

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 413 OF 2023

(Arising from Land Application No. 560 of 2020 in the District Land and Housing Tribunal for Kinondoni at Mwananyamala before Hon. Sillas, Chairperson).

DELTA AFRICA LIMITED..... APPELLANT

VERSUS

KARIM ALIBHAI T/A SHOPPERS PLAZA..... RESPONDENT

JUDGMENT

Date of last Order: 28/02/2024

Date of Ruling: 19/3/2024

A. MSAFIRI, J.

The appellant being dissatisfied with the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (the trial Tribunal) in Application No. 560 of 2020, has lodged this appeal advancing five grounds of appeal as follows;

- 1. The Honourable Chairman erred in law and facts when he proceeded with the hearing of the respondent's case in total violation of the right to be heard in that:*
 - i. The appellant was not given his right to be heard to defend the case.*
 - ii. There was no order for exparte proof warranting the Tribunal to compose judgment in absence of defense case.*

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2. *That the Honourable Chairman erred in law and facts when he admitted Exhibit P1 (Lease Agreement) despite having the appellant raised objections regarding non stamping in terms of the Stamp Duties Act, Cap 189 RE 2019.*
3. *That the Honourable Chairman erred in law and facts when he conducted the trial with two different set of assessors in total contravention of the law as the case started hearing with different set of assessors (Mbakileki and Kinyondo) and midway assessors changed to (Kulaba and Mbakileki) who heard the case and gave written opinion towards delivery of judgment.*
4. *That the Honourable Chairman erred in law and facts when he made judgment without assigning reasons.*
5. *That the Honourable Chairman erred in law and facts when considered extraneous matters not on record in holding that the appellant failed to prosecute his case.*

The appeal was heard orally and the appellant was represented by Mr. Daniel Ngudungi, learned advocate while the respondent had legal services of Mr. Sweetbert Festo, learned advocate.

I have considered their worthy submissions and I will analyse them as I determine the grounds of appeal. I will determine the 1st and 5th grounds of appeal jointly as they are on the same issue. In these, the appellant is claiming she was denied her right to be heard to defend the case against her before the trial Tribunal and that there was no order for exparte proof warranting the trial Tribunal to proceed exparte. *Alle-*

Mr Ngudungi argued that on 28/3/2023 the matter was set to be heard before the Tribunal. That the appellant had sent on that date, a notice of absence that his advocate was attending High Court proceedings at Commercial Division but the adjournment prayer was refused by the Tribunal. That the Tribunal decided to proceed with the hearing of the matter. That after hearing where one witness testified and three exhibits were received, the applicant prayed for judgment in favour of applicant.

That the Tribunal then proceeded to order for the assessors' opinion to be delivered and after that the judgment date was pronounced. Mr. Ngudungi argued that the trial Tribunal never entered an ex-parte order against the appellant who was by then the respondent.

The counsel submitted further on 5th ground that the statement of page 2 of the impugned judgment is not reflected in the proceedings and hence the Chairperson erred when he considered extraneous matters which were not in record. He prayed to the court to nullify the proceedings and the judgment and order for retrial.

In reply, Mr Festo submitted that on the 1st ground that it is the appellant and his advocate who denied themselves the right to be heard for their failure to appear before the Tribunal. He said that on 20/3/2023 when the matter was fixed for hearing to be conducted on 28/3/2023, the appellant

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was present, hence failure to appear on 28/3/2023 cannot be termed as denying the appellant the right to be heard.

The counsel emphasized that according to Rule 13(3) of the Land Disputes Regulations, G.N No 174 of 2003, the Tribunal cannot believe the notice of the advocate attending the higher courts without presenting summons as proof. That there was no proof of summons that the appellant advocate was attending High Court hence the Tribunal was right to proceed exparte.

Mr Festo added further that after judgment was delivered, the applicant was supposed to file an application to set aside the exparte judgment as provided under Regulation 11(2) of the Land Disputes Regulations, 2003 but did not do so.

On the 5th ground, Mr. Festo conceded to the claim and submission by the counsel for the appellant that there was extraneous facts at paragraph 3 of the judgment which was not part of the proceedings during the trial and prayed for the appeal to be allowed with no order as to the costs.

The counsel for the appellant mostly reiterated his submissions and prayers.

I have read carefully the proceedings of the trial Tribunal where the appellant was a respondent and the respondent was an applicant. The *Alle*.

proceedings show that the hearing of the application commenced on 12/4/2022 where the first witness of the applicant started to give her evidence as PW1. On that date, both parties were being represented by their respective advocates. PW1 did not finish her testimony on that date hence the matter was adjourned several times to diverse dates until on 28/3/2023 when it was set for hearing on that date.

On that date, neither the respondent nor his advocate were in attendance in court. However, there was Advocate Bernadeta Fabian who appeared holding brief for Advocate Mbudungi, the counsel for the respondent. Ms. Fabian informed the court that she was holding brief with no instructions to proceed and that Mr Mbudungi was appearing before the High Court Commercial Division on that date. Ms Fabian prayed for adjournment.

However the prayer for adjournment was vehemently contested by Mr Festo, advocate for the applicant who prayed to proceed with the hearing. The Tribunal then gave an order where it agrees with the prayer to proceed with hearing. The hearing proceeded and the witness PW1 continued with giving her evidence in court and tendered some exhibits which were admitted in Tribunal as exhibits. After that the applicant prayed to close their case whereby the Tribunal proceeded to issue an order of submission

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of assessors' opinion on 17/4/2023 and later the judgment was delivered on 03/8/2023.

Regulation 11(1) (c) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides that;

(1) On the date the application is set for hearing, the Tribunal shall:-

*(c) where the respondent is absent and was duly served with the notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, **proceed to hear and determine the matter ex-parte by oral evidence**". (emphasis added).*

By the contents of the above Regulation, the Tribunal was to proceed ex-parte in the current dispute after the respondent has failed to appear on the date of hearing. However, after the Tribunal have granted the applicant's prayer to proceed to adduce evidence, there was no order from the Tribunal that the hearing shall now proceed ex-parte against the respondent. The Tribunal just proceed to hear evidence of the applicant side until the case of the applicant was closed. Even the judgment which was later delivered by the Tribunal did not reveal that it is the ex-parte judgment.

The counsel for the respondent argued that the appellant was supposed to file an application to set aside the ex-parte order. However how could

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the appellant do that while the said exparte order was never entered by the Tribunal?

The trial Chairperson even went further to state that after the applicant have finished to give his evidence, the respondent was summoned to defend but she avoided/evade to do so. This was extraneous as the proceedings does not show that there was any time the respondent avoided to defend his case when he was summoned. What happened is that the counsel for the appellant was absent and informed the court about his absence through an advocate who was holding his brief.

This also determine the 5th ground of appeal that there was an extraneous matter in the judgment which were added by the trial Chairperson, which were not part of the proceedings but the Chairperson considered them and decided in favour or the respondent. The counsel for the respondent has also admitted on this gross irregularity committed by the trial Chairperson in the course of composing the judgment.

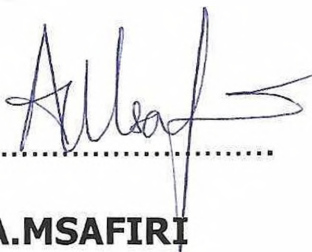
With due respect, the trial Chairperson erred and his actions have prejudiced the rights of the parties particularly the appellant.

In the circumstances, I find that the 1st and 5th grounds of appeal have merit and since they suffice to dispose of this appeal, I will not go into determination of other grounds of appeal. *Alle.*

I hereby allow the appeal, quash and set aside the proceedings, judgment and decree of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Application No. 560 of 2020 and order for retrial before another Chairman/Chairperson. I remit this case file and the proceedings to the said Tribunal for commencement of a fresh trial as expeditiously as possible.

Each party to bear its own costs as the irregularities were not caused by the parties.

It is so ordered.

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

A.MSAFIRI

JUDGE

19/3/2024