IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 12 OF 2021

(Arising from the decision of the District Land and Housing Tribunal for Mwanza in Misc. Land Application No. 217B/2020 which originated from Land Application No. 217/2019)

OLIVA KABAKOBWA..... APPELLANT

VERSUS

AKIBA COMMERCIAL BANK (T) LTD.....1ST RESPONDENT

DOCTOR PHILIP ISACK MASAMBA.....2ND RESPONDENT

JUDGMENT

Last Order date: 13.10.2021
Judgment Date: 29.10.2021

M. MNYUKWA, J.

The Appellant Oliva Kabakobwa appealed against the decision of the District Land and Housing tribunal of Mwanza in Application No. 217B of 2020 that was dismissed for failure to show good cause to restore his earlier application, Land Application No. 217 of 2019 that was also dismissed for want of prosecution.

To appreciate the essence of the issue, it will be important to state the material facts. The appellant instituted before the District Land and Housing Tribunal (henceforth to be referred as DLHT), Land application No 217 of 2019. In between, the appellant filed a Misc. Land Application No. 217B of 2019 at the DLHT that was tried and dismissed on 27/12/2019. This resulted to resume the main Land Application No. 217 of 2019. The matter was called on 27/12/2019 where the applicant was present and the respondents were absent. The matter was adjourned for Mention until on 27/01/2020. On 27/01/2020, only the first respondent appeared. The Chairperson of the DLHT adjourned the matter for Mention up to 31/01/2020. On that day again, when the matter was coming for Mention only the first respondent appeared and the applicant was absent without notice of absence. The counsel for the first respondent prayed the DLHT to dismiss the application under Regulation 11 (1) (b) of G.N No 174 of 2003 because the appellant failed to prosecute her case. The Chairman of the DLHT dismissed the application under the above Regulation for want of prosecution.

Dissatisfied, on 11.12.2018, the appellant lodged before the DLHT Application No. 217B of 2020 for setting aside a dismissal order. The same was dismissed on 05.03.2021 for failure to show good cause. The

appellant preferred this appeal against the decision in application No. 217B which dismissed the application for setting aside a dismissal order.

The appellant advanced four grounds of appeal as follows; -

1. *That the trial Tribunal chairperson erred in law and in facts for upholding the dismissal order on the ground that appellant failed to attend and prosecute her case while the same is not true.*
2. *That the trial Tribunal Chairperson erred in law and facts for failure to consider the evidence of appellant which was enough to prove her case.*
3. *That the trial Tribunal Chairman erred in law for denying the appellant the right to be heard.*
4. *That the trial Tribunal Chairman erred in law and in facts for misdirecting himself in the provision of the law before dismissing the appeal.*

The appeal was argued by way of oral submissions. The applicant was represented by Mr. Majura Kiboga learned advocate while the first respondent afforded the legal services of Mr. Prudence Buberwa and the matter was heard ex-parte against the second respondent for failure to enter appearance after being served through substituted way of service on Mwananchi Newspaper.

The appellant was the first to toss the ball and he prays to abandon the second ground of appeal.

Submitting on the first and fourth ground of appeal altogether, the counsel for the appellant stated that the DLHT misdirected itself by using

the wrong provision of Law to dismiss the matter. He argued that, the DLHT used Regulation 11 of the GN No 174 of 2003 instead of Regulation 15 of the GN No. 174 of 2003. He therefore claimed that the dismissal order was contrary to the law.

He went on that the appellant appeared before the DLHT and prosecuted her case except on 27/01/2020 and 31/01/2020. He added that, Regulation 15 of GN No 174 of 2003 mandated the DLHT to dismiss the application for want of prosecution if the application is left unattended by an applicant for a period of 90 days. He claimed that the DLHT dismissed the appellant's application for want of prosecution while the applicant did not appear before the DLHT for four days only. Therefore, he concluded his argument by averred that the DLHT erred to dismiss the application on the ground that the appellant did not intend to prosecute her case.

Submitting on the third ground he stated that, the DLHT had to consider the fundamental constitutional principle that guaranteed the right to be heard. He referred to Article 13(6) (a) that insisted on the right to be heard to the parties. He added that the DLHT failed to consider the requirement of the said Article after the failure of the appellant to attend her case for that period. He therefore, prays the appeal to be allowed.

Responding on the first and fourth ground of appeal, the learned advocate for the respondent, averred that the DLHT used the correct provision of law that is Regulation 11 (1) (b) of GN No. 174 of 2003 to dismiss the application for nonappearance of the appellant because the same mandated him to dismiss the application when the applicant was present on the last date or was informed on the presence of the matter.

He further submitted that, when visiting at page 6 of the trial Tribunal proceedings, it shows that the appellant did not enter appearance on 27/12/2019 and 27/01/2020 without any notice of absence. Again when the matter was scheduled on 31/01/2020, the appellant also did not enter appearance without justifiable reason. Since the appellant failed to prosecute his case, it was right for the DLHT to dismiss it for want of prosecution under Regulation 11 (1) (b) of GN No. 174 0F 2003.

The counsel for the respondent went on to state that from 27/12/2019 up to 31/01/2020 is almost two months that the appellant did not attend before the DLHT. On the averment of the appellant that the proper Regulation that the Chairman of the DLHT ought to have used to dismiss the application is Regulation 15 instead of Regulation 11 (1) (b) of the GN No. 174 OF 2003, the counsel for the respondent strongly disputed and submitted that, the DLHT was correct to use that provision.

On the third ground the counsel for the respondent submitted that, the appellant was given a right to be heard because on 27/01/2020 when the case was fixed for preliminary stage of hearing, the appellant did not appear. The matter was fixed on 31/01/2020, but again she did not appear. He went on that; the appellant cannot complain that he was not given a right to be heard because she was given an opportunity to prosecute her application of setting aside the dismissal order but she had failed to adduce sufficient reasons to convince the DLHT to set aside its order. He concluded by stated that the appellant cannot deny to have not given the right to be heard in the circumstances of the present case because she was given that right. The counsel for respondent added that the appellant is doing delaying tactics because she did not pay back the loaned amount. He therefore, prays the appeal to be dismissed with costs.

Rejoining, he insisted that, Regulation 11 (1) (b) of GN No. 174 of 2003 is inapplicable to dismiss the application when the matter is fixed for Mention. The said Regulation is only applicable if the matter was fixed for Hearing or the applicant is properly served with the Notice of Hearing. He therefore prays the appeal to be allowed with costs.

I have given careful consideration to the arguments advanced by the learned counsels of both parties. I find the central issue for

consideration and determination is whether the appeal before me is meritious.

It is from the record that the DLHT dismissed the appellant's application to set aside the dismissal order for failure to show good cause on why she did not enter appearance before the DLHT. When dismissing the application, part of the Ruling of the Chairperson of the DLHT reads as here under;

> *"Ifahamike kwamba ni msimamo wa kisheria kwamba mleta maombi anapoomba kutengua amri ya kufuta kesi lazima aonyeshe sababu za msingi na kwenye maombi hayo mleta maombi hakuwepo tarehe 27/12/2019. 27/01/2020 na tarehe 31/01/2020 na maombi yake yalifutwa kwa kutoendeshwa chini ya Kifungu cha 11 (1) (b) ya* ***tangazo la serikali*** *namba 174 ya 2003 lakini mleta maombi hajaeleza sababu ya msingi ya kwanini hakufika Barazani.*
>
> *Hivyo kwa maelezo hayo hapo juu nafuta maombi haya kwa kukosa sababu za msingi za kutengua amri kufuta maombi namba 217 of 2019."*

The above order compels me to have a close look into the trial tribunal's records to see what is on record in regards to the dismissal of the main application of the appellant.

After going through the trial tribunal's records, I find out the matter was called on 27/12/2019 where the applicant was present and both

respondents were absent without notice of absence. This resulted the matter to be adjourned up to 27/01/2020 for Mention. On that day when the matter was fixed for Mention, the applicant and second respondent were absent without notice and it was only the first respondent who entered appearance. This again compelled the Chairperson of the trial tribunal to schedule the matter for Mention on 31/01/2020. On that date, it was only the first respondent who entered appearance and the other parties were absent without notice. When addressing the Tribunal, the counsel of the first respondent prayed the application to be dismissed for want of prosecution under Regulation 11 (1) (b) of G.N No 174 of 2003. The Chairperson of the trial tribunal granted the prayer and it was thereby dismissed under Regulation 11 (1) (b) of G.N No 174 of 2003.

As it was provided for in the first and fourth grounds of the Notice of Appeal, the appellant claims that the trial tribunal erred in law and facts for misdirecting on the provision of law before dismissing the application and for upholding the dismissal order on the ground that the appellant failed to prosecute her case. The provision of law that is claimed by the appellant to be wrongly interpreted is Regulation 11 (1) (b) of G.N No 174 of 2003. This is the provision of law that gives power to the DLHT to dismiss the matter for want of prosecution. The relevant provision is to the effect that: -

*"Regulation 11 (1) On the day the application is fixed for **hearing** the Tribunal shall*

*(b) When the applicant is absent without good cause, and had received **notice of hearing** or was present when the **hearing date** was fixed, dismiss the application for non-appearance of the applicant."*

(Emphasis is mine on the bolded words)

In the present matter the applicant submitted that the application was dismissed when the matter was called on for Mention. Therefore, it is contrary to the requirement of the Regulation 11 (1) (b) of G.N No 174 of 2003.

As it is reflected in the trial tribunal's records, it is clearly shown that the matter was not scheduled for hearing and it was not proved that the applicant received the notice of hearing. In that circumstances, it is my considered view that the Chairperson of the DLHT wrongly applied the provision of the above Regulation to dismiss the case.

The position of the Court of Appea of Tanzania l in which I am bound to follow is clear on dismissing the matter when it is scheduled for Mention. In the case of **Shengena Ltd v National Insurance Corporation and Another**, Civil Appeal No 9 of 2008 CAT at Dar es Salaam (Unreported) the Court held that:

***"...** It is therefore, a practice before courts of law whereby parties to a case appear before the court to ascertain the*

state of pleadings or stage reached in the trial and then proceed to make necessary orders. ***It is not the practice of courts in our jurisdiction to dismiss or make other orders that substantially bring a case to finality on a day fixed for Mention. In our considered view, therefore a case can be dismissed for various, legally recognized grounds when it comes up for hearing not Mention.*** *In our present case, we find it improper for the trial judge to have dismissed the case when it came up for Mention".*

(Emphasis is mine on the bolded words)

Again in the case of **Mr. Lembrice Issrael Kivuyo v Ms.DHL World wide Express and Another**, Civil Appeal No. 83 of 2008, CAT at Arusha pointed out;

"In fact, if we may disgress here a bit, we think it is common knowledge that when a case is set down for mention at the back of a party's mind there will be an expectation that the case will come up for necessary orders only. A party or parties in the circumstances will not expect the same to be dismissed on such a mention date"

Guided by the above decisions and the provision of Regulation 11 (1) (b) of G.N No 174 of 2003, I fully subscribed the appellant's argument that it was wrong for the Tribunal to dismiss the application for want of prosecution on the day when the application was coming for Mention as

it was clearly shown in the trial Tribunal records. The dismissal for want of prosecution can only be made on a **hearing date** and not on a **mention date.** For that reason, I find the first and fourth ground of appeal has merit, and therefore I allow them.

Coming now to the third ground of appeal, it is the submissions of the appellant's counsel that the DLHT did not afford the appellant with her constitutional right to be heard when dismissed the application for want of prosecution. That assertion was strongly opposed by the respondent who claimed that the appellant was given right to be heard but she has failed to exercise it because she did not enter appearance when the matter was scheduled by the Tribunal, but also failed to advance sufficient reasons to warrant the Tribunal to set aside its dismissal order.

I did not subscribe the first respondent reasoning that the appellant was given the right to be heard when she defends the miscellaneous application to set aside dismissal order and the Misc. Application No 217 B of 2019 before the DLHT.

It has to be noted that, the law gives the court power to dismiss matters before it but it has to be done judiciously. In the case of **Tanesco v IPTL and 2 Others** (2000) TLR 324 it was held that

"Judicial discretion must be guided by law and rules and not by humor. It must as well not be arbitrary and fanciful but legal and regular"

It is clear from the available records that the matter was dismissed when it was scheduled for Mention and not the Hearing. For that reason, it can not be said that the appellant was given the right to be heard while she had not received a notice of hearing and the hearing date was not fixed.

It goes without say that the right to be heard is one among the principle of natural justice and a very constitutional right as it is provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 (as amended). To my opinion there is no point in time the person can be denied his right to be heard unless there is a legally justifiable reason for holding so.

Therefore, since in the present matter the Tribunal wrongly dismissed the application when it was coming for Mention, automatically the appellant was denied her right to be heard since the matter was dismissed when it was scheduled for mention.

Thus, consistent with the constitutional right to be heard, I am settled that the appellant was denied her constitutional right of being heard in the Land Application No 217 of 2019. This right has been emphasized in many decisions of the Court of Appeal as well as the High

Court. For example, the Court of Appeal in the case of **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 (Unreported) the court held that: -

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law."*

Likely in the case of **Elikana Bwenda vs Sylvester Kuboko,** Civil Appeal No 7 of 2020, HC of Tanzania at Kigoma (Unreported), observed that: -

> *"It is a settled that the decision reached in violation of the constitutional right to be heard cannot be allowed to stand even if it is the same decision which would have been reached had the parties been heard."*

On the basis of the above decisions, it is my view that, in the present appeal the appellant has been denied her right to be heard on Application No 217 of 2019. Thus, I also allow the third ground of appeal.

In the upshot, I find I find the Ruling of the trial Tribunal in Application No 217B of 2020 to have been a nullity for upholding dismissal order on the ground that the appellant failed to advance sufficient cause when her Land Application No 217 of 2019 was dismissed for want of prosecution. Accordingly, its Drawn Order dated 05/03/2021 is declared to be null and void.

I therefore proceed to allow the appeal and invoke the power given to this court under section 43(1) (b) of the Land Disputes Courts Act, Cap 216 R.E 2019 to quash and set aside the decision and any order emanated from the Application No 217B of 2020. I remit back the file to the trial Tribunal at Mwanza so as the Application No 217 of 2019 to be heard as if the same was not dismissed for want of prosecution. To avoid bias, the matter should be heard before another Chairperson. Costs to follow event. It is so ordered.

M. MNYUKWA
JUDGE
29/10/2021

The right of appeal explained to the parties.

M. MNYUKWA
JUDGE
29/10/2021

Judgment delivered on 29/10/2021 via audio teleconference whereby all parties were remotely present.

M. MNYUKWA
JUDGE
29/10/2021