

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

MISC. LAND CASE APPEAL NO. 28 OF 2020

(Arising from the District Land and Housing Tribunal for Kagera at Bukoba in Misc. Application No. 331 of 2018 and Original Civil Case No. 21 of 2017 at Karabagaine Ward Tribunal)

JUVENARY SPRIAN..... 1ST APPELLANT

MUTALEMWA POLIT.....2ND APPELLANT

VERSUS

EDWIN CHRISTIAN..... RESPONDENT

JUDGMENT

Date of Judgment: 08.07.2022

A.Y. Mwenda, J

This appeal emanates from the ruling of the District Land and Housing tribunal of KAGERA at BUKOBA. In the said application the appellants sought the pleasure of the Tribunal to grant them leave for extension of time to file appeal against the ex-parte judgment entered by KARABAGaine Ward Tribunal.

After hearing the submissions by both parties, the Honorable Chairman dismissed the appellant's application on the reasons that they failed to account for each and every day of delay. Aggrieved, the appellants came before this court with a memorandum of appeal containing four grounds, to wit:

1. That, the Honorable Tribunal erred in Law and fact by denying to grant extension of time to appeal while the Ward Tribunal's judgment delivered ex-parte without notice to the herein appellants so that would have afforded an opportunity timely to take reasonable steps to enforce their rights.
2. That, the Honorable Tribunal erred in law by failing to note that the Ward Tribunal's proceedings and judgment were tainted with irregularity whereby administrators of estate (Appellants) were sued in their personal capacity.
3. That, the Honorable Tribunal erred in law and fact by failing to note that the dispute before the Ward Tribunal was tainted with irregularity due to the failure to join the vendor of the disputed shamba as party to the case.
4. That, the Honorable Tribunal erred in law and in fact in failing to consider, evaluate and make its own findings on the evidence available before it.

These grounds were served to the respondent who replied accordingly. After that, this court fixed a hearing date and on the date in question the appellants were represented by Mr. KABAKAMA and Mr. RWEYEMAMU, learned counsels and the respondent enjoyed the services of Mr. DANSTAN MUJAKI, learned counsel.

During submission in chief, Mr. Rweyemamu, learned counsel while dealing with the first ground of appeal submitted that the appellants sought extension of time to file appeal out of time before the District Land and Housing Tribunal. However it was dismissed as the Hon. Chairman was of the view that they failed to account for each and every day of delay.

The learned counsel said, during continuance of the party's case before the Ward Tribunal the appellants were served with the summons to appear but failed to comply due to various reasons including the first appellant being sick. He said the case was then heard ex parte and on the judgment date the appellants were not served with the summons to attend and take the judgment. He said, with failure to issue summons then the appellants become unaware as to when the judgment was issued and this is a sufficient reason for extension of time. To support this point, he cited the case of COSMAS CONSTRUCTION CO. LTD VS. ARROW GARMENTS LTD [1992] TLR 127.

With regard to the second ground of appeal Mr. RWEYEMAMU submitted that in Land dispute settlements, the Ward Tribunal operates like normal courts which is required to call witnesses, record evidence under oath or affirmation and then arrange a visit of Locus in quo. He said, it is trite practice that the witnesses at the Locus in quo should be those who testified before the tribunal under oath. However, he said, when the Ward Tribunal visited the Locus in quo the vendor who was not called as a witness during trial was invited to testify. He said, the vendor who was an important witness ought to be called as a witness to testify under oath first before being invited at the Locus in quo where his evidence was not taken under oath. To support this argument he cited the case of JOVENT CLIVERY RUSHAKA AND ANOTHER VS. BIBIANA CHACHA, CIVIL APPEAL NO. 236 OF 2020 (unreported) page 19.

On top of that the learned counsel submitted further that the witnesses before the Ward Tribunal testified without being sworn or affirmed which was a fatal irregularity. He supported this point by citing the case of MARIAMUS BARNABAS MROPE VS. VICTORIA AMANDUM MISC. LAND CASE APPEAL NO. 9 OF 2016 (unreported) at page 3 and the case of GABRIEL BONIFACE NKAKATISI VS. THE BOARD OF TRUSTEES OF NSSF, CIVIL APPEAL NO. 237 OF 2021 (unreported) at page 6. He said in these cases it was stated that the tribunal operates as a court and for that matter the witnesses should take oath vide S. 4(a) of the Oaths and Statutory Declaration Act [Cap 34 R.E 2019]. He said with the said anomaly the remedy available is to quash the whole proceedings.

The learned counsel concluded his submission by stating that the trial tribunal's proceedings was tainted with illegality which by itself, ought to be considered by the appellate tribunal and grant extension of time because illegality alone is sufficient reasons for extension of tension. To support this point he cited the case of PRINCIPAL SECRETARY, MINISTRY OF DEFENSE AND NATIONAL SERVICE VS. DURAN P. VALAMBHIA CAT [1992] TLR. The learned counsel prayed this appeal to be allowed and for an order to allow the appellants to file the appeal out of time.

In reply to the submissions by the learned Counsel for the appellant, Mr. Danstan Mujaki, learned Counsel for the respondent submitted that if the applicant is seeking extension of time relying on illegality, the said illegality must be clearly

seen and the same must be advanced by the applicant himself. He said, in seeking extension of time, the applicant must account for each and every day of delay and must also show that he filed his application promptly and without any invalid explanation and negligence on his part. To support the point he cited the case of TANZANIA PORTS AUTHORITY AND OTHERS, CIVIL APPLICATION NO. 87 OF 2016 (unreported).

Mr. Danstan, further submitted that the counsel for the appellants is not refuting that the applicants were served with the summons to appear but now he alleges that they ought to be served with the summons to appear on the judgment date. He said, under S. 15 and 16 of the Ward Tribunal Act, the tribunals are not bound by rules and procedure of the courts since the tribunal are required to regulate their own procedures in a view of reaching a fair decision.

With regard to complaint over the trial tribunal taking evidence at the Locus in quo of the witness who was not called to testify under oath, the learned counsel for the respondent submitted that there is no law which provide a *modus operandi* during the visit of the Locus in quo. He said, Section 15 (2) of Ward's Tribunal's Act state that the Tribunal may adopt its own procedure with a view of reaching a fair decision. He added that in the case of JOVENT CLAVERY RUSHAKA (*supra*) it was stated that visits of Locus in quo shall be in exceptional cases. With regard to the case of MARIAMUS BARNABAS MROPE VS. VICTORIA AMANDUM (*supra*) which

was cited by Mr. Rweyemamu, Mr. Danstan submitted that it is distinguishable in sense that it was all about keeping records of the tribunal especially in the coram. With regard to complaint over witnesses who testified without taking oath, the learned Counsel for the respondent, having perused the Ward Tribunal's proceedings and satisfied himself that the witnesses testified without taking oath or affirmation he submitted that the proceedings of the Ward Tribunal are a nullity. He thus prayed this court to nullify the proceedings of the District Land and Housing Tribunal as well as that of the Ward Tribunal.

In a brief rejoinder Mr. Rweyemamu submitted that he is glad if the learned counsel for the respondent concedes that there were no oaths taken by the witnesses. For that matter, he said, since before this court there is no appeal against the Ward Tribunal's decision, then he prayed the appellant to be allowed to file their appeal before the District Land and Housing Tribunal before another Chairman.

I have keenly gone through the submissions by the counsels for both sides, and the issue for determination is whether the appellants advanced sufficient reasons to warrant extension of time to appeal against the decision of the ward tribunal. In dismissing the appellant's application, the Hon. Chairman was of the view that they failed to account for each and every day of the delay. The Hon. Chairman might be right that they failed to give an account for each and every day of delay but it is important to note that such account is not the only factors to be considered

in applications for extension of time. It is trite law that other factors such as existence of irregularity/illegality is sufficient reason for extension of time. In the case of LYAMUYA CONSTRUCTION COMPANY LTD VS. THE BOARD OF REGISTERED TRUSTEE OF YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF TANZANIA (Civil Application No. 2 of 2010) [2011] TZ CA the court of appeal formulated guidelines to be considered by courts when exercise of its discretion to grant extension of time, these are:

- (a) The applicant must account for all the period of delay.
- (b) The delay should not be inordinate.
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that intends to take and;
- (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.

From above guidelines it is clear that when a point at issues is illegality of the decision challenged, then that alone suffice sufficient reason for courts to exercise their discretion and grant extension of time. In the Case of GOSBERT KAHWA AND TWO OTHERS V. MSAFIRI M. MALANJA, LAND CASE APPLICATION NO. 78 OF 2020 this court, while citing the case of SOSPETERJAMHURI WAMBURA AND 3 OTHERS V. NYABOKE RYANGARO MONGU(Administrator of the estate of the late

MANYASI MONU, Misc. Land Application No. 61 of 2020 (unreported) held *inter alia* that :

"In our view when a point at issue is one alleging illegality of the decision being challenged, the court has the duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

That being said, it is now the duty of this court to ascertain as to whether there is any illegality in the Ward Tribunal's records. During submission in chief, Mr. Rweyemamu raised two points of illegalities. One that after the case was heard *ex-parte*, the appellants were not served with the summons to appear on the judgment date and two that during trial at the ward tribunal, witnesses testified without being sworn or affirmed as required by the Law.

Having considered the first point of illegalities, this court is in agreement with the learned counsel for the appellants that failure to issue summons to appear on the judgment date is fatal. It is trite law that once the case is heard *ex-parte*, summons to the respondents to appear on the judgment date must be issued. In the case of *COSMAS CONSTRUCTION CO. (LTD) V. ARROW GARMENT LTD* [1992] TLR (CA) the Court observed as follows:

"A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte, but has to be told when the judgment is delivered so that he may, if he wishes, attend to take it as a certain consequences may follow."

With regard to the second illegality that witnesses before the ward tribunal testified without being sworn, this court went through the records and noted it to be true. As was rightly pointed out by Mr. Rweyemamu, while handling land disputes, the Ward Tribunal is a land Court for the purpose of Land Laws and for that purpose its records must be kept properly like any other court of law.

In the case of MARIAMUS BARNABAS MROPE V. VICTORIA AMANDUS, MISC. LAND CASEAPPEALNO. 9 OF 2016, (unreported) this court held inter alia that:

"...that takes us to section 167 of the Land Act, Section 62 of the Village Land Act, and Section 3(1) of the Land Disputes Courts Act to see the Status of the Ward Tribunal. These provisions recognize the Ward Tribunal as a land Court. It is Court for the purposes of Land Laws. For that Purpose its records must be kept properly like any other court record."

In the same case the court went further to state that:

"Section 24(2) of the Ward Tribunal's Act vests the duty to keep records properly to the secretary of the Ward tribunal. He is required to endorse the coram, record the evidence adduced and record other matters formally transpiring during the proceedings."

The take away from the authority above is that keeping the records properly like any other courts also entails that the witnesses testifying before it shall do so under oath or affirmation. With regard to consequences for failure to comply with the above guidance the court stated as follows that:

"It is important for the secretary to take this aspect in a mid-seriously because failure to do so may properly may cause the record to be found illegal and make the whole proceedings a waste of time."

From the foregoing observations, with the illegalities discussed above in the ward tribunal's records, this court is satisfied that the same are sufficient to warrant the court to exercise its discretion to grant extension of time. That being said, this court finds merits in the present appeal and it is hereby succeeds. The Ruling of the District Land and Housing Tribunal for Kagera at Bukoba is dismissed and any other order emanating therefrom is set aside. Extension of time to file appeal out of time is granted. The appellants shall do so within 14 days from the date of this ruling.

Each party shall bear its own costs.

It is so ordered.



A.Y. Mwenda

Judge

08.07.2022

Judgment delivered in chamber under the seal of this court in the presence of the appellants and in the presence of Mr. Danstan Mujaki learned advocate for the respondent.



A.Y. Mwenda

Judge

08.07.2022