

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 1746 OF 2024

(Originating from Misc. Application No. 481 of 2023, Kinondoni District Land and Housing
Tribunal)

ILUMINATA MELEWAS.....APPELLANT

VERSUS

RAJABU MWILIMA.....1ST RESPONDENT

SAID SALIM TENGA.....2ND RESPONDENT

PAULO ALMAS MBILIZI.....3RD RESPONDENT

PETER RODGER MWAMBUGA.....4TH RESPONDENT

JUDGMENT

12th to 18th April, 2024

E.B. LUVANDA, J

The Appellant named above is challenging the decision of the Tribunal which refused to entertain an application for extension of time to set aside the default judgment on the ground that it is *functus officio*.

In the memorandum of appeal, the Appellant raised six grounds of appeal. However, in her submission the Appellant re-paraphrased the six grounds into only two grounds as follows:

One, the Hon. Chairperson erred in law and fact when she held that the Tribunal was *functus officio* to grant the application for extension of time within which to apply for setting aside *ex parte* judgment and default judgment entered on 11th May, 2022 whereas the parties were never heard on that point of extension of time and that the Tribunal considered irrelevant matters instead of determining the application for extension of time.

Two, the Hon. Chairperson erred in law and fact when she refused to extend the time within which to set aside *ex parte* judgment and default judgment based on grounds upon which the extension of time may be granted, including the lengthy of delay, reasons for delay, accounting for every day of delay, not being aware of the existence of the case, illegality in which there was two awards (two decrees named *tuzo*) both issued on 24th May, 2022 in respect of Land Application No. 525 of 2021, the absence of judgment, non-involvement of assessors and the right to be heard.

Mr. Thomas Eustace Rwebangira learned Counsel for the Appellant submitted that the Misc Land Application No. 481 of 2023 which was struck out was for extension of time within which to file application to set aside *ex parte* judgment and default judgment. He submitted that the trial chairperson was supposed to consider the application before her, arguing that instead, she ruled out that the execution was complete so the Tribunal has no jurisdiction to entertain the

dispute for it being *functus officio*, arguing it was as if the Appellant was applying for stay of execution. He submitted that the Tribunal could not be held to be *functus officio* as the *ex parte* judgment is still in force. He submitted that even if the execution was complete, which is disputed, but still the Tribunal had jurisdiction to set aside the default judgment and the appellant could have resorted to the provisions of section 89 of the Civil Procedure Code, Cap 33 R.E. 2019 for restitution, citing the case of **Farida Ahmed Mbaraka And Another V. Domina Kagaruki And Another**, Civil Appeal No. 293 of 2022 Court of Appeal of Tanzania, TANZLII, TZCA 17597 (2023-09-05), at page 21.

He submitted that in our case, if at all the execution was complete, but still the judgment may be set aside and the Appellant shall resort to section 89(1) of Cap 33 (supra) for restitution order upon setting aside the judgment. As such the Tribunal was not *functus officio*, arguing that is why when there is refusal to set aside *ex parte* decree the aggrieved party has a right of appeal even if the execution is complete. He submitted that the issue whether the Tribunal was *functus officio* or not was raised *suo motu* and parties were not called upon to address that issue, arguing the Appellant was condemned unheard. He submitted that even if the issue was properly raised, but going by records one will find that the execution was not complete and the alleged information from the Tribunal Broker was not telling the truth. He submitted that on 12/7/2022

the Tribunal Broker Adili Auction Mart, falsely informed the Tribunal that he has executed the decree on 8/7/2022, which was not true, for reason that thereafter the Tribunal issued eviction and demolition order on 6/9/2022 after two months, arguing if at all the execution was complete, then, the Tribunal could not have issued the eviction and demolition order in subsequent dates. He submitted that after obtaining the eviction and demolition order the said Adili Auction Mart on 12/9/2022 wrote a letter to Police Commander of Kinondoni requesting for police security, the latter responded the request on 20/9/2022. He submitted that the said eviction and demolition order and the letters were attached to the counter affidavit of the First Respondent as annexure RM2 and RM3 collectively. He submitted that if the Chairperson had considered these documents and contradictions thereto, he couldn't have held that the execution was complete and the tribunal was *functus officio* whereas there was no such execution. He submitted that the fact that the Appellant is still in possession of the disputed property is a proof to the effect that there was no execution at all. He submitted that the First Respondent having noticed that it has been difficult to execute the decree, on 31/8/2023 filed to the Tribunal Misc. Land Application No. 451 of 2023 summoning the Appellant to show cause why execution should not be implemented against her, but later the application was withdrawn. Arguing there was no completeness of the execution as ruled out by the

Chairperson in her ruling and order. He submitted that to say that the Tribunal is *functus officio* on a certain issue, that issue must be heard and determine conclusively. He submitted that the application for extension of time was a new one and was not heard previously, arguing that the principal of *functus officio* was misapplied in all intent.

Ground number two, the learned Counsel submitted that, the grounds upon which the extension of time may be granted have been stated in numerous cases, citing the case of **Zanzibar Telecom Ltd V. The Commissioner General** (TRA), Civil application No. 222/15 of 2021, Court of Appeal of Tanzania (unreported); **Petromark Africa Limited And Another V. Eximbank (T) Limited**, Civil Application No. 642/16 of 2022, Court of Appeal of Tanzania (unreported); **Shabbir Gulamabbas Nathan V. Sajjad Ibrahim Dharamsi And Another**, Civil Application No. 774/01 of 2022, Court of Appeal of Tanzania (unreported). He submitted that in the case of **Zanzibar Telecom** (supra), the grounds upon which the extension of time may be granted were held to be accounting for every day of delay, reasons for delay, length of delay, level of prejudice and illegality of the decision challenged. He submitted that these grounds were not considered by the Chairperson at all. He submitted that the Appellant through affidavit and submission met those grounds, arguing that that the Tribunal ought to have granted the application for extension of time.

He submitted that the Appellant was not aware of the existence of the case until on 22nd August, 2023 when the Appellant, while at the office of the District Commissioner for Kinondoni, was informed by one Stella Msofe, the District Administrative Secretary about the existence of the judgment by this Tribunal against her. He submitted that the Appellant accounted for all days of delay, under paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the affidavit, by showing all steps taken in those days after knowing the existence of the case against her. He submitted that the Appellant could not have taken any step until on 8th September, 2023 when the proceedings, judgment and decree were supplied to her upon being extracted on 7th September, 2023. He submitted that the Appellant also accounted for number of days as from 8th September, 2023 when the requisite documents were supplied to her until when the application for extension of time was filed, particularly under paragraphs 10, 11, 12, 13, 14, 15 and 17 of the affidavit. He submitted that the first pre-condition for granting extension of time by accounting for all days of delay has been complied, citing the case of **Indo-African Estate Ltd v. District Commissioner for Lindi District and Others**, Civil Application No. 12/07 of 2022, Court of Appeal of Tanzania (unreported) at page 10. He submitted that the second condition for extension of time is reasons for delay. He submitted that the Appellant who was numbered as the Third Respondent in the main

Application No. 525 of 2021 was not served with the initial summons to appear and defend the case, and she was not aware of the existence of the case. He submitted that in his counter affidavit, under paragraph 10, the First Respondent alleges that the Appellant was served with summons and attached annexure "RM-3". He submitted that annexure "RM-3" is not a summons, rather it is letters written by Adili Auction Mart addressed to the Chairperson of the Tribunal in execution process. He submitted that, if at all the summons was served, which is disputed, the court process server was supposed to file affidavit in respect of this application, arguing that the fact that the Appellant was not served remain unchallenged. He submitted that the alleged summons was supposed to be served to the Appellant as per the Land Disputes Courts (the District Land and Housing Tribunal) Regulations in particular regulation 6(3), which require personal service of the summons or by way of substituted service as per regulation 9(a) by affixing it to the house or land in dispute. He submitted that even the proceedings which started from 3rd November, 2021 is silent as to the service of the appellant, citing coram dated 03/11/2021, 5/11/2021, 18/11/2021, 14/1/2022, 1/3/2022 and 29/03/2021 arguing in all above records the status of service of the Appellant, but on 11/5/2022 the Tribunal passed default judgment. He submitted that the Tribunal's findings that the Appellant was aware of the case was not supported by the Tribunal records because at

no time the alleged service was proved and no record of allowing the First Respondent to proceed *ex-parte* against the Appellant. He cited the case of **Abutwalib Musa Msuya & Others V. Capital Breweries Ltd & Two Others** (2016) TLR 12, for a proposition that the High Court had ordered substituted service, but on revision the Court of Appeal emphasized the physical service of the summons to the respondent before resorting to substituted service and held. He submitted that in this case substituted service was not even attempted and no proof that the Appellant was avoiding service. He submitted that even if the Appellant was deemed to have been served and failed to appear, which was disputed, but the Law and Regulations does not allow entering default judgment in a claim for land, it requires ownership to be proved by evidence, citing regulation 11(1)(c) of Land Disputes Courts (The District Land and Housing Tribunal) Regulation, 2002. He submitted that the denial of the right to be heard is the first illegality. He submitted that illegality alone has been good ground for extension of time even if the other conditions have not been met, citing the cases of **Petromark Africa Limited** (supra); **Shabbir Gulamabbas Nathan** (unreported); **Zanzibar Telecom Ltd** (supra); **M.B. Business Limited V. Amos David Kassanda and Another**, Civil Application No. 48/17 of 2018, Court of Appeal of Tanzania (unreported). He submitted that where there is illegality apparent on the face of record, time has to be extended.

He submitted that in the impugned judgment and decree the Appellant is not mentioned anywhere, arguing two versions of wording of the judgments (*tuzo*), one excluding the Appellant and the other entering default judgment against the Appellant and consent judgment against the First, Second and Fourth Respondents without mentioning the fate of the Appellant. He cited the case of **Laemthongrice Company Ltd V. Principal Sercretary , Ministry Of Finance** (2002)TLR 389, at page 407, for a proposition that the Court of Appeal discouraged the court giving two decrees or decision or substituting the decisions. He submitted that in a situation where there are two judgments delivered on the same day, that one amount to illegality which is apparent on the face of record. He submitted that the two judgments cannot co-exist in the record. He submitted that in the proceedings is that the judgment was entered without proper quorum as per sections 23(1) and (2) and 24 of the Land Disputes Courts Act. He submitted that in reaching a decision the Chairman is supposed to consider the opinions of the assessors although she is not bound with it as per Section 24. He submitted that by determining the suit and entering the default judgment without involving the assessors was another illegality. He cited the case of **John Masweta v. General Manager, MIC (T) Ltd**, Civil Appeal No. 113 of 2015, Court of Appeal of Tanzania at Mwanza; **The General**

Manager Kiwengwa Strand Hotel v. Abdallah Said Musa, Civil Appeal No.

13 of 2012, for a proposition that the Tribunal was not properly constituted.

Mr. Rajabu Mrindoko learned Counsel for First Respondent in reply submitted that the Tribunal was correct and proper in law to struck out the application for extension of time to set aside the default judgment because the said application was improper for two reasons: One, the Tribunal was *functus officio* after the default judgment in Land Application No. 525 of 2021 intended to be set aside has been executed by the Tribunal in Misc. Land Application No. 322 of 2022. He submitted that the case of **Farida Ahmed Mbaraka** (supra) is distinguishable for reasons that therein parties were challenging execution proceedings under section 89(1) of Cap 33 (supra) while herein the Appellant is seeking extension of time to set aside default judgment.

Two, he submitted that the default judgment has no remedy of setting aside chosen by the Appellant, rather the only remedy is to appeal, citing section 74 and Order XL rule 1(b) of Cap 33 (supra). He submitted that the application for extension of time to set aside the default judgment was improperly before the Tribunal.

He submitted that the question of *functus officio* was not raised by the Tribunal rather was born from pleadings that is from the First Respondent's submission and the Appellant also made a submission on it. He submitted that no injustice

was occasioned by the Tribunal, arguing both parties were given the right to be heard.

Ground number two, the learned Counsel submitted that the Tribunal after the default judgment has been executed, the Tribunal had no jurisdiction to consider and make findings on the ground of extension of time, for reason that the application was improperly before the Tribunal arguing the Appellant ought to have appealed.

The Second, Third and Fourth Respondents did not file a reply.

On rejoinder, Ms. Joyce Magubu learned Counsel for Appellant, submitted that there is an illegality in the proceedings where two decrees were entered, the first does not tally with proceedings, the second one tally with proceedings. She submitted that it is not true that execution was done, for reason that if it was done the Tribunal could not have issued eviction and demolition on 6/09/2022. She submitted that the Appellant is still in possession of the disputed farm. She submitted that section 74 and Order XL rule 1(b) Cap 33 (supra) are irrelevant. She submitted that it is the law that before approaching the superior court for appeal one should exhaust the available remedies by applying to set aside and upon refusal should appeal, citing **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, Civil Appeal No. 13 of 2021 CAT; **Yara Tanzania vs DB Shapriya & Co. Ltd**, Civil Appeal No. 245 of 2018 CAT. She submitted

that the Respondent has not submitted to the ground of extension of time, arguing should be taken it as concession. She submitted that the Appellant accounted for each day of delay, but the Tribunal did not determine the application on merit. She insisted that there are illegalities on the decision, arguing, that alone may be a good reason for extension of time.

To my opinion, it was a misapprehension on the part of the Tribunal to rule that it was *functus officio* to entertain the application for extension of time to set aside the default judgment by importing elements that the defaulted judgment subject for setting aside, its execution were complete. To my respective view, execution of a decree and an application for extension of time to set aside the default judgment are two different processes governed by different rules.

Setting aside the default judgment falls under the domain of Order VIII rule 15, Cap 33 (*supra*), I quote,

'(1) Where a judgment has been entered pursuant to rule 14 the court may, upon application made by the aggrieved party, within sixty days from the date of the judgment, set aside or vary the default judgment upon such terms as may be considered by the court to be just.'

(2) In considering whether to set aside or vary the order for the default judgment under this rule, the court shall consider whether the aggrieved party has:

(a) applied to the court within period specified

(b) given good cause for failing to file a written statement of defence'

This provision is imported in, not for purpose of determining the merit of the intended application, rather to answer a query by the learned Counsel for First Respondent whom in his entire response, his argument was premised on the fact that the Appellant staged her course to a wrong forum for seeking extension of time for setting aside instead of resorting to the process of appeal, under section 74 read together with Order XL rule 1(b) Cap 33 (supra).

To my view, I find no merit into this argument. This is for obvious reason that herein the Appellant predominantly challenge the legality of the Tribunal mounting an order for default judgment without ascertaining the status of service and proof of service. Indeed, going by the records of Land Application No. 525 of 2021, specifically on a summons for appearance which was directed or addressed to the Appellant, the process server recorded into an affidavit for service as follows,

*'Mpokea wito yupo Arusha anaomba apangiwe mwezi wa
16/12/2021'*

There is no illustration as to where such information were obtained, either from third party or by phone call conversation. No wonder the Appellant banked on it being marred by illegality.

Without delving much on the merit of the intended application, it suffices to say the recourse for seeking extension of time for setting aside was well grounded and properly made before the Tribunal. To my view, one can opt to challenge the default judgment through appeal, in a situation where he/she is challenging the merit of the verdict and not where he/she is challenging an order for mounting to the default judgment.

In **Dangote** (supra), at page 7 and 8, the apex Court had this to say,

*'Thus, the requirement that an aggrieved party should not appeal before attempting to set aside an ex parte judgment, does not apply where the appellant is not interested to challenge the order to proceed ex parte or was the plaintiff at the trial court. This position was clearly stated in the case of **Faffari Sanya & Another v Saleh Sadiq Osman** (supra) where it was stated as follows;-*

"This rule setting aside an ex parte decree will only benefit a defendant. But there are two possible scenarios in an ex parte decree. One, a defendant might not want to set aside an ex parte decree but may wish to contest the findings of the award. Two, a plaintiff notwithstanding that the decree

is in his favour, might nevertheless wish to challenge the findings of the award.

Order XL R. 14 will not assist either of the two persons mentioned above. In such a case the remedy would appear to be appeal under section 5(1)(a) of the Appellate Jurisdiction Act, 1979...'

At page 11 the apex Court went on to say,

*'The Court was saying, basing on the authority in its previous decision in **Faffari Sanya & Another v. Sleh Sadiq Osman** (supra) that, as the jurisdiction to set aside an ex parte judgment is exclusively conferred to the trial court, it cannot be addressed by way of an appeal. If we can quote from page 11 of the ruling, the Court observed as follows:-*

"On the basis of the above provision and authorities, it is settled that where a defendant against whom an ex parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to file an application to that effect in the court that entered the judgment"

With the above remarks, the argument by the learned Counsel for First Respondent who opined that the remedy was for the Appellant to appeal instead of applying for extension of time to set aside the default judgment, is marked as a settled and closed.

In the impugned ruling, at page eight, the Tribunal cited the case of **Patricia Siweto vs Uongozi wa CCM Tawi la Muungano**, Misc. Land Appeal No. 119

of 2021, to aid and enable its verdict that to the effects that the Tribunal was functus officio to entertain the application for reason that execution was complete.

Going by the entire decision in the above cited case, one could wonder why the learned Chairperson opted to close her eyes or read the decision of this Court half way or in piece meal and ignore a substantive verdict which was made by this Court when it was confronted with the situation akin to the matter before the Tribunal. I reproduce the entire version from page eight onward in the case of **Patricia Siweto** (supra) this Court speaking through Honorable Mgeyekwa, J as she then was, commented,

*'Apart from the issue of execution, this Court after going through the appellant's grounds of appeal and the records of the Ward Tribunal, noted that there are some irregularities concerning issuing of a summons. Although the execution took place, the same does not deprive this court to adjudicate on appellant's other claims as it was stated by the Court of Appeal of Tanzania in the case of **Ms. Sykes Insurance Consultants Co. Ltd v Ms Sam Construction Co. Ltd**, Civil Revision No. 08 of 2010, whereas the Court when clarifying Order XXI Rule 57(2) of the Civil procedure Code Cap. 33 [R.E. 2019] referred to MULLA (op. cit) at page ISOS-5A held that:-*

"Where a claim is preferred under Order 21/rule 58 against attachment of immovable properties/the fact that the properties are sold or the sale is confirmed, will not deprive the court of its jurisdiction to adjudicate on the claim. The

inquiry into the claim can be proceeded with by the trial court and in the event of the claim being allowed, the sale and confirmation of sale shall to that extent be treated as a nullity and of no effect"

The Court further stated that:-

"...we are of the firm view that the learned Judge had not only the power but also the duty to hear and determine Mrs. Anna Mhina's application. Having failed to do so i.e. having declined to exercise his jurisdiction, regardless of the merits or otherwise of her claims, we have found ourselves lacking the temerity to hold that no gross injustice was occasioned to her. Her application had to be heard even if eventually it would have been found lacking in merit"

In the upshot, I am convinced that this case fits in the mould of cases for which extension of time on the ground of delay may be granted. Circumstances of this case reveal sufficient cause capable of exercising the Court's discretion and extending time within which to file an application for revision before the District Land and Housing Tribunal against the decision of the Ward Tribunal of Kimanga, Application No. 48 of 2018.

Accordingly, I allow the appeal without costs'

I still wonder why the learned Chairperson still slept into an error by misapplying this verdict which fall squarely into the matter before her.

Herein the learned Counsel for First Respondent did not reply to a long argument in chief that the Appellant accounted for all days of delay and explained for reasons for delay. I therefore take it as concession on his part.

For that matter, I fault the decision of the Tribunal and set aside its ruling and drawn order. I substituted with the verdict that the Appellant is entitled for extension of time having successfully accounted for days of delay and explained reasons for delay.

The Appellant is given an extension of fourteen days to file an application for extension of time against the default judgment dated 11/05/2022 in Land Application No. 525 of 2021, which will count from the date hereof.

In the event the intended application is filed, I direct for it to be assigned to a different Chairperson.

The appeal is allowed. No order for costs.



E.B. LUVANDA
JUDGE
16/04/2024

Judgment delivered in the presence of Mr. Thomas Rwebangira learned Counsel for the Appellant and Ms. Kashindye Thabiti learned Counsel holding brief for Mr. Rajabu Mrindoko learned Counsel for the Respondent.



E.B. LUVANDA
JUDGE
16/04/2024