

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPEAL NO. 93 OF 2021**

(Arising from the decision of the District Land Appeal for Kinondoni at
Mwananyamala in Misc. Land Application No. 221 of 2021, originating from
Bunju Ward Tribunal in Land Dispute No. 106 of 2019)

THOMAS REWELIAN KYARUZI APPELLANT

VERSUS

ADVERA REVELIAN KYARUZI RESPONDENT

JUDGMENT

Date of last order: 16.05.2022

Date of Judgment: 20.05.2022

A.Z.MGEYEKWA, J

This is a second appeal, it stems from the decision of the Ward Tribunal of Bunju in Land Dispute No.106 of 2019 and arising from the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Misc. Land Application No. 221 of 2021. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to

appreciate the present appeal. They go thus: the appellant and the respondent have biological relation, and they have a land dispute over a piece of land measuring 50m x 34m located at Tegeta within Dar es Salaam Region. The said piece of land is owned by Tanzania Portland Cement Ltd under a Certificate of Title No. 42336. The Tanzania Portland Cement Ltd lodged a Civil Case No. 173 of 2003 and Civil Appeal No. 129 of 2008 where the court decided in favour of the Tanzania Portland Cement Ltd and the individuals living in the disputed land were declared trespassers.

The Government through the Ministry of Lands and Human Settlement Development resolved the matter between the parties and the individuals were given the disputed plots. The appellant was among the individuals who were allocated a piece of surveyed land.

In 2019, the respondent filed a Land Case No. 106 at Bunju Ward Tribunal against the appellant with a claim that the appellant trespassed into her suit land. The trial tribunal decided the matter in favour of the respondent and she was declared the legal owner of the suit land.

Aggrieved, the appellant lodged a Misc. Land Application No. 221 of 2021 at the District Land and Housing Tribunal for Kinondoni at Mwananyamala challenging the judgment of the trial tribunal. However, the matter was marked

withdrawn for purpose of exploring settlement. Unfortunately, the settlement did not materialize hence the appellant lodged an application for restoration of the appeal out of time. The appellate tribunal dismissed the application for lack of sufficient reasons

The first appeal irritated the appellant. Hence this appeal before this court whereby she has raised two grounds of grievance, namely:-

- 1. That, both the Honourable Chairperson of the Tribunal erred in law and facts by dismissing an application for extension of time to set aside an order for withdrawal of Land Appeal No. 61 of 2020 based on wrong reasons.*
- 2. That, the decision by Hon. Chairperson of the District Land and Housing Tribunal for Kinondoni at Mwananyamala is void ab initio as it is premised on a misconceived application.*

When the appeal was called for hearing on for hearing on 21st April, 2022, the appellant had the legal service of Mr. Andrew Miraa, learned counsel and the respondent enlisted the legal service of Mr. Rajabu Mrindo. By the court order, the appeal was disposed of through written submissions, preferred in conformity with the schedule drawn by the Court and fully adhered to by

counsel for the parties. I thank the learned counsels for their concise and focused written submissions.

Getting off the ground, on the first ground, the learned counsel for the appellant contended that the Chairman in Misc. Land Application No. 221 of 2021 dismissed the application on the ground that the appellant did not adduce sufficient reason for the prayers of extension of time. Mr. Miraa submitted that the Chairman held that failure to settle the matter amicably by parties is not a good cause for an extension of time. The learned counsel for the appellant strenuously argued that the Chairperson erred to hold that the only reason advanced by the appellant in support of his prayers for an extension of time as per the affidavit in support of his application. He went on to submit that the reasons of the appellant are stated in the affidavit and the Chairperson's decision was premised only at paragraph 4 of the affidavit and other reasons were abandoned. To buttress his submission, the counsel for the appellant referred this court to paragraphs 5, 6, and 7 of the applicant's affidavit.

The learned counsel for the appellant claimed that following the proceedings and judgment of the trial tribunal which denied the appellant his rights over the disputed property. He added that it was in the interest of the

tribunal to allow the appeal and re-evaluate evidence instead of dismissing the appeal based on technicalities. Fortifying his submission he cited the case of **Principal Secretary Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 182. Mr. Miraa submitted that the applicant in paragraph 6 pleaded the existence of illegalities in the trial tribunal.

As to the second ground, the appellant's Advocate was brief and straight to the point. He submitted that the appellant on 18th August, 2020 the appellate tribunal dismissed the application for an extension of time to file an application to set aside the dismissal order in Land Appeal No. 61 of 2021. It was his submission that since Land Appeal No. 61 of 2020 was withdrawn and not dismissed an appropriate action by the appellant could have been to file to the tribunal an application for an extension of time to restore an appeal and not set aside the dismissal order as there was no order for dismissal of Land Appeal No. 61 of 2020. Mr. Mirra further submitted that the Chairman in his ruling acknowledged the defect but did not make an appropriate order, instead of striking out the application for being misconceived and allowing the appellant to file the proper application be determined it on merit.

On the strength of the above submission, the learned counsel for the appellant urged this court to allow the appeal and afford the appellant a chance to file an

appropriate application and finally challenge the decision of the trial tribunal that illegally deprived what legally belonged to him.

In reply, Mr. Rajabu came out forcefully and defended the District Land and Housing Tribunal's decision as sound and reasoned. Mr. Rajabu began to narrate a brief background of the matter which I am not going to reproduce in this appeal. On the first ground, it was his submission that the appellant misconstrued the ruling of the appellate tribunal. He stated that the application for an extension of time was not dismissed for the reason of the ground of failure to settle the matter amicably.

He added that the applicant's application for extension of time was dismissed because it was unmaintainable because his appeal was withdrawn thus the Chairman was correct in holding that after the appellant's prayer to withdraw his appeal and the appeal marked withdrawn thus, there was no way the tribunal could entertain the appellant's application for extension of time to restore the appeal which was withdrawn. To support his submission he cited Order XXIII Rule 1 (3) of the Civil Procedure Code Cap. 33. He went on to submit that the appellant withdraws his appeal without securing leave to refile it afresh thus he is barred from seeking an extension of time to secure leave to re-admit it again. Supporting his submission, Mr. Rajabu cited the

case of **CRDB Bank PLC & Another v Aziz Mohamed Aboud & Another**, Misc. Commercial Cause No. 277 of 2005 (unreported).

Regarding the ground of illegality, Mr. Rajabu submitted that the applicant introduced a new ground that was not raised before. He added that it was wrong for the appellant to introduce a new ground. To fortify his submission he cited the cases of **Idha Salum v Khalifa Khamis Said** (2004) TLR 423 and **Shilalo Masanje v Lobulu Ngateya** (2001) 374.

Arguing for the second ground, the learned counsel for the respondent submitted that the appellant has admitted that the application for extension of time had defect for seeking extension of time to set aside the dismissal order while he prayed to withdraw the matter and it was marked withdrawn. Mr. Rajabu contended that since the appellant withdrew the appeal without securing leave to refile it afresh thus in terms of Order XXIII Rule 1 (3) of the Civil Procedure Code Cap. 33 [R.E 2019], it was his view that the appellant was barred from seeking an extension of time to secure leave to re-admit it. Thus, in his view, the Chairman was correct in dismissing the same. To support his stand he cited the case of **CRDB Bank PLC & Another v Aziz Mohamed Aboud & Another**, Misc. Commercial Cause No. 277 of 2015 (unreported).

On the strength of the above submission, Mr. Rajabu beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief. Insisting, he opposed in length the submission of the respondent stating that the respondent in her submission introduced factual evidence. He urged this court to expunge the introduction part. To support his submission he cited Order XXXIX Rule of the Civil Procedure Code Cap.33 [R.E 2019]. He submitted that the records show that the appellant at the tribunal prayed to withdraw the appeal for purpose of exploring settlement out of the tribunal but the respondent proceeded to file an application for execution which raises red flags.

Stressing on the point of the wrongful dismissal of the application, he argued that the Chairman wrongly dismissed the Misc. Land Application No. 221 of 2021 since he did not exhaust all the reasons advanced in the appellant's affidavit supporting the application. He added that Order XXIII Rule 1 (3) of the Civil Procedure Code Cap.33 does not apply in the matter at hand.

The learned counsel for the appellant came up forcefully complaining that the Chairman after noting that the application was incompetent proceeded to

determine the application instead of striking it out since there was no proper application before him.

In conclusion, the learned counsel for the appellant urged this court to allow the appeal since there are illegalities on the face of the record that needs to be investigated and corrected for purpose of providing fair justice to all.

The gist of this application emanated from the Land Appeal No. 61 of 2020 whereas the applicant prayed to withdraw the appeal and the District Land and Housing Tribunal granted the applicant's application. Then the applicant lodged a Misc. Land Application No. 221 of 2021 at the District Land and Housing Tribunal for Kinondoni at Mwananyamala. I have perused the District Land and Housing Tribunal proceedings and noted that the applicant through Chamber Summons supported by his affidavit prayed against the respondent's three orders. For ease of reference, I reproduce the following orders as hereunder:-

1. This Honourable tribunal may be pleased to grant an application for extension of time to file an application to set aside the dismissal order in Land Appeal No. 61 of 2020 dated 18th August, 2020 by Hon. Wambili, Chairman.
2. Cost of this application to be borne by the respondent.

3. Any other relief (s) this Honourable Court may deem fit and just to grant.

From the above prayers, it is clear that the appellant wanted to set aside the dismissal order in Land Appeal No. 61 of 2020 which was marked withdrawn, after the appellant's prayer to withdraw the same and informed the tribunal that they wanted to discuss the matter at a family level. The respondent's Advocate had no objection. Thereafter, the appellant lodged Misc. Application No. 225 of 2021 and as rightly pinpointed by the learned counsel for the respondent the appellant was required to file an application for extension of time to file an appeal out of time.

In my findings, I noted that the Chairman misdirected himself to proceed with determining the application while he noted that the application was incompetent. The best option would have been for the Chairman to restrain himself to determine the application on merit and to strike out the application for being incompetent instead of dismissing it.

In the upshot, the appeal succeed to the extent that the Chairman erred in determining the application while the said application was incompetent before him. I, therefore, proceed to quash and set aside the District land and Housing Tribunal Ruling in respect to Misc. Land Application No. 221 of 2021 and the

applicant is allowed to file a proper application before the District Land and Housing Tribunal for Kinondoni. No order as to costs.

Order accordingly.

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

 A.Z. MGEYEKWA
JUDGE
20.05.2022

Judgment delivered on 20th May, 2022 in the presence of Mr. Andrew Miraa, learned counsel for the appellant also holding brief for Mr. Rajabu Mrindoko, learned counsel for the respondent.

 A.Z. MGEYEKWA
JUDGE
20.05.2022