

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 294 OF 2023

(Arising from Miscellaneous Land Application No. 626 of 2022)

RASHID HAMIS (ADMINISTRATOR OF

THE ESTATE OF MARIAM MOHAMEDAPPELLANT

VERSUS

MARIAM ALLY MCHEMBA RESPONDENT

Date of last order: 07/11/2023

Date of Judgment: 17/11/2023

JUDGMENT

A. MSAFIRI, J

In this appeal the appellant was aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (herein the District Tribunal) in Land Application No. 626 of 2022 delivered on 16.06.2023 before R. Mbilinyi Chairperson.

On the said Application the District Tribunal's decision was in favour of the respondent, hence, this appeal.

The appellant has paraded six grounds of appeal as follows;-

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1. *That the learned trial Chairperson erred in law and fact for failure to scrutinize and analyse the evidence on record, paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Affidavit of Rashid Hamis.*
2. *That, the learned trial Chairperson erred in law and fact for failure to analyse the evidence of the irregularity and illegality for the dismissal for want of prosecution order was given while the Appellant's counsel was attending the matter in the High Court of Tanzania and summons was tendered to the Honourable Tribunal.*
3. *That the learned trial Chairperson erred in law and fact for failure raising issues of failure to file an appeal and reaching decision thereon without affording parties right to be heard.*
4. *That the trial Chairman erred in law and in fact by holding that the Applicant failed to account for days of delay while the Applicant has accounted for in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 of the Affidavit of Rashid Hamis supporting the Application.*
5. *That the trial Chairman erred in law and fact by dismissing the Application for extension of time while Applicant unequivocally pointed out illegalities that are apparent on the face of record.*
6. *That the trial Chairman erred in law and in fact by failing to analyse evidence on record but rather relied solely on absence of parties' submissions hence reached the wrong and irregular decision.*

The appellant is praying for the appeal to be allowed and the setting aside of the Ruling and Drawn Order of the District Tribunal in Misc. Application No. 626 of 2022.

The brief background of this appeal is that the appellant having been dissatisfied with the decision of Mabibo Ward Tribunal in Shauri UWC/MWT/028/2020, he sought for the order of revision of that decision at the District Tribunal for Kinondoni in Application No. 794 of 2021. On

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21/3/2022, the Application for revision was scheduled to be heard by way of written submissions starting by the appellant who was then the applicant. The appellant failed to file his submission in chief on time as a result the District Tribunal dismissed his case for failure to file his written submission. The appellant aggrieved by that decision, filed Application No. 626 of 2022 before the same District Tribunal seeking for an extension of time to file an Application to set aside the dismissal order in Application No.794 of 2021. The District Tribunal found that the applicant failed to account for each day of delay and dismissed the Misc. Application with costs. The appellant was not happy about that decision hence he has lodged this current appeal.

The hearing of the appeal was by way of written submissions, whereas, the appellant was represented by Mr. Kelvin Kidifu, learned advocate while the respondent was represented by Mr. Zawadi Beatus Lupelo, learned advocate.

Mr. Kidifu in arguing grounds of appeal opted to consolidate the 1st, 2nd, 4th and 5th grounds of appeal into one ground of appeal that there were irregularities in dismissing Misc. Application No. 626 of 2022. That the trial Chairperson erred in law and fact for failure to analyse evidence of the irregularity and illegality for the order of dismissal for want of

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prosecution was given while the counsel for the appellant was attending the matter in the High Court and summons were tendered to the Tribunal.

He added that if the trial Chairperson had scrutinised and analysed evidence on record, he would have noted that when the order was made to hear the Application No. 794 of 2021, the appellant had a service of his advocate and the same was not given right to be heard as to why he had failed to file those submissions.


Furthermore, the counsel for the appellant argued that the applicant had accounted for each day of delay as per paragraphs 2,3,4,5,6,7,8,9,10,11,12,13,14,15 of the affidavit of Rashid Hamis. He said that basing on that, the act of District Tribunal was contrary to Regulation 13(3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003.

On the 3rd ground, Mr. Kidifu stated that the parties were not afforded their right to be heard for reasons that the District Tribunal raised an issue on the appellant's failure to challenge the Ward Tribunal decision by way of appeal while the District Tribunal was aware that the applicant had timely filed an Application for revision and it was dismissed for purportedly want of prosecution. That the District Tribunal was obliged to call for the parties before it and afford them the right to be heard. *Alls*

On the 6th ground, Mr. Kidifu contended that failure of the applicant to submit the written submission in support of the affidavit in Application No. 794 of 2021 is not fatal and that it does not amount to nonappearance because having filed the affidavit in support of the Application, the trial Tribunal was furnished with evidence enough to determine the merit of the said Application in absence of written submission.

He prayed for the appeal to be allowed and the ruling and drawn order in Land Application No. 626 of 2022 be set aside.

On reply, Mr. Lupelo, learned counsel started by stating that the Application by the appellant was for extension of time to restore Misc. Land Application No. 794 of 2021 which was challenging by way of revision, the decision of Mabibo Ward Tribunal in Shauri UWC/MWT/028/2020. However he added that even if the extension was granted, the execution of the decision of the Ward Tribunal had already been done hence, the Application was overtaken by events.

On grounds of appeal No. 2,3 and 5, the counsel for the respondent submitted that the appellant is faulting the decision of the District Tribunal for failure to consider the grounds of irregularity and illegality as the appellant was not afforded the right to be heard before Misc. Application No.794 of 2021. 

He argued that the Application No. 794/2021 was dismissed for want of prosecution and not because of the non-appearance of the Appellant's advocate as alleged.

He submitted that the applicant in the District Tribunal was to file the written submission by 04/04/2022 failure of which amounted to failure to prosecute. He added that the said Application was dismissed on 16/06/2023. To bolster the point above the counsel for the respondent cited the case of **Hamis Mwingi & Sauda Seleman vs. Aisha Akbar Chopra** Misc. Land Application No. 704 of 2021 where the High Court held that failure to file written submission is tantamount to failure to appear before the court on date set for hearing.

The counsel stated that Regulation 11(1) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides that where the applicant is absent without good cause on the date of hearing and had received notice of hearing or was present when the date of hearing was fixed, the Tribunal is bound to dismiss the Application for non-appearance. That the only remedy is for the party to make Application to set aside the dismissal order.

On the grounds No. 1,4, and 6 which the respondent has decided to consolidate and argue them jointly, Mr Lupelo contended that the

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appellant had failed to account for each day of delay whereby he had applied for extension of time to set aside the dismissal order on 17/11/2022 almost five months after the dismissal order was delivered on 20/6/2022.

He said that the claim that the appellant was ill did not show that the appellant was ill for all five months. In addition, he pointed that the medical chit dated 20th, 22nd, and 30th of April, 2022 when the appellant had attended the hospital cannot hold water because it shows that it was before the dismissal order.

The counsel prayed for the Court to dismiss the appeal with costs for being devoid of merits.

In rejoinder, Mr Kidifu contended that, this appeal or subsequent orders are not overtaken by events as claimed by the respondent. That the fact that the execution has been affected does not deny the appellant the right to challenge the impugned decision of the Ward Tribunal which is tainted with illegalities and irregularities. He reiterated his submissions in chief and prayers.

Having gone through the rival submission of the parties and the impugned decision which is attached on record, it appears that the appellant chose to argue the grounds of appeal by consolidating them into

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three grounds of appeal instead of six, hence I will follow that stance although it seems the respondent did not follow the mode of the appellant and decided to group the grounds of appeal in the other way. However, since the issues in contention are the same, I believe that consolidating the grounds of appeal in three grounds cannot in any way prejudice the parties to this appeal.

The issue for determination is whether this appeal is meritorious.

Starting with the first consolidated ground, the appellant has a combination of reasons for wanting this Court to set aside the impugned decision. First, that there was an order to hear Misc. Application No. 794/2021 by way of written submission, but the trial Tribunal dismissed the matter while the counsel for the appellant was attending the matter in the High Court and that the said advocate was not given right to be heard as to why he has failed to file the submissions on time.

Basing on that claim, I have read the trial Tribunal's proceedings in Misc. Application No 794/2021. It is on record that on 21/3/2022 the counsel for the applicant then Mr Ole Mkulago prayed for the Application to be disposed of by written submissions. The prayer was granted by the trial Tribunal which set the schedule as follows; that the applicant to file submission on 04/4/2022, the reply by the respondent to be filed on

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19/4/2022 and the rejoinder by the applicant to be filed on 27/4/2022. The matter was set for mention on 11/5/2022.

On 11/5/2022, both parties were absent in court. The District Tribunal set the matter again for mention on 20/6/2022. Again neither the applicant nor his advocate were present in court. The respondent's advocate Mr Kadata informed the District Tribunal that the counsel for the applicant was appearing before the High Court and produced summons proving that. However, Mr Kadata urged the Tribunal to dismiss the Application for want of prosecution for reason that the applicant was required to file his submissions in chief so that the respondent could file their reply as per the schedule order but the applicant until that time has failed to file his submission.

Following that prayer by the counsel for the respondent, the trial Tribunal dismissed the Application on that date 20/6/2022.

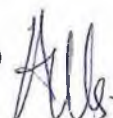
Having read the proceedings, I am satisfied that there was no irregularity or illegality in the decision of the District Tribunal to dismiss the Application. As the counsel for respondent has correctly submitted, the Application was not dismissed because the applicant's advocate was not present in court. But it was for the reason that the applicant has failed to comply with the Tribunal's schedule of filing the submission in chief



within the scheduled time. The counsel was present in court when the schedule was set and in fact it was he, the counsel for the applicant who prayed for the hearing of the matter by way of written submission. The submission in chief was to be filed by 04/4/2022 but until 20/6/2022, the applicant has not filed the said submission.

I disassociate myself from Mr Kidifu's view in the submission that the filing of the affidavit supporting the Application was enough and the trial Tribunal should have proceeded to decide the matter basing on the affidavit. I agree that the affidavit is evidence but it is the court's procedure that the applications should be argued either orally or by written submission in support of the contents of the Application. Besides that, the Tribunal has already issued order of hearing and it was the obligation of the applicant to comply with the order and file submissions to prosecute his case. I am in agreement by the persuasive case of **Hamis Mwingi & Sauda Seleman vs. Asha Akbar Chopra (supra)** by this Court that failure to file written submission is tantamount to non-appearance on the date of hearing.

Furthermore on the advocate's right to be heard on the reason why he did not file the submission on time, it is my view that the advocate was twice given the right to be heard and explain the reason for failing to



comply with the Tribunal's order but failed to do so. The two times are on 11/5/2022 when the matter was set for mention. The Tribunal set that date purposefully to see whether the submissions has been completed but the applicant or his advocate did not appear on that date. The matter was set again on 20/6/2022. Also neither the appellant nor his advocate entered appearance in court. So if the appellant or his counsel could have appeared in those two times, then they could have given reasons on their failure to file written submission on time. Hence the appellant cannot claim that he was not accorded the right to be heard. I believe that the right to be heard goes along with the obligation to comply with the court's orders in which the appellant failed to comply with hence the Application was rightly dismissed.

Second, the applicant has claimed that, the trial Chairperson erred in holding that the applicant has failed to account for days of delay. And that the evidence on Application was in the affidavit of the appellant who was then the applicant.

I have read the affidavit of the appellant who was then the applicant in Misc. Application No.626/2022 where he was praying for the order to set aside the dismissal order in Misc. Application No. 794/2021. At paragraph 5 of his affidavit, the applicant stated that he engaged an

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advocate to represent him in the District Tribunal and that he fell sick in periods of 20/4/2022 which he had to attend to hospital. That he went to another, second, private hospital and was subjected to another treatment from 20/6/2022 on ward to the date he was making the affidavit.

At paragraph 12 of his affidavit, the applicant said further that the dismissal order was requested on 09/11/2022 and was availed on 11/11/2022, the Application was prepared and on 15/11/2022 it was lodged without delay.

However, it is on record that the dismissal order was entered on 20/06/2022 and the applicant requested for the impugned order on 09/11/2022 and it was availed to him on 11/11/2022. The impugned order was issued/delivered on 20/6/2022. The appellant did not account for the delay of about five (5) months from the date of dismissal order which was on 20/6/2022 to the date he purportedly requested for a copy of dismissal order and the same was availed to him on 11/11/2022. The applicant's affidavit is silent on those five months. What stopped the current appellant from getting the requisite copy of the order on time and file the application within the time?

In his affidavit, the applicant who is the current appellant has pleaded sickness. That on the period of 20/4/2022 he got sick and has to

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attend the hospital. That he was not better at the first hospital so he went to another hospital where he was subjected to treatment from 20/6/2022. This Court does not dispute the sickness of the appellant. But, the attached photocopies of the Medical Report shows that the appellant was attended on 20/4/ 2022. This was before the dismissal order. The second report shows that the appellant was attended on 17/8/2022. There is nothing to show that the appellant was being treated continuously from 20/6/2022 to November 2022 the date of filing the Application to set aside the dismissal order. Therefore it is my view that the appellant failed to account for each day of delay.

It is trite law that the applicant has to account for each day of delay. Hence all the period delayed has to be accounted for, as it was held in the case of **Bushiri Hassan vs. Latifa Mashayo**, Civil Application No. 3 of 2007, where it was stated that:-

"Delay even of a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken. "

In the cited case, the applicant failed to account for each day of delay hence the Application was dismissed.

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To sum up, it is my finding that this appeal lacks merit for reasons that first, the appellant have failed to establish the illegality and irregularities which were purportedly in Misc. Application in No. 794 of 2021 and Misc. Application No. 626 of 2022 both by the District Tribunal. Second, the appellant has failed to account for each day of delay in filing the Misc. Application No. 626 of 2022 from the date of dismissal of Misc. Application in No. 794 of 2021.

Basing on that, I hereby find that this appeal has no merit and it is dismissed with costs.

Order accordingly. Right of further appeal explained.



A. MSAFIRI

JUDGE

17/11/2023