

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND APPEAL NO 284 of 2023

JUSTIN WAMBALI APPELLANT

VERSUS

PANTALEO BASHASHA RESPONDENT

Date of last Order: 05/02/2024

Date of judgment: 21/02/2024

JUDGMENT

I. ARUFANI, J

The instant appeal is arising from the decision of Kinondoni District Land and Housing Tribunal at Mwananyamala (hereinafter referred as the tribunal) delivered in Miscellaneous Application No. 635 of 2022 dated 6th June, 2023. The afore stated application was filed in the tribunal by the counsel for the respondent beseeching the tribunal to dismiss Miscellaneous Applications Nos.110 & 111 of 2019 filed in the tribunal by the appellant in the instant appeal for failure to comply with the order of the tribunal dated 30th December, 2020 which ordered the appellant to rectify or amend the afore mentioned applications.

The tribunal granted the application of the counsel for the respondent and dismissed the stated Miscellaneous Applications Nos. 110 and 111 of the 2019 for the appellant's failure to rectify or amend the

mentioned applications as ordered by the tribunal. The appellant was aggrieved by the decision of the tribunal and filed the instant appeal in the court basing on the following grounds: -

- 1. That the Honourable Tribunal Chairman grossly erred in law and fact for failure to consider that the respondent having filed the application challenging the decision could not have filed amendment.*
- 2. That the Trial Chairperson erred in law and fact for holding that there is no affidavit of the tribunal clerk who refused to admit the amendment.*
- 3. That the Trial Chairperson erred in law and fact in holding that because the original file was not forwarded to the High Court then amendment could have been filed.*

The respondent who has not appealed from any part of the impugned decision of the tribunal filed in the court a memorandum of cross objection under sections 2 and 51 of the Land Disputes Courts Act, 2002 as amended by the written Law (Miscellaneous Amendments) Act, 2010, Rule 22 of Order XXXIX of the Civil Procedure Code, 1966 and sections 3A and 3B of the Civil Procedure Code, 1966 as amended by section 6 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 containing the grounds quoted hereunder: -

- 1. The learned tribunal chairman aforesaid failed to express any specific or implied opinion on the allegations in appellant's counter affidavit which are denied: that the deponent of the*

affidavit committed criminal offences, namely perjury and/or fabricating evidence and/or false swearing, by which failure the learned tribunal chairman aforesaid deprived himself of opportunity to consider and weigh the credibility of the counter affidavit in view of the counter affidavit not containing actual evidence of the commission at any of the alleged crimes aforesaid.

2. *The learned tribunal chairman aforesaid failed to express any specific or implied opinion on the admission in the counter affidavit that no amendments were filed and the simultaneous rejection in the said counter affidavit of the oath in the affidavit that the relevant Tribunal file did not contain any such amendments, by which failure the learned tribunal chairman aforesaid deprived himself of the opportunity to consider and weigh the credibility of the counter affidavit in the interest of justice.*

While at the hearing of the appeal the appellant enjoyed the legal service of Mr. Samual Shadrack Ntabaliba, learned advocate, the respondent enjoyed the legal service of Mr. Novatus Rweyemamu, learned advocate. The parties consented the appeal and the cross objection be heard by way of written submissions.

The counsel for the appellant stated in relation to the first ground of appeal that, the decision of the tribunal which ordered the appellant to amend or rectify the applications was made on preliminary objections raised by the counsel for the respondent. He stated the tribunal overruled

the stated preliminary objections but granted the appellant leave to amend the application to rectify minor errors on verification clause of the affidavits of the stated applications. He stated that, after the respondent being aggrieved by the decision of the tribunal, he lodged Miscellaneous Civil Application No. 299 of 2021 in the High Court seeking for extension of time to appeal against the order of the tribunal. He stated the application was dismissed on ground that the impugned ruling was interlocutory order which is not appealable.

He stated the appellant could not have filed the amended applications in the tribunal because the order granted the appellant leave to amend the applications was challenged by the respondent in the High Court. He stated the appellant herein made effort to lodge the amended applications in the tribunal without success because the respondent was challenging the decision of the tribunal granted the appellant leave to amend the applications in the High Court. He based on the above stated reason to pray the court to allow the first ground of appeal.

He argued in relation to the second ground of appeal that, the practice of getting affidavit of the tribunal clerk refused to admit the amended applications in the tribunal might be very impracticable because it is not easy for the tribunal clerk to swear an affidavit implicating herself for refusing to admit the amended applications in the tribunal. He argued

that, although it can be seeing it is easier that the tribunal can swear an affidavit, but sincerely it is very difficult to have the tribunal or court clerk to swear an affidavit implicating or accusing himself or herself. He based on the above stated submission to pray the court to allow the second ground of appeal.

As for the third ground of appeal the counsel for the appellant argued to hold that as the original file was not forwarded to the High Court, then the appellant could have filed the amended applications in the tribunal is a gross misdirection. He stated that is because the tribunal clerk had already refused to admit the appellant's amended applications in the tribunal on ground that there was application pending in the High Court challenging the decision of the tribunal. He stated as the tribunal clerk had refused to admit the amended applications, the appellant had no other option than to wait for the outcome of the decision of the High Court. He based on the above submission to pray the end of justice be met by allowing the appellant to file the amended applications in the tribunal.

In his reply the counsel for the respondent consolidated the first and third grounds of appeal and argued them together. He stated the mentioned grounds are based on gross misconception of crucial questions arising from the decision of the tribunal. He argued the stated crucial

questions arose from paragraph 1 of the chamber summons and paragraph 20 of the affidavit filed in Miscellaneous Application No. 635 of 2022 filed by the appellant at the tribunal. He argued that, the crucial questions arising from the mentioned paragraphs is that the appellant delayed to comply with the order of the tribunal required him to amend or rectify the applications for about four months from 20th July, 2022 when the High Court delivered its decision until when Miscellaneous Application No. 635 of 2022 was filed in the tribunal.

He stated he was surprised by the argument by the counsel for the appellant in his submission that the amendments in question relates to minor errors on verification while he failed to file required the amended applications in the tribunal within a very few days from the date of delivery of the ruling of the High Court which was delivered in the presence of Mr. Paul Mtui, learned advocate for the appellant. He stated that, as Miscellaneous Application No. 635 of 2022 was filed in the tribunal on 29th November, 2022 the appellant had a lot of time from when the decision of the High Court was delivered until when the respondent filed the afore mentioned application in the tribunal which the appellant is challenging its decision in this court.

He submitted that the record of the matter shows the appellant was either reckless or negligence or he didn't care in handling the applications

and cited in his submission various errors appearing in the various applications and matters filed in the tribunal and in the High Court. He stated that, although the appellant was informed by the tribunal that he had 45 days to appeal against the decision of the tribunal but he delayed until the last day to file the instant appeal in the court and served the same to the respondent on 24th August, 2023 which was after the elapse of almost one month.

He argued in relation to the second ground of appeal that, the argument that the tribunal clerk could not have sworn an affidavit was held in the case of **John Chuwa V. Anthony Ciza**, [1992] TLR 233 to be totally invalid. He argued that, failure to file the affidavit of the stated tribunal clerk in the tribunal tarnished credibility of the evidence of the appellant. He submitted the appellant failed to state whether the stated tribunal clerk was male or female, when the amended application was presented for filing without success and whether the filing fees was paid. As for the argument that the original file was not forwarded to the High Court, he prayed the court to read page 5 of the impugned decision of the tribunal delivered on 6th June, 2023. He submitted the tribunal was keeping good track of the record pending receipt of the amendment from the appellant as ordered by the tribunal.

As for the cross objection filed in the court by the counsel for the respondent, he summarized the first ground as criminality allegations and the second ground as self-contradiction allegations. He argued in relation to the ground of criminality allegations that, although the counsel for the appellant admitted what he deposed at paragraphs 1, 2, 3 and 4 of his affidavit, but to his surprise the counsel for the appellant vehemently denied in paragraph 4 of his counter affidavit what he deposed at paragraph 21 of his affidavit. He submitted that, by necessary implication the stated denial accused him of the offence of perjury c/s 102, fabricating evidence c/s 106 and false swearing c/s 107 of the Penal Code, Cap 16.

He argued that, the counsel for the appellant failed to establish in his counter affidavit existence of the facts constituting the alleged criminal offences. He submitted the counsel for the appellant defied the mandatory provisions of Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 which provides for equality before the law and section 110 of the Tanzania's Evidence Act which provides for a burden of proof. He submitted that, if the tribunal chairman expressed any specific or implied opinion in favour of the respondent on the stated criminal allegations, he should have strengthened his finding that the appellant was recklessly or negligently in failing to file in the tribunal the amended applications timeously.

He argued in relation to the self-contradiction allegations that, the said allegations impeached credibility of the appellant's counter affidavit in terms of section 164 (1) (c) of the Evidence Act, 1967 which provides for the ways upon which the credit of a witness may be impeached. He argued that, if the tribunal chairman expressed any specific or implied opinion on the stated self-contradiction allegations in favour of the respondent, he should have strengthened his finding that the appellant had no credible reason to file the amended applications in the tribunal out of time. The appellant did not reply the submission of the counsel for the respondent in respect of the cross objection raised by the respondent.

After going through the rival submissions from both sides of this appeal, I have found the main issue to determine in this matter is whether the grounds of appeal and cross objection contains merit which can move the court to allow or disallow the appeal. In determine the stated issue I will start with the grounds of appeal raised in the memorandum of appeal filed in the court by the appellant and thereafter I will proceed with determination of the merit of the grounds raised in the cross objection filed in the court by the respondent. I will also merge the first and third grounds of appeal and determine them together because as rightly stated by the counsel for the respondent, they are so much interrelated and they

are basing on the same issue of the appellant's failure to file the amended applications as ordered by the tribunal.

Commencing with the afore stated two grounds of appeal the court has found the counsel for the appellant is challenging the decision of the tribunal which held the appellant failed to comply with the order of the tribunal delivered on 30th December, 2020 which ordered the appellant to file in the tribunal amended applications. The court has found the record of the matter shows it is true that the tribunal delivered the ruling in Miscellaneous Applications Nos.110 & 111 of 2019 date 30th December, 2020 which ordered the appellant to amend or rectify the defects pointed out by the counsel for the respondent that were in the applications filed in the tribunal by the appellant.

The proceedings of the tribunal do not show the appellant was given specific time of filing the stated amendment in the tribunal so that it can be said the appellant failed to comply with the time given for filing the required amended applications in the tribunal. The requirement for the order of the court or tribunal to specify what should be done in the amendment ordered by the court or tribunal can be drawn from the case of **Peter Wegesa Chacha Timasi & Two others V. North Mara Gold Mine Limited**, Civil Appeal No. 49 of 2020, CAT at Mwanza (unreported)

where it was stated inter alia that, an order of amendment of pleadings should not be general or open ended.

The court has also found the record of the matter shows that, after the tribunal made the afore stated order, the respondent filed in the High Court Miscellaneous Civil Application No. 299 of 2021 seeking for extension of time to appeal against the decision of the tribunal which ordered the appellant to amend or rectify the defects found were in the applications. The record of the tribunal shows further that, on 30th September, 2021, Mr. Goodluck Charles Rwiza, learned advocate appeared in the tribunal on behalf of the appellant, prayed to file in the tribunal the amended applications as ordered by the tribunal but the counsel for the respondent prayed the tribunal to await determination of the application which was pending in the High Court. The record of the matter shows the tribunal ordered the amendment of the applications of the appellant should be done after determination of the application of the respondent which was pending in the High Court.

The court has found after determination of the application which was pending in the High Court, the counsel for the respondent prayed the tribunal to give them another date to wait for the copy of the decision of the High Court and the matter was adjourned to another date to wait the counsel for the respondent to get the copy of the decision of the High

Court. The court has found the record of the tribunal shows further that, on 22nd November, 2022 the counsel for the appellant informed the tribunal the copy of the decision of the High Court had already been issued and prayed to file their amended applications in the tribunal pursuant to Regulation 16 of the GN No. 174 of 2003 as ordered by the tribunal.

The counsel for the respondent informed the tribunal that they were preparing an application which they wanted to file in the tribunal. As the counsel for the appellant had no objection to the prayer of the counsel for the respondent, the matter was adjourned to another date and the counsel for the respondent filed in the tribunal Miscellaneous Application No. 635 of 2022 which moved the tribunal to dismiss the applications of the appellant. As stated earlier in this ruling the stated decision is the one the appellant is now challenging before this court.

The court has carefully considered the afore stated record of the matter as appearing in the proceedings of the tribunal. The court has been of the view that, as the tribunal did not specify when the applicant was required to file in the tribunal the amended applications and as after the tribunal delivered the stated decision the counsel for the respondent filed the above stated application in the High Court seeking for extension of time to appeal against the decision of the tribunal, the appellant cannot

be faulted for failure to file in the tribunal the amended applications ordered by the tribunal to be filed in the tribunal.

The court has come to the stated view after seeing that, it would have not been proper for the stated amended applications to be filed in the tribunal while there was application pending in the High Court intending to challenge the decision ordered the appellant to file the stated amended applications in the tribunal. Therefore, the court has found the appellant was justifiable in not filing the amendment ordered by the tribunal from when the decision of the tribunal was delivered until when the decision of the High Court was delivered on 20th July, 2022.

The court has considered the argument by the counsel for the respondent that the appellant failed to file in the tribunal the amendment ordered by the tribunal for a period of about four months commencing from when the decision of the High Court was delivered on 20th July, 2022 until when Miscellaneous Application No. 635 of 2022 was filed in the tribunal on 29th November, 2022. The court has found that, after the stated decision of the High Court being delivered, the counsel for the appellant prayed to file in the tribunal the amended applications as ordered by the tribunal but the counsel for the respondent prayed to wait the copy of the decision of the High Court to be supplied to them and the stated prayer was granted.

The court has considered that there was a prayer of waiting the copy of the decision of the High Court to be supplied to the counsel for the respondent. After the said documents being issued the counsel for the appellant prayed to be allowed to file the amendment in the tribunal. His prayer was not granted because the counsel for the respondent had said he had an application he wanted to file in the tribunal. It is the view of this court that, it cannot be said under the stated circumstances it was proper for the applications of the applicant to be dismissed on ground that the applicant had failed to comply with the order of the tribunal of filing in the tribunal the amended applications ordered by the tribunal.

Therefore, if there is any delay which to the view of this court and as revealed in the proceedings of the tribunal referred hereinabove is not an actual delay it was caused by the steps taken by the respondent of taking the matter to the High Court and the prayers of waiting for the decision and copy of the decision of the High Court made to the tribunal by the counsel for the respondent. Under the stated circumstances the court has failed to see any merit in the argument made by the counsel for the respondent that, as the amendment was on minor errors on verification as stated by the counsel for the appellant, the appellant was required to file the required amendment in the tribunal within a very few days after delivery of the ruling of the High Court.

The court has also considered the further argument by the counsel for the respondent that the appellant was either reckless or negligent or he was not caring because the record of the matter shows different typing errors in the matters filed in the tribunal and in the High Court but find the stated errors cannot be a ground of justifying dismissal of the applications of the applicant as it has not been stated the errors goes to the merit of the applications of the applicant. As for the argument that the instant appeal was filed in the court on the last day of filing the same in the court and it was served to the respondent after the elapse of about one month the court has found it has not been stated which rule or law was violated by the stated situation.

The court has found that, although it is true that the original file of the matter had not been forwarded to the High Court but the chairman of the tribunal was not right in holding the appellant failed to file the amended applications ordered to be filed in the tribunal. The court has come to the stated finding after seeing the appellant was prevented by justifiable cause which includes the application filed in the High Court by the respondent and the prayer of waiting the copy of the decision of the High Court made to the tribunal by the counsel for the respondent. It is because of the above stated reasons the court has found the first and third grounds of appeal are meritorious and deserve to be allowed.

Coming to the second ground of appeal the court has found it states the chairman of the tribunal erred in holding there was no affidavit of the tribunal clerk refused to admit the amended application presented to the tribunal by the applicant. The court has found, it is true as rightly argued by the counsel for the respondent that the law as stated in various cases including the case of **John Chuwa** (supra) requires an affidavit of material person to support what is deposed in an affidavit of a party to a case to be filed in the tribunal or the court.

The court has found that, although it was not disputed that there was no affidavit of the tribunal clerk refused to admit the amended application stated by the counsel for the appellant was presented to the tribunal for filing and the tribunal clerk refused to admit the same was filed in the tribunal but the court has found under the circumstances of what has been stated hereinabove, failure of the appellant to file the affidavit of the stated tribunal clerk in the tribunal to support his affidavit ought not to be used as a ground of finding the appellant failed to file in the tribunal the amendment ordered by the tribunal within the required time.

The court has come to the stated finding after seeing that, the record of the tribunal shows failure of the appellant to file the stated amendment in the tribunal was not caused solely by the alleged refusal

of the tribunal clerk to admit the same but also the orders made by the tribunal that the amendment should be made after the decision of the High Court being delivered and the prayer of waiting the copy of the decision of the High Court. In the premises the court has found the chairman of the tribunal was not right in basing on failure of the appellant to file the affidavit of the tribunal clerk in the matter as a ground of finding the appellant failed to establish why he delayed to file the amendment ordered by the tribunal to be filed in the tribunal.

Turning to the grounds raised in the cross objection filed in the court by the respondent the court has found that, although the cross objection was made on the law which have already been revised and incorporated in the current revised edition of the laws of Tanzania of 2019 but the court will ignore the citation of the stated outdated laws and I will continue to deal with merit of the grounds raised in the memorandum of cross objection. The court has taken the stated decision after seeing it has not been stated anywhere that the stated defect has caused any miscarriage of justice to anybody.

I will start with the first ground which the counsel for the respondent stated is centred on criminality allegations. The court has considered the argument by the counsel for the respondent that, the vehement denial of the facts he deposed at paragraph 21 of his affidavit in support of the

application made at paragraph 4 of the counter affidavit of the counsel for the appellant shows he committed the offences of perjury, fabricating evidence and false swearing while there are no facts deposed in the counter affidavit of the counsel for the appellant to support the stated allegations.

The court has found it is proper to have a look on what is deposed in the paragraphs of the affidavit and counter affidavit stated by the counsel for the respondent have shown he was accused of the above stated offences. The court has found paragraphs 1, 2, 3 and 4 of the affidavit of the counsel for the respondent which its facts were admitted by the counsel for the respondent at paragraph 2 of his counter affidavit were basically confined to introduction of the counsel for the respondent. The court has found paragraph 21 of the affidavit of the counsel for the respondent shows the counsel for the respondent deposed therein that he was swearing the affidavit in support of the chamber summons filed in the tribunal and nothing else.

The response made by the counsel for the appellant in his counter affidavit in relation to what is deposed in the mentioned paragraph 21 of the affidavit of the counsel for the respondent shows he deposed at paragraph 4 of his counter affidavit that he was vehemently denying what is deposed in the stated paragraph 21 and other paragraphs of the

affidavit of the counsel for the respondent which were not admitted in paragraph 2 of his counter affidavit and he was putting the counsel for the respondent into a strict proof of the same at the time of hearing of the application.

After considering what is deposed in the afore mentioned paragraphs of the affidavit and counter affidavit of the counsel for the parties and what is stated in the submission filed in the court by the counsel for the respondent the court has found the vehement denial made by the counsel for the appellant in the stated paragraph of his counter affidavit was a normal denial made in pleadings or affidavit filed in the court and impose a duty to the other side of the case to prove strictly what is stated in his pleading or affidavit and does not establishing criminality allegations stated by the counsel for the respondent. It is does not establish accusation of criminal allegations alleged by the counsel for the respondent were made against him by the counsel for the appellant.

Therefore, although the impugned decision of the tribunal shows the stated accusation of criminal allegations was raised before the tribunal and the chairman of the tribunal did not make any specific or implied finding in relation to the same but to the view of this court there was nothing material in the said argument which would have moved the tribunal to find failure of the appellant to file in the tribunal the

amendment ordered by the tribunal within the time was caused by reckless or negligence of the appellant but because of what has been stated hereinabove.

Going to the second ground of cross objection which the counsel for the respondent summarized as self-contradiction allegations, the court has considered what is stated in the submission of the counsel for the respondent and read the provision of section 164 (1) of the Evidence Act cited in support of the stated submission but failed to see the self-contradictions the counsel for the respondent is arguing if were considered by the tribunal would have caused the tribunal to find the appellant had no credible reason of filing the amendment ordered by the tribunal out of time.

The court has considered the facts stated in the second ground of the cross objection that, the stated self-contradiction allegations is based on the deposition made in the counter affidavit of the counsel for the appellant that, no amendment was filed in the tribunal. Another contradiction is on the statement that the amendment taken to the tribunal by the appellant was not admitted by the tribunal clerk as there was application which had been filed in the High Court by the respondent. The court has failed to see any material contradiction in the stated statements which can be said would have moved the tribunal to find the

appellant had no credible reason of failing to file the amendment ordered by the tribunal within the period stated the appellant failed to file the same in the tribunal.

In conclusion the court has found the cross objection filed in the present appeal by the respondent and the submission made to the court in support of the same have not managed to satisfy the court they deserve to be allowed. As for the appeal filed in the court by the appellant, the court has found as stated hereinabove the same deserve to be allowed. Consequently, the appeal filed in the court by the appellant is hereby allowed and the cross objection filed in the court by the respondent is dismissed for being devoid of merit. The court is hereby quashing and set aside the decision of the tribunal which dismissed Miscellaneous Applications Nos. 110 and 111 of 2020 and it is ordering the stated applications be restored in the register of the tribunal and proceed with further steps from where they had reached before delivery of the decision which has been set aside by the court. The court is ordering each party to bear his own costs in this appeal. It is so ordered.

Dated at Dar es Salaam this 21 day of February, 2024


I. Arufani
Judge
21/02/2024

Court:

Judgment delivered today 21st day of February, 2024 before Hon. M. F. Lukindo, DR in the presence of Mr. Novatus Rweyemamu, learned advocate for the respondent and also holding brief for Mr. Erasmus Buberwa, learned advocate for the appellant. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to be "M. F. Lukindo", written over a horizontal line.

M. F. Lukindo

Deputy Registrar

21/02/2024