IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 141 OF 2021

(*Arising from Land Application No. 25 of 2020 from the District Land and Housing Tribunal for Kinondoni*)

AHMED NASSOR KHALIFA ..... APPLICANT

VERSUS

SULTAN KONDO ..... 1ST RESPONDENT

FAUSTINE JOSEPH MALLYA ..... 2ND RESPONDENT

KABANGO GENERAL BUSINESS (T) LIMITED ..... 3RD RESPONDENT

MWANUKA AHMED SAID (Administratrix of the Estate of

The late AHMED SAID LUSAMA ..... 4TH RESPONDENT

JUDGMENT

Date of Last order: 05.10.2022

Date of Judgment: 20.10.2022

A.Z. MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is due to the decision made by the Hon R.B. Mbilinyi

(Chairperson) of the District Land and Housing Tribunal (DLHT) for Mwananyamala Kinondoni in Land Application No. 25 of 2022.

The material background facts of the dispute are not difficult to comprehend. They go thus: Ahmed Nassor Khalfan, the appellant had instituted Land Application No. 25 of 2020 in the DLHT at MwananyaMAla claiming for declaration of ownership of the suit property against the respondents. The application was instituted and admitted in the DLHT on 19.01.2021.

On 08.02.2021, the 1st respondent raised a preliminary objection on the ground that the Land Application No. 25 of 2020 filed by the Appellant herein was res judicata, whereas the trial Chairperson sustained the Preliminary objection and dismissed the Application. Dissatisfied, the appellant appealed to this court.

Believing the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala was not correct, the appellant lodged a petition of appeal containing two grounds of appeal after abandoning three of them as follows: -

1. *That the Hon. Madam Chairperson erred in law and fact in holding or stating that the application is res judicata based on the evidence perused from the tribunal's record which records*

neither the appellant nor the respondents were given the right to address on the same.

2. *That the Hon. Madam Chairperson erred in law and in fact relied on land case No. 228/2009 Between* ***Ali Ismail Ubishi vs Mohamed Mindu and 2 others****, which case facts are distinguishable from the appellant's case.*

When the matter was called for hearing before this court on 25.09.2022, By the Court consent the matter was disposed of by way of written submissions whereas the appellant was represented by Mr. Adrian Mhina learned counsel while the 1st, 3rd, and 4th respondents were present in person and the 2nd respondent was absent.

Counsel for the appellant contended that the trial Chairperson erred in law and fact in holding that Application No. 25 of 2020 was res judicata while the same was completely different from all other applications as it was the main application with different parties.

He asserted that the 3rd respondent was not a party in other Land Application No. 153/2014 and 316/2014 which were dismissed for want of prosecution. He went on to submit that the said application was not determined to its finality, hence, cannot be *res-judicata* because it does not meet the criteria for res judicata provided under Section 9 of the Civil Procedure Code Cap 33 [R.E. 2019].

In reply, the 1st respondent maintained that the trial Chairperson of the trial tribunal was correct in holding that the Application No. 25 of 2021 was *res judicata* because the appellant had an opportunity to explore his cause but defaulted to appear in court, as a result, the case was dismissed for want of prosecution on 04.06.2021. He insisted that the parties in application No. 25 of 2021 and Application No. 165 of 2021 were the same, hence *res judicata*.

In conclusion, the 1st respondent submitted that the instant appeal is misconceived and the appellant has no ground worth to be considered. He urged this Court to dismiss the appeal with costs.

In his written submission, the 4th respondent conceded to the first ground that the trial Chairperson erred in law and fact in holding that Land application No. 25 of 2020 was *res judicata* because it does not meet the criteria set in the case of **Paniel Lotta vs Gabriel Tanak and Others** [2003] TLR 312 (CAT) or want of prosecution, it was not heard on its finality. The 4th respondent contended that this court be heard denovo.

I have gone through the court records, it appears that from the date the Land Application No. 25 of 2020 was registered to the DLHT on 21.01.2021 to the date of Ruling on 04.06.2021, no set of assessors was involved in determining the Land Application No. 25 of 2020. To be precise on 14.04.2021 the matter was scheduled for mention whereas both parties

appeared at the Tribunal. Mr. Sisty, counsel for the applicant prayed for mention date. The respondent did not object, hence, the DLHT scheduled mention date on 11.05.2021.

The record further reveals that on 11.05.2021, the DLHT did not attend the parties, surprisingly on 04.06.2021 the matter was dismissed for being *res judicata* in absence of the applicant and in presence of the respondents. The record is not clear when the respondents were summoned to appear at the Tribunal on 04.06.2021.

In my considered view, I find that the Chairman was not required to proceed *exparte* against the applicant who was not summoned to appear at the Tribunal. Considering the fact that the matter was scheduled for mention. The Court of Appeal of Tanzania made it clear that a case cannot be dismissed on mention date. In the case of **Mrs. Fakhiria Shamji v The Registered Trustees of the Khoja Shia Ithnasheri (Mza) Jamaat**, Civil Appeal No. 143 of 2019 the Court of Appeal of Tanzania held that:-

> *'With due respect, we find the Judge misdirected himself by giving the said order. Considering it was a "mention" date and not the date set for the hearing of the PO, the order was unnecessary.*
>
> *Although the term "mention" is not provided for in our CPC, but it has been a well-established practice that there is a difference between a 'mention' and a 'hearing' date.*

Guided by the decision in ***Mr. Lembrice Israel Kivuyo*** *(supra), that dismissal can only be made on a hearing date and not "mention" as most parties consider a "mention" day as a day for necessary orders, including scheduling of a hearing date, which was not the case in the instant matter. We thus agree with Mr. Mayenga's submission that it was not fitting for the Judge to hurriedly react by dismissing the PO. The Judge did not even bother to allow Mr. Luoga to address him on the PO raised.*

Applying the holding of the Court of Appeal in the instant appeal, it is clear that the circumstances of the case are similar. The Chairman misdirected himself by issuing the said order. Considering the fact that the Chairman moved himself to determine the preliminary objection without affording the parties the right to be heard.

The inappropriateness of courts or tribunals determining a matter without affording all parties the right to be heard was deplored in the case of **Tan Gas Distributor Ltd v Mohamed Salim Said** Civil Application for Revision No. 68 of 2011, the Court of Appeal held that:-

" No decision must be made by any court of justice/ body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

Similarly, in the case of **Mrs. Fakhiria Shamji** (supra). The Court of Appeal held that:-

> *"" As rightly conceded by Mr. Mayenga and Mr. Gilla that the right to be heard, which is fundamental, has been violated. We agree that not hearing the parties on the merits of the PO raised and dismissing the same on the "mention" date without being moved by a party present was a serious omission constituting illegality that violated the rule of natural justice. In the famous case of* ***Abbas Sherally & Another v. Abdul S. H. M. Fazalboy****, Civil Application No. 33 of 2002 (unreported) where the Court said:*
>
> > *The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice.*
>
> *This violation of the right to be heard is a breach of the cardinal principle of natural justice and an abrogation of the constitutional guarantee of the basic right to be heard as enshrined* ***under Article 13(6)(a) of the Constitution****. See the cases of* ***Mbeya Rukwa Auto***

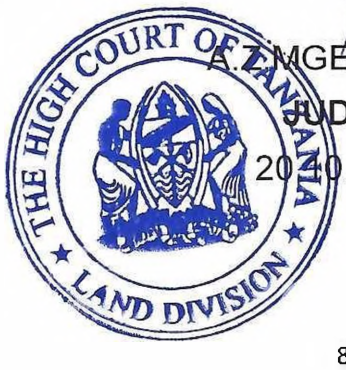
Parts and Transport Limited v. Jestina George Mwakyoma *[2003] T.L.R. 251..."*

Applying the above holding of the Court of Appeal of Tanzania, I am satisfied that none of the parties was availed of an opportunity to be heard on the preliminary objection. This vitiated the proceeding before the District Land and Housing Tribunal for Kinondoni at Mwananyamala from 04.06, 2021 onwards and those proceedings are thus nullified. I find this one ground suffices, and therefore no need to dwell on the remaining four grounds.

In the upshot, I allow the appeal and order the record to be remitted to the District Land and Housing Tribunal for Kinondoni at Mwananyamala, and the hearing to proceed from where it was left before 04.06. 2021. Mindful of the long time the matter has taken in court, I direct, the case scheduling be expedited within six months from the date of Judgment. Costs in due course

Order accordingly.

Dated at Dar es Salaam this date 20th October, 2022.



A.Z.MGEYEKWA
JUDGE
20.10.2022

Judgment was delivered on 20th October, 2022 via video conferencing whereas the 1st and 2nd respondents were remotely present.

A.Z.MGEYEKWA
JUDGE
20.10.2022

Right of Appeal fully explained.