IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO.184 OF 2020

(Arising from the District Land and Housing Tribunal for Kinondoni in Land Application No. 685 of 2019 delivered on 28th July 2020 by Hon. Wambili, Chairman, and Application No. 416 of 2007)

GINCHE KISASE ..... APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE ..... 1ST RESPONDENT

M/S KISASE INVESTMENT CO. LTD ..... 2ND RESPONDENT

PROPERTY INTERNATIONA LTD ..... 3RD RESPONDENT

FELIX HERIM MLAKI ..... 4TH RESPONDENT

JUDGMENT

Date of last Order: 05.05.2023

Date of Judgment: 12.05.2023

A.Z.MGEYEKWA, J

The appellant has lodged this appeal against the Ruling of the District Land and Housing of Kinondoni in Misc. Land Application No. 685 of 2019 dated 28th July 2020 by Hon. Wambili, Chairman. The material background facts of the

dispute are not difficult to comprehend. They go thus: the appellant filed an omnibus application for extension of time to file an application to set aside the dismissal order in respect to Land Application No. 416 of 2007 dated 10th April 2019, to set aside the dismissal order and restore the Land Application No. 416 of 2007. The 1st and 4th respondents resisted the application and demonstrated their resistance by filing counter affidavits. The District Land and Housing Tribunal for Kinondoni determined the application and ended up dismissing the same for the main reason that the appellant had not adduced sufficient reasons to move the Tribunal to decide the application in his favour.

The appellant was not happy with the decision of the District Land ad Housing Tribunal. Therefore, he preferred this appeal on three grounds of grievance; namely:-

1. *The Trial Chairperson of the Kinondoni District Land and Housing Tribunal erred in law and facts when erroneously failed to understand that there was a lot of illegality in the proceedings when dismissed Land Application No. 416 of 2007 on 10th April 2019.*
2. *The Trial Chairperson of the Kinondoni District Land and Housing Tribunal erred in law and facts when ruled that, the appellant was reckless and negligent in prosecuting his Land Application No. 416 of 2007 while that*

case was taken to the High Court Land Division and thereby the Tribunal adjourned generally without giving the appellant notice on the arrival of the file for continuation of the hearing.

3. *The Trial Chairperson of the Kinondoni District Land and Housing Tribunal erred in law and facts when he failed to understand the gist of the appellant's application No. 685 of 2019 and when he came to know that the Land Application No. 416 of 2007 was dismissed.*

When the matter was called for hearing before this court on 5th May 2023, the appellant had the legal service of Mr. Johnson Kongwa, learned counsel, and the 4th respondent enlisted the legal service of Mr. Ignas Denis, learned counsel. The 1st, 2nd, and 3rd respondents were duly being served to appear in court. However, they did not show appearance. Therefore this court granted the appellant's Advocate prayer to proceed *exparte* against the 1st, 2nd, and 3rd respondents.

Getting off the ground, on the sole ground of complaint, Mr. Johnson was brief and focused. The learned counsel for the appellant started to narrate a brief background of the matter that the appellant filed their appeal on 9th September 2020 after being aggrieved by the decision of the Hon.

Wambili, Chairman in Misc. Application No. 685 of 2019 which was delivered on 28th July 2018 hence this appeal.

On the first ground, Mr. Johnson submitted that the Chairperson of DHLT for Kinondoni erred in law and facts erroneously failed to understand that there were a lot of illegalities when dismissing Land Application No. 416 of 2007 dated 10th April 2019. He contended that the Application No. 416 of 2007 was dismissed for want of prosecution, while the appellant and his witnesses had an opportunity to testify, his case was closed and the Tribunal scheduled a hearing date for the defiance case. In his understanding, the Tribunal was supposed to allow the defence case to proceed in the absence of the appellant instead of dismissing it entirely. The learned counsel for the appellant went on argue that the Tribunal dismissed the case without fixing a date of hearing the Counter Claim which in the eyes of the law is a cross-suit. He valiantly argued that the act of the Chairperson was contrary to the provision of Order IX Rule 1 and 2 of Civil Procedure Code Cap.33.

As to the second ground, Mr. Johnson contended that the trial Chairperson of DHLT for Kinondoni erred in law and fact when ruled that

the applicant was reckless and negligent in prosecuting his Land Application No. 416 of 2007 while the said case was brought before this Court, thus the tribunal adjourned generally without notifying the parties that the said file was returned at the Tribunal for the continuation of the hearing. He stressed that the primary duty of the court is the adherence to the principle of natural justice and protecting the rights of the parties to the case as provided under the Constitution of the URT, especially Article 13 (6). He went on to submit that the appellant filed Land Revision No. 29 of 2019, however, the same was dismissed by Hon. De Mello, J, and the DHLT ordered to stay Land Application No. 416 of 2007 pending the determination of the said Revision, however, they were surprised to know that the Land Application No. 416 of 2007 was dismissed for want of prosecution without notifying the parties.

Mr. Johnson continued to argue that the Chairman in his ruling blamed the appellant for failure to explain the mode of notification while it is known that summons is the reliable mode of communication used by the court of law to communicate with the parties, especially in situation where there are unsettled issues or when the Court wants to issue

necessary orders. In his view, the Tribunal action was unfair and the applicant was infringed the right to prosecute his case.

Arguing for the third ground, the appellant's counsel contended that the trial Chairperson erred in law and facts by failure to understand the gist of the applicant's Application No. 485 of 2018. He argued that the Chairperson did understand that the Application No. 146 of 2018 was for extension time to file an application to set aside the Application No. 416 and set aside a dismissal order as the application was dismissed without the knowledge of the appellant because the appellant was not notified by the tribunal that the case file was returned to the Tribunal. The learned counsel for the appellant continued to argue that it would be fair if the Chairman allowed Application No. 684 of 2019 and proceed to determine Application No. 416 of 2007 on merit considering the fact that the appellant's absence was not due to negligence. He added that in case this Court will not allow the appeal, the appellant will suffer irreparable loss and he will lose his property without being given the right to be heard.

In conclusion, Mr. Johnson beckoned upon this Court to thus we pray this Court to allow the appeal, the decision of the DHLT for Kinondoni be quashed and direct Land Application No. 416 of 2007 to proceed where it ended with costs.

In his reply, Mr, Igans started to narrate the genesis of the matter at hand. He stated that Hon. De Mello, J dismissed the revision on 27th September 2018 and the file was returned to DHLT on 11th November 2018 whereas the matter proceeded whereas the 1st and 4th respondents appeared four times before Hon. Lungwecha but the appellant never showed appearance, hence the matter was dismissed for appellants failure to peruse their interest and the appellant failed to convince the Tribunal to restore their application.

On the 2nd ground, Mr. Ignas argued with some force, he stated that there is no law that requires the Court to inform the parties that the case is finally determined, instead it is upon the appellant himself to make a close follow-up and take proper measures to peruse his case. He spiritedly argued that it not true that the appellants were not summoned to appear at the tribunal.

In his rejoinder, Mr. Johnson reiterated his submission in chief. Stressing on the point of illegality, he submitted that they have proved that the Tribunal's decision was tainted with illegality and the counter claim was never been determined instead the DHLT dismissed the whole Application on it's entirely. He insisted that it was important for the Tribunal to summon the parties to proceed with hearing the case after receiving the file from this Court. Ending, Mr. Johnson beckoned upon this Court to grant the appellant's appeal.

After a careful perusal of the submission made for the appeal by the appellant and the respondent and after having gone through the court records, I have come to the following firm conclusions. In determining this appeal the main issue calling for determination is ***whether the appeal is meritorious.***

I have opted to address the first and second grounds of appeal because the same dispose of the appeal. The appellant is faulting the Tribunal for failure to consider the issue of illegality as a ground for extension of time, and the appellant claims that he was not notified or summoned to appear at the Tribunal when the case file was returned to the Tribunal for the continuation of hearing the case. As a result, the Tribunal disallowed the appellant's

application for an extension of time to file an application for restoration of Misc. Land Application No.416 of 2007 and restore the same Application.

I have keenly gone through the Miss, Land Application No. 685 of 2019, the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, and the written submissions made by the learned counsels of the appellant and 1st and 4th respondents. The appellant has shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of the DHLT when it dismissed the application for non-appearance. The applicant's Advocate in his submission before the appellate tribunal raised two main limbs for his delay, ordinary delay, and illegality. I have opted to address the second limb of illegality. The applicant alleges that the decision of the trial tribunal is tainted with illegality. The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice as it was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93

The illegality is alleged to reside in the decision of the DLHT, the appellant on paragraph 9 of his affidavit explained in length the issue of irregularity that the tribunal closed the applicant's case and on 23rd January 2017 the DLHT fixed

a date for defence hearing, he expected the DLHT to proceed with hearing the defence case instead of dismissing the case. In their submission in chief the counsel for the applicant raised the same ground of irregularity. However, the Tribunal in its decision did not state anything regarding the ground of irregularity.

The legal position, as it currently obtains, is that where illegality exists and is pleaded as a ground, the same may constitute the basis for an extension of time. This principle was accentuated in the **Permanent Secretary Ministry of Defence & National Service v D.P. Valambhia** [1992] TLR 185, to be followed by a celebrated decision of **Lyamuya Construction Company Limited and Citibank (Tanzania) Ltd v T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported). In **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89 thus:

> *"In our view, when the point at issue is one alleging illegality of the decision being challenged,* ***the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record straight****." [Emphasis added].*

Applying the above authority in the matter at hand, it is clear that the ground of irregularity that has been cited by the appellant meets the requisite

threshold for consideration as the basis for the enlargement of time and that this alone is weighty enough to constitute sufficient cause for an extension of time.

In addition, the appellant in paragraph 8 of the applicant's affidavit supported his grounds for restoration of the Misc. Land Application No. 416 of 2007 that when the file was returned to the Tribunal, the Tribunal did not notify the appellant. Guided by the evidence on record, service was not duly effected, as there is no any proof summons, thus the same is questionable. Reading impugned Ruling there is no any evidence proving that the appellant and other parties were summoned to appear at the tribunal after the case file was returned to the Tribunal. The 4th respondent's counsel in his oral submission did not object that the appellant was not notified. The same implies that the appellant is stating the truth. So, it was improper for the Tribunal to dismiss the case in the absence of notification to all parties. It is my considered view that failure to notify the appellant, infringed his rights to be heard. The complaint that the appellant has been denied the right to be heard cannot, in the circumstances, be underrated. In the famous case of **Abbas Sherally & Another v Abdul S. H. M. Faza l boy**, Civil Application No. 33 of 2002

(unreported), the right to be heard before adverse action is taken is well elucidated when 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 18 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."*

The 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 of the United Republic of Tanzania, 1977. See the case of **Mbeya Rukwa Auto Parts and Transport Limited v Jestina George Mwakyoma** [2003] T.L.R. 25.

Given the settled position of the law, I am satisfied that the appellant has established grounds of illegalities, and this vitiated the proceedings before the DLHT in Land Application No. 416 of 2007. Therefore, I hold that the Tribunal proceedings were conducted in disregard of the law. In my considered view, this is a good reason and the same sufficient to move this Court to set aside

the dismissal order and restore the Land Application No. 416 of 2007. Consequently, I find no need to determine the third ground since the first and second grounds suffice to dispose of the appeal.

In the upshot, I restore the Land Application No. 416 of 2007 before the District Land and Housing Tribunal for Kinondoni for the continuation of hearing from where it stopped when it was dismissed for want of prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order to costs.

Order accordingly.

Dated at Dar es Salaam this date 12th May 2023.

A.Z.MGEYEKWA

JUDGE

12.05.2023