IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

LAND APPEAL NO. 13 OF 2022

(Originating from Misc. Civil Application No. 01 of 2022, Mbinga District Land and Housing Tribunal)

OMARY ADBALLAH ABUBAKARY ..... APPELLANT

VERSUS

MAURUS BERNAD HYERA ..... RESPONDENT

JUDGEMENT

19/04/2023 & 13/06/2023

E.B LUVANDA, J.

The Appellant is aggrieved by the decision of the Mbinga District Land and Housing Tribunal (herein the trial Tribunal) which dismissed his omnibus application (for extension of time and setting aside *ex parte* judgement) on the grounds that, he failed to adduced a good reason(s) for his delay to file an application to set aside the *ex parte* judgement as prescribed by the law.

In the memorandum of appeal, the Appellant raised two grounds of appeal to challenge the decision of the trial Tribunal thus; One, the trial tribunal erred in law and facts when it failed to grant the application which was tabled before it while there were sufficient reasons not only

for extension of time but also for setting aside the *ex parte* judgement; Two, the trial tribunal (sic, erred in law and facts) when it declined to grant the Application while it was open from the circumstances of the case there were two rights of occupancy seemingly to have been issued to the Applicant and the Respondent respectively on the same suit premise which necessitated the joining of the authority responsible to issue the rights of occupancy so as to afford them a right of being heard.

By consent of the parties this appeal was argued by way of written submission.

Mr. Vicent Kassale learned counsel for the Appellant submitted that they are aware of the court discretionary power on granting the extension of time. Also, he is alive of the fact that, the lower court discretion power can rarely be interfered by a superior court only on circumstance where the decision arrived at was a result of erroneous exercise of discretion through either the omission to take into consideration relevant matters or taking into account irrelevant, extraneous matters.

The learned counsel submitted that the Appellant was not notified the date when the *ex parte* judgement was delivered which is one of the reasons for his delay. That, from the record there is no any proof of

service of summons to the Appellant. He cited the case of **Mary Mchome Mbwambo v. Mbeya Cement Co. Ltd**, Civil Appeal No. 161 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported). He further submitted that failure to notify a party of the date of delivering an *ex parte* judgement is fatal and can be a good round (sic, ground) for extension of time. It is the counsel opinion that the trial tribunal took into considerations irrelevant facts wen (sic, when) it hold that it was supposed to be an affidavit of Dickson Ndunguru, while it was clear that there was no need of having the said affidavit.

The learned counsel submitted that the Appellant engaged an advocate as observed by the trial tribunal and he believed that the matter was in the care of the advocate who was supposed to attend in all preliminary stages save when it is necessary he would have notified him (the appellant) to attend to the tribunal. The learned advocate acknowledged the necessity of the parties to make follow up for his case but he believed that it was unnecessary for the party who engaged an advocate to attend to the tribunal during preliminary stages which will add unnecessary cost and wastage of time to the party where he is not required to say anything in the court.

The learned counsel conceded on the absenteeism of the Appellant advocate after he filed the written statement of defence. However, the

learned counsel blamed the tribunal for failure to summon the Appellant after the renewal of the assessors. He cited the provision of regulation 11(c) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 which provides for the circumstance where the tribunal can proceed *ex parte*.

The learned advocate submitted that since the Appellant and his advocate was absent when the hearing date was fixed as per above mentioned regulation, the trial tribunal was duty bound to serve the Appellant with the notice of hearing which was not complied with. The learned counsel believes for that reason the trial tribunal had to set aside its *ex parte* judgement, failure of which shows clearly that the decision arrived was a result of erroneous exercise of discretion through the omission to take into consideration of relevant matters and or taking into account irrelevant and extraneous matters by the trial tribunal which in turn necessitate interference by this court.

As for the second ground of appeal the learned counsel submitted that from the record there was double allocation of the suit land done by the allocating authority to the Appellant who had thereby obtained a certificate of title which was attached in his written statement of defence together with the receipt of payment showing that the Respondent was allocated. He submitted that, had the trial tribunal considered the

pleadings, it could have come to the conclusion that the allocating authority presence was necessary in order to enable the effectual and complete adjudication of the suit land. He cited the provision of Order 1 Rule 10(2) of the Civil Procedure Code [Cap 33 RE 2019], also section 6(4) of the Government Proceedings Act [Cap 6 RE 2019], to support his argument. The learned counsel submitted that the second ground touches the jurisdiction of the court which is so fundamental and can be raised at any time, he cited the case of **M/S Tanzania China Friendship Textiles Co. Ltd v. Our Lady of Usambara Sisters** [2006] TLR 70 to back up his submission. He prayed this appeal to be allowed.

In response, Mr. Innocent Mbunda learned Advocate for the Respondent, submitted that it is not true that he was not notified on the date when the judgement was delivered. This issue was clearly determined by the trial tribunal at page 4 of its judgement. It is the contention of the counsel that, in order for someone to be granted the extension of time, number of the factors has to be considered , he cited the case of **The Attorney General v. Emmanuel Marangakisi and Others**, Civil Application No. 138 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 11. The learned counsel for the Respondent submitted that, the issue in the case at hand is whether the

factors mentioned in the above cited case reflected in the record and appeal at hand. It is the learned counsel for the Respondent submission that none of the Appellant factor fit to let the tribunal to grant him the extension of time to set aside the *ex parte* judgement. He insisted that the fact of non-awareness of the Appellant has been well demonstrated and determined by the trial tribunal at page 4 of the ruling.

The learned counsel for the Respondent submitted that, at paragraph 4 of the Respondent counter affidavit the Respondent denied the allegation of the Appellant not being notified on the date of the judgment, a fact which the Appellant did not dispute. That a summons was served via Mbinga Mjini B Ward Executive Officer and the Appellant denied to sign as a result the trial tribunal proceeded and pronounced the judgement in his absence.

The learned counsel for the Respondent opposed the appellants' argument that it is not necessary for the party who engage an advocate to attend to the court on preliminary stages instead he insisted that, the law dictate a party who engage the service of an advocate has a duty to closely follow up the progress and status of his case otherwise he cannot throw his blame to the advocate and cannot complain of being not informed the progress and status of his case, he cited the case of **Lim Han Yung and Trading Co. Ltd v. Lucy Treseas Kristensen**,

Civil Appeal No. 219 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) at page 22. He submitted that the Appellant posed all blame to his advocate for failure to notify him the status of his case but no any affidavit sworn by Advocate Dickson Ndunguru as to why he was not attending to the tribunal nor inform the Appellant the status of his case.

As for the second ground, the counsel for the Respondent submitted that, the issue of double allocation, that there are two Right of occupancy issued to the Applicant and the Respondent respectively on the same suit premise is the new fact which was neither pleaded in the affidavit to support the application nor being addressed by the trial tribunal when hearing miscellaneous application, the counsel cited the case of **Francis B. Mndolwa v. Bank of Africa Tanzania Limited and Viettel Tanzania Limited**, Civil Appeal No. 71 of 20221 High court of Tanzania at Dar es Salam. The counsel submitted that for the part to rely on point of illegality the same must be pleaded as a point at issue in the impugned decision. It is the contention of the learned counsel for the Respondent that he went through the trial tribunal record and nowhere the Appellant pleaded the existence of the point of law of sufficient importance such as illegality of the decision as the ground to set aside the *ex parte* judgement. He submitted that the issue

of double allocation was never pleaded as illegality in the trial tribunal when he was seeking for extension of time.

Starting with the first ground, it is common ground that engaging an advocate is not an alternative to the party appearance, that means even when the advocate appeared to court the party to a case has to be present or make follow up for his case, see the case of **Lim Han Yung and Another v. Lucy Treseas Kristen** (*supra*). The Court of Appeal sitting at Dar es Salaam had this to say, I quote for easy reference:

> *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 judgement passed against him.*

Therefore, the argument of the Appellant's counsel that it was unnecessary for the party who engaged an advocate to attend to the Tribunal proceedings during preliminary stages on explanation that will add unnecessary cost and wastage of time to the party where he is not required to say anything in court, is baseless. Regarding not being served with the summons to appear on the *ex parte* judgement, upon my perusal to the record of the trial Tribunal indicate that on 3rd March,

2021 the Tribunal ordered the summons to be issued to the Appellant and indeed the Appellant was dully served with summons to appear on 14/5/2021 at 8:30 hours, where the Appellant acknowledged to receive it on 4th March, 2021. It is a cardinal law that the record of the court is the official and conclusive as to what transpired or happened in the court, as it was decided in the case of **Halfani Sudi v. Abieza Chichili** (1998) TLR 527 at page 529 where it was held that:

> *Court record is a serious document. It should not be lightly impeached, and that there is always a presumption that a court records represents accurately what happened.*

To this situation the records of the trial Tribunal speaks loudly, that the Tribunal ordered summons to be served to the Appellant to enable him to appear on the date scheduled for delivery the *ex parte* judgement. Evidence reveals that the Appellant personally received the summons on 4th March, 2021 as aforesaid, from the process server one Alestuta D. Kapungu, but due to the reasons best known to himself he did not bother to appear at the date as he was duly informed. Instead the Appellant opted to heap blame to his lawyer. May be his lawyer ought to be the complainant here, lamenting for not be served to appear for *ex parte* judgement, because in the Appellant's written statement of defence reflect address of his lawyer.

As for the second ground of appeal, it is true as alluded by the learned counsel for the Respondent that, the issue of double allocation termed as illegality was neither pleaded in the affidavit in support of the application nor addressed by the trial tribunal when determining a miscellaneous application. Nowhere in trial Tribunal record reflect that the Appellant pleaded the existence of the alleged point of sufficient importance such as illegality of the decision and the double allocation as among the ground(s) to set aside the *ex parte* judgement. In the case of **Richard Majenga v. Specioza Sylivester**, Civil Appeal No. 208 of 2018, Court of Appeal of Tanzania at Tabora at page 10 and **Marwa Chacha @ Nyaisure v. The Republic,** Criminal Appeal No. 243 of 2018, Court of Appeal of Tanzania at Mwanza at page 7 (both unreported), in particular a former case, the Court of Appeal had this to say:

> *It is a settled principle of the law that at an appellate level the court only deals with matters that have been decided upon by the lower court.*

From the record of the trial Tribunal as repeatedly said above, the issue of double allocation was not among the grounds the Appellant advanced for extension of time or setting aside the *ex parte* judgement

of the trial Tribunal. As such, I find the second ground of the appeal to have no merit.

Summing it up, the Appellant was served with summons to appear on 25/09/2019 on which the trial Tribunal ruled that pleadings were complete and slatted the matter for hearing on 3/12/2019, where the Appellant and his lawyer went missing in four sessions consecutively, till when an *ex parte* order was made on 25/6/2020. And so for the Appellant was served with summons to appear when the *ex parte* judgement was delivered on 14/5/2021, his absence at any rate was by design, and cannot be condoned for whatever excuse.

The appeal dismissed with cost.

E.B. LUVANDA

JUDGE

13/06/2023