IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 26182 OF 2023

(Originating from Misc. Application No. 119 of 2023, Ilala District Land and Housing Tribunal)

KISANDUKU OMARY SALEHE.....APPELLANT

VERSUS

BARAKA JULIUS MTITU.....RESPONDENT

JUDGMENT

20th to 27th March, 2024

E.B. LUVANDA, J

In the memorandum of appeal, the Appellant named above raised two grounds of appeal challenging the decision of the Tribunal which disallowed his application for extension of time to set aside the Tribunal's ex parte judgment dated 23/01/2023 in Application No. 190 of 2020. The grounds of appeal are: One, the trial Tribunal grossly misdirected itself in fact and law on the questionof burden of proof and thus entered erroneous and unjust decision; Two, the trial Tribunal erred in law and fact for entertaining the matter with serious irregularities and illegalities.

Mr. M.R. Kiondo learned Counsel for Appellant abandoned ground number one and argued ground number two alone. He submitted that Application No. 190 of 2020 deteremined by Honorable Kirumbi it was against the rules of natural justice that the Chairperson to determine application (Misc. Application No. 119 of 2023) against his previous decision. He submitted that Misc. Application No. 119 of 2023 was on Application No. 190 of 2020, argued to his astonishment the Chairperson relied on the records of Application No. 33 of 2022 to determine Misc. Application No. 119 of 2023, citing page 4 of the impugned ruling. He submitted that the Chairperson failed to comply with regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN 174 of 2003 and section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 of 2019, on the requirement of sitting with assessors and giving their opinion. He cited Dora Twisa Mwakikosa vs Anamary Twisa Mwakikosa, Civil Appeal No. 129 of 2019. He submitted that the irregularities are fatal.

The Respondent did not file a reply.

Actually, the learned Counsel for Appellant is missing a point. The provisions of section 23(2) Cap 216 and rule 19(1) and (2) which make cross reference to rule 14 of GN 174 of 2003, they are meant when the chairperson is judging on the merit of the application. Both the provision make mention to the judgment. Herein the Chairperson was entertaining an application for extension of time

made under the enabling provisions of section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019. Subsection (2) of section 14 Cap 89 (supra) make clearly that the provisions of subsection (1) is applicable to miscellaneous application. Indeed what was before the Chairperson was a mere miscellaneous application for extension of time to set aside the exparte judgment. The end product the Chairperson delivered a ruling and not a judgment. The provisions cited by the learned Counsel for Appellant both make reference to the effects that the Tribunal shall be properly constituted when the Chairperson sit with assessors and give their opinion before the Chairman reaches the judgment. A ruling is not a judgment for all purpose and intent. Therefore I hold a view that the applicability of the provisions of section 23(2) and rule 19(1) and (2) are limited to the situation or in the event when the Chairperson reaches or is delivering a Tribunal's judgment.

The learned Counsel also faulted the Chairperson for what alleged to have acted against the rules of natural justice that the Chairperson to determine application (Misc. Application No. 119 of 2023) against his previous decision and for relying on the records of Application No. 33 of 2022 to determine Misc. Application No. 119 of 2023.

Happily, the learned Counsel did not cite any rule to muscle up his argument. Rues for setting aside are well known and elementary that it is the same judicial

officer who have mandate to entertain the application and request for sitting aside its orders. Setting aside at this stage should not be confused with the appeal stage. For istance rule 11(3) GN 174 of 2003 (supra) provide categorically that the same Tribunal will have mandate to set aside its order. There is no mention of different Tribunal or Chairperson of the same ranks and hierarchy setting aside the orders of the other Tribunal or Chairperson. Entertaining the like argument will be setting dangerous precedents for other Chairperson embracing discontentment among judicial officers of the same ranks. For brevity, I reproduce regulation 11(2) of GN 174 of 2003, and I bold an area relevant to the point on discussion,

'A part (sic) to an application may where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), within 30 days apply to have the orders set aside, and **the Tribunal may set aside its orders** if it think fit so to do and in case of refusal appeal to the High Court'

Rule 9 of Order IX of the Civil Procedure Code, Cap 33 R.E. 2019, has a similar wording and is more elaborate,

'In any case in which a decree is passed ex parte against a defendant, **he may apply to the court by which the decree was passed for an order to set it aside**; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall

make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceedings with the suit'

To my respective view application to the same court cannot be deviated to mean to a different judicial officer who pronounced or made the order. This rule by analogy extends to an application for extension of time to set aside the ex parte judgment. However the matter ca be handled differently in the situation where the judicial officer who made the decision for one reason or another is prevented to attend the application.

Regrding a complaint that the learned Chairperson relied on the records of Application No. 33 of 2022 to determine Misc. Application No. 119 of 2023, the same is without substance. To my view, there is no way the learned Chairman could determine the application lodged by the Appellant without peeping ormaking reference in the main suit. This is for obvious reason that in the affidavit in support the Appellant failed even to mention the date alleged he failed to attend before the Tribunal, instead he left it blank without mentioning a date or month, only inserted the year 2022. Secondly in the said affidavit no single reason was advanced as to why the Appellant delayed to lodge the application for extension of time within thrity days stipulated in the law. Instead the Appellant dwelled mich explaining on the merit of the intended application

for setting aside and explaining as to why he did not attend on the date which culminated into an impugned order for exparte proof. Indeed, in the ex parte judgment depict the Counsel for Appellant was on attendance.

Therefore the Tribunal was justified to rule that the Appellant failed to show sufficient cause which precluded him to take essential steps to challenge the ex-parte judgment within time.

The appeal is dismissed with costs.

E.B. LUVANDA
JUDGE
27/03/2024

Judgment delivered in the presence of the Appellant and the Respondent.

E.B. LUVANDA
JUDGE
27/03/2024