IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND REVISON NO. 46 OF 2011
(From the Decision of the District Land and Housing Tribunal of Temeke at Temeke Bomani in Application No. 172 of 2009)

SULEIMAN HAROUB ..... APPLICANT

VERSUS

EUSTAD MUGYABUSO KAGARUKI ..... RESPONDENT

RULING

MWAMBEGELE, J.:

This is an application for revision filed by Suleiman Haroub; the applicant. The application has been taken under Section 43 (1) of the Land Disputes Courts Act, Cap 216. It is supported by an affidavit deposed to by Issa Maige; learned Advocate. By agreement of the parties – Mr. Abdulfattah, learned Counsel for the Applicant and the Respondent who was unrepresented - and by leave of the court, this matter was agreed to and has been argued by way of written submissions. All the submissions have been submitted well in time.

For easy appreciation of the sequence of events leading to this application, I find it desirable to outline briefly the facts of this case. Briefly stated, the facts of the case are as follows: in the District Land and Housing Tribunal of Temeke, Eustad Mugyabuso Kagaruki; the Respondent herein had sued the Applicant and another person (one Abdallah Ally Kimbwelele – who is now deceased and was withdrawn by the Respondent after his death) for trespass into plot No. 375 situate at Mtoni area, Temeke kwa Kindande in the City of Dar es Salaam. After the close of the Respondent's case (the Applicant at the trial), the Applicant herein defaulted to enter appearance and the Tribunal proceeded to fix a judgment date and ultimately entered judgment *ex parte* in favour of the Respondent. An application to set aside the *ex parte* judgment proved futile as it was on 18.11.2011 dismissed on a preliminary point of objection that it was filed out of time. Previously; that is before the judgment and after the *ex parte* order, the Applicant filed an application to have the *ex parte* order set aside but the same was not entertained. The *Ex parte* judgment was pronounced anyway.

The Applicant feels that the application to set aside the *ex parte* judgment was based on factual matters which were not raised by the Respondent. The

applicant believes that the execution process will continue before he is served with any notice and before receiving a copy of the last order.

The Applicant has attacked both the *ex parte* judgment and the ruling dismissing his application to set aside the *ex parte* judgment. On the *ex parte* judgment, the Applicant submits first that the Tribunal was wrong in awarding reliefs which were not pleaded. He submits that the Respondent in his amended application prayed for the following reliefs: construction of a four bedroom self contained house to replace his demolished house or alternatively payment of forty million shillings which is the estimated value of the demolished house, costs and any other reliefs the Tribunal deemed fit to award. The Tribunal had declared the Respondent the rightful owner of the disputed land; the Applicant was ordered to demolish the structure built on the disputed land and ordered to vacate. The Applicant contends that the prayers granted were not pleaded. To support this argument, the Applicant has referred this court to the decision of the Court of Appeal in ***James Funke Ngwagilo Vs Attorney General*** [2004] TLR 161 in which the rationale of the principle against departure from pleading was stated to be that a party should not be taken by surprise. ***Passineti Adriano Vs CIRO Gest Limited an another***

[2001] TLR 89 and ***the National Insurance Corporation Vs Sekulu Construction Company*** [1986] TLR 157 have also been cited to support this point.

Another attack on the *ex parte* judgment is based on the fact that the Tribunal ought to have entertained the application to set aside the *ex parte* order before embarking on another step. The Applicant contends that the application has not been entertained to date and is still pending in court.

On the ruling dismissing the application to set aside *the ex parte* judgment, the Applicant's Counsel attacks it on two fronts; first that it was wrong for the Tribunal to raise *suo motu* the validity of the Exchequer Receipt Voucher. He thinks that that was a question of fact which ought not to have been raised by the Tribunal because it needed response from the parties. Having so done, the Counsel submits, the applicant has been condemned unheard. The second attack on the ruling has gone to the gist of the decision to the effect that it was time barred. He submits that having been filed on 22.03.2011 while the *ex parte* judgment sought to be challenged was delivered on 25.02.2011, the application was well within time. He submits that the ERV is dated 24.03.2011 and the Chamber Summons was signed by the Chairman on 22.03.2011. He

clarified that at the time of filing the application, the Temeke District Land and Housing Tribunal was short of the ERVs thus upon advise of the Chairman, the payment was effected in the Ilala District Land and Housing Tribunal. On this point, he contends further that the Tribunal erred in raising the issue of the validity of the ERV *suo motu* as the Respondent had not raised the issue himself.

On the other hand the Respondent has attacked the application with some force. On the *ex parte* judgment, the Respondent submits that the Tribunal was correct to entertain matters as it did. He submits that in view of paragraph 7 of the amended application he filed which mentioned four reliefs, the Tribunal was quite right to award the reliefs complained of by the Applicant.

On the issue whether the application to have the *ex parte* judgment set aside was time barred, the Respondent submits that it was indeed time barred. He contends that the application was filed on 24.06.2011 and therefore that the document speaks for itself. The Respondent has also attacked the affidavit deposed to by Mr. Maige as being defective for containing hearsay. He states

that hearsay embodied untruths. To bolster this point, the Respondent has cited ***Ignazio Messina Vs Willow Investments*** SPRL Civil Application No. 21 of 2001 (DSM unreported) in which at page 4 of the typed judgment it was stated:

> *"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied to resolve any issue"*

The Respondent finally submitted that this Application must be dismissed as there is no error material to the merits of the case involving injustice to warrant the granting of this application.

In rebuttal, the Applicant has reiterated the arguments presented in the submissions in chief and in addition claimed that the Respondent has not responded to some of the grounds and thus asked this court to find and hold that the points have constructively been admitted. On the affidavit by Mr. Maige, the Applicant's counsel has contended that the attack hinges on a point of law which ought to have been raised at the beginning of the trial and not otherwise.

I have examined the relevant provisions of the Civil Procedure Code, Cap 33 and the provision under which this application has been taken; the provisions of Section 43 (1) of the Land Dispute Courts Act, Cap 216. This provision reads:

> *"(1) In addition to any other powers in that behalf conferred upon the High Court, the High–*
>
> *(a) shall exercise general powers of supervision over all District Land and Housing Tribunals and may, at any time, call for and inspect the records of such tribunal and give directions as it considers necessary in the interests of justice, and all such tribunals shall comply with such direction without undue delay;*
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> *(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit".*

In the light of the above, it is obvious that this court has mandate to revise the proceedings of the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction in situations where it appears that there has been an error material to the merits of the case involving injustice. I pause here and ask myself a question: as per record, has there been an error material to the merits of the case involving injustice as to warrant this court to invoke its revisional powers under the law? It is a matter of judicial notoriety that under the provisions of Section 43 (1) of the Land Disputes Courts Act, Cap 216, this court has been vested with, *inter alia*, revisional powers over District and Housing Tribunals. This jurisdiction can be exercised in appropriate circumstances - where it appears to the court that there has been an error material to the merits of the case involving injustice.

I have carefully considered the rival submission of both parties. I have as well treaded through the court record in its entirety and with great care. In the present case, the District Land and Housing Tribunal entered judgment *ex parte* in favour of the Respondent after the Applicant herein defaulted to enter appearance. The Tribunal held the Applicant defaulted appearance twice. However, the record shows that the Applicant defaulted appearance only

once. For the order that I will make at the end of this judgment, I refrain from making any finding on the merits of the case in the District Land and Housing Tribunal because this course might preempt any future decision in this matter. Suffice it to mention that there was entered judgment *ex parte* in favour of the Respondent. The Applicant filed two applications – the first was one to set aside the *Ex parte* order and the second one was to set aside the *ex parte* judgment. The first application; that is one to set aside the *Ex parte* order was not heard and there is no mention in the case file in respect of it. It is clear that the second application, that is; one was to set aside the *ex parte* judgment was dismissed for being filed out of time. The application filed by the Applicant to set aside the *ex parte* order was not and has not been heard and therefore it is still pending in court. As rightly pointed out by the Applicant's Counsel, it was wrong for the Tribunal to proceed with the *ex parte* judgment while this application was still pending in court and there is no evidence to suggest that the Chairman was not aware of its pendency. This alone left justice crying. I think this is enough reason to warrant this court exercise its revisional powers. I find and hold that by not entertaining the application to have the *ex parte* order set aside, the record of the Tribunal has

been tainted with an error material to the merits of the case involving injustice. In the premises, I exercise my revisional powers conferred upon me by the provisions of Section 43 (1) (b) of the Land Disputed Courts Act, Cap 216 and, except up to the close of the Respondent's case, quash the proceedings of the District Land and Housing Tribunal and set aside all the orders made therein. I direct that the record be remitted to the District Land and Housing Tribunal for continuation of the defence hearing.

As already said earlier in this ruling, I will refrain from attacking the contents of the judgment of the Tribunal for a clear reason that I might preempt any future decision on this matter.

The ultimate result of the foregoing is to allow this application with costs.

DATED at DAR ES SALAAM this 11th day of February, 2013.

J. C. M. MWAMBEGELE

JUDGE