

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI

MISC LAND APPEAL NO. 3 OF 2019

(C/f Misc. Application No. 14 of 2018 District Land and Housing Tribunal of Moshi at Moshi)

DANIEL SEBASTIAN APPELLANT

VERSUS

SEBASTIAN DANIEL ODETARIKI RESPONDENT

9th June, 2020 & 10th July, 2020

JUDGMENT

MKAPA, J:

This appeal originates from the decision of the Moshi District Land and Housing Tribunal in **Misc. Land Application No. 14 of 2018** delivered on 6th December, 2018 in which the Chairman **Hon. T. J Wagine** dismissed the application for extension of time with cost for lack of sufficient cause for the delay.

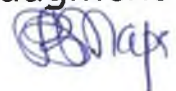
The brief facts which gave rise to the instant appeal is to the effect that, the respondent herein is the appellant's father, the former successfully sued the latter before Masama Kusini Ward Tribunal for trespassing over his piece of land measuring six (6) acres located at Zaran, Mkombozi within Hai district in Kilimanjaro region. It is alleged that at the ward tribunal, the appellant was summoned but did not enter appearance thus the

application was heard and decided ex parte and the judgment delivered on 10th December, 2015. On 22nd January 2018, the appellant filed before the District Land and Housing Tribunal an application for extension of time to lodge appeal out of time against the ward tribunal's decision, the same was dismissed hence this appeal. The appellant has raised four grounds of appeal which are all centred on the fact that:-

1. The District Land and Housing Tribunal chairman erred in law and fact in delivering a ruling in favour of the respondent by disallowing to grant leave for extension of time to appeal out of time.

At the hearing the parties agreed for the appeal to be argued by filing written submissions and the court so ordered. The appellant was represented by Mr. Elia Kiwia, learned advocate while the respondent had the services of Ms. Esther Kibanga also learned Advocate.

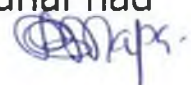
Arguing in support of the appeal Mr. Kiwia submitted in detail on the illegality of the decision of the ward tribunal as if this court is the first appellate court. He went on submitting that, the ward tribunal decision was tainted with illegalities thus warrant for extension of time but the District Land and Housing Tribunal denied to grant the extension. Mr. Kiwia mentioned one such illegality being signature of one Hadija Yahaya in the judgment



of the ward tribunal alleging to have signed on behalf of the tribunal's assessor one Hadija Mboya which was a forgery. He cited a number of cases to support his argument one of them being the landmark case of **Lyamuya Construction Limited V Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Appeal No. 2 of 2010 CAT (unreported)** in which the Court of Appeal set the requirements to be considered while granting extension of time that;

- (a) The applicant must account for all the period of delay.*
- (b) The delay should be inordinate*
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in prosecution that he intends to take*
- (d) If the court feels that there are sufficient reasons, such as existence of point of law of sufficient importance, such as illegality of the decision sought to be challenged.*

It was Mr. Kiwia's contention that the appellant was served with summons annexed with ward tribunal's judgment during execution at the district tribunal thus he was not properly summoned during the determination of this matter at the ward tribunal. Mr. Kiwia went on arguing that, the ward tribunal had



no jurisdiction to entertain the matter at hand as the matter was probate in nature, and further that by determining the matter ex parte it prejudiced the appellant of his right to be heard.

Finally, Mr. Kiwia submitted that, the appellant's delay was caused by harassment, torture and continuous detention at Bomang'ombe Police Station and framing of a number of criminal cases against him which he ended up being detained at Karanga Prison. He finally prayed that this appeal be allowed.

Contesting the appeal Ms. Kibanga submitted that, the allegations regarding forged signature of one of the assessors in the ward tribunal's decision required higher degree of probability than the one applicable in civil cases. It was Ms. Kibanga's view that the same cannot be raised in the appeal. Supporting her argument she cited decision in the case of **Salim Juma Kivara V. Mwanaidi Jumanne Mkwizu, PC Civil Appeal No. 11 and 12 of 2019** which referred the case of **Omary Yusuph Ahmed Abdubakar (1987) TLR 169** where the court held that;

"When the question whether someone has committed a crime is raised in civil proceedings that allegation need to be established on higher degree of probability than that which is required in civil cases."



Ms. Kibanga went on submitting that, the ward tribunal had jurisdiction to entertain this matter as a result the district court passed the execution order since it was proved that the respondent was the legal owner. Furthermore, the District Land and Housing Tribunal dismissed his application for being unfounded and devoid of merits. Finally Ms. Kibanga contended that the allegations that the appellant had been harassed lack legal basis since there is a long existing feud between the parties and the appellant has always been the one refusing to appear whenever summoned. She finally prayed for the appeal to be dismissed with costs.

In his brief rejoinder Mr. Elia reiterated his stance in submission to the effect that the ward tribunal decision was tainted with a number of illegalities to warrant him to be granted extension of time.

I have thoroughly gone through both tribunal's records and parties submissions and I think the only issue for determination is whether the appellant has demonstrated sufficient reasons for this court to grant the application sought.

The law is settled to the effect that extension of time is the discretion of a court only if there are sufficient and reasonable causes. See **Benedict Mumello V Bank of Tanzania**, E.A.I.R [2006] Vol. I, also **Lyamuya Construction** (*supra*). In the

instant appeal, the main reason that led the District Land and Housing Tribunal's chairman to dismiss the appellant's application is the failure by the applicant to account for each day of delay from 10th December, 2015 when the judgment was delivered until 22nd January, 2018 when he filed his application for extension of time.

More so, I think it is pertinent to establish whether the appellant can appeal against an *ex parte* judgment. As a matter of practice a party which did not enter appearance during *ex parte* decision if aggrieved by the decision has to first move the court (or tribunal in this case) to vacate or set aside the *ex parte* decision. The court of Appeal in **Jaffara Sanya Jussa & Ismail Sanya Jussa V Saleh Sadiq Osman, Civil Case No. 22 of 1996 (unreported)** is informative on the fact when it held:-

"Therefore the applicants ought to have applied for setting aside the ex parte decree in the High Court and should not have simultaneously filed an appeal in this court. That move was undoubtedly irregular."

The above position was further elaborated in the case of **Yara Tanzania Limited Vs. DB Shapriya & Co. Limited, Civil Appeal No. 245 of 2018**, whereby **Mwambegele J.A.** had this to say-



"...it is now settled that when a party is aggrieved with an ex parte, summary or default judgment of the High Court he must first exhaust the alternatives or remedies available in the High Court before coming to this court on revision or appeal. If that is not done, the revision or appeal to the court will be rendered misconceived and prone to be struck out."

In an application to set aside the *ex parte* decision, an aggrieved party (in this case the appellant) must have given reasons for non-appearance. Upon satisfaction the ward tribunal would have set aside the *ex parte* decision, and allow the matter to be heard *inter-parties*.

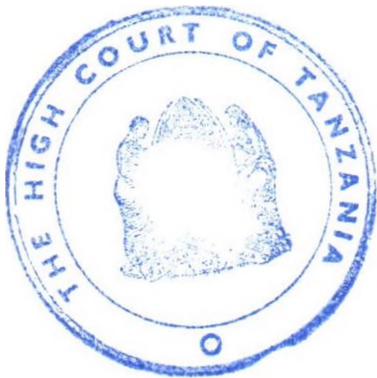
The rationale behind the above procedure is the fact that, the tribunal being the same body which previously had made an *ex-parte* order has to be satisfied with the reasons for the appellant's non- appearance. If the ward tribunal would have dismissed such application, then the appellant could rightly appeal to the district tribunal and if still aggrieved appealed to this Court. Had the ward tribunal denied the appellant such audience and right to be heard, and the district tribunal also dismissed his claims then this appeal would have been entertained.



Failure by the appellant to adhere to the laid down legal procedures in my view renders the appeal prematurely instituted at the District Land and Housing tribunal consequently, I nullify the whole proceeding, decision and order thereto.

This appeal is therefore dismissed and since the parties are related (father and a son) I give no orders as to costs.

Dated and delivered at Moshi, this 10th Day of July, 2020




S.B. MKAPA

JUDGE

10/07/2020