

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 291 OF 2021

(Arising out of the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Misc. Application No. 27 of 2020 between the same parties herein)

STAR MEDIA (T) LIMITED1ST APPELLANT

EPHANIA SAMSON RUHANYALA 2ND APPELLANT

VERSUS

GIDION WILLIAM SHIRIMA 1ST RESPONDENT

MARGARETH MUKASA 2ND RESPONDENT

AKIBA COMMERCIAL BANK LIMITED 3RD RESPONDENT

JUDGMENT

Date of last Order: 27/09/2022

Date of Judgment: 05/10/2022

KHALFAN, J.

The appellant herein unsuccessfully applied for application to set aside *ex parte* judgment in consolidated application Nos. 463 of 2010 and 34 of 2011. The ruling in Application No. 27 of 2020 prompted the appellant to knock the doors of this Court. The

Petition of Appeal contains a total number of five grounds of appeal namely;

1. That the Honourable Trial Tribunal grossly erred in law and fact in dismissing *suo moto* the appellant's application for setting aside the *ex parte* judgment without availing the parties an opportunity to address on the same, thus leading to miscarriage of justice as the appellants have been condemned unheard.
2. That the Honourable Trial Tribunal grossly erred in law and fact in holding that the notice of appeal lodged before the Court of Appeal of Tanzania in respect of the decision of this Honourable Court in Land Appeal No. 02 of 2020 dated 26/10/2021 does not bar the Trial Tribunal from delivering its decision whereas the alleged notice of appeal was neither lodged by the appellant herein nor were the appellants heard on their application for setting aside *ex parte* judgment, thus there was nothing to be delivered by the Trial Tribunal at that particular time.

3. That the Honourable Trial Tribunal grossly erred in law and fact in holding that after determination of the Land Appeal No. 02 of 2020 of this Honourable Court there was no any pending application for stay of execution whereas what was before the Trial Tribunal was an application for setting aside the *ex parte* judgment which condemned the appellants unheard and not an application for execution.
4. That the Honourable Trial Tribunal grossly erred in law and fact in holding that the appellant's application for setting aside the *ex parte* judgment has been overtaken by events, thus causing a miscarriage of justice.
5. That the Honourable Trial Tribunal grossly erred in law and fact in condemning the appellant to pay costs, under the circumstances of this case.

At the hearing of the appeal, Mr. Mpwaga Bernard appeared for the appellants while Mr. Kephass Mayenje represented the first respondent the second and third respondents were represented by Mr. Thomas Massawe and Mr. David Wasonga, learned advocates

respectively. The parties were allowed to argue the appeal by making oral submissions.

Mr. Bernard submitted on the first ground of appeal to the effect that by dismissing the appellant's application to set aside *ex parte* judgment by reason of existence of an appeal, which they were not party, denied the appellants their right to be heard. He cited the case of **Pili Ernest vs. Moshi Musani**, Civil Appeal No. 39 of 2019, Court of Appeal of Tanzania (unreported).

On the second ground, which to the great extent resembled the first ground, Mr. Bernard submitted that the appellant did not file the notice of appeal to the Court of Appeal. The dismissal of their application by reason of the said notice of appeal prejudiced the appellants.

The learned advocate for the appellant submitted on the third ground by referring the Court to page 2, first paragraph of the impugned ruling. He argued by inviting this Court to scrutinize as to whether the Trial Tribunal was right in coming to its conclusion that there was nothing to stop the Trial Tribunal from dismissing

the application to set aside *ex parte judgment*. The Trial Tribunal wrongly involved the absence of order for stay and the application for setting aside *ex parte judgment* hence condemning the appellants unheard.

As to the fourth ground, Mr. Bernard submitted that since the appellants were not made parties to the main application and other applications, then the Trial Tribunal was wrong to declare the application for setting aside *ex parte judgment* that it has been overtaken by events. He added that, the appellants' application was the right remedy and there was nothing to hinder the hearing on its merits. He cited the case of **Patricia Simeto vs. Uongozi wa CCM Tawi la Muungano**, Misc. Land Appeal No. 119 of 2021 (unreported) to cement buttress in his submission.

Mr. Bernard submitted on the fifth ground that; the Trial Tribunal condemned the appellants to pay costs without considering other factors that the appellants were exercising their right to be heard. He went on submitting for this Court to set aside orders made by the Trial Tribunal with costs to the appellants.

As for Mr. Kephas Mayenje, he submitted by giving a brief historical background by directing the attention of this Court to the decision of My Sister Msafiri, J., in the case of **Magreth Mukasa vs. Akiba Commercial Bank Limited and Others**, Land Appeal No. 2 of 2020 (unreported), where the appellants in this appeal were the fourth and fifth respondents.

He further submitted that, the challenged ruling of Hon. Mwakibuja, Chairman was delivered on 30th November, 2021. This was after hearing of both parties in respect of the prayer to dismiss the application for setting aside *ex parte*, in consolidated application No. 463 of 2010 and 34 of 2011. He added that, the application was overtaken by events because the judgment of Honourable Msafiri, J., upheld the judgment of Trial Tribunal.

In response to the first ground, Mr. Mayenje submitted that the dismissal of the application for setting aside *ex parte* judgment was not *suo moto*. That the records speak for themselves that, Mr. Mayenje raised the issue before the Trial Tribunal, that the application has been overtaken by events. He argued that the

appellants were represented by Mr. Adolf Mahai, learned advocate. That submission of both parties was considered and ruling was delivered thereafter. He referred the Court to page 3 of the impugned ruling and argued that the words 'kupitwa na wakati' in its loose meaning is that it has been overtaken by events.

He contended that, the allegation that the ruling was delivered after raising the issue *suo moto* is incorrect. That the Trial Chairman had no jurisdiction after the judgment of this Court upholding the *ex parte* judgment.

Mr. Mayenje submitted against the second ground that the Tribunal was indeed correct in holding the notice of appeal does not bar the Tribunal from delivering its ruling. That, the record establishes that the issue of notice of appeal was brought to the attention of the Tribunal by the learned Counsel for the appellant, Mr. Mahai. He referred this Court to page 2 of the impugned ruling particularly last paragraph but one.

He added that, the Tribunal took the issue of notice of appeal into consideration and gave its ruling. He argued that, the allegation that the appellants were not heard on application for setting aside judgment because of notice of appeal does not exist anywhere in the ruling. He added that the submission is contrary to the available record as the same is misleading.

In reply to the third ground, Mr. Mayenje submitted that setting aside and stay of execution are two distinct applications. According to him, after the judgment of this Court, application for setting aside *ex parte* judgment died a natural death.

On the fourth ground, Mr. Mayenje submitted in reply that, what was before the Trial Tribunal was whether the application to set aside *ex parte* judgment was overtaken by events or not. That, whether they were made parties to the main application or other applications was not the issue before the said Tribunal. He insisted the claim that the appellants were fully given the right to be heard and were represented by their former advocate is unfounded.

Coming to the fifth ground, Mr. Mayenje submitted that costs is the discretion of the court and the same was granted after both parties were heard and thus the Trial Tribunal was correct to do so.

As to the cited cases, Mr. Mayenje submitted that the case of **Pili Ernest (supra)** is not applicable in the sense that the established facts in the circumstances of this case cited are different to the case at hand. He referred this Court to page 6 of the judgment and argued that in the case at hand the issue was raised by the Counsel for the appellants not the Trial Tribunal. That, both parties were given the right to submit on the raised issue.

As to the case of **Patricia Simeto (supra)**, Mr. Mayenje argued that it is merely persuasive and not binding. He argued that the issue in the cited case was *functus officio* while in the Trial Tribunal the issue was whether the application to set aside *ex parte* judgment was overtaken by events.

Mr. Wasonga, on his part, submitted briefly that, the first and second grounds can be determined looking at the proceedings and the decision of the Court in Land Appeal No 2 of 2020. The issue is

on the right to be heard and contention that the appellants were not included during trial. He submitted that the proceedings reveal that on 30th November 2021, the appellants were (present) as they were duly represented during trial.

On the third ground, he submitted that, there is difference between the application setting aside *ex parte* judgment and the application for stay of execution. To him, these were two distinct actions.

As to the fourth ground, Mr. Wasonga submitted that the issue as to whether the application for setting aside *ex parte* judgment was overtaken by events needs to consider the definition of the term being overtaken by events which to the effect that:

'Overtaken by events means to be changed because of something that has substantially and unexpectedly happened.'

On the last ground, Mr. Wasonga submitted that the Trial Tribunal Chairman was correct to award costs as he was exercising his discretion. As to the cited cases, he also distinguished the same as

not applicable to this appeal reiterating what was submitted by Mr. Mayenje.

In his rejoinder, Mr. Bernard reiterated what he submitted in his submission in chief.

I have considered the submissions of both sides, the record and authorities cited therein. The appeal revolves around the effect of the judgment of this Court as per my Sister Hon. Msafiri, J., on the application which led to the impugned ruling. In determining the main issue hereof there are sub issues that need to be determined.

The first issue is whether the appellants were parties in Land Appeal No. 2 of 2020. The second issue is whether the appellants were given the right to be heard before the Trial Tribunal during the hearing of the application that led to the impugned ruling. I have gone through the available record of this Court and it is an established fact at pages 3 and 4 of the decision of this Court that the appellants were the fourth and fifth respondents. They appeared in person as they were unrepresented.

The appellants are recorded to have challenged the said appeal as shown at page 9 of the judgment and it is on the record that the fourth and fifth respondents who represented themselves, replied jointly and submitted that they are not disputing the appeal because it covers what happened in the transaction and hearing of the case.

As correctly submitted by Counsel for the first, second and third respondents respectively, the appellants were present before this Court in Appeal No.2 of 2020. The next issue is whether the Trial Tribunal's holding that the appellants' application for setting aside *ex parte* judgment was overtaken by events caused miscarriage of justice. The answer to this question is found in the case of **Felix Emmanuel Mkongwa vs. Andrew Kimwaga**, Civil Application No. 249 of 2016, Court of Appeal of Tanzania, (unreported) where it was stated at page 7 that:

'Whenever it is shown that the application will no longer serve the purpose it was intended to or that an application has been overtaken by

events, the Court, has in a number of cases dismissed such application.'

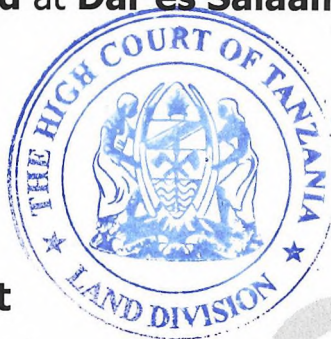
In this appeal, the appellants argue that the application to set aside *ex parte* judgment is not affected by the decision of this Court in Land Appeal No. 2 of 2020. On the other hand, the respondents argue that the same renders the said application as overtaken by events. I am of the considered view that the application to set aside *ex parte* judgment was overtaken by events. The reason to my finding is not implausible. There is no dispute that the application that led to impugned decision would no longer serve the purpose it was intended to after the judgment of the Court.

There is no doubt in my mind that the application for setting aside *ex parte* judgment cannot operate against the decision of this Court in Land Appeal No. 2 of 2020. After all, the impugned decision of the Trial Tribunal did not cause any injustice to the appellants. The appellants were legally represented, and therefore,

were afforded the opportunity to be heard before the impugned decision was delivered.

In fine, I find the appeal before me devoid of merits. I proceed to dismiss the same in its entirety with costs.

Dated at Dar es Salaam This 5th October, 2022.




F. R. KHALFAN
JUDGE
05.10.2022

Court

Judgment delivered on this 5th day of October, 2022 in the presence of Ms. Irene Swai, learned Counsel for the first respondent, also holding brief for Mr. Mpwaga Bernard, learned Counsel for the appellant, Mr. Thomas Massawe, learned Counsel for the second respondent and Mr. David Wasonga, learned Counsel for the third respondent.




F. R. KHALFAN.
JUDGE
30.09.2022