

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 28246 OF 2023

(Arising from Misc. Land Application No. 147 of 2023 and emanating from Land Application No. 317 of 2019 at District Land and Housing Tribunal for Temeke)

JOACHIM GERION MMUYA.....1ST APPELLANT

MARIAM DANSTAN HAULE.....2ND APPELLANT

VERSUS

ACCESS BANK TANZANIA LTD.....1ST RESPONDENT

KOTI BROTHERS COMPANY LTD.....2ND RESPONDENT

MICHAEL BENSON MAHENGHE.....3RD RESPONDENT

GODLIVER JOSEPH RULANGWA.....4TH RESPONDENT

JUDGEMENT

Date of Last Order: 17/05/2024

Date of Judgement: 30/05/2024

MWAIPOPO, J

This is an appeal filed by Joachiam Gerion Mmuya and Mariam Dastan Haule, hereinafter referred to as the first and second Appellants, against Access Bank Tanzania Ltd, Koti Brothers Company Ltd, Michael Benson

Mahenge and Godliver Joseph Rulangwa hereinafter to be referred to as the 1st, 2nd 3rd and 4th Respondents.

The appeal emanated from Miscellaneous Land Application No. 147/2023 arising from Land Application no. 317/2019 whose decision was entered exparte against the Respondent on 24th January 2023. Following the delivery of the exparte Judgment in Land Application No. 317/2019, the 1st Respondent, being aggrieved by the said decision, filed application No.147/2023 for extension of time to set aside the exparte Judgement in its said case. After its hearing, the Tribunal (Hon. Rugarabamu) delivered its decision in favour of the 1st Respondent herein, granting it extension of time to file an Application to set aside the exparte Judgement in Land Application No. 317/2019. The said decision was delivered on 7th November 2023. The Tribunal granted the decision based on the reason that; the 1st Respondent was not served with summons/notification of the Judgement date hence it delayed to file an application for setting aside the exparte Judgement. Aggrieved by the said decision, the Appellants herein have preferred this Appeal containing the following 4 grounds of appeal;

1. That while the 1st Respondent was present not only during the Tribunal exparte hearing but also during delivery of the exparte Judgement on 24/1/2023 the Land Tribunal Chairperson fumbled, erred in fact and law and misdirected himself to grant application for extension of time on account that the Tribunal ought to issue summons to the Respondent while in fact they were present.

2. That the learned Chairperson erred in fact and law to hold as he did that failure to save the Respondent was illegality sufficient for it to grant the Respondent extension of time without regard to respondent failure to account for reasons for each day of delay days.
3. That the learned chairperson erred in fact and law to hold that the respondent was not aware of the Judgement up to the time it was served with the application for execution dated (sic) while in fact that they were fully aware of the Judgement and fully participated in the Bill of Costs proceeding (i.e. Misc. Application No. 65/2023) which on 15th March 2023 was determined.
4. The 1st Respondent had no good reason to apply for extension of time and if at all wanted to challenge for exparte order he could do so since 29th November 2022 without waiting for Judgement date. The 1st Respondent chose not to act against Ex-parte order to date. The Judgement copies were relevant only to challenge the Ruling and order against it and not otherwise as it was ruled by F.W.Mgaya Judge on 5/11/2014 in Misc. Land Appeal No. 23 of 2024 at the High Court Tanzania Land Division between Mbelwa Justine Vs. Joachiam Mmuya that; before writting this Judgment, upon perusal of the appellate tribunals records I find that this appeal is hopelessly time barred. I say so because the record of the District Land and Housing Tribunal shows that the judgement was delivered on 4/10/2023, and this appeal was filed before this

court on 6/3/2024. Section 38 (1) of the Land Disputed Courts Act Cap. 216 R.E 2002 clearly provides that, I quote

"38 (1) Any party who is aggrieved by decision or order of the District Land Housing Tribunal in the exercise of its appellate or revision jurisdiction, may within sixty days after the date of the decision or order, appeal to the High court (Land Division)."

From the above provision it is very clear that the appellant herein filed this appeal on 6/3/2014 against the decision of the District Land and Housing Tribunal, which was delivered on 4/10/2023. This appeal is filed after the elapse of 150 days, which is hopelessly out of the prescribed time by the law and therefore the appeal is hopelessly time barred. In this circumstance, I need not go into the merits of this appeal as this court has no jurisdiction to hear and determine this appeal for being time barred. Hence the Respondents were satisfied with the expert judgement and choose to forego any possibility of setting aside the same for almost 180 days,

Thus, the Appellants prayed for the appeal to be allowed by quashing the Ruling and setting aside orders made therefrom with costs.

The hearing of the Appeal proceeded by way of written submissions, pursuant to the time table issued by the court. At the commencement of hearing the Appellants were represented by learned advocate Deonatus Mutani, the 1st Respondent was enjoyed the services of learned advocate Violeth Mipawa. The 2nd, 3rd and Respondents never appeared in court

despite being served with the summons. Therefore, the appeal was argued exparte.

Arguing in support of the Appeal the 1st and 2nd Appellant submitted as follows;

Firstly, the Appellants began by dropping the 4th ground of Appeal, containing defects and anomalies.

Secondly, with regard to the 1st ground of appeal the learned counsel for the Appellants contended that it was wrong for the Chairperson to declare that non issuance of the summons to the 1st Respondent was a reason to grant the 1st Respondent extension of time to appeal while the 1st Respondent had been hopelessly time barred. The learned counsel contended that the 1st Respondent was very much aware of the schedule of hearing and determining the matter, as the Respondent was present and aware of every process up to the Judgement and beyond.

It was evident from the proceedings of the Hon. Tribunal dated 2nd November 2022 that, the 1st Respondent was present when the Hon. Chairperson issued orders that the matter was set for hearing on 29 November 2024 and Judgement on 24th January 2023. The 1st Respondent was duly represented earlier on when an order for exparte proof was made against the 2nd, 3rd and 4th Respondents who never bothered to file their defenses against the Appellants in their claim in the Land Application No. 317/2019. Surprisingly, on 29th November 2022, the 1st Respondent who was represented by advocate Amon Meja informed the court that he had no witnesses hence failing to comply with a previous court order. The Hon

Tribunal in turn, in the presence of the 1st Respondent advocate ordered for the exparte proof against the Respondents based on the prayer which was made by the Appellants and the 24th January 2023 was reconfirmed as the date for Judgement. On the 24th January 2023, the Judgment was delivered in the presence of the 1st Respondent. The learned counsel argued that, it looks like a puzzle as to why the Hon. Chairperson of the Tribunal chose to ignore this fact and state that the 1st Respondent was not aware of the Judgment. He contended that in the exparte Judgment which was delivered by Rugarabamu it was stated clearly that the same was delivered before learned Advocates Evans Rwekansa and Maranaseha Mbenyani representing Access Bank and learned advocate Elias Masinyi representing the Applicants/appellants and the right of appeal was explained. Therefore, it was obvious that they participated in the proceedings of the Tribunal till the Judgment date contrary to what was stated in the decision of Hon. Sillas. Therefore, he argued that the Respondents knew they had the right to appeal and the issuance of summons for exparte judgement has got nothing to do with the Respondents being utterly time barred. He prayed for the appeal to be allowed since the Chairperson erred in law.

With regard to the second ground of appeal the Appellants addressed the issue as to whether failure to serve the Notice of the exparte judgement would suffice as a reason for granting leave to the 1st Respondent to apply for extension of time to appeal. He humbly submitted that such failure would amount to the decision to set aside the exparte Judgment

and not the decision to allow the 1st Respondent to appeal out of time when they were hopelessly time barred. That since the Application for extension of time had to be backed up by reasons as to why the 1st Respondent failed to appeal in time. Therefore, he asserted that the Chairperson erred in law when he quoted the inaction of the court to give notice of the exparte Judgement to other respondents as a reason for failure to appeal on time. He asserted that the contested matter in this appeal is whether the illegalities in the trial Judgement if any, could result into allowance of extension of time to appeal out of time or allowance of extension of time to appeal was and is supposed to be out of reasons as to why there was a delay on the part of the 1st Respondents to appeal out of time.

With regard to the 3rd ground of appeal the Appellants submitted that the 1st Respondent was aware of the Judgement from the day it was delivered in court and that such knowledge cannot be entertained as a reason for the delay in appealing and hence would never suffice as a reason to seek allowance for the time barred appeal. The Appellants contended that it was wrong for the chairman to concoct information which was not found in the Tribunal proceedings when he made reference to the fact that the 1st Respondent was not served with summons and that he got the information concerning the Judgement at the stage of execution. He asserted that the 1st Respondent was aware of the Judgement since they were dully served with copies of the Judgement and participated on the Judgement day when it was being delivered on 4th January 2024 and were also participating in the execution proceedings. Further, the Appellants made correspondences

to the 1st Respondent regarding their Leseni ya Makazi TMK/036715 and attached copies of the Ruling. The Respondent received the said on 11 April 2023. However, with all these efforts they chose not to appeal within time. Therefore, the said Application for extension of time to appeal, was vexatious since it was made six months after the decision and 3 months after the Bill of Costs was filed. Therefore, the Appellants found it to be an insult to legal thinking. He referred the Court to the case of **James Kabalo Mapalal Vs British Broadcasting Corporation Civil Appeal No. 23 of 2001 TZCA 11, 11 November 2002** Reported where the Court of Appeal stated that an exparte Judgement could be set aside once it is proved that summons was not served to the Defendant. They contended that in the instant matter the 1st Respondent was aware of the Judgment date and he participated on the Judgment date and that failure to appeal is based on their own negligence. Therefore, he finally prayed for the appeal to be allowed.

Submitting in rebuttal, the learned counsel for the 1st Respondent began by giving a background of the matter in dispute and proceeded to submit that, upon perusal of the courts file after the Appellants herein served the 1st Respondent with an Application for execution, the 1st Respondent then realized that on the very same day i.e. 29th November 2022, upon pronouncing the matter to proceed exparte, the Appellants herein were heard and their testimony was marked closed on the same day and Judgment date was ordered to be on 24th January 2023. He contended that the Appellants were required as per the law to issue summons informing the Respondent on the date scheduled for exparte Judgement

but this was not the case. The Respondents were not aware of the Judgement date when the decision was delivered, without being served with summons. The Appellants' submissions stating that the 1st Respondent was present on the date the Judgement was delivered is highly misconceived and untrue. The trial chairperson before granting orders for extension of time went through the proceedings and realized that 1st Respondent was absent in the Tribunal the date the Judgement was delivered. The learned counsel contended that, the court can extend time under section 14 of the Law of Limitation Act Cap 89 RE 2019 and that extension of time is within the discretion of the court but it has to be exercised judiciously based on good reasons advanced by the Applicant. He argued that the Tribunal keenly elaborated that there was failure to issue summons to the 1st Respondent notifying them on the date scheduled to deliver the exparte Judgement hence leading to a procedural illegality, which is a good cause for extension of time. He cited the case of **Kalunga and Co. Advocates V National bank of Commerce 2006 TLR 235**. That the term good cause has never been defined and it is relative depending on the circumstances of each case. For their case the Trial Tribunal failed to issue them with summons notifying them on the delivery of the exparte Judgement, hence leading to a procedural illegality which is a good cause for extension of time. He cited the case of **VIP Engineering and Marketing Ltd and Two Others Vs. Citibank Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of the Court of Appeal of Tanzania** (unreported) as stated in the decision of Hon. Rugarabamu. The 1st Respondents emphasized that failure to serve them with Notice

made them delay to file an Application for setting aside the exparte judgement which was their first remedy and not appealing. They referred the court to the case of **Dangote Industries Ltd Tanzania Vs Warncom (T) Ltd Civil Appeal no. 13/2021** in which the cited case of **Jafari Sanya & another V Salehe Sadiq Othman** where it was stated that the jurisdiction to set aside the exparte judgement is conferred to the trial court exclusively it cannot be addressed by way of appeal. Therefore, the Appellants have misdirected themselves in stating that the 1st Respondent intend to lodge an appeal against the exparte Judgement which is not true. The 1st Respondent thus prayed for the Appeal to be dismissed with costs

In rejoinder the Appellants reiterated their submissions in chief.

Having gone through the rival submissions of the parties, the broad question to be addressed is whether the Appeal has merit. In doing so I will begin with the 1st and 2nd grounds of appeal, which are intertwined. The said grounds of appeal are to the effect that the Land Tribunal chairperson fumbled, erred in fact and law and misdirected himself to grant an Application for extension of time on account that the Tribunal ought to have issued summons to the Respondent while in fact they were present in the Tribunal when the decision was delivered and secondly whether the chairperson erred in law and in fact to hold that failure to serve the 1st Respondent was an illegality sufficient for the Tribunal to grant the 1st Respondent with extension of time, without regard to Respondent's failure to account for reasons for each day of delay.

The Appellants in their submission have argued that, the 1st Respondent was aware throughout the proceedings that the Tribunal had ordered for an exparte hearing and was present during the exparte hearing and also the date when the Judgment was delivered on 24th January 2022. The 1st Respondent on his part has contended that, they were not served with summons to appear on the date of Judgement and that the Tribunal rightly decided in their favour. That they knew about the decision at the time of execution.

In dealing with the grounds of appeal, I have gone through the proceedings and observed that the 1st and 2nd Appellants herein filed an application (Land Application) No. 317 of 2019 claiming against the 1st Respondent and others for an order discharging the Appellants as guarantors and Mortgagors of the suit property No. TMK 036715 of Joachim Gerion Mmuya (1st Appellant herein) situated at Kijichi Temeke Dar es Salaam, an order compelling the 3rd and 4th Respondents to secure and repay the loan issued by the 1st Respondent herein, general damages in the sum to be issued by the Tribunal, costs of the suit and any other reliefs.

When the matter was called for hearing on the 29th of November 2022 in the presence of both parties, the legal counsel for the 1st Respondent did attend before the Tribunal with the Principal officer of the 1st Respondent so that the application could be read to him. He thus prayed for the adjournment of the matter; however, the Trial chairperson ordered the matter to proceed exparte. In his long ruling delivered on that date the

Chairperson stated among other reasons, that the matter had been adjourned several times and the 1st Respondent was aware of the hearing date. I have further observed that there is nowhere in its ruling dated 29th November 2024, the 1st Respondent was ordered to leave the Tribunal premises, as contended in his submissions. Therefore, the Appellant proceeded to give their testimonies and the matter was closed in the same day. Therefore, the Tribunal set the date for the Tribunal to receive the opinion of the assessors and thereafter the date for Judgement was set on 24th January 2023. Looking at the Judgement delivered by Hon. Sillas, one will note that at the end of the Judgement the Tribunal has certified that, the said Judgement was delivered in the presence of the Advocate Evans Rwekansa and Maranaseha Mbenyani for the 1st Respondent, Access Bank and Advocate Elias Masinyi for the Appellants. Therefore, since this is an appellate court, it relies on the record of the Tribunal on what transpired before the Tribunal, the Judgment is one of the records of the Tribunal in Land Case No.317/2019. The said Judgement shows clearly that Hon. Chairperson Sillas has certified that the Judgement was delivered in the presence of the advocate Mbenyani and Rwekansa for the Acces Bank, the 1st Respondent herein.

I have further perused the Application for extension of time filed by the 1st Respondent before the Tribunal and observed that the same was filed on 26th June 2023, after the delivery of the exparte Judgement on 24th January, 2023 i.e. five months afterwards. The Land Dispute Courts (The District Land and Housing Tribunal) Regulations, of 2003 under regulation

11(2) require that such an application should be filed within 30 days therefore it was clearly filed out of time.

Similarly, I have noted that in their Application the 1st Respondent contended under para 11 of the Affidavit that the Bank was not given summons to appear before the Tribunal when the matter was called for Judgement and that is the reason for their delay to file an application for setting aside the exparte Judgement.

With due respect to the learned counsel for the 1st Respondent's reason for delay as contained in the Chamber application and supported by the Tribunal (Hon. Rugarabanwa) I am inclined to disagree with the decision of the Tribunal in Misc. Application No. 147/2023, for the reasons that, firstly, the 1st Respondent were in the Tribunal when the exparte Judgement was being delivered on 24th January 2024. This is evidenced from the record of the Judgement at page 3. I have no reason to fault Hon. Sillas on that aspect, as the Judgement is a good record of the trial Tribunal or the Trial court and that court records are sacrosanct and always considered to be authentic. They cannot be impeached so easily as the 1st Respondent would want to do or prove before this court.

Secondly, the 1st Respondent ought to have filed an Application to set aside the exparte Judgement within 30 days but the 1st Respondent did not do so.

Thirdly, in the presence of such record in the Judgement, the issue of an illegality cannot arise since the 1st Respondent was in the Tribunal to receive the Judgment therefore there was no any miscarriage of justice so

to speak. I thus distinguish the case of **VIP Engineering** (supra) as cited by the Respondent since the claim of illegality was superfluous in Land app no 147/2023.

The Application for extension of time to set aside the exparte Judgement, being filed out of time and after five months, was in my opinion, an afterthought and a mockery to justice as rightly stated by the Appellants.

I hold that the 1st Respondent was aware of the Judgement from the date it was delivered on the 24th of January 2023 and ought to have challenged it within time and not after five (5) months, beyond the stipulated statutory time.

Therefore, it was wrong for the Tribunal to grant them extension of time to set aside the exparte Judgement as 1st Respondent did not have or offer any good reason for that. The record is clear that they opted not to be heard on 29th November 2024 by seeking for an adjournment of the hearing of the matter as indicated in the proceedings while knowing well in advance that the matter was scheduled for hearing on that date. Clearly the filing of the Application for extension of time amounted to kicks of a dying horse. The case of **Osward Mwizarubi** cited by the 1st Respondent is distinguishable in the sense that they did not offer sufficient reasons for extension and therefore they cannot shelter on that case. Further, the Tribunal (Hon. Rugarabamu) erred in law in the exercise of its discretion. See the case of **Kalunga and co. Advocates**(supra)

In the upshot I proceed to allow the Appeal based on ground 1 and 2 as they are sufficient to dispose this Appeal. The Appellant are awarded costs of the Appeal.

The right of appeal is hereby explained

DATED at DAR ES SALAAM this 30th day of May 2024.




S.D. MWAIPOPO

JUDGE

30/05/2024