IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 82 OF 2021

(Appeal from the decision of the District Land and Housing Tribunal for Temeke District at Temeke in Misc. Application No. 51 of 2020)

NAOMI ATHANAS LEGUNA ..... APPELLANT

VERSUS

HEMED SHAMTE ..... RESPONDENT

Date of last Order: 27/07/2022

Date of Judgment: 20/09/2022

EX PARTE JUDGMENT.

I. ARUFANI, J

The appellant is challenging the decision of the District Land and Housing Tribunal for Temeke District at Temeke (hereinafter referred as the tribunal) delivered in Misc. Application No. 51 of 2020. The history of the matter as can be deduced from the record of the matter brought to this court is to the effect that, the appellant filed Application No. 30 of 2016 at the tribunal against the respondent. The mentioned application was dismissed on 31st July, 2019 under Regulation 11 (1) (b) of the GN No. 174 of 2003 for want of prosecution.

The appellant applied for the above stated dismissal order to be set aside vide Misc. Application No. 266 of 2019 but the application was

dismissed on 24th January, 2020 for want of prosecution. The appellant sought to set aside the afore mentioned dismissed order vide Misc. Application No. 51 of 2020 but the application was dismissed after being found it was lacking sufficient cause. Now the appellant has come to this court to challenge the decision of the tribunal which dismissed Misc. Application No. 51 of 202 basing on the grounds of appeal quoted hereunder: -

1. That the District Land and Housing Tribunal's Chairman erred in law and fact when dismissed the application in holding that the applicant's application was left unattended for three months while not.
2. That the District Land and Housing Tribunal's Chairman erred in law and fact in dismissing the application without considering the surrounding circumstances of the application and ended up with unfair decision.

The court ordered hearing of the appeal to proceed ex parte after the respondent failed to appear in the court despite all efforts of serving him which includes serving him through affixation of summons at the door of his place of residence. The court ordered the counsel for the appellant to argue the appeal by way of written submission and he fully complied with the order of the court.

The counsel for the appellant stated in his written submission in relation to the first ground of appeal that, the appellant's application was dismissed for lack of sufficient reason while the appellant advanced sufficient reason for failing to appear in the tribunal in the affidavit supporting the application. He cited in his written submission Regulation 15 (a) of GN No. 174 of 2003 which states the tribunal may, where an application is left unattended, by an applicant for a period of three months dismiss the application for want of prosecution.

He argued that, as he averred at paragraph 10 of his affidavit, the chairman of the tribunal wrongly interpreted the above cited provision of the law in both Misc. Application No. 266 of 2019 and Misc. Application No. 51 of 2020. He stated that, the record of the matter shows that, before dismissal of Misc. Application No. 266 of 2019 on 24th January, 2020, the counsel for the appellant appeared in the tribunal on 30th August, 2019 when the tribunal issued initial orders. He stated the matter was adjourned to 25th October, 2019 when he appeared in the tribunal and the matter was adjourned until 15th November, 2019.

He stated that, although the record shows the appellant's side was absent but the reasons were advanced on what transpired on the stated dates. He submitted that, in order for Regulation 15 (a) of the GN No. 174 of 2003 to apply the time was supposed to be counted from 15th

November, 2019 when the appellant and her advocate defaulted to appear in the tribunal. He submitted further that the application was dismissed on 24th January, 2020 on ground that the application was left unattended. He stated that was wrong because when the application was dismissed it was only two months which had elapsed from when the applicant and her advocate failed to appear in the tribunal.

He stated that, it is deposed at paragraphs 6 and 7 of the affidavit supporting the application that, the reason caused the counsel for the appellant to fail to appear in the tribunal on 24th January, 2020 when the application was dismissed is because she got a car break down when she was on her way going to the tribunal and when she arrived at the tribunal she found the application had already been dismissed for want of prosecution. He argued that, the above stated reason was not considered by the tribunal's chairman and no reason was assigned for ignoring the stated evidence.

He referred the court to the case of **Tanzania Breweries Limited V. Anthony Nyingi,** [2016] where the court stated if a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same and set out the reason for rejecting or accepting it. Otherwise, the decision becomes arbitrary one. He stated that, even if the appellant did not effectively advance any argument in

addressing the issue before the tribunal but still the tribunal was obliged to decide the issue according to the law and not against the weakness of the argument advanced by the party as that will resulted into miscarriage of justice.

He submitted that the chairman dismissed the appellant's application on a single reason that the affidavit of the tribunal's clerk was required to support the affidavit of the applicant despite the effort made to inquire from the tribunal's clerk the exact next date. He argued that, this court being the first appellate court it is entitled to subject the evidence on record to an exhaustive examination in order to determine whether findings and conclusion reached by the tribunal can be left to stand. To support his argument, he referred the court to the case of **William Diamonds Limited & Another V. R**, [1970] EA 1.

The counsel for the appellant referred the court to the case of **Stanislaus Kasusura & Another V. Pharase Kabuye**, [1982] TLR 338 where it was stated that, it is a duty of the first appellate court to re-evaluate the entire evidence of the trial court or tribunal and subject the same to critical scrutiny. He stated that, it was the duty of the tribunal to analyse and evaluate the evidence on record in order to resolve the issues and contested facts fairly and appropriately. He submitted that, they were misinformed by the tribunal's clerk about the date which had been set for

the matter and prayed the court to find the first ground of appeal is meritorious.

He argued in relation to the second ground of appeal that, always an order of dismissal for want of prosecution is granted where the tribunal has been satisfied an applicant has lost interest in prosecuting the matter and that is done only when the matter is fixed for hearing. He argued that, Misc. Application No. 266 of 2019 was dismissed after the appellant defaulted to appear in the tribunal on two days set for mention of the application. He stated on the first date the matter came for mention and on 24th January, 2020 the appellant's advocate's car got break down and it was before the matter being set for hearing.

He argued that, the tribunal did not direct itself to all the reasons advanced by the appellant which led to non-appearance of the counsel for the appellant in the tribunal and caused the matter to be dismissed but rather it directed itself to the previous reasons. He submitted that the tribunal was not required to base on a single reason only which caused the application of the appellant to be dismissed. He argued that, by the time the tribunal dismissed the application the pleadings were complete and the matter was ready for hearing but the tribunal dismissed the application contrary to Rule 8 (1) of the GN No. 174 of 2003.

He submitted there is a miscarriage of justice which invites this court as a first appellate court having powers to re-evaluate the evidence adduced at the tribunal to subject the evidence adduced before the tribunal to critical scrutiny and arrive to its own decision. He argued that, the surrounding circumstances of the present matter is premised in a situation where the appellant's applications have been dismissed and ownership of the land which the respondent has trespassed is in dispute. He stated that, if the court will not intervene there is a likelihood of the appellant to lose her land which is under the possession of the respondent. It is because of the above stated reasons the counsel for the appellant prayed the appeal be allowed and the ruling and order of the tribunal be quashed and set aside and issue an order to restore the dismissed application with costs.

The court has given keen consideration the submission filed in the court by the counsel for the appellant and it has found it is proper to start with the second ground of appeal whereby the appellant states the tribunal erred in dismissing his application without considering the circumstances surrounding the application and ended up with an unfair decision. The court has found the submission by the counsel for the appellant in support of the above stated ground of appeal is based on the argument that the application was dismissed on the date when the

application was coming for mention and not hearing and supported his argument with Regulation 8 (1) and (2) of the GN No. 174 of 2003.

The court has found the counsel for the appellant has either failed to comprehend the basis upon which Misc. Application No 266 of 2019 was dismissed or he is trying to mislead the court. The court has come to the stated view after seeing when the application was dismissed the matter had not reached a hearing stage so that it could have been governed by Regulation 8 (2) of the GN No. 174 of 2003. To the contrary the court has found the record of the matter shows the application was at the stage of filing pleadings in the tribunal. The argument by the counsel for the appellant that filing of the pleadings had already been completed is not supported by the record of the matter.

The court has found the record of the tribunal shows the counsel for the applicant appeared in the tribunal on 25th October, 2019 for the first time and prayed to substitute the chamber summons before serving the same to the respondent and the prayer was granted. From that date the matter was set to come for mention on 15th November, 2019 whereby no party appeared in the tribunal. The matter was set to come again for mention on 3rd December, 2019 and again there is no party appeared in the tribunal. The matter was adjourned for the last time until 24th January, 2020 and as the applicant and his counsel were absent the matter was

dismissed under Regulation 15 (a) of the GN No. 174 of 2003 for want of prosecution.

The court has found that, until when the application was dismissed for want of prosecution, the substituted chamber summons sought to be filed in the tribunal by the counsel for the appellant had not been filed in the tribunal. The court has also found that, Regulation 8 (1) and (2) of the GN No. 174 of 2003 which the counsel for the appellant argued was not observed by the tribunal's chairman governs fixing of a date of hearing of an application which written statement of defence or counter affidavit has already been filed in the tribunal. It does not apply in a situation where filing of pleadings in the tribunal has not been completed as it was in Misc. Application No. 266 of 2019 of the tribunal.

Under that circumstances the court the court has found that, although it is true that the matter was dismissed on a date when the matter was coming for mention and not hearing as argued by the counsel for the appellant but the court has failed to see any merit in the appellant's counsel's argument. The court has arrived to the stated finding after seeing the matter was not dismissed under Regulation 11 (1) of the GN No. 174 of 2003 which governs dismissal of the matter where an applicant has failed to appear in the tribunal when a matter is scheduled for hearing but it was dismissed under Regulation 15 (a) of the mentioned law which

governs a matter which has generally not been attended for a period of three months notwithstanding is at the mention stage or hearing stage. In the premises the court has failed to see which surrounding circumstances of the application was not considered by the chairman of the tribunal and reached to which unfair decision.

Back to the first ground of appeal the court has found it is true as argued by the counsel for the appellant and as stated hereinabove that Misc. Application No. 266 of 2019 was dismissed for want of prosecution under Regulation 15 (a) of the GN No. 174 of 2003 after being found the applicant had left the matter unattended for three months. The cited provision of the law states as follows: -

> *"The tribunal may, where an application is left unattended by an applicant for a period of three months-*
>
> *(a) Dismiss the application for want of prosecution ..."*

From the wording of the above quoted provision of the law it is crystal clear that the Chairman of the tribunal is empowered to dismiss an application which has been left without being attended by an applicant for a period of three months. The court has also found it is the position of the law as stated in the cases of **Williamson Diamond Limited** and **Stanislaus Kasusura** (supra) and as rightly stated by the counsel for the appellant that, this court being the first appellate court it has power

to re-evaluate the entire evidence adduced before the tribunal and come up with its own finding.

While being guided by the position of the law stated in the above cited cases the court has found the question to determine here is whether under the circumstances of the matter the tribunal was justified to dismiss the appellant's application under the stated provision of the law. The court has found as stated earlier in this judgment the counsel for the appellant attended the matter on 25th October, 2019 and failed to attend the matter on 15th November, 2019, 3rd December, 2019 and 24th January, 2020 when the application was dismissed for want of prosecution.

The court has found that, as rightly argued by the counsel for the appellant, three months provided under Regulation 15 (a) of the GN No. 174 of 2003 were supposed to be counted from 15th November, 2019 when the applicant and his counsel failed to appear in the tribunal and not from 25th October, 2019 as on the later date, the counsel for the appellant was present in the tribunal. If you count three months from 15th November, 2019 you will find they were supposed to end up on 15th February, 2020. That means the application which was dismissed on 24th January, 2020 was dismissed before passing three months provided under the provision of the law upon which an order for dismissing an application

which has been left unattended was supposed to issued. In other word the application was dismissed prematurely.

The court has found it is also true as argued by the counsel for the applicant that the tribunal's chairman based on the single reason that the averment in the affidavit supporting the chamber summons which stated the counsel for the appellant was misled by the tribunal's clerk and failed to appear in the tribunal to dismiss the application as it was not supported by the affidavit of the mentioned tribunal's clerk. The court has found the reason of the counsel for the appellant's car to get break down while on the way going to the tribunal was not considered at all.

Starting with the issue of lack of an affidavit of the tribunal's clerk to support the facts deposed in the affidavit of the counsel for the appellant supporting the chamber summons the court has found the tribunal's chairman was right to refuse to accept the stated reason as it was not substantiated by sufficient evidence. The court has come to the stated view after seeing the position of the law is very clear that, where a person has been mentioned in an affidavit to have done anything in relation to a matter pending in court or tribunal, an affidavit of such person is required to be filed in the court or tribunal to support the facts deposed basing on information obtained from the mentioned person.

Otherwise, the facts deposed in relation to the mentioned person will be treated as hearsay.

The position of the law stated hereinabove can be seeing in the cases of **Benedict Kimwaga V. Principal Secretary Ministry of Healthy**. Civil Application No. 31 of 2000 and **NBC Ltd V. Superdoll Manufacturing Co. Ltd,** Civil Application No. 13 of 2003, CAT at DSM (both Unreported) where it was stated in the latter case that, an affidavit which mentions another person is hearsay unless that other person has sworn or affirm an affidavit as well to support the affidavit mentioning him in the affidavit filed in the court or tribunal. Therefore, the court has failed to see any error committed by the tribunal's chairman to fail to accept the reason based on the facts mentioned the tribunal's clerk who did not swear or affirm an affidavit and file the same in the tribunal to support the affidavit of the counsel for the appellant.

Coming to the ground of the car of the counsel for the appellant to be involved into a breakdown the court has found that, although it is true that the stated ground was not considered and determined by the tribunal as required by what was stated in the case of **Tanzania Breweries Limited** (supra) that it ought to be determined and the reason to reject or accept the same to be demonstrated but the court has failed to see any merit in the said reason. The court has come to the stated finding

after seeing the counsel for the appellant has not told the court what hindered the appellant to appear in the tribunal on the date when the application was dismissed and why she failed to find a person to hold her brief or inform the tribunal about the predicament caused her to fail to appear in the tribunal on the date when the application was dismissed.

The court has found that, although the reasons advanced by the counsel for the appellant as the cause of failure to appear in the tribunal on the dates mentioned above were not sufficient enough to justify restoration of the application which was dismissed for want of prosecution, but the court has found that, as Misc. Application No. 266 of 2019 was dismissed under Regulation 15 (a) of the GN No. 174 of 2003 on the ground that it was left unattended for three months, the tribunal's chairman erred in dismissing the mentioned application under the cited provision of the law because three months provided under the mentioned provision of the law had not elapsed.

It is because of the above stated reason the court has found the order of dismissing Misc. Application No. 266 of 2019 of the tribunal cannot be left to stand as the dismissal of the application was made contrary to the provision of the law upon which the dismissal order was made. Consequently, the appeal of the appellant is hereby allowed, the decision of the tribunal made in Misc. Application No. 51 of 2020 which

dismissed the application for restoration of Misc. Application No. 266 of 2019 which was dismissed for want of prosecution is quashed and set aside.

The court is ordering Misc. Application No. 266 of 2019 be restored to the tribunal and be handled by another chairman of competent jurisdiction from where it had reached before being dismissed by the tribunal. As the matter was heard ex parte no order as to costs. It is so ordered.

Dated at Dar es Salaam this 20th day of September, 2022

I. Arufani

JUDGE

20/09/2022

Court:

Ex parte judgment delivered today 20th day of September, 2022 in the presence of Mr. Mussa Kiobya, learned advocate for the appellant and in the absence of the respondent. Right of appeal to the Court of Appeal is fully explained.

I. Arufani

JUDGE

20/09/2022