IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(LAND DIVISION)

AT SONGEA

LAND REVISION NO. 01 OF 2023

(Originating from the District Land and Housing Tribunal for Mbinga at Mbinga in Miscellaneous Application No. 36 of 2022)

BENJAMIN HYERA ..... APPLICANT

VERSUS

DANSTAN DANNY ..... RESPONDENT

RULING

Date of Last Order: 30/05/2023
Date of Judgment: 31/05/2023

U. E. Madeha, J.

To begin with, this is an application made under sections 43 (1) (a) and (b) of the *Courts (Land Disputes) Act No. 2 of 2022 (The Land Dispute Courts Act) R. E. 2019* and 95 of the *Civil Procedure Code* (R. E. 2019). It is worth considering that, the applicant is requesting this Court to call for the records and revise the proceedings, decision and orders made in Miscellaneous Application No. 36 of 2022 from the District Land and Housing Tribunal for Mbinga.

Basically, before the District Land and Housing Tribunal the Respondent hereinabove named filed an application for execution of a decree from Matarawe Ward Tribunal in Land Case No. 88 of 2018. At the hearing, the Appellant contested the execution on the ground that the Trial Ward Tribunal had no jurisdiction to determine the matter since the disputed land was not located within the territorial jurisdiction of Matarawe Ward.

As a matter of fact, the objection raised by the applicant was overruled for the reason that if the Applicant knew that the Ward Tribunal had no jurisdiction, he would have raised such objection at the hearing of the application before the trial Ward Tribunal or he would have preferred an appeal on that ground. Also, the District Land and Housing Tribunal added that so far as the decision of the Trial Ward Tribunal was unchallenged, it remained valid so it proceeded to give execution orders. Aggrieved with the decision of the District Land and Housing Tribunal the Applicant preferred this application for revision.

It is important to note the fact that, in his affidavit in support of the application the Applicant averred that the District Land and Housing Tribunal erred in law to order the Applicant to vacate in the disputed land and pay the Respondent herein Tshs. 50,000. He further contended

that if the orders given by the Trial Tribunal will not be revised, they will lead the Applicant to suffer irreparable loss.

At the hearing of this application the Applicant appeared in person whereas the Respondent enjoyed the services of none other than; Mr. Dickson P. Ndunguru, the learned counsel.

In particular, the application was argued by way of written submissions. Regarding to that, both parties adhered to the orders of this Court. As a result, they filed their submissions on time which enabled this Court to compose this judgment. Arguing in support of his application the Applicant submitted that during the hearing of Miscellaneous Application No. 36 of 2022 in which the Respondent filed an application for execution he objected the execution on the ground that the judgment which was subject to the execution was tinted with errors.

With respect to that, he added that the judgment of the Trial Ward Tribunal which was subjected for execution was given while having no jurisdiction to determine the same. Moreover, he further contended that the judgment failed to describe the disputed land something which would make the execution orders to be inoperative. The Applicant further argued that the Trial Tribunal erred in law and in fact in

overruling the objection raised before the Trial Tribunal despite the defects found on the judgment which was applied for execution. To add flavor to it, he contended that even in the execution order the District Land and Housing Tribunal failed to describe the address of the disputed land. Basing on those arguments the Applicant prayed for this Court to call for the records in respect to Miscellaneous Application No. 36 of 2022 from The District Land and Housing Tribunal for Mbinga.

On the contrary, Mr. Dickson P. Ndunguru the learned advocate for the Respondent shortly submitted that; the application which has been preferred by the Applicant before this Court is invalid since if the Applicant thought that the decision given by Matarawe Ward Tribunal has the said irregularities he would have preferred an appeal against it and not resisting the application for execution. Expounding his argument, he made reference to the case of **Paskali Nina v. Andrea Karera**, Civil Appeal No. 325 of 2020 in which the Court of Appeal of Tanzania was on the view that, as long as the order of the Court was neither challenged nor overruled on appeal by the superior Court, it remains valid.

When it comes to the Respondent's learned advocate was on the stand that since there was no appeal against the judgment of Matarawe

Ward Tribunal which was the subject of the application for execution, the District Land and Housing Tribunal correctly overruled the objection raised by the Applicant. Finally, he prayed for this application to be dismissed with costs. On the other hand, in his short rejoinder submission the Applicant has nothing new to add other than reiterating what he submitted in his submission in chief. Lastly, he prayed for his application to be allowed with costs.

As far as I am concerned, having gone through the records of the Ward Tribunal, the original records of the District Land and Housing Tribunal, the affidavit sworn by the Applicant and the submissions made by both parties, I find the Applicant is faulting the execution order of the District Land and Housing Tribunal.

In that case, his grievances are premised on his objection which he had raised on the jurisdiction of the Ward Tribunal contending that it has no jurisdiction to entertain the matter since the disputed land is not found in Matarawe Ward. Also, the Applicant was on the view that since the disputed land is not located in Matarawe Ward, the execution order granted by the District Land and Housing Tribunal is not executable. The Respondent's learned advocate was on the view that the District Land and Housing Tribunal correctly overruled the objection raised by the

Applicant on the issue of jurisdiction of the Ward Tribunal to determine the matter. Besides, he was on the same view with the District Land and Housing Tribunal that if the applicant thought the judgment of the Ward Tribunal contained the stated irregularities, he would have preferred an appeal and not to raised an objection at execution stage.

The District Land and Housing Tribunal in its holding, firmly stated that as long as the judgment of the Ward Tribunal was not challenged the Applicant's objection could not stand. In reaching into its decision the District Land and Housing Tribunal was guided by the holding of this Court in the case of **Jeremia Makoi v. Geneva Ntima**, Civil Appeal No. 53 of 2017, in which the Court held that:

> *"In my finding, therefore, the Hon. Chairman wrongfully dealt with factual issues which were not properly before the court and which ought to have been dealt with in an appeal. As a result, he entertained the application for execution as if it was an appeal whilst the decision whose decree was sought to be executed was never appealed against by the respondent."*

Basing on the holding in the above decision the District Land and Housing Tribunal overruled the objection since the application before it

was not an appeal. It further stated that since the judgment which was tabled before it for execution was not overturned by the higher Tribunal it remained valid and proceed to give execution orders.

Basically, from the above position of the law, it is my firm position that the District Land and Housing Tribunal reached into a correct decision. I also concur with the submissions made by the Respondent's learned advocate that there is nothing to be revised in the decision made by the District Land and Housing Tribunal.

In particular, it is a crystal-clear position of the law that a person aggrieved by any decision may appeal to the higher Tribunal or Court. The Court of Appeal of Tanzania, the apex Court in our jurisdiction, in the case of **Paskali Nina v. Andrea Karera** (supra), had this to state:

> *"So, long as the said order was neither challenged nor overturned on appeal by a superior Court, it remained valid ..."*

In the final event, I find the District Land and Housing Tribunal was correct in overruling the objection raised by the applicant. Principally, entertaining the objection it would have been mean dealing with the application for execution as an appeal which is not correct.

On the basis of the foregoing discussion, I find there is nothing to disturb in the decision reached by the District Land and Housing Tribunal. This application has no merit and it is dismissed with costs. Order accordingly.

DATED and **DELIVERED** at Songea this 31st day of May, 2023.

U.E MADEHA

JUDGE

31/05/2023

COURT: Ruling delivered on this 31st day of May, 2023 in the presence of the Appellant and the Respondent. Right of appeal is explained.

U. E. MADEHA

JUDGE

31/05/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CIVIL APPEAL NO. 15 OF 2022

(Arising from Songea District Court in Civil Case No. 18 of 2021)

DIDAS PAUL LYAKURWA ..... APPELLANT

VERSUS

MAGRETH SAIKOKI MASAWE ..... RESPONDENT

JUDGMENT

Date of Last Order: 04/05/2023

Date of Judgment: 29/05/2023

U.E Madeha, J.

Before the District Court of Songea, the Respondent was the plaintiff and she successfully sued the Appellant for breach of contract. She was awarded TZS. 30,000,000 as specific damages, being the purchase price of the goods from the shop of the late husband of the Respondent, TZS. 10,000,000 as incidental costs resulted from the void contact, TZS. 5,000,000 as general damages and interest in the decretal sum at the Courts rate of seven percent (7%) per annum from the date of judgement to the full satisfaction.

It is important to note that, from the Trial Court records, the facts of the case are to the effect that Magreth Saikoki Massawe (the

Respondent) is the administratrix of the estate of her late husband, one Saikoko Massawe who died on 18th June 2019. A copy of appointment form was exhibited as exhibit A1. She testified further that the deceased was a businessman and he used to conduct his business within Songea District.

The Appellant (Didas Paulo Lyakurwa) is also a businessman and he has a very close relationship with the deceased. The Appellant used to buy goods from the shop of the deceased in which the Respondent served as the shopkeeper. The Appellant was buying the goods by paying cash money and by credit. It reached a time when the Appellant failed to pay back the money to the deceased and he used his motor vehicle with registration No. T 165 BLW make Fusso as a bond. The motor vehicle was worth TZS. 30,000,000 only while the goods which the Appellant took from the deceased were more worth than the motor vehicle. She further testified that she knew that the Appellant was the owner of the motor vehicle which was bought through public auction.

Upon the Appellant's failure to pay the deceased for the goods he was given, the car was sold to one Simon Petro Silayo. Since the motor vehicle was registered in the name of another person, it was seized by PPCB it was wrongly auctioned as the owner one Emmanuel Ambrose

Myoka had paid the debt to the SACCOS in which it was pledged. The Respondent was sued by Simon Petro Silayo for the recovery of the purchase. The Court ordered the Respondent to pay TZS. 40,000,000 as the purchase price and subsequent costs, which she had paid.

Before the Trial Court the Respondent prayed to be paid TZS. 30,000,000 which was the purchase price of the motor vehicle, TZS. 10,000,000 as costs caused by the Appellant upon failure to pay the costs of the goods he had taken from the deceased's shop and costs of the case.

On the other hand, Mathew Alexander Mkumbo (PW2), testified to the effect that he is a businessman and he works with Kapondogoro Auction Mart, the company which deals with the collection of debts and public auctions. His clients are banks and corporate unions and in the year 2017, he was given a permit by the Commission of the Corporate Union Committee to collected debts from ten regions and among them was Ruvuma Region. He issued notice to the clients who were indebted and for those who failed to pay after the expiry of the notice their bonds were attached. Among the attached properties was a motor vehicle with registration number T165 BLW make Fusso which was attached at Iringa from a person who was indebted with Sokoo Kuu Corporative Union and

the Appellant bought it through public auction conducted on 3rd September, 2017. However, the Appellant failed to follow the right procedures of the auction since he failed to pay the money on time to the account of either the Auctioneer or the Cooperative Union but the Appellant deposited the money into the Auctioneer's Manager. When the Cooperative Union needed to be paid the money but they failed pay the money since the Appellant was not already deposited the money to the Auctioneer's bank account.

Thereafter, the owner of the motor vehicle reported to the PCCB office at Iringa. Upon making follow ups they discovered that the money was not deposited into the cooperative account. They ordered for the money to be handed over to the owner but it proved failure and the PCCB seized the motor vehicle and sent back to the owner. The Appellant was not given the certificate of sale from the Auctioneer since the money was paid in a wrong account.

By virtue of power of attorney, Maximilian Komba (DW1), represented the Appellant and he was the only witness of the Appellant (defendant). In his testimony he told the Trial Court that, as much as he knew the Appellant, the Respondent and her deceased husband, there was nothing to be believed in what was testified by the Respondent and

her witness. He added that there is no any binding document between the deceased and the Appellant to prove that there were goods which were received on credit by the Appellant from the shop of the Respondent's husband. He contended that for the property worthy TZS. 30,000,000 was to be given with a delivery note and not by mere words. He further prayed for the Trial Court to dismiss the Respondent's claims with costs.

At the end of the trial the Trial Court ordered that, the contract between the deceased and the Appellant was to be declared as null and void initio and proceeded to grant the orders which I have stated early hereinabove. Distressed with that decision, the Appellant appealed to this Court on the following grounds;

1. *That, the Trial Court erred in law and fact to find the appellant liable for where there was no evidence to prove the claim.*
2. *That, the Trial Court erred in law to hold that the evidence of PW2 corroborated the evidence of PW1 while it was not.*
3. *That, the Trial erred in law and fact to award specific damages which was not specifically pleaded and strictly proven.*
4. *That, the Trial Court erred in law and fact to award general damages without stating the reason of so awarding.*
5. *That, Trial Court erred in law and fact to hold that there was contract of sale of the motor vehicle without any prove to the same.*

6. *That, the Trial Court erred in law and fact that the contract can be made orally or by writing without regard to the restrictions of orally made under section 6 (1) of the Sales of goods Act (Cap. 214, R. E. 2019).*

This appeal was disposed by way of written submission. The Appellant was represented by none other than; Mr. D. P. Ndunguru the learned advocate whereas the Respondent enjoyed the services of Mr. Eliseus Ndunguru the learned advocate.

On the first ground of appeal Mr. D.P. Ndunguru submitted that the Trial Court erred in law and facts in finding that there was breach of contract while there was no evidence to prove such claim. He contended that since the Appellant denied the claims laid before him it was the duty of the Respondent to prove that the Appellant received goods from deceased's shop worth TZS. 30,000,000 on credit. To buttress his argument, he cited section 110 (1) and (2) of the *Evidence Act (Cap. 6, R. E. 2019),* which provides that:

> *"110 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

He further submitted that in this case there was nothing discharged by the Respondent to prove that the Appellant sold a car to the Respondent and the Appellant took goods from the deceased's shop on credit and used the motor vehicle as a bond. In that regard, he contended that in any suit for the specific damages to be proved, it's a trite principle that requires that the same must be specifically pleaded and strictly proved. To cement his argument, reference was made to the case of **Zuberi Augustino v. Anicet Mugabe** (1992) TLR 137, in which it was held that:

"Specific damages need to be specifically pleaded and strictly proven".

Also, he cited with approval the case of **Bamprass Star Services Station Ltd v. Mrs Fatuma Mwale** (200) TLR 390, in which it was held that:

"It is trite law that specific damages being exceptional in their character" and which may consist of off-pocket expenses and loss of earnings incurred down to the trial" must not only be claimed specifically but strictly proven."

He emphasized that in this case the Appellant was sued for breach of contract for non-payment of TZS. 30,000,000 being the price of goods taken from the shop of the Respondent's husband. He added that the Appellant was ordered to pay that amount of money even though there was no specification of which goods were taken from the shop of Respondent's husband. He was on the view that the Respondent was to prove specifically which goods were taken and not to generalize the claims. To cement it, he made reference in the case of **Vidoba Freight Co. Limited V. Emirates Shipping Agencies (T) Ltd & Another**, Civil Appeal No. 12 of 2019, Court of Appeal of Tanzania (unreported), in which it was held that:

> *"It is a trite principle of law that specific damages must be specifically pleaded and strictly proved."*

On the second ground of appeal, he argued that the Trial Court erred in law and fact by holding that the evidence of the PW2 corroborated with the evidence given by PW1 while it did not. He added that the evidence of PW1 led the Court to believe that the Appellant took goods from the shop of PW1's husband and he took on credit and later on pledged the motor vehicle for the debt while PW2 testified that Julius Mashauri sold the motor vehicle to the Appellant and there was no corroboration on the evidence of the two witnesses. He added that the

testimony given by PW2's was not direct evidence and all evidence must be direct as required under section 62 (1) of the *Evidence Act (Cap. 6 R. E. 2022)*, which reads:

> *"Oral evidence must, in all cases whatever, be direct".*

On the third ground of appeal, he averred that the Trial Court erred in law and fact in awarding specific damages that were not specifically pleaded and strictly proved. He stated that a person who claim to have suffered specific damages the law requires the same to be specifically pleaded and proved. In the instant case the Respondent claimed to have sold goods to the Appellant valued at TZS. 30,000,000. In that regard she was required to prove them specifically by specifying the name of the sold goods, their value and date when they were taken on credit. But in this case that was not proved meanwhile the Respondent made a mere assertion which was not proved at all. To cement his argument, he made reference to what was held in **Vidoba Freight Co Limited v. Emirates Shipping Agencies (T) Ltd** (supra) and **Zuberi Augustino v. Anicet Mugabe** (supra) and **Bamprass Star Services Station Ltd v. Mrs. Fatuma Mwale** (2000) TLR 390. In the latter case it was held that:

"It is trite law that specific damages being exceptional in their character" and which may consist of off-pocket expenses and loss of earnings incurred down to the trial" must not only be claimed specifically but strictly proven".

Notably, on the fourth ground of appeal that the Trial Court erred in law and fact in awarding general damages without justification, he argued that the Trial Court awarded TZS. 5,000,000 as a general damage and there was no reason to justify the award which contravened the principle developed in the case of **Antony Ngoo & Davis Antony Ngoo v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), as cited in the case of **Vidoba Freight Co. Limited v. Emirates Shipping Agencies (T) Ltd** (supra), in which it was held that:

"The law is settled that general damages are awarded by the trial court after consideration and deliberation on evidence on record able to justify the award. The judge has discretion in awarding general damages although has to assign reasons in awarding the same."

Principally, he argued that concerning the fifth ground of appeal, the Trial Court erred in law and fact in holding that there was a contract of sale of the motor vehicle without any proof of the same. Under

Section 6 (2) of the *Sale of Goods Act, (Cap. 214 R. E. 2019),* it is provided that:

> *"A contract of sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives the goods, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the parties to be charged or by his agent in that behalf."*

To crown it all, he further emphasized that in this case there was no evidence to prove that the Appellant sold a vehicle to the Respondent since the car or its registration card were tendered as an exhibit or there was no evidence that the Appellant possessed the said car. Also, he added that the said Simon Petro Silayo who was alleged to have bought the motor vehicle was not called to testify during trial. Notably, Mr. D. P. Ndunguru concluded his submission by stating that on the sixth ground this Court has to revisit the wording of Section 6 (1) of the *Sales of Goods Act, (Cap. 214, R.E. 2019),* which he cited earlier.

On the other hand, Mr. Eliseus Ndunguru submitted that on the first ground of the appeal the counsel for the Appellant submitted that the Trial Court erred in law and in fact by declaring that there was contract between the Appellant and the Respondent's late husband. He

added that the Respondent proved her case to the required standard as she was a shopkeeper in the deceased's shop and she knew that the motor vehicle was pledged to the deceased by the Appellant.

In addition, he argued that PW2 testified that the motor vehicle was sold to the Appellant by Kapondogoro Action Mart and there was no doubt that the Appellant possessed it before it was taken back by PCCB since the Appellant failed to follow the required procedures. He prayed this Court to believe that the Appellant handed over the said motor vehicle to the deceased as he was indebted to the deceased.

Besides, he further contended that the Appellant did not appear in person before the Trial Court to testify instead he gave a power of attorney to Maximilian Komba (DW1), who has never witnessed anything but he was told by the Appellant (Didas Lyakurwa) what happened, thus his evidence was just a hearsay. He argued that there was no evidence before the Court to oppose the assertion that the Appellant was supplied with good from the Respondent's husband and he pledged his motor vehicle and it is crystal clear from PW1's testimonies that the vehicle was handed over to the deceased for the goods which were valued at TZS. 30,000,000.

As far as the second ground of appeal is concerned the Respondent's learned counsel submitted that the evidence given by PW2 collaborated with that given by PW1 in the sense that while in his written statement of defence the Appellant denied having owned the motor vehicle, PW2 being the Principal Officer of Kapondogoro Auction Mart, testified that the said vehicle was sold to the Appellant which was later seized by PCCB. Thus, from the testimony of PW1 and PW2 there is no dispute that it was once owned by the Appellant.

On the third ground of appeal, he submitted further that, it is not true that the Trial Court granted special damages that were not pleaded and proved. He argued that the damages which were granted by the Trial Court were pleaded in the plaint and strictly proved to the required standard.

Additionally, on the fourth ground, he argued that the Trial Court was correct to grant general damages of TZS. 5,000,000 as it did, since in granting general damages, the Court uses its discretion power basing on the circumstances of the case. He added that looking on the circumstances of this case the Court was justified in granting the damages as it did.

On the fifth ground of appeal that the Trial Court erred in law in holding that there was a contract to sell the motor vehicle while there was no any proof, he submitted that in terms of Section 6 (2) of the *Sale of Goods Act* (Cap. 214, R. E. 2019) there was ample evidence to prove that the motor vehicle was sold to the deceased in lieu of goods supplied to him. Lastly, he prayed for this appeal to be dismissed with costs.

As much as I am concerned, I have gone through, the petition of appeal which encompasses three grounds and I find they boil down into two issues namely which are; **one**, whether this case was proved on the balance of probabilities and; **two**, whether the Trial Court correctly awarded the general damages of TZS. 5,000,000 and what reliefs are the parties entitled to.

Also, I have thoroughly perused the original records of this appeal and I find there was no any exhibit that the Respondent tendered during trial which linked with the Respondent's testimony to prove that the Appellant was given goods valued at TZS. 30,000,000 from the Respondent's husband shop.

From the facts of this case, the Respondent claimed that her late husband owed the Appellant TZS. 30,000,000 of which the Appellant it was alleged that the Appellant used to take goods from the shop of the

Respondent's husband. I am of the view that the Respondent failed to prove her case. Her case was a fabricated. There is no evidence to prove that the Respondent's husband supplied goods to the Appellant valued at TZS. 30,000,000.

Claims on the motor vehicle, I have observed that there is no sufficient evidence to prove that the said motor vehicle was pledged to the Respondent's husband. Even the card of the motor vehicle was not tendered as an exhibit. Thus, I find there was no sufficient evidence to prove that the motor vehicle was pledged by the Appellant to the Respondent's late husband. The Respondent is supposed to bring evidence to prove her claims on the balance of probabilities.

In the event, I agree with the Appellant's learned advocate that the there is no evidence to prove that the Appellant took goods on credit from the shop of the Respondent's husband and pledged his motor vehicle.

As far as I am concerned, I find the Respondent's claims to the Appellant had no legs to stand. There was no sufficient evidence to prove that there was an agreement between the Respondent's late husband and the Appellant.

On the issue of payment of general damages, the Appellant is challenging an order to pay TZS. 5,000,000 as a general damage. On that regard, I will start by making reference on the holding in **P.M. Jonathan v. Athman Khalfan** (1980) TLR 175 at 190, in which it was stated that:

> *"The position as it therefore emerges to me is that general damages are compensatory in character. They are intended to take care of the plaintiff's loss of reputation as well as act as a solarium for mental pain and suffering."*

Generally, in a very special way, the Trial Court awards general damages if the plaintiff proves that there is a suffered loss. Also, the damages are awarded if the damage was caused by an act done by the defendant and they are given at the discretion of the court. This stance was stated in the case of **Finca Microfinance Ltd. v. Mohamed Omary Magayu,** Civil Appeal No. 26 of the 2020, High Court of Tanzania at Mbeya, in which the Court has this to state:

> *"In general, one key consideration in all these propounded principles is that general damages are awarded at the discretion of the court after the plaintiff has averred that he has suffered such damage of the act he is complaining of and that wrong must be caused*

by the defendant but the quantification of such damage is the court's question".

As general principle general damages are awarded upon the plaintiff's proving the claims against the defendant. In the instant appeal, I have not seen the reason for awarding Respondent the general damage of TZS. 5,000,000 since the claims made by the Respondent were not proved.

To put it in a nutshell, I find the Trial Court failed to make adequate consideration on the evidence given before it. As a result, the damages were granted while the Respondent's claims were not strictly proved to the required standard of proving on the balance of probability. The decision was erroneously reached and I hereby set aside.

In the final event, I am satisfied that this appeal is merited and allowed. The judgment and decree of the Trial Court are hereby set aside. In the circumstances of this case, I give no order to costs. Order accordingly.

DATED and **DELIVERED** at Songea this 29th day of May, 2023.

U.E MADEHA

JUDGE

29/05/2023

COURT: Judgment delivered on this 29th day of May, 2023 in the presence of both parties and Mr. Vicent Kasale the learned advocate, holding brief for Mr. Eliseus Ndunguru the learned advocate for the Respondent. Right of appeal is explained.

U. E. MADEHA

JUDGE

29/05/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 24 OF 2022

(Originating from the District Land and Housing Tribunal for Songea at Songea in Land Application No. 182 of 2022)

GERMANUS MARCUS MLOWE ..... 1ST APPELLANT

SILVESTA MARCUS MLOWE ..... 2ND APPELLANT

FLOWIN MARCUS MLOWE ..... 3RD APPELLANT

METHOD MARCUS MLOWE ..... 4TH APPELLANT

THOMAS MARCUS MLOWE ..... 5TH APPELLANT

METHOD MARCUS MLOWE ..... 6TH APPELLANT

VERSUS

PASCAL CASPAR KILAWI ..... RESPONDENT

JUDGMENT

Date of Last Order: 15/05/2023

Date of Judgment: 30/05/2023

U. E. Madeha, J.

To begin with, this appeal originates from Miscellaneous Land Application No. 182 of 2022 in which the Appellant's application to set aside an order which dismissed their application in Land Application No. 05 of 2019 was not in their favour.

In fact, in albeit the brief background of this appeal is as follows; On 10th June, 2022 the Trial Tribunal dismissed Land Application No. 05 of 2019 with costs for non-appearance of the Appellants. The Appellant's filed an application to set aside the dismissal order via Miscellaneous Application No. 182 of 2022. The reasons advanced by the Appellants in their application were on the problem they encountered on the hearing date since they faced difficulties on getting means of transport from their village. Due to the encountered problems, they arrived before the Trial Tribunal and found their application has been dismissed. The Trial Tribunal found the reasons given by the Appellants not sufficient and dismissed their application.

The Appellants were distressed with the decision of the Trial Tribunal and they appealed before this Court. In their joint petition of appeal, they advanced five grounds of appeal which can be paraphrased as follows:

i. *That the District Land and Housing Tribunal erred in by deciding the application basing on legal technicalities.*
ii. *That the legal technicalities which the District Land and Housing relied upon in its decision do not project to bring harmony, peace and tranquillity in the community but it promotes animosity.*

iii. *That the District Land and Housing Tribunal erred in law and in fact by assessing and equating the capability of the Appellants with that of the Respondent.*

iv. *That the District Land and Housing Tribunal misdirected by deciding that the Appellants intentionally refused to attend before the Trial Tribunal when their application was dismissed on 10th June, 2022.*

v. *That the Trial Tribunal erred in law by giving a light touch to the provision of the law granting powers to the Trial Tribunal to set aside the dismissal order.*

On the light of the above grounds of appeal the Appellants prays for this appeal to be allowed by quashing an order that dismissed their application to set aside the dismissal order given on 10th June, 2022 and the Respondent be condemned to pay the costs of this appeal.

This appeal was disposed of by way of written submissions. Dr. Rwezaula Kaijage, the learned advocate represented the Appellants whereas the Respondent appeared in person.

Arguing in support of the grounds of this appeal, Dr. Rwezaula Kaijage preferred to argue the first and second grounds of appeal together. He contended that the Trial Tribunal used legal technicalities to dismiss the Land Application No. 05 of 2019 since the proceedings on records shows that the Appellants had a good tendance of appearance

before the Tribunal. He averred that on the date the application was dismissed, the Appellants failed to attend before the Tribunal on time since the only public bus which gives service between Mpitimbi Village and Songea Municipal did not render its service on that date and the Appellants was to walk by feet up to Songea – Mbinga main road where they managed to get a public transport. The Appellants arrived before the Trial Tribunal and found their application has been dismissed. He concluded that the Trial Tribunal was to consider those facts and set aside the dismissal order given on 10th June, 2022 and failure of that it reached into an erroneous judgment which creates animosity in the community.

The third and fourth grounds of appeal were also argued together and Dr. Rwezaula Kaijage submitted that the Trial Tribunal erred in reaching into its decision on the reason that the Respondent arrived early before the Tribunal. He added that it was necessary for the Trial Tribunal to consider the means of transport that were used by each party. He averred that the late coming of the Appellants was not on their fault but it was due to the failure to get public transport which was caused by poor infrastructures.

On the fifth ground of appeal Dr. Rwezaula Kaijage submitted that the Trial Tribunal wrongly dismissed the application to set aside an order which dismissed Land Application No. 05 of 2019. He averred that the Trial Tribunal has power to set aside, but that power was misused and the Trial Tribunal greatly misguided itself in the whole process of adjudication. He contended that in order to solve the dispute, it was necessary for the Trial Tribunal to set aside the dismissal order. Lastly, he prayed for this appeal to be allowed and the Respondent be ordered to pay the costs of this appeal.

On the contrary, the Respondent who was unrepresented submitted that the Appellants filed an Application before the Trial Tribunal praying to set aside the dismissal order under Regulation 11 (2) of the *Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003*, but the reasons didn't meet the legal requirements and it was dismissed. He added that the allegations made by the Appellants that the Trial Tribunal decided the Application without any justification in its decision are not correct. He averred that the Trial Tribunal was justified and it did not base in technicalities in making its decision.

In addition, he further argued that it is the legal requirement that if one wishes to set aside such an order, he has to adduce sufficient and genuine reasons as to why he/she failed to attend when the application was scheduled for hearing. Apart from that, he further contended that during the hearing of Miscellaneous Land Application No. 182 of 2022, in which this appeal emanates from, the reasons adduced by the learned counsel for the Appellants (Applicants) were on the transport challenges since on the day fixed for the hearing of the application there was no public transport due to bad infrastructures. He averred that coming late before the Tribunal on the ground that there were transport challenges on the date set for hearing has never been a sufficient ground to set aside the dismissal order. There must be other good reason. He made reference to the case of **Deogratius Bakinahe & Two Others v. Shirika la Usafiri Dar Es Salaam (UDA) & Another**, Miscellaneous Labour Application No. 361 of 2020 (unreported), in which the Court stated that:

> *"It is well established principles that, the one who wish the order for non- appearance to be set aside, must by affidavit evidence, adduce good reasons."*

Furthermore, he submitted that the Appellants had to adduce good and sufficient reasons for the dismissal order to be set aside. He added

that the Appellants in this appeal they have come up with new facts that they used to walk by feet from their village up to Mbinga – Songea main road where they had to board public transport and they arrived before the Trial Tribunal and found Land Application No. 05 of 2019 has been dismissed. He was on the view that such facts are new since they were not adduced before the Trial Tribunal and it is an afterthought. The Respondent further argued that raising new issues at the appellate stage is legally prohibited. To cement his submission reference was made in **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] TLR 90 and **Remigius Muganga v. Barrick Bulyahulu Gold Mine**, Civil Appeal No. 47 of 2017, Court of Appeal of Tanzania at Mwanza (unreported). In the latter case the Court had this to say:

> *"It is a settled principle that a matter which did not arise in the lower court cannot be entertained by this court on appeal."*

Finally, he prayed for this appeal to be dismissed in its entirety for lack of merit and the Appellants be ordered to pay costs.

In his rejoinder submission, Dr. Rwezaula Kaijage contended that the reasons adduced by the Appellants before the Trial Tribunal were sufficient and the application was dismissed without any justification. He added that the Respondent has failed to acknowledge what a good and

genuine reason is. In that regard, he further stated that it was for Tribunal to decide properly on the reason adduced before it. He further contended that on the material date the Appellants arrived at the precinct of the Trial Tribunal and found their application was dismissed but the Tribunal was still in progress and the Respondent was around the premises of the Tribunal. He added that each case has its own merits, and he argued that it could have been prudent for the Trial Tribunal to recall the file and hear the parties and that approach could have promoted peace and justice to the parties. To crown it all, he stated that going through the history of this matter before the Trial Tribunal it is quite apparent that the parties are at a tug-of-war vis-à-vis that particular piece of land and the local government has failed to resolve this dispute and the parties lives in the same village and they are neighbours.

Principally, he emphasized that it is only this Court which may bring peace to the parties by ordering the Trial Tribunal to hear and determine who is the rightful owner of that particular piece of land. Finally, he submitted that the case of **Deogratius Bakinahe & Two Others vs. Shirika la Usafirishaji Dar Es Salaam (UDA) & Another** (supra) and **Remigius Muganga v. Barrick Bulyahulu**

Gold Mine (supra), cited by the Respondent are distinguishable from this case since that Appellants appeared at the Trial Tribunal few minutes after the dismissal order has issued and the Tribunal was still in progress with other cases. He prayed for this appeal to be allowed by quashing the ruling of the Trial Tribunal in Miscellaneous Land Application No. 182 of 2022 and order Land Application No. 05 of 2019 to be heard and determined.

From the grounds of appeal and the submissions made by the parties in this appeal, the issue is whether the Appellants adduced good and sufficient reasons for their absence for the Trial Tribunal to set aside the dismissal order.

As much as I am concerned, having perused the proceedings in Miscellaneous Land Application No. 182 of 2022 and find the Appellants prayed for the District Land and Housing Tribunal to set aside the dismissal order dated 10th June, 2022. The reasons adduced by the Appellants are to the effect that on 10th June, 2022, they failed to attend before the Trial Tribunal on time for the hearing of Land Application No. 05 of 2019 due to transport challenges from their village and they had to walk on feet up to the main road where they got public transport.

Also, they stated that due to financial challenges they failed to come one day before since they had no money to accommodate them.

On the contrary, the Respondent in his reply he submitted that they live in the same village and it was the negligence of the Appellants since if they could leave their homes early, they could attend the Tribunal timely. Basically, the Respondent was on the view that there were no genuine reasons as to why they failed to attend on time, that is why the Trial Tribunal dismisses their application with costs.

Regulation 11 (2) of the *Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003*, vests the District Land and Housing Tribunal's discretion power to set aside the dismissal order upon sufficient reason has been adduced. Having gone through the reasons advanced by the Appellants, I am of the opinion that the District Land and Housing Tribunal failed to exercise its discretion judiciously as it is required by the law. The reasons adduced by the Appellants were sufficient enough to enabled the Trial Tribunal to set aside the dismissal order.

In the final event, I find this appeal has merit and I proceed to allow it. I hereby quash and set aside the decision made on 11th October, 2022, in Miscellaneous Land Application No. 182 of 2022 and

set aside the dismissal order in Land Application No. 05 of 2019 dated on 10th June, 2022.

Conclusively, I order the case records in respect to the Miscellaneous Land Application No. 182 of 2019 to be remitted to the District Land and Housing Tribunal for Songea to be determined on merit. I give no order as to costs. Order accordingly.

DATED and **DELIVERED** at Songea this 30th day of May, 2023.

U. E. MADEHA

JUDGE

30/05/2023

COURT: Judgment delivered on this 30th day of May, 2023 in the presence of the Appellant's advocate and the Respondent in person. Right of appeal is explained.

U. E. MADEHA

JUDGE

30/05/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

(LAND DIVISION)

AT SONGEA

MISCELLANEOUS LAND CASE APPLICATION NO. 02 OF 2023

(Originating from Land Application No. 07 of 2020 from the District Land and Housing Tribunal for Mbinga at Mbinga)

MKOMBOZI COMMERCIAL BANK PLC ..... APPLICANT

VERSUS

ABEL R. MATABWA ..... RESPONDENT

RULING

Date of Last Order: 04/05/2023

Date of Ruling: 29/05/23

U. E. Madeha, J.

First and foremost, this is an application for extension of time made under section 14 (1) of *The Law of Limitation Act* (Cap. 89, R.E 2019), section 41 (2) of the *Land Disputes Courts Act* (Cap. 216, R.E. 2019) and Order XLIII, Rule 2 of the *Civil Procedure Code* (Cap. 33, R. E. 2019). The Applicant is seeking for an order of extension of time to file an appeal against an *ex-parte* judgment delivered by the District Land and Housing Tribunal for Mbinga at Mbinga in Land Application No. 07 of 2020.

It is worth considering that, the brief facts of this application as depicted in the Applicant's affidavit and the original records from the Trial Tribunal are as follows: On 8th May, 2020 the Respondent filed Land Application No. 07 of 2020 before the District Land and Housing Tribunal for Mbinga at Mbinga. The Respondent's claims were for the Applicant's breached of the contractual terms in respect to a house located at Plot No. 4, Block A located at Kihaha Street within the District of Mbinga which was mortgaged to the Applicant. According to the judgment and original records of the Trial Tribunal the Applicant was summoned and managed to filed a written statement of defence. On the same note, was represented by none other than; the learned advocate Mr. Hilary Ndumbaro.

It is important to note that, before the commencement of the hearing of the application the Applicant and his learned advocate failed to show up or appear before the Trial Tribunal despite being issued with several remainder summons. Notably, on 11th May, 2022 the Applicant's learned advocate informed the Trial Tribunal that the summons was to be served to the Applicant since he was no more representing the Applicant. As a result, the application was heard *ex-parte* against the Applicant and its judgment was pronounced on 28th October, 2022.

On 25th November, 2022 the Applicant became aware on the existence of the *ex-parte* judgment and started making follow ups and requesting for a copy of judgment. After obtaining a copy of the certified judgment the legally prescribed time for appeal was lapsed and this application was filed.

At the hearing of this application the Applicant was represented by the learned advocate Ms. Gema Mrina whereas the Respondent enjoyed the legal services of none other than; Mr. Eliseus Ndunguru the learned advocate.

Arguing in support of the application the Applicant's learned advocate started by praying for the affidavit sworn in support of the application to be part of his submission in chief. Generally, in his long-written submission the Applicant's learned advocate focused mainly on four main aspects that is: **One**, that the judgment and the whole proceedings before the Trial Tribunal were tinted with illegality. **Two**, that there was no summons issued to the Applicant for the hearing of the *ex-parte* judgment. **Three**, that the Applicant was not notified on the advocate's withdrew from representing the Applicant. **Four**, that it was the default of the advocate (an officer of the Court) which made the suit to be heard and determined

ex-parte against the Applicant. The Applicants learned advocate in his submission, he submitted that the proceedings of the Trial Tribunal were tinted with illegality due to the fact that the Chairperson erred in law to order for *ex-parte* hearing of the application after no-appearance of the advocate. He argued that the best practice requires the Tribunal or Court to issue summons and not to order for *ex-parte* hearing. He added that section 45 of the *Land Disputes Settlement Courts Act* (R. E. 2019) insists for the Tribunal or Courts to deal with substantive justice and not procedural justice. Thus, after the abandonment of the case by the advocate what was required was for the Trial Tribunal to issue a summons and not to order for *ex- parte* hearing. Also, he added that the order to proceed *ex-parte* was a punishment to the Applicant as the matter was determined unheard and it was contrary to the principle of natural justice.

To add to it, the Applicant's learned advocate made reference to section 3A of the *Civil Procedure Code* (supra) which stipulates on the overriding objective principle which requires Courts to handle matters before it and reach into proportionate and affordable resolutions. In that regard, he argued that the Trial Tribunal was required to notify the Applicant respectively.

Furthermore, he contended that the Trial Tribunal was bound to notify the Applicant on the date of judgment as it is required by the law. He added that the proceedings of the Trial Tribunal are silent on whether the summons was served to the Applicant before the *ex-parte* judgment was delivered. To cement it, the Applicant's learned advocate cited with approval the case of **Chausiku Athmani v. Atuganile Mwaitege,** Civil Appeal No. 122 of 2007, High Court of Tanzania at Dar Es Salaam (unreported) in which the Court clearly stated that in any *ex-parte* proceedings, the defendant/respondent must be notified on the date of delivery of *ex-parte* judgment and failure to notify renders such proceedings nullity.

To crown it all, the Applicant's learned advocate further averred that she was not notified on the abandonment of the case as the advocate himself informed the Trial Tribunal that the Applicant was to be given summons. However, the summons was not served to the Applicant as expected. In addition to that, he further submitted that failure to serve summons to the Applicant was against the principle of natural justice since the right to be heard was denied. He argued that the principle of natural justice is not only a common law principle but it is also a constitutional

right as it is enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977. He further added that the mistakes done by the learned advocate who is an officer of the Court contributed a lot on the order to proceed *ex-parte* which led to the infringement of the Applicant's right to be heard.

For more emphasis, he made reference to the case of **Tanzania Sewing Machines Co. Ltd v. Njake Enterprises Ltd,** Civil Application No. 56 of 2007, Court of Appeal of Tanzania (unreported), in which the Court granted an order for extension of time on the reason that there was omission made by the Court Officer. To crown it all, the Applicant's learned advocate made reference to the case of **Githere v. Kimungu** (1976-1985) 1 E. A 101 (CAK) and **Ramadhani Nyoni v. Haule & Co. Advocate** (1996) TLR 72, in which it was stated that the object of the Court is to decide the rights of the parties and not to punish them through the mistakes made by them. Thus, the mistake which was made by the learned advocate who was engaged by the Applicant cannot be used to punish the Applicant. He prayed for this Court also to consider the application before it and grant an order for extension of time for the interest of justice which demands both parties to the case to be heard.

Basically, on the averment of online filing system he argued that this application was first filed through electronic filing system but it happened that the High Court Songea District Registry Land Division was not operative. That was after making communication with the Deputy Registrar of Dar es Salaam Registry who communicated with the Deputy Registrar of Songea Registry. Eventually, this contributed to the delay in filing this application. Finally, he contended that the *ex-parte* judgment was delivered on 28th October, 2022 whereby the copy of the judgment was obtained on 10th January, 2023. This application was filed on 20th January, 2023 which was ten days from the date of obtaining a copy of judgment. Thus, the delay was due to the fact that the copy of judgment was supplied too late. Besides, the Applicant's learned advocate prayed for the prayers sought to be granted since there is sufficient cause for the delay as stated by the Court of Appeal in the case of Charles **Richard Kombe v. Kinondoni Municipal Council,** Civil Appeal No. 13 of 2019 in which the Court held that denial of the right to be heard is among the ground for extension of time. To put it in a nutshell, he added that the illegality pointed in this application will be rectified only if time will be enlarged and failure to that

will make the Applicant to suffer loss due to the illegality made by the Trial Tribunal.

On the other hand, the Respondent's learned advocate in his humble submission was brief and focused. In fact, he argued that on the averments made by the Applicant that there was illegality in the impugned *ex-parte* judgment of the Trial Tribunal are not justifiable. He stated that after the withdrew of the learned advocate Mr. Hilary Ndumbaro, summons was issued to the Applicant that is before the delivery of the *ex-parte* judgment summons was also issued to the Applicant. He averred that the allegation that the Court erred to proceed *ex-parte* was to be raised before the Trial Tribunal. To cement his argument, he made reference to the case of **Herman Omary Mganga v. Winnie Sheba Seme**, Civil Appeal No. 368 of 2019, Court of Appeal of Tanzania (unreported) in which the Court of Appeal held that a person aggrieved by the decision to proceed *ex-parte* must file an application to set aside before the Trial Court or Tribunal and not to appeal.

Apart from that, he cited with approval Regulation 11 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation, G/N No. 174 of 2003 and averred that the case of **Gidhere v. Kimungu**

(1976) E. A 101 and **Ramadhani Nyoni v. Haule & Co. Advocates** (1996) TLR 72 are not relevant in the instant application.

He argued that the High Court has no jurisdiction to entertain the intended appeal since the jurisdiction is vested in the Trial Tribunal as stated in the cited cases. Lastly, the Respondent's learned advocate prayed for this application to be dismissed since there is no sufficient reasons adduced by the Applicant for the extension of time. On the same note, he submitted that the arguments made by the Applicant's learned advocate that the Applicant committed no mistake except for the mistake that was committed by the advocate is baseless since there is no an affidavit sworn by the advocate to prove that he committed that mistake.

Notably, the Applicant had no rejoinder submission. As a matter of fact, this Court is now duty bound to determine on the merit or otherwise of this application. In determining an application for extension of time, the Court is always guided by the circumstance of each case depending on the facts presented before it. Moreover, it has also been settled that it is the discretion of the Court to grant or to refuse it. To crown it all, reference is made to the case of **Benedict Mumello v. Bank of Tanzania,** Civil

Appeal No. 12 of 2002 (unreported), the Court of Appeal of Tanzania stated that:

> *"It is trite law that an application for the extension of time is entirely in the discretion of the Court to grant or to refuse it. And that extension of time may be granted where it has been sufficiently established that the delay was with the sufficient cause".*

In addition to that, this Court and the Apex Court of this country, the Court of Appeal of Tanzania in a number of cases has discussed on the criteria to be considered in granting an order for the extension of time. In **Lyamuya Construction Co. Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010, the Court of Appeal of Tanzania formulated four guidelines to be considered in granting or refusing to grant extension of time. The *first* criteria is for the Applicant to account for all the period of delay. *Second* the delay should not be inordinate, *third* the Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and the *fourth* criteria is to the effect that if the Court feels that there are other sufficient reasons, such as the

existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

As much as the first criteria is concerned, the Applicant must account for all the period of delay, it has also been discussed by the Court of Appeal of Tanzania to mean that every day of delay must be accounted. This is actually well stated in the case of; **Crispian Juma Mkude v. R**, Criminal Application No. 34 of 2012. Also, while referring to the case of **Bariki Israel v. R**, Criminal Application No. 4 of 2011 (unreported) the Court held that:

> *"... in any application for extension of time, the applicant has to account for every day of the delay".*

Above all, in the instant application the judgment which is to be challenged through appeal was delivered on 28th day of October, 2022. Alternatively, in the affidavit in support of this application it was deponed that the Applicant became aware on the existence of the *ex-parte* judgment on 25th November, 2022. Consequently, this application was filed before this Court on the 2nd day of February, 2023, which was almost ninety-seven days from the date of judgment. Moreover, the reason for the delay as stated by the Applicant's learned counsel includes the fact that the

judgment was delivered *ex-parte* and the Applicant was not notified on the day of judgment.

In fact, the Applicant obtained the copy of judgment after the expiry of the time of appeal; that is to say, there was a problem on the electronic filing system of the High Court as the first attempt to file this application was made on 20th January, 2023. However, due to the encountered problems it failed.

It is important to note that, the judgment of the Trial Tribunal was certified on 25th November, 2022. Whereas, the Applicant in his affidavit sworn in support of the Application deponed that the copy of judgment was obtained on 10th January, 2023 and no reason was given for the delay. Besides, the Applicant was duty bound to state why he had failed to get the certified copy of judgment on time from the date of being aware of the existence of the *ex-parte* judgment, that is on 25th November, 2022, which is forty-six (46) solid days.

Apparently, from all that I have discussed above I am of the view that the Applicant has failed to account for each day of delay and the delay for the forty-six (46) solid days was unjustified. As a result, this shows that

the Applicant has failed to show diligence in the prosecution of the action that he intends to take.

Thus, the first, second and third criteria formulated in **Lyamuya Construction Co. Limited v. Board of Registered Trustee of Young Women's Christian Association of Tanzania** (supra) have not been proved by the Applicant in the instant application.

As much as the fourth criteria that is; if the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance on the illegality of the decision sought to be challenged, enlargement of time may be entertained. Among others, the grievances which the Applicant has averred in this application is on the procedural illegality of the Trial Tribunal in dealing with the *ex-parte* proceedings. The Applicant has submitted that before granting an order to proceed *ex-parte* the Trial Court failed to notify the Applicant so as to appear and defend the claims. Also, the Applicant's learned advocate argued that the law requires the defendant/respondent to be notified on the date of judgment but the Applicant was not notified.

On his party, the Respondent's learned advocate was on the view that, the allegations laid by the Applicant in this application are not subject to appeal since the *ex-parte* judgment are always set aside by the Trial Court or Tribunal whereby this Court has no jurisdiction to entertain the same. To crown it all, the Respondent's learned counsel has referred this Court in case of **Herman Omary Mganga v. Winnie Sheba Seme,** Civil Appeal No. 368 of 2019 in which the Court of Appeal of Tanzania has this to say:

> *"The position of the law on that aspect is well settled. It is such that, a party to an **ex parte** decision who is aggrieved by the motion to proceed **ex parte,** cannot fault such decision in a higher court by way of appeal or revision before first attempting, at the court that pronounced the **ex parte** decision, to have the same set aside" (emphasize is mine).*

As I have stated hereabove, the Applicant's learned advocate in his submission was focused mainly on four main aspects. **One**, that the judgment and the whole proceedings before the Trial Tribunal were tinted with illegality. **Two**, that there was no summons issued to the Applicant for the hearing of the *ex-parte* judgment. **Three**, that the Applicant was not

notified on the resignation of advocate who was representing the Applicant. **Four**, that it was the default of the advocate (an officer of the Court) which made the suit to be heard and determined *ex-parte* against the Applicant.

In that regard, from the submission made by the Applicant, the discussed illegality is on the proceedings of the Trial Tribunal on giving an order to proceed *ex-parte* and failure to notify the Applicant on the date of hearing and delivery of the *ex-parte* judgment. Notably, the Applicant is defaulting the order of the Trial Tribunal to proceed *ex-parte*, that there was denial of the right to be heard on the party of the Applicant.

Furthermore, as argued by the Respondent's learned advocate, I am in support of his views that those are matters that are dealt by the Trial Tribunal. As a matter fact, this Court has no jurisdiction to deal with them. In fact, the Applicant would have preferred an application before the Trial Tribunal to set aside the *ex-parte* judgment and not an appeal.

As the previous point, the ground of illegality would have been a good ground of setting aside the *ex-parte* judgment. To add flavor to it, this has also been discussed several times by the Court of Appeal of

Tanzania. In **Dangote Industries Ltd. Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021 the Court of Appeal of Tanzania stated that the appeal against *ex-parte* judgment is available if the appeal is on the merit of the judgment and not on the order that enabled the case to be heard *ex-parte*. Principally, in the instant application, the illegality stated by the Applicant are to be considered by the Trial Court.

The Applicant's advocate also has alleged that it was the default made by the advocate (an officer of the Court) which made the suit to be heard and determined *ex parte* against the Applicant. That the advocate didn't inform the Applicant on his resignation. I am on the view that, it is not a good cause for this Court to grant for an order for extension of time. In **Lim Han Yung & Lim Trading Company Ltd. v. Lucy Treseas Kristensen,** Civil Appeal No. 219 of 2019, the Court of Appeal of Tanzania was had this to state:

> *"A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an* ***ex parte*** *judgment passed against him".*

From the above stance, I think the Applicant was duty bound to closely follow up the progress and status of the case.

On the same note, in his submission the Applicant's learned advocate also has stated that there was failure of the Court electronic filing system on 20th January, 2023. I find that averment is untenable since there was a lapse of more than fifty-five solid days from the date of being notified on the existence of the *ex-parte* judgment.

As far as I am concerned, I find the Applicant has no sufficient ground to be granted extension of time to file an appeal. In that regard, I must therefore conclude that the Applicant has failed to convince this Court that in the intended appeal is going to challenge on the merit of the case and not an order that enabled the suit to proceed *ex-parte* before the Trial Tribunal. Conclusively, for whatever has been stated above, I find this application has no merit and I proceed to dismiss it with costs. Order accordingly.

DATED and **DELIVERED** at Songea this 29th day of May, 2023.

U. E. MADEHA

JUDGE

29/05/2023

COURT: Ruling delivered in the presence of Mr. Vicent Kasale the learned advocate, holding brief for the Applicant's advocate and M. Eliseus Ndunguru the learned advocate for the Respondent. Right of appeal is explained.

U. E. MADEHA

JUDGE

29/05/2023

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

DC. CRIMINAL APPEAL NO. 14 OF 2023

(Originating from Tunduru District Court in Criminal Case No. 21 of 2022)

SALUMU CHALAMANDA ATHUMAN @ CHALA ..... 1ST APPELLANT

ALLY RASHID HASSAN ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

RULING

Date of Last Order: 18/04/2023

Date of Ruling: 31/05/2023

U. E. Madeha, J.

First and foremost, the Appellants; Salum Chalamanda Athumani @ Chala and Ally Rashid Hassan, on the 2nd day of January, 2023 were convicted by the District Court of Tunduru (Chuvaka-SRM) for the offence of cattle theft contrary to section 268 (1) and (3) of the *Penal Code* (Cap. 16, R. E. 2019). They were sentenced to serve five years imprisonment. On 9th February, 2023, they filed a notice of intention to appeal and

proceeded to filed this appeal. It is worth considering that, before the hearing of the appeal, the State's Attorney representing the Republic raised the Preliminary Objection that the notices of intention to appeal filed by the Appellants were filed out of time.

At the hearing of the preliminary objection, the Appellants had no representation, whereas the Respondent was represented by none other than; Mr. Frank Chonja and Ms. Lucia Bukuku, the State's Attorneys who joined forces to represent the Republic.

It is worth considering the fact that, arguing in support of the preliminary objection, Ms. Lucia Bukuku submitted that the appeal before this Court is incompetent for the reason that the notice of appeal was filed out of time. She emphasized that all appeals from the Subordinate Courts to the High Court are directed and governed by the *Criminal Procedure Act* (Cap. 20, R. E. 2022) and pursuant to section 360 (1) (a) of the Act, the Appellants were supposed to file his notice of intention to file an appeal within ten days from the date of judgment.

Ms.Lucia Bukuku, the learned State Attorney added that the Appellants were late in filing the notice of intention to appeal for three solid days, which was contrary to section 361 (1) (a) of the *Criminal Procedure*

Act, (supra). To cement her arguments, she cited with approval the case of **Hussein Ramadhan Beka v. Republic,** Criminal Appeal No. 349 of 2016, Court of Appeal of Tanzania at Mwanza, in which the Court stated that a notice of intention to appeal filed out of time made an appeal to be struck out for the reason that it was accompanied by any incompetent notice of appeal. She emphasized that in this appeal it is in records that the judgment was read on 2nd January, 2023 and the notice of intention to appeal was filed at Tunduru District Court on 9th February, 2023 which was thirty-three days from the date of judgment. She added that the notice of intention to appeal was filed out of time and contrary to the law and she prayed for this appeal to be struck out.

In fact, the Appellants in their reply submitted that they know that they filed their notices of intention to appeal on time. Moreover, they stated that the Prison Officers are the one who prepared the notice and filed it in Court and they are surprised to find that the notices were filed out of time. They added that the delay was caused by the Prison Officers and they know that they filed the notice of intention to appeal within ten days which are require by the law and they were not late. Therefore, they prayed for this appeal to be heard and determined.

In her short rejoinder submission, the State's Attorney for the Republic stated that the notice of intention to appeal is the basis of filing an appeal and it was to be filed within time but the Appellant filed it after thirty-three from the date of judgment instead of being filed within ten days. The learned State Attorney requested for this appeal to be struck out.

In view of the position rendered by the Court of Appeal in **Hussein Ramadhan Beka v. Republic** (supra), I concur with the State's Attorney for the Republic that the Appellants were required to file their notices of their intention to file an appeal before the Trial Court within ten days from the date of judgment. The impugned judgment was delivered on the 2nd day of January, 2023. The Appellants filed their notices of intention to appeal before the subordinate Court on 9th February, 2023 which was thirty-three days from the date of judgment. The Appellant stated that their notices of intention to appeal was filed on time and the one to be blamed are the Prison Officers. Section 361 (1) (a) of *the Criminal Procedure Act* (supra), states as follows:

> *"361 (1) Subject to subsection (2), no appeal from any finding, sentence or order referred to in section 359 shall be entertained unless the Appellant (a) has given notice of*

his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence;"

Having gone through the Appellants' notices of intention to appeal, I found the Appellants filed their notices in Court on 9th February, 2023. As much as I am concerned, I agree with the State's Attorney for the Republic that the notices of intention to file an appeal filed by the Appellants were filed out of time. Failure to file their notices of intention to appeal on time renders this appeal incompetent.

In case the Appellants are still determined to proceed to pursue an appeal, they are required to start afresh by taking two main steps. **One,** by making an application for an extension of the time to file the notice of intention to appeal out time. **Two**, to file an application for leave to appeal out of time as time starts to run from the date of finding, sentence or order. See the case of **Mohamed Shango and Two Others v. Republic**, Criminal Appeal No. 62 of 2016 (unreported).

On the basis of the foregoing reasons, I struck out this appeal for being accompanied with a defective notice of intention to appeal. Order accordingly.

DATED and DELIVERED at **SONGEA** this 31st day of May, 2023.

U. E. MADEHA

JUDGE

31/05/2023

COURT: Ruling is read over in the presence of the Appellants and Mr. Alfred Maige and Mr. Frank Sarwart, State Attorneys who joined their forces to represent the Respondent. Right of appeal is explained.

U. E. MADEHA

JUDGE

31/05/2023