IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 328 OF 2023

(Arising from Misc. Land Application No. 314 of 2022, Originated from Misc. Application No. 465 of 2021, Arising from Application No. 275 of 2019)

PASCAL THOMAS LELO.....APPELLANT

VERSUS

AKIBA COMMERCIAL BANK PLC.....1ST RESPONDENT

BEST GROUP LTD.....2ND RESPONDENT

CHAMPION AUCTION MART.....3RD RESPONDENT

JUDGMENT

15th September, 2023 & 24th October, 2023

L. HEMED, J.

Here is an appeal emanating from the ruling of the District Land and Housing Tribunal for Temeke (DLHT) in Misc. Land Application No. 314 of 2022, delivered on 18th July 2023, refusing to set aside the dismissal order in Misc. Application No. 465 of 2021. The background of the matter at hand is such that, in the year 2019, the Appellant herein, **PASCAL THOMAS LELO** instituted a suit *vide* Application No. 275 of 2019 against the respondents herein, **AKIBA COMMERCIAL BANK PLC, CHAMPION**

AUCTION MART and **JORAM JACOB MUNUO** challenging the sale of the mortgaged property located at Makangarawe, Uwazi and Dovya street, in Temeke - Dar es Salaam with residential licence No. TMK 037203 and TMK 023239. The said suit was dismissed on 13th July 2021 under Regulation 11(1) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations GN. No. 174 of 2003.

In attempt to restore the said suit he presented an application for restoration which was registered in the trial Tribunal on 23rd July 2021 as Misc. Application No. 465 of 2021. The applicant failed to appear on 3rd August 2022, which the application was to be heard and consequently thereof, the application ended up being dismissed with costs under Reg. 11 (1)(b) of the Land Disputes Courts (The District Land & Housing Tribunal) Regulations *(supra).*

The applicant did not get tired, he re-knocked the gates of the trial Tribunal with another Application. It was received by the trial Tribunal on 30th August, 2022. This time, the applicant tried to beseech the Tribunal to restore Misc. Application No. 465 of 2021.

In this application, the applicant managed to prosecute it. In fact he was heard *exparte*. At the end, the trial Tribunal found no good cause to have been demonstrated to warrant it restore the dismissed Misc. Application No. 465 of 2021. Hence this appeal on the following grounds:

> *"1. That the trial tribunal erred in law and fact by dismissing the applicant's application with costs while the matter was heard expart (sic)*
>
> *2. That the trial erred in law and fact by failure to allow the applicant's application without taking into account that the respondent had not put forward any objection that on the date when the matter was dismissed there was no such matter which was pending in the High Court (Land Division) between the appellant hearing and the 1st respondent. (sic)*
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> *3. That the trial tribunal erred in law and fact to dismiss the appellant's application without taking into account that the appellant had no intention of adjoin the matter to any other dates but it was prayed the matter to proceed around 14:30 pm on the same date, after attending High Court case between appellant and the 1st respondent. (sic)*
>
> *4. That the trial tribunal erred in law and fact by failure to consider that the appellant was represented*

by advocate, and non-appearance for one days could not amount to dismissal of the application without considering regulation 13(2) of GN. No. 174 of 2023. (sic)

5. That the trial tribunal erred in law and fact by entering the decision contrary to section 23(1) and (2) and section 24 of the Lands Disputes Courts Act Cap. 216 R:E 2019 (sic) ...."

The appeal was argued by way of written submissions. The appellant argued the appeal through **Mr. Alex Enock**, Advocate while the 1st respondent enjoyed the service of **Ms. Neema Munuo**, learned advocate. It should be noted that the 2nd and 3rd respondents never appeared despite being duly served. The hearing of this matter proceeded in their absence.

Let me start with ground one of the appeal that the trial Tribunal erred in law in dismissing the appeal with costs while the matter was heard *exparte*. The contention of the appellant is that since the application was heard *exparte*, it was unjustifiable to award costs to the respondents who did not appear on the hearing date.

In response thereto, the counsel for the 1st respondent stated that the chairman was right in awarding costs because costs do follow events.

In ascertaining whether or not the trial Tribunal was right in awarding costs, I opted to revisit the Proceedings in Misc. Application No. 314 of 2022 and found that the 1st Respondent filed counter affidavit. The 1st Respondent also attended the matter on 13/03/2023, 03/04/2023 and 24/05/2023, save for 22/06/2023 when the matter was heard. The 1st respondent also attended the matter on 18/07/2023 when ruling was delivered. I am of the firm view that filing counter affidavit and attending the matter in the aforesaid dates are the events which entitle the 1st respondent for reimbursement of costs incurred as the result of attending and defending Misc. Application No. 314 of 2022.

The failure of the 1st respondent to attend the matter on the hearing date does not relinquish the 1st respondent's right to be reimbursed costs incurred in other events. Of course, awarding costs in civil proceedings is the discretion of the court and that costs would usually follow the events as was held by the Court of Appeal of Tanzania in **Mohamed Salmini vs Jumanne Omary Mapesa**, Civil Application No. 04 of 2014. In the impugned ruling, the respondents though they were not heard, they emerged winners. Therefore, they were entitled for costs as it was held by the Court of Appeal of Tanzania in **Registered Trustee of Roman**

Catholic Archdiocese of Dar es Salaam vs Sophia Kamani, Civil Appeal No. 158 of 2015 thus:

> *"It is well known principle that a winner is entitled to cost unless there are exceptional circumstances which were shown to exist."*

The 2nd and 3rd grounds of appeal were argued jointly by the appellant. The counsel for the appellant argued that the trial Chairman, when determining Misc. Application No. 314 of 2022, did not take into account that on the date Misc. Application No. 465 of 2021 was dismissed, the respondent did not object the notice for adjournment and that the notice requested the hearing be at 14:30 hours.

In reply thereto, the learned counsel for the 1st respondent contended that the trial Chairperson was justified to dismiss Misc. Application No. 465/2021 because on the material date the applicant's advocate did not show proof of him being attending another matter in the High Court.

I have revisited the proceedings of 3rd August 2022 in Misc. Application No. 465 of 2021 and found the same reading as follows:

> *"M/kiti J. Sillas*
> *Wajumbe 1*

Mleta Maombi: Hayupo

Wajubu Maombi 1. Wakili Neema Munuo

2. } *Hawapo*

3. }

k/b. Edith Sanga

Wakili

Neema Munuo:

- *Shauri limekuja kusikilizwa na Mdai hayupo. Nimeona barua ya Wakili wake lakini hakuna uthibitisho alioambatanisha (cause list & summons) kuonyesha kweli yupo Mahakama Kuu.*
- *Ni sharti la Kisheria kwamba kama wakili yupo Mahakama Kuu anapaswa kuleta cause list au summons ambayo hatuioni hapa.*
- *Hivyo basi tunaomba shauri lifutwe chini ya Kanuni ya 11(1) (b) ya sura ya 216 kwa gharama.*

Sgd: J. SILAS

M/KITI

3/8/2022

AMRI

Shauri limefutwa chini ya Kanuni ya 11(1)(b) sura ya 216

Wadaiwa walipe gharama

Ndivyo illivyo amriwa.

Sgn: J. SILLAS

M/KITI

3/8/2022"

The proceedings reproduced herein above show clearly that the counsel for the 1st respondent is the one who moved the trial Tribunal to dismiss the said application for restoration of the main suit. On the fateful date, neither the applicant nor the advocate who appeared before the Tribunal. The applicant's advocate lodged a letter of adjournment without attaching to it a cause list or summons related to the case which he was attending in the High Court. I am of the firm view that the trial Chairman was justified to refuse restoration because under Regulation 13 (3) of the Land Disputes Court (the District Land and Housing Tribunal) Regulations G.N. 174/2003, it provides thus:

> *"where a party's advocate is absent for the reason of attending the proceedings in the High Court or Court of Appeal, the* ***Tribunal shall not believe any other evidence as a proof of being in the superior courts other than producing summons to the advocate and cause list from such courts".*** [Emphasis added]

It is my firm view that, the notice for adjournment could not be considered in the absence of the cause list and summons to the advocate to

attend a matter in the High Court as was alleged. Failure to fulfill the requirements of Reg. 13(3) of GN 174/2003 by the advocate of the applicant implied that he desired the consequences thereof.

It should also be noted that a notice for request for adjournment of a matter is a mere prayer for adjournment just in a form of a letter. The prayer/request can be granted or denied subject to the discretion of the court or Tribunal depending on the prevailing circumstances. Therefore, the advocate who lodges notice requesting for adjournment of proceedings should also bare in mind that the court/Tribunal may refuse the request. When the request is refused, there must be a mitigating measures such as the presence of a party in person before the court. In this case, the learned advocate lodged a notice or request for adjournment and the applicant also opted not to appear perhaps, relying on the notice. In my opinion, this was a disrespect to the Tribunal and amounted to carelessness of the highest grade.

I have also noted the assertion of the appellant's advocate that he was ready to proceed around 14:30 hours. Apart from what already said, the learned advocate was trying to grabbed authority of the court by fixing time contrary to the time which the Tribunal had already fixed. Parties are bound

to respect orders of court, failure so to do must be prepared for the consequences thereof.

From the foregoing, I find no merits in the 2nd and 3rd grounds of the appeal. They are bound to fail.

Let me now turn to the 4th ground of appeal. In this ground, the appellant is blaming the trial chairperson for failure to consider that the Appellant was represented by an advocate and that the non-appearance for one day would not amount for the dismissal of the application by virtue of Reg. 13(2) of GN. No. 174 of 2003. In response to the 4th ground of appeal, the 1st respondent argued that the trial Tribunal was right because there was no proof of the advocate being appearing in the High Court or Court of Appeal.

I have perused the records of the trial tribunal and found that the applications were dismissed under Regulation 11(1)(b) of GN No. 174 of 2003 on account of non-appearance of the Applicant. I have noted that on the fateful date, neither the applicant nor his advocate who was present before the Tribunal. Regulation 13 of the Land Disputes Court (the District Land and Housing Tribunal) Regulations, GN. No. 174 of 2003, applies in the

circumstance where a party to the proceedings who has an advocate, appears before the Tribunal without the presence of such advocate. It provides thus:

> *"13(1) The parties to the proceedings may during the hearing of proceedings be represented by an advocate or any other representative.*
>
> *(2) where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of* ***Appeal the Tribunal may require the party to proceed himself an if he refuses without*** *good cause to lead the evidence to establish his case, the Tribunal may make an order that the application be dismissed....."* [Emphasis added]

In present case the applicant and his advocate were absent that the Tribunal could not evoke regulation 13(2) of GN. No. 174 of 2003. I am holding so because the application of the above cited provision presupposes the presence of a party in person, as the Tribunal may require him to proceed himself in the absence of his advocate. In other words, the application of Regulation 13(2) of GN No. 174/2003 is when the party (applicant) appears but his advocate does not. Where both, the advocate and the party to the

proceedings fail to appear on the date fixed for hearing, then, the proper provision is Regulation 11 of GN. No. 174 of 2003. In the instant case, the trial Chairman properly applied Regulation 11(1) (b) of GN. No. 174 of 2003 to dismiss the application. From the foregoing, I find no merits in ground 4 of the Appeal.

In the 5th ground of appeal, the Appellant blames the trial Tribunal for entering the decision contrary to section 23(1), (2) and 24 of the Land Dispute Courts Act [Cap 216 R.E 2019]. In his argument to support this ground, the learned advocate for the appellant asserted that in determining the application for restoration of Misc. Application No. 465 of 2021, the Tribunal was not properly constituted as there was no assessors. He also argued that the Chairman did not consider the opinion of the assessors in his ruling. He urged the court to quash the said ruling. On his part, the counsel for the 1st respondent was of the view that applications for restoration falls in the category of matters of law and thus assessors cannot be involved.

I am at one with the counsel for both parties that the impugned proceedings and ruling are for restoration of Misc. Application No. 465 of

2021. The question is whether the chairman was bound to sit with assessors and consider their opinion before composing his ruling.

I am aware that under Reg. 22 of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN. No. 174 of 2003; the Chairman has special powers. It provides thus:

> *"22. The chairman shall have powers to determine: -*
>
> *(a) Preliminary objections based on points of laws;*
> *(b) Applications for execution or orders and decrees;*
> *(c) Objections arising out of execution of orders and decrees;*
> *(d)* **Interlocutory application***;....."* [Emphasis added]

The above provisions envisages that the chairman does not need the aid of assessors when he sits to determine, Preliminary Objections based on points of laws, applications for execution, objection proceedings and interlocutory applications. The question that arises is whether applications for restoration of a case fall within the special powers of the chairman.

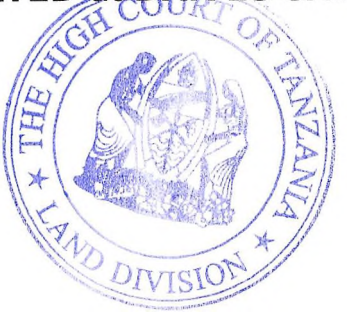
The answer is straight forward that applications for restoration are interlocutory because they are normally made in an intermediate stage between the commencement and conclusion of the cause of action.

Applications for restoration of a case are interlocutory because they can provide temporary provisional or final decision. When the application for restoration of a suit/case is granted the order becomes provisional in regard to the restored case and when the application for restoration is dismissed it will have the effect of final determination of the dismissed case.

From the explanation aforesaid, the application for restoration of Misc. Application for restoration of Misc. Application No. 465 of 2021, was an interlocutory application falling squarely under Regulation 22 (d) of GN. No. 174 of 2023. The trial Chairman did not require to sit with assessors or procure their opinion. I find no merits in the 5th ground of appeal.

In the final analysis, I find all grounds of appeal to have failed. There is no option other than dismissing the entire appeal. Appeal is hereby dismissed with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 24th October, 2023.



L. HEMED

JUDGE