IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA
LAND APPEAL NO. 65 OF 2022

(Arising from the District Land and Housing Tribunal for Singida in Misc. Land Application No. 80 of 2022)

1. ADAM KAGUSA.....1ST APPELLANT
2. OMARI KISAI.....2ND APPELLANT

Versus

EZEKIEL HEMA MJIE (Administrator of the late Hema Mjie).....RESPONDENT

JUDGMENT

Date of Last Order: 14th August 2023.
Date of Ruling: 08th September 2023.

MASABO, J:-

The appellants are aggrieved by a ruling of the District Land and Housing Tribunal of Singida at Singida in Misc. Land Application No. 80 of 2022 which turned down their application for leave within which to file an application for setting aside an ex parte judgment entered against them by the same tribunal in Land Application No. 34 of 2020. Their appeal before this court is premised on a sole ground that: *the Trial Chairlady erred in law and fact for failure to take into account and evaluate the evidence adduced by the appellants.*

The hearing of the appeal proceeded in writing with the consent of the parties who were both represented. The appellants were represented by Mr. Hemed Kulungu, learned Advocate whilst the respondent was represented by Ms. Amina Sungura, learned Advocate. Both parties complied with the scheduling order by filing their submissions, which shall soon summarise, in good time and within the schedule.

Before I provide the summary, for appreciation of the background as it discerned from the record, I shall provide brief facts of the case which are not difficult to comprehend. They go thus, the respondent being an administrator of estate of the late Hema Mjie filed an application before the District Land and Housing Tribunal of Singida suing the respondent for trespassing into the deceased land vide Land Application No. 34 of 2020. The appellants defaulted appearance. In consequences, the case was heard *ex parte* them and on 31st January 2022, a judgment was entered in favour of the respondent after it was declared that the disputed land belonged to the late Hema Mjie and the appellants were mere trespassers.

On 11th August 2022, the appellants resurfaced and filed an application for leave for extension of time stating that, they were unaware of the application. The tribunal found them to have failed to demonstrate a good cause and dismissed the application with costs. Hence, this appeal which as afore said has only one ground that the tribunal erred in law and fact for failure to take into account and evaluate the evidence adduced by the appellants.

Submitting on the ground of appeal, Mr. Kulungu stated that the tribunal erred in dismissing the application as the appellants were not aware of Land Application No. 34 of 2020 which was pending against them as they were not summoned to appear before the tribunal and on the date of the ex parte judgment, they had no notice. He argued that the appellants became aware of the suit after been served with the application for execution by the respondent and only they did they file an application of extension of time to set aside the ex parte judgment. Therefore, he

argued, the trial tribunal had no justification to refuse to grant extension of time and its denial of the leave has caused a miscarriage of justice as the appellants were not given a right to be heard.

In reply, the respondent's counsel resisted the appeal and submitted that the it has no merit as tribunal considered and evaluated properly the contents of joint affidavit filed by the appellants in supporting their application for extension of time to file application for setting aside exparte order. At page number 3 to 5 of the impugned ruling it shows that the tribunal found that the appellants appeared before it on 5/10/2020 and 25/11/2020 but did not file written statement. Hence, the argument that they were not aware of the matter and the decision thereof was without merit. Also, they were served with the notice of judgment and they totally failed to account for each day of delay. Therefore, he concluded that, it is not true that the appellant had no knowledge of Land Application No. 34/2020. Conclusively, he prayed that, the appeal be dismissed with costs. The appellants didn't file their rejoinder.

I have carefully considered the ground of appeal in the light of the record of the tribunal which I have thoroughly read and the submissions by the parties. I will now determine the appeal. As this is an appeal challenging the decision of the DLHT for refusing to grant the leave for extension of time within which to file the application for setting aside the *ex parte* judgment, the starting point should be Regulation 11 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 of 2003 which provides thus:

11(1) on a day the application is fixed for hearing, the tribunal shall:

(a) Where the parties to the application are present proceed to hear the evidence on both sides and determine the application.

(b) Where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant.

(c) Where the respondent is absent and was duly served with the notice of hearing or was present when the hearing date was fixed and has not furnished the tribunal with good cause for his absence, proceed to hear and determine the matter ex-parte by oral evidence. (Emphasis supplied).

(2) a party to an application may, where he is dissatisfied with the decision of the tribunal under sub regulation (1), within thirty days apply to have the orders set aside, and the tribunal may set aside its orders, it thinks fit so to do and in case of refusal, appeal to the High Court.

As it is evident in this provision, the DLHT has discretion, when it has heard and determined a matter ex parte, to reverse its decision by setting it aside if it has been moved so by the aggrieved party but such application need be filed within 30 days. Where as in the present case, the period of 30 days lapses before the aggrieved party applies to have the *ex parte* judgment set aside, she/he can move the court under section 14 of the Law of Limitation, Cap 89 RE 2019 for a leave for extension of time. If in the end, the tribunal is satisfied that a good cause upon which to extend the time has been demonstrated by the applicant, it can positively exercise its discretion by enlarging the time to enable the applicant to lodge his

application (see **Regional Manager, Tanroads Kagera vs. Ruaha Concrete Company Ltd,** Civil Application No. 96 of 2017(CAT-unreported).

Much as the law is silent on what constitutes a good cause, the law in this area is very well settled that in determining whether a good cause has been demonstrated the tribunal or court should consider such factors as; the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged and the overall importance of complying with the prescribed timelines. (See **Lyamuya Construction Company Ltd vs. Board of Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010, [2011] TZCA 4 TANZLII). The law further requires that, in such applications, the duration of delay must be explained. Thus, a delay of even a single day must be accounted for. In **Kibo Hotel Kilimanjaro Ltd vs Treasury Registrar & Another** (Civil Application No. 502 of 2020) [2021] TZCA 80 TANZLII, the Court of Appeal held that;

> The law is clear that in case of the delay to do a certain act, the applicant should account for each day of delay. The authorities of the Court to that effect are many, one of them include **Hassan Bushiri v. Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) where the Court stated:
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> > "Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken". [See also, **Lyamuya Construction Company Ltd** (supra), **Zitto Zuberi Kabwe and Others** (supra) and **Bariki Israel v. R,** Criminal Application No. 4 of 2011 (unreported)].

As the tribunal held that the appellants did not disclose a good cause, the sole question for determination is whether the appellants demonstrated a good cause for delay and if so, whether the tribunal erred in its finding. Looking at the affidavit jointly filed by the appellants in support of their joint application before the tribunal, I have observed that as correctly held by the tribunal, they essentially demonstrated only one reason for delay that they were unaware of the proceedings and the decision as they were not served with summons. The rest of the deposition attacked the ***ex parte*** judgment for being incorrect, complaints which were misconceived as they could not be determined in the application hence improperly raised.

In their ground that they were not notified of the application, they have only stated that they did not know the existence of the application and its respective ruling hence they were denied a right to be heard. However, as correctly observed by the tribunal, they have not specifically state when they became aware of the ex parte judgment hence, they were not of any assistance to the tribunal in computing the days of delay and in so doing, miserably failed the requirement of the law that they should fully account for each day of delay. As the delay was for an approximately period of 7 months which is inordinate, it was incumbent for them to fully account for the delay. Since they did not, they had none but themselves to blame for such failure.

I am however aware that, the law recognizes illegality as a sufficient ground of appeal. Dealing with this issue in **Maulid Juma Bakari @ Damu Mbaya v Republic**, Criminal Application No. 62/1 of 2020 the

Court of Appeal stated that, much as illegality is in itself a good ground for delay, for it to be considered so, the illegality must be apparent on the face of record, meaning that it should be one that it is too obvious and easily identifiable by any one reading the record as opposed to one that would require long legal argument to establish. Thus, as held in the case of **Tanzania Rent a Car Limited v Peter Kihumu**, Civil Application No. 226/01 of 2017, (unreported) a point illegality should distinguishable from mere errors of law or facts. The assertion that they were not served with summons implicitly means they were adjudged unheard hence an illegality which, undoubtedly suffices as a good cause for extension of time so as to give room for the tribunal to examine the record and see whether the appellants were served with summons or not.

In my further examination of the record, I have observed that the tribunal went ahead to consider the merit of the illegality and held that, it had no merit as the record shows that the appellants appeared twice before it did not file written statement of defence which implies they were summoned. Also, they were served with the summons for exparte judgment but declined service. The examination and the finding there to were misconceived as it was not in the place of the tribunal determining an application for extension of time to determine the merit of the illegality. Such duty was a reserve of the tribunal determining an application for setting aside the exparte order, an application which would have been filed had the tribunal positively determined the applicant's application for leave for extension of time. Therefore, by determining the merit of the illegality, the tribunal pre judged the application for setting aside the *ex parte* order which was not yet before it and in so doing it materially erred.

The law as stated in the case of **The Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 185, that when a point of illegality is advanced, the court has a duty to extend the time. Expounding this principle, the Court of Appeal held that;

> "In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a 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 there cord straight.

In view of the above and considering that the right to be heard is a constitutional right and the omission of which invalidates the proceedings, it was incumbent that the application be granted to provide room for the tribunal, while determining an application for setting aside the *ex parte* judgment, to scrutinize the record and see whether the appellants were indeed not summoned hence unaware of the proceedings and the *ex parte* judgment.

That said, I find merit in the appeal, allow it and proceed to extend time within which the appellants can lodge their applications to set aside the *ex parte* judgment. Accordingly, leave is granted to the appellants to lodge their application before the tribunal within twenty (20) days from the date of this judgment. The costs shall be shared by each of the parties shouldering its respective costs.

DATED at **DODOMA** this 8th day of September, 2023.

J.L. MASABO

JUDGE