

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL CASE NO. 208 OF 2020**

(Originating from the decision of District Land and Housing Tribunal of Temeke at Temeke in Application No. 113 of 2019 dated 03/09/2020)

**DIDAS MATHIAS MUSHI.....APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK PLC.....1<sup>st</sup> RESPONDENT**

**ADILI AUCTION MART LTD.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*22/3/2021 & 10/05/2021*

**Masoud, J.**

The appellant was the applicant in the District Land and Housing Tribunal in Application No. 113 of 2019. Having refused to proceed with the hearing on the date on which the matter was set for hearing as a last adjournment, the trial tribunal dismissed the matter with costs. While dismissing the matter, the trial tribunal reasoned in the light of the previous orders of the tribunal relating record of appearance of the parties, the nature of the adjournments effected and the requirement of regulation 13(2) of the Land Disputes (the District Land and Housing Tribunal) Regulations, GN No. 174 of 2003, and was satisfied that the appellant was not ready to be heard or testify.

The appellant was aggrieved by the decision. He appealed against the decision in this court. He thought that the trial tribunal was not in the circumstances mandated to dismiss the matter. The appeal was grounded on the complaints that, the trial tribunal, firstly, failed to adhere to the right to be heard on the part of the appellant; secondly, failed to consider the appellant's right to settle the matter out of court as intended by the appellant; and thirdly, failed to consider that the fact that the appellant was not ready to proceed with the hearing in the absence of the Advocate.

The appellant was represented by Emmanuel Machibya, learned Advocate, while the first respondent was represented by Mr Hilal Hamza, Advocate. With the leave of the court, parties herein argued the appeal by filing written submissions. The order was, gratefully, complied with. I examined the submissions in the light of the grounds of the appeal and the proceedings of the trial tribunal. In so doing, my attention was drawn to the requirements of regulation 13(2) of the Land Disputes (the District Land and Housing Tribunal) Regulations (supra) which was, by and large, the basis of the dismissal complained of by the appellant.

On the first ground of appeal, it was the appellant's submission that the trial tribunal did not adhere to the principle of natural justice when it dismissed the matter, while the appellant's counsel could not enter appearance as he was at the same time appearing before Hon. Makani J. in Land Case No. 121 of 2020 between **GoodMen Co. Ltd vs General Business & Equipment Supplies Ltd and Others**. It was the position of the appellant that the trial tribunal was in the circumstance not mandated to invoke regulation 13(2) of the Land Disputes (the District Land and Housing Tribunal) Regulations (supra) to dismiss the matter.

Replying on the submissions in respect of the first ground of appeal, the counsel for the first respondent argued that the appellant's right to be heard was not violated by the trial tribunal as alleged as the tribunal accorded the appellant opportunity to be heard in the matter, but he declined to exercise the right. The learned counsel for the first respondent referred the court to the trial tribunal's proceedings, which according to him, speak for themselves loud and clear.

As to the argument that the counsel for the appellant was on the material time appearing in this court before Hon. Makani, it was argued in reply that the argument was a mere statement from the bar as there was no record of the same in the trial tribunal proceedings. It was

additionally argued that even if it were true, the argument must be consistent with regulation 13(2) of the Land Disputes (the District Land and Housing Tribunal) Regulations (supra) which requires proof of such claims by a court summons or a cause list.

In the present instance, it was further argued in reply that neither a summons nor a cause list was produced and marked as received on the record of the trial tribunal proceedings. The attempt by the appellant to produce the summons in the course of making his submission in chief in this appeal was attacked as being improper. The reason was that as a matter of principle written submissions cannot be used to introduce new evidence. Reliance was made on the case of **Registered Trustees of the Archdiocese of Dar es Salaam verses The Chairman Bunju Village Government and 11 Others** Civil Appeal No. 147 of 2006 (unreported) which had it that submissions are not evidence. Rather they are elaborations and explanations on evidence already adduced on the record.

By way of rejoinder, it was counter argued by the counsel for the appellant as follow: That, the appellant never asked for last adjournment, the appellant prayed for adjournment as his learned counsel had another matter in the High Court; that the appellant would

not be able to proceed in the absence of his Advocate; that the absence of the appellant's counsel was a good cause for adjournment geared at fostering substantive justice as intimated in the case of the **Registered Trustees of the Archdiocese of Dar es Salaam** (unreported) also relied upon by the appellant's counsel; and that the appellant has a genuine claim against the respondents.

As to the second ground of appeal, it was vehemently argued and submitted by the appellant's counsel that the right of parties to settle a case out of court is stipulated under regulation 18(1) of the Land Disputes (the District Land and Housing Tribunal) Regulations (supra) which was wrongly not considered by the trial court. Pursuant to the said regulation, the parties embarked on the settlement until 3/9/2020 and what was left was only the filing of the settlement deed.

In a bid to strengthen the above argument as to the settlement, the appellant introduced some new fact. They included the assertion that the default by the appellant to repay the loan advanced to him by the first respondent was a result of reasons beyond his hands, that the appellant continued to repay the outstanding loan and had so far repaid Tshs 5,000,000/-. A deposit slip attached to the appellant's submission was shown in support of the argument as to the alleged repayment.

Replying on the submissions made by the appellant's counsel on the second ground of appeal, the counsel for the first respondent maintained that the submissions were misplaced. There was no settlement deed whatsoever entered between the appellant and the first respondent as alleged. If there was any, it would have been filed before the trial tribunal and duly recorded. In this regard, regulation 18(2) of the Regulations was not relevant.

Submitting in chief on the third and last ground of appeal, it was contended that as the counsel for the appellant was unable to appear for hearing on 3/5/2020 because of having another matter in the High Court, it was not proper for the trial tribunal to order the matter to proceed ex-parte contrary to regulation 13(1) of the Regulations. In reply, it was argued that regulation 13(2) of the Regulations was clear that if a party's Advocate is absent for two consecutive dates the tribunal may make an order that the application be dismissed.

Having considered the rival submissions, I saw it fit to start by looking at the record before determining whether the appeal is meritorious. I was content that the determination of this appeal rests on the provision of regulation 13(2) of the Land Disputes (the District Land and Housing

Tribunal) Regulations (supra), and the manner in which it was applied, regard being had to the circumstances of the matter then pending before the trial tribunal. The provision reads thus:

***13(2) Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause, the Tribunal may make an order that the Application be dismissed or make such orders as may be appropriate.***

My understanding of the above provision is that it vests discretionary powers to the tribunal to determine within the context prescribed in the provision whether to dismiss a matter pending before it or otherwise. The provision is applicable when the following conditions exist. Firstly, where a party's advocate is absent without good cause for two consecutive dates and there is no proof that such advocate is in the High Court or Court of Appeal notice; and where the party whose advocate is absent refuses to proceed with the hearing himself without good cause after being asked by the tribunal to proceed himself. The question is

whether the provision was relevant and applicable in the circumstances of the matter then pending before the trial tribunal.

It is on the record that an order was made by the trial tribunal to dismiss the matter. It is on the record that the dismissal was based on the failure of the appellant's counsel to appear on the day scheduled for hearing on 3/9/2020 following a last adjournment order of 21/07/2020.

Further, it was on the record that the matter was set for hearing on 21/07/2020, having been adjourned on 9/4/2020, because of the applicant's counsel prayer for time to negotiate a settlement. The adjournment of 21/07/2020, which was marked as the last, was made pursuant to the prayer by the applicant that his counsel was on the material day in the High Court, attending **Jaha Juma vs DCB Bank**, Land Case No. 289 of 2019 before Hon. Mlayambina J.

It was also on the record that when the matter came for hearing on 3/9/2020, the applicant was present but his advocate was absent. The first respondent's counsel, one Hilal Hamza, was also present and ready for the scheduled hearing. There was nothing from the applicant as to the whereabouts of the applicant's counsel. The record is such that the applicant did not submit anything about the alleged settlement deed



which was also not on the record. The appellant only told the trial tribunal that he had consulted his family about finding a smooth way of resolving the matter. It was on the record that it was for such reason that the applicant refused to be heard. The counsel for the applicant, on his part, urged the court to dismiss the matter under regulation 13(2) of the Regulations.

It is equally on the record that the trial tribunal warned the applicant about his refusal to proceed with the hearing. Notwithstanding the warning, the applicant maintained his position and asked the trial tribunal to for more time to consult his family and other relatives about the matter.

In view of the details of the record summarized herein above, the complaint of being denied right to be heard is on my part not supported by the record of the proceedings; as is the complaint on the failure of the trial tribunal to consider that the appellant was not ready to proceed in the absence of his Advocate.

The record tells it all that the trial tribunal dealt with the situation pursuant to the provisions of regulation 13(2) of the Regulations. The allegation that the counsel for the appellant had another matter i.e

**GoodMen Co. Ltd vs General Business & Equipment Supplies Ltd and Others (supra)** before Hon. Makani J., was unfounded as it was not part of the record of the proceedings. The record is clear that the absence of the appellant's counsel was for two consecutive dates as the record indicates.

It was not on the record that the trial tribunal was notified of the appearance of the appellant's counsel in the High Court. There was neither a cause list nor a summons presented to form part of the record evidencing that the appellant's counsel was appearing before the High Court for the said case. It was similarly not on the record that the applicant was not prepared to proceed with the hearing because of the absence of his advocate whose absence was as already pointed out above not notified to the trial court. The above complaints were therefore mere arguments from the bar as they were not reflected on the record. The first and third grounds of appeal therefore fails and they are accordingly dismissed.

The complaint that the trial tribunal failed to consider the appellant's right to settle the matter out of court as intended by the appellant was equally without merit. The record as reviewed above was clear that that matter was adjourned to allow time for the intended settlement to be

concluded. Although the settlement deed was to be filed before the trial tribunal pursuant to the order of the trial tribunal dated 09/4/2020, there was not on the record any deed of settlement filed in accordance with the order of the trial tribunal.

Worse still, the trial tribunal was not notified by the applicant or his counsel of the settlement progress. When the appellant refused to proceed with the matter before the tribunal, he did not say that there was a settlement that was in the progress. which was also unlikely and the respondent on his was ready for the scheduled hearing. For this reason, the second ground of appeal equally fail and is accordingly dismissed.

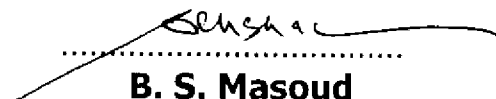
All said and done, I find that the three grounds of appeal are devoid of merits and as already pointed out they all fail. Given the circumstances of the matter then before the trial tribunal, there was every justification for invoking the provision of regulation 13(2) of the Regulations. The appellant's counsel did not enter appearance for two consecutive dates without good cause; the appellant did not justify his counsel's absence in any way; there was no proof that the appellant's advocate was in the High Court or Court of Appeal; and there was no good cause as to why the appellant should not proceed with the matter as the same had

already been adjourned for the last time; and in this respect the reason given that the matter should be adjourned because the appellant needed time to consult his family and relatives on how the matter can best be resolved was not in the circumstances of the case taken as a good cause.

In the event and for the stated reasons, this appeal stands dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 10<sup>th</sup> day of May 2021.

  
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**B. S. Masoud**  
**Judge**

