

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 50 OF 2022

(C/F Misc. Application No. 308 of 2021 and Originating from Application No. 62 of 2020 at District Land and Housing Tribunal for Moshi at Moshi)

ERASMUS BARNABAS MUSHI..... APPELLANT

VERSUS

AMINI IDD MUSHI.....RESPONDENT

JUDGEMENT

Date of Last Order: 29.08.2023

Date of Judgment: 29.09.2023

MONGELLA, J.

This is an appeal originating from a Ruling of the District Land and Housing Tribunal of Moshi at Moshi (the Tribunal, hereinafter) in Misc. Application No. 308 of 2021 which originates from Application No. 62 of 2020 before the same Tribunal.

The brief facts of the matter are to the effect that: the appellant herein filed Application No. 62 of 2020 against the respondent over 5 acres of land located at Machame Kaskazini Ward within Foo Village, Mulotu Hamlet in Hai District, Kilimanjaro region alleging that the respondent had trespassed. Upon filing his Written Statement of Defense (WSD), the respondent raised a preliminary

objection which was resolved in the appellant's favour in a Ruling delivered on 03.12.2020. After the Ruling was delivered, in granting a request advanced by the respondent, the application was struck out by the presiding Chairman for want of prosecution under Regulation 15 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174 of 2003.

The appellant wished to restore his suit, but noting that he was out of time, he filed an application for extension of time to apply for restoration of the suit vide Application No. 308 of 2021, but the same was dismissed for lack of sufficient reasons. Aggrieved, the appellant has filed this appeal on two grounds being:

- 1. That the trial Tribunal erred in law and in fact in not considering that, the Ruling given on 03.12.2020 was illegal.*
- 2. That, the trial Tribunal erred in law and in fact in not considering that, there was a point of law of sufficient importance such as illegality of the decision sought to be challenged.*

The appeal was resolved viva voce whereby both parties were represented by learned advocates. The appellant was represented by Mr. Macmillian Festo Makawia and the respondent by Mr. Engelbert Boniface.

Mr. Makawia briefly explained that Application No. 62 of 2020 was dismissed by the trial Tribunal on 03.12.2020 for want of prosecution under **Regulation 15 of the District Land and Housing Tribunal Regulations, GN. No. 174 of 2003 (GN 174 of 2003)**. That, on the material day, two rulings were delivered. One was on a preliminary objection which was decided in the appellant's favour. That, the matter therein had been resolved by written submissions as ordered by Hon. Makwandi, the then presiding chairman, on 16.07.2022. The order required the respondent to file his submissions on 30.07.2020, the applicant to file his reply on 14.08.2020 and the same to be mentioned on 24.08.2020 whereby the date for ruling was to be given. He said that there were multiple adjournments of the said ruling until on 27.11.2020 when the ruling was ordered to be delivered on 03.12.2020 and the same was delivered on the said date. However, he said, the trial Chairman ordered the suit to be struck out for want of prosecution as prayed by the respondent.

That together with his client, they had been attending the trial Tribunal sessions since April 2020 when the matter was filed. He submitted that he went to the Chairman's chamber and asked him on what grounds was the suit struck out. That, the Chairman admitted that the same was wrongly struck out and advised him to write an administrative letter to complain of the situation. However, the letter was never replied despite many follow ups up to 30.03.2021. That, the file then disappeared and was found during the mention of Bill of Costs No. 52 of 2021 which arose from the striking out order made on 03.12.2020.

He went on to submit that they then sought for the necessary documents so as to file an application for restoration of the suit, but since they were out of time, they sought for an enlargement of time which was granted and they filed the application for restoration which was dismissed for want of sufficient reasons.

Mr. Makawia averred that the order given on 03.12.2020 was issued under **Regulation 15 of G.N 174 of 2003**, but the ruling given by Hon. Mtei was given on basis of **Regulation 11(a) to 11(2) of G.N. 174 of 2003**, which was illegal. He averred that the applicant was diligent. That they were present during hearing and only missed on the date of fixing the date for the ruling. Citing the case of **Jamala S. Mkumba Abdallah Issa Nkungu and 359 Others vs. The A.G.**, Civil Application No. 240/01 of 2019, whereby it was held that illegality is a basis for restoration of a suit. He was of the view that Hon. Makwandi also struck out the case on the date of ruling which was itself an illegality. He also cited the case of **Benedict Mumelo vs. BOT**, Civil Appeal No. 12 of 2002 and prayed for the appeal to be allowed and the Tribunal orders be set aside.

In reply, Mr. Boniface explained that this appeal arose from Misc. Application No. 308 of 2021 which originates from Land Application No. 62 of 2020, both from the District Land and Housing Tribunal for Moshi at Moshi. He averred that the two grounds of this appeal are on illegality which had not been pleaded by the appellant in Misc. Land Application No. 308 of 2021. Insisting that parties are bound by their pleadings and the ground of illegality should be clearly

pleaded in pleadings presented by parties, he cited the case of **Dira Media Group vs. Joseph Kubebeka Kulangwa and 2 Others** (Misc. Application No. 504 of 2022 [2023] TZHC 1283 TANZLII.

He averred that Misc. Land Application No. 308 of 2021 was for extension of time and it was denied. That the appellant never filed an application for restoration of Land Application No. 62 of 2020 which is also the reason why he could never cite the case number of the application for restoration. That, Land Application No. 62 of 2020 was dismissed on 03.12.2020, while Misc. Application No. 308 of 2021 was lodged in the trial Tribunal on 21.05.2021 which was after the lapse of 6 months.

He contended that, in the appellant's application for extension of time, only two reasons were advanced for the delay being: **one**, that they had filed an administrative letter as advised by the trial Chairman Hon. Makwandi on 04.12.2020 and; **two**, that the appellant had never been supplied with copies of orders and proceedings. On the second reason, Mr. Boniface argued that the appellant also never presented any document before the trial Tribunal to show that he requested for copies of orders and proceedings of the Tribunal. Hence, he reiterated his stance that the ground of illegality was never pleaded at the trial Tribunal. He considered the issue of illegality being a new fact raised at this appeal stage.

He further challenged the conversation Mr. Makawia said to have had with the Tribunal Chairman in early December 2020 maintaining the stance that the appellant remained silent until 31.05.2021 and failed to account for each day of delay in his application for extension of time.

Mr. Boniface contended further that the appellant appeared only once in Land Application No. 62 of 2020 which was filed in March 2020. That, the appellant's counsel appeared only six times while the case was called before the Tribunal thirteen times rendering the counsel to have missed seven times. He argued that it was the appellant that instituted Land Application No. 62 of 2020 and thus he ought to have personally appeared before the tribunal at all scheduled times for mention and hearing.

He supported the two orders issued by the trial chairman arguing that there is no law limiting the Tribunal Chairman from making more than one order in a single application. He averred that on 05.11.2020, the applicant's counsel was present and the trial Chairman ordered a ruling to be delivered on 27.11.2020, but the counsel never appeared. The matter was then adjourned to 03.12.2020, but the appellant and his counsel never appeared and the ruling on the preliminary objection of the main case was fixed for mention. He maintained that the trial Tribunal correctly relied on **Regulation 15 of GN 174 of 2003** as the main case remained unattended for more than 3 months.

He reiterated his contention that the applicant never pleaded the issue of illegality in the trial Tribunal and therefore he could not raise the same at this appeal stage. That, the same ought to have been challenged through a revision which should have been made within 30 days. He cited the case of **Jubilee Insurance Co (T) Ltd. vs. Mohamed Smeef Khan** (Civil Application No. 439/01 of 2020) [2022] TZCA 623 TANZLII, in which it was ruled that illegality does not constitute sufficient ground in every application for extension of time when pleaded, unless the illegality is apparent of the face of the record. He finalized his submissions by praying that this court dismisses the appeal with costs.

Rejoining, Mr. Makawia referred to the case of **Abdallah Milazi vs. Asha Makeo**, as to the question of illegality. He maintained that during the delivery of the Ruling on 03.12.2020 the appellant was not present, but it was not true that the appellant never appeared for 3 months. He said that he attended on 29.04.2020 and October as well thereby referring the court to page 4 of the Tribunal proceedings. He added that the question of illegality was pleaded before the trial Tribunal and the same was argued through written submissions. He maintained his prayers for the appeal to be allowed with cost.

I have considered the appellant's grounds of appeal, the rival submissions of both parties and thoroughly gone through the trial Tribunal's record. Upon observing the two grounds of appeal, I am of the considered view that the two grounds address the question

of illegalities in Land Application No. 62 of 2020, which were not considered by the Tribunal in, Misc. Application 308 of 2021 on basis of three points: **one**, that, the trial Chairman relied on Regulation 11 in his decision while Application No. 62 of 2020 had been struck out under regulation 15 of the same G.N.; **two**, that, the trial Chairman failed to note that Application No. 62 of 2020 was illegally struck out and **three**, that, the trial Chairman was wrong to strike out the case on the same day he overruled the objections.

Before addressing these issues, I have noted from the submission by Mr. Makawia that he greatly confused himself by submitting that this appeal is filed against an application for restoration of Application No. 62 of 2020 instituted vide Misc Application No. 308 of 2021. As argued by Mr. Boniface, which is also vivid on record, there was never an application for restoration of Application No. 62 of 2020, but rather Misc. Application No. 308 of 2021 was filed seeking for enlargement of time to file an application for restoration of the suit.

In his submission, Mr. Boniface challenged the applicant's grounds of appeal which are based on the question of illegality in Land Application No. 62 of 2020; on the ground that the same are new issues as they were not pleaded in the applicant's affidavit filed in Misc. Application No. 308 of 2021. In that respect, he supported the Tribunal decision as it is trite law that parties are bound by their own pleadings. In this appeal, the claim of illegality by the applicant is

to the effect that Land Application No. 62 of 2020 was struck out on the date the matter was fixed for ruling.

I have gone through the Tribunal record and noted that this question of illegality was indeed not advanced in the applicant's supporting affidavit as rightly argued by Mr. Boniface. In fact, the record shows that this question of illegality was advanced by the appellant's advocate in his written submission in support of Misc. Application No. 308 of 2021. It is indeed settled law that parties are bound by their own pleadings whereby the purpose of pleadings is to accord each party an opportunity to know the case against him or her and duly prepare his case. See: **Yara Tanzania Limited vs. Ikuwo General Enterprises Limited** [2022] TZCA 604 TANZLII and; **Salim Said Mtomekela vs. Mohamed Abdallah Mohamed** [2023] TZCA 15 TANZLII.

In **Salim Said Mtomekela vs. Mohamed Abdallah Mohamed** (supra) the Court of Appeal stated:

"In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from such pleadings except where the court has granted leave to amend the requisite pleadings."

The Court further reasoned;

"We are fortified in that regard because, as earlier intimated, like it is for the parties, the trial court is as well bound by the pleadings of the parties and as such, the court should not entertain any inquiry into the case before it other than to adjudicate specific matters in dispute which the parties themselves have raised by the pleadings."

As noted earlier herein, the parties argued the application by written submissions. In that respect, the order to file written submissions was with respect to the claims by the applicant advanced in his supporting affidavit and the respondent's reply in the counter affidavit. As such, advancing the issue of illegality in the written submission was incorrect. This position has been settled by the Court of Appeal in the case of **Hadija Ally vs. George Masunga Msingi** [2023] TZCA 17270 TANZLII in which it was ruled that written submissions cannot be used as a forum for raising new complaints. Thus, what the applicant's counsel argued in the written submission in Misc. Land Application No. 308 of 2021 regarding illegalities were statements from the bar, which is prohibited.

Affidavits are substitutes of oral evidence and in that respect, submissions thereof are to elaborate on what has already been stated in the affidavits. In the case of **Rosemary Stella Chambe Jairo vs. David Kitundu Jairo** (Civil Reference No. 06 of 2018 [2021] TZCA 442 TANZLII, the Court while quoting in approval its previous decision in the case of Registered Trustees of the **Archdiocese of Dar es**

Salaam vs. The Chairman, Bunju Village Government & 11 Others,
Civil Appeal No. 147 of 2006, held:

“... submissions are not evidence. Submissions are generally meant to reflect the general features of a party’s case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.”

It is well settled that for a court to grant enlargement of time, the applicant must show good and sufficient cause. Some of the factors considered in determining whether there is a good and sufficient reason include the applicant’s accounting on each day of the delay, sickness, or whereby there is an illegality in accordance with the criteria settled under the law. These have been discussed in plethora of authorities including: **Lyamuya Construction Co. Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII; **Mashaka Juma Shabani & Others vs. The Attorney General** (Civil Reference No. 30 of 2019) [2023] TZCA 17615 TANZLII, and **Melau Mauna & Others vs. The Registered Trustees of the Evangelical Lutheran Church in Tanzania (ELCT North Center Diocese & Another** (Civil Application No.546/02 of 2021) [2023] TZCA 17585 TANZLII. Discussing the said factors in **Melau Mauna & Others vs. The Registered Trustees of the Evangelical Lutheran Church in Tanzania (ELCT) North Center Diocese & Another** 9(supra) the Court of Appeal held:

“Here are some guiding factors which the Court may consider to ascertain whether there is good cause or not. The factors, depending on the circumstances of each particular case, are; whether the applicant has accounted for all the period of delay; whether the delay was not inordinate; whether the applicant had shown diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and whether there is any point of law of sufficient importance, such as, illegality of the decision sought to be challenged.”

In the Ruling of the impugned application, the trial Chairman is vividly seen to have noted that the appellant failed to adduce sufficient cause for his delay from the date his application was struck out for want of prosecution whereby he failed to account for each day of the delay. This main point of the decision has not been challenged by the appellant in this Appeal thus showing that the trial Tribunal was correct in its findings. The applicant has only challenged the decision on basis of failure to consider the illegalities not pleaded in the affidavit but only argued in the written submissions.

While arguing in chief in this appeal, the appellant's counsel argued that the trial Tribunal also engaged in an illegality by invoking **Regulation 11(a) to 11(2) of the District Land and Housing Tribunal Regulations, G.N. No. 174 of 2003** while Land Application was dismissed for want of prosecution vide **Regulation 15** of the same law. At this juncture, in consideration of my observation on

the issue of illegality, which is the centre of the grounds of appeal, I find this argument misplaced. The argument may be relevant in an application for restoration of the dismissed application and not in an application for extension of time.

In the circumstances, given the observation I have made herein, I find the appeal devoid of merit and dismiss the same. With costs.

Dated and delivered at Moshi on this 29th day of September 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA