hence not appeal able, This court is also agree with the trial tribunal that the appellant has not given the reasons as to why the application should not be heard inter parties in


order every party's right to be heard as complained by the appellant can be exercised.

In view of the foregoing, the appeal is thus incompetent and accordingly dismissed. I order an immediate remitting back of the original records to the trial tribunal to have the matter proceed and determined on merit and inter-parties as it was ordered by the tribunal. In regard of the nature of the case no order as to costs.

It is so ordered.

DATED at SHINYANGA this 29th day of February, 2024.




R.B Massam
JUDGE
29/02/2024