

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 194 OF 2021

(Arising from the Misc. Land Application No. 56 of 2020 at the District Land and Housing Tribunal for Kibaha District at Kibaha)

JESTINA MARTIN BARABARA 1ST APPELLANT

EPHATA LUCAS MLAVI 2ND APPELLANT

SHANI MAKALA KIUNSI 3RD APPELLANT

VERSUS

JOSEPH KEENAN MHAIKI 4TH RESPONDENT

JUDGMENT

Date of Last Order: 06/6/2022

Date of Judgment: 23/6/2022

A. MSAFIRI, J

The appellants having been dissatisfied with the whole Ruling and Order delivered by the District Land and Housing Tribunal for Kibaha District at Kibaha,(herein as the District Tribunal), they have lodged this appeal basing on two grounds of appeal as follows;

1. The District Land and Housing Tribunal erred in law and fact by dismissing the application for revision with costs without considering irregularities and illegalities in the decision and proceedings of Ward Tribunal. *Alls-*

2. The District Land and Housing Tribunal erred in law and fact by deciding in favour of respondent herein without sufficient reasons.

The appellants prayed for the appeal to be allowed, the whole ruling and order of the District Tribunal to be quashed and set aside and costs of the appeal be granted. The appeal was argued by way of written submissions whereby the appellants' submissions were drawn and filed by Ms. Catherine Lyasenga, advocate while the respondent's submission were drawn and filed by Ntemi Ezekiel Massanja, Advocate.

The appellants counsel Ms. Lyasenga, started her submission with the brief background of this matter. She stated that the appellants were served with application for execution of the ex-parte decision of Ward Tribunal of Fukayosi at Bagamoyo District through Land Application No. 22 of 2020 dated 19/2/2020. The Ward Tribunal in the said decision, has declared the herein now the respondent as a lawful owner of the farm land located at Kidomole Village within Bagamoyo District, Pwani Region. The decision was ex-parte against the appellants. Following that, the appellants filed an application for Revision No. 56 of 2020 at the District Tribunal so as to revise the ex-parte decision by Ward Tribunal. The District Tribunal found the application for revision to have no merit and dismissed it with costs. Hence they appealed to this Court.

Submitting seriatim on the grounds of appeal, on the first ground, the counsel for the appellants stated that there was irregularities and *Allo*.

illegalities in the decision and proceedings of Ward Tribunal. On the irregularities, the counsel pointed that, the respondent herein filed a matter at Ward Tribunal against Martin Barabara as 1st respondent, Shani Kiunsi as 2nd respondent and Makalla as 3rd respondent. She said that the parties who filed for revision were Jestina Martin Barabara as 1st applicant, Ephata Lucas Mlavi as 2nd applicant and Shani Makala Kiunsi as 3rd applicant. They prayed for the District Court to revise and nullify the ex-parte order of the Ward Tribunal so that they may get a chance to be heard on the matter as they were not party to the dispute at the Ward Tribunal as legal owners of the suit property.

On the issue of illegalities, the counsel stated that the appellants were denied their fundamental rights to be heard as stipulated under Article 13(6) (a) of the Constitution of the United Republic of Tanzania of 1977. She argued that, the purported summons to appear at the Ward Tribunal did not even mention the appellants herein as the respondent did not claim against them in the dispute. That, the appellants were not notified of the matter at the Ward Tribunal hence the District Tribunal erred in its decision to dismiss the applicants' application.

On the second ground of appeal, Ms. Lyasenga submitted that, the purported summons by the Ward Tribunal were not properly served as required by Section 12 of the Ward Tribunal Act, Cap 206 R.E. 2019 which provides that summons shall be issued directly to the parties by Secretary of the Ward Tribunal, but in this matter there is no such proof. She

Alle.

submitted further that there should have been a process server's affidavit to prove the service not the mere words which are in the record of trial Tribunal. She prayed for the appeal to be allowed and the decisions of the District Land and Ward Tribunal to be quashed and set aside.

In reply, Mr. Massanja, submitted that, the appellant's counsel has concealed some crucial material facts of this matter. He stated that, the District Tribunal had no jurisdiction to entertain this matter as the same was time barred. This is because the Ward Tribunal delivered ex-parte decision on 19/2/2020, the appellant were aggrieved and filed for revision on 05/5/2020 before the District Tribunal. In computing the time, the Revision was filed after 75 days had lapsed.

Mr. Massanja stated that the issue of limitation of time was well addressed in the respondent's written submission but the Hon. Chairman overlooked the issue and never addressed it in the ruling. In his opinion, this appeal is centered on two issues, first; whether the appeal can be decided on merit if application for Revision from the District Court was time barred? Second is whether the District Tribunal had jurisdiction to try the matter which was time barred?

On the first issue, Mr. Massanja argued that, the statutory time for filing application for Revision in the District Tribunal arising from orders of decision of the Ward Tribunals is not provided in the Ward Tribunals Act, Cap. 206 or in the Land Disputes Courts Act, Cap 216 or the Land Act, Cap

Ally

113 or any other law. Therefore, the time limit for filing an application for revision falls under the Law of Limitation Act, Cap 89 R.E 2019. And, as per the provisions of the Law of Limitation Act, Application No. 30 of 2019 for revision was filed beyond prescribed time as 75 days had lapsed.

On the second issue, Mr. Massanja submitted that, this Court in exercising the appellate jurisdiction cannot determine this appeal on merit. The reason is that, the proceedings in application for revision were nullity for being time barred. To cement his points, the counsel cited the cases of **NBC Ltd & IMMMA Advocates vs. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019, CAT at Mbeya (unreported) and **Njake Enterprises Limited vs. Blue Rock Limited & Rock and Venture Company Limited**, Civil Appeal No. 69 of 2017, CAT at Arusha (unreported).

On the grounds of irregularities and illegalities of the decision and proceedings of the District Tribunal and Ward Tribunal, the counsel for the respondent submitted that, the ground of illegality and irregularities cannot cure or override the principle of limitation of time. He reiterated that the Revision No. 30 of 2019 in which this appeal originates was time barred so the proceedings were a nullity. He prayed for dismissal of the appeal with costs.

The appellants rejoined and submitted through their counsel that, they reiterates the submission in chief. On the issue of limitation of time, the counsel for the appellants stated that, the application for the revision *Alles*.

originates from Ward Tribunal. Since the Ward Tribunal Act does not provide for time limit, then it is allowed to take inspiration of the procedure used in other Court of relatively or similar level which in this case is the Primary Court whereby the Magistrates Courts Act, Cap 11 R.E 2019, under Section 22 (4) provides for the time limit to file application for revision in the District level to be twelve months. The counsel argued that, borrowing from that procedure, the application for the revision of the decision of Ward Tribunal was filed on time, which is within twelve months.

To cement her point, the counsel made a reference to the case of **Batamanangwa Cornelius Pomonhi vs. Martine Kuloba**, Land Appeal No. 14 of 2020, High Court Mwanza Registry, (unreported). She added that, under Section 15(1) (2) of the Ward Tribunal Act, the Ward Tribunals are not bound by rules of procedure applicable in any other courts and shall regulate their own procedure. She maintained that the appeal has merits and prayed for the same to be allowed with costs.

Having heard the submission from parties and after going through the Court records, it is my view that this matter attracts two issues; First, whether the application No. 56 of 2020 before the District Tribunal was time barred and therefore it was incompetent before the said Tribunal and Second, whether this appeal has merit.

Adls

Before I embark on determining those two issues, I see it paramount to point out the errors on the face of the appeal and the written submissions presented before this Court.

On the errors on appeal, in the Memorandum of Appeal, it is shown that the same has been brought under Section 41(1) and (2) of the Land Disputes Court Act. However, I find this to be the wrong provision because it provides for the appeals and revisions which originates from the District Tribunal in the exercise of its original jurisdiction. It is my belief that the correct provision in this appeal should be Section 38 (1) and (2) of the Land Disputes Act. Despite this, I find the wrong citation not fatal and can be cured with the principle of overriding objective. Furthermore, in the appeal, it is not mandatory to cite the enabling provisions of law with the memorandum of appeal.

Another error which I have observed is in the reply submission by the respondent. The respondent kept referring to Revision No. 30 of 2019 supposedly before the District Tribunal and which this appeal originates from. However, this appeal originates from Application No. 56 of 2020 before the District Tribunal. I also find that the mistake is not fatal and falls under the slip of the pen rule.

Now I will deal with the first issue on the competency of Application No. 56 of 2020 before the District Tribunal and whether it was time barred. *Atte.*

The counsel for the respondent submitted that the Application No. 30 of 2019 (which I have corrected to be Application No. 56 of 2020), was time barred before the District Tribunal. That, the respondent raised and addressed this issue of time limitation in his written submission before the District Tribunal, but this issue was never addressed in the ruling of the District Tribunal.

Following this claim by the respondent, I painstakingly went through the proceedings at the District Tribunal. The proceedings shows that the hearing of revision was by way of written submission. In his written submission responding to the submissions in chief, the respondent raised the issue of time limitation, stating that the application before the District Tribunal was time barred hence it was untenable.

Looking into the ruling of the District Court, it is true that the Hon. Chairman never addressed the issue of limitation of time of the application. However, I have observed that, the issue of limitation of time of the application was never raised by the respondent in his counter affidavit, instead this issue was raised in the written submissions by the respondent. It is my finding that the respondent ought to have raised this issue as a preliminary objection and/or included it in his counter affidavit.

It is trite law that the submissions are not evidence but a mere summary of arguments and cannot be used to introduce evidence on point of law. In the case of **Sahara Media Group Ltd vs. Bidya John & Others**, Misc. *Alles*

Labour Application No. 40 of 2022, High Court Mwanza (unreported), my learned brother Hon. Kahyoza, J observed thus;

“It is axiomatic that courts determine applications on the strength of the averments in the affidavits and not upon submissions”.

From this, the averment by the respondent that the application was time barred was mere words from bar, and the District Tribunal did not address it. I am of the view that the District Court was correct to base its decisions on the contents of the affidavit and counter affidavits and not new issues being raised from the bar.

However, since the matter of limitation of time is a point of law, and this being the appellate Court of first instance, I feel that I am mandated to step into the shoes of the District Tribunal and determine the point of law which have been pointed out.

The respondent averred that the decision of the Ward Tribunal was delivered on 19/2/2020 while the application at the District Tribunal was filed on 06/5/2020 which almost seventy five days has lapsed. To his opinion, the application before the District Tribunal was hopelessly time barred. However, as per their affidavit, the applicants (now appellants) got information of the existence of ex-parte decision of the Ward Tribunal on 02/4/2020 when the 3rd applicant was served with summons to appear and

Alto.

show cause at the District Tribunal in application for execution of the ex-parte decision of the Ward Tribunal.

I have also gone through the proceedings and decision of the Ward Tribunal. It is revealed that, the respondents have refused summons to appear before the Ward Tribunal despite being served by the Tribunal. That, the respondents were served with summons for more than three times, but they did not appear before the Tribunal. Unfortunately, the proceedings does not reveal the purported summons to prove that.

Furthermore, when the Ward Tribunal was delivering its ex-parte judgment, it was not stated whether there was any notice or another summons sent to the respondents notifying them of the date of the decision. Hence, the respondents (appellants) were unaware of the date of the delivery of the ex-parte decision and could not have filed the application within the time.

Since it is not shown in the records of the proceedings on whether there was notification of the date of delivery of the Ward Tribunal decision, then the Court had to believe that, the first time the appellants were aware of the decision is on 02/4/2020 and since the application was filed on 06/5/2020, the appellants were still within the statutory time. Basing on this analysis, I find that the application before the District Tribunal was not time barred.

Atls

The second issue is whether this appeal has merit. In their affidavit during the District Tribunal, the appellants stated that, they were not notified of Application No. 22 of 2019 before the Ward Tribunal and the 1st and 2nd applicants were not joined as necessary parties to the said application.

In the current appeal, the appellants have raised the ground of illegalities and irregularities that, the parties at the Ward Tribunal were Martin Barabara as 1st respondent, Shani Kiunsi as 2nd respondent and Makalla as 3rd respondent. While the applicants before the District Tribunal were the present appellants, who were seeking for provisional orders for the District Tribunal to set aside ex-parte decision so that they can get a chance to be heard as they were not party to the proceedings at the Ward Tribunal.

In this it is my finding that, first, I agree that, the parties at the Ward Tribunal according to the proceedings were Martin Barabara as the 1st respondent, Shani Kiunsi as the 2nd respondent, and Makalla as the 3rd respondent. It is apparent on the face of the record that the 1st respondent and 3rd respondent at the Ward Tribunal are different parties from the parties at the District Tribunal who were Jestina Martin Barabara – 1st respondent, Ephata Lucas Mlavi – 2nd respondent; except for the 3rd respondent. Therefore, basing on that, the District Tribunal could have invoked its powers under Sections 35 and 36 of the Land Disputes Court Act and revise the Ward Tribunal proceedings on that. *Alle*

Second, it is my finding that even if the parties at the Ward Tribunal and the District Tribunal were the same, the proceedings of the Ward Tribunal does not reveal on how the respondents were served more than three times and refused to enter appearance. At page 4 of the Ruling of the District Tribunal, the Hon. Chairman pointed that he has gone through the proceedings and whole documents at the Ward Tribunal and has satisfied himself that the applicants were summoned and refused to enter appearance.

However, I have gone through the proceedings of the Ward Tribunal and I have failed to see any proof that the applicants were summoned as it was stated in the decision of the Ward Tribunal. It was important that records of the proceedings should have contained the purported summons which were served to and refused by the applicants.

For these reasons, I am constrained to agree with the appellants that there was irregularities on the proceedings and decision of the Ward Tribunal which the District Tribunal failed to consider and determine which have caused injustice to the appellants.

Basing on that, I hereby invoke this Court's powers under Section 43 of the Land Disputes Courts Act, and hereby quash the proceedings and set aside the ruling of the District and Housing Tribunal of Kibaha District at Kibaha in Misc. Application No. 56 of 2020 and also I quash the proceedings and set aside decision of the Ward Tribunal of Fukayosi in Land Dispute No. 22

Adls.

of 2019. The parties are at liberty to file fresh suit at the competent Tribunal. No order for costs.

It is so ordered. Right of appeal explained.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal line.

A. MSAFIRI,

JUDGE

23/6/2022