

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB REGISTRY
AT ARUSHA**

LAND APPEAL NO. 213 OF 2022

(Originating from the District Land and Housing Tribunal of Arusha
in Misc. Application No 382 of 2021)

GEOFFREY KIBIRA APPELLANT

VERSUS

EZEKIEL MCHELERESPONDENT

JUDGMENT

30th October & 20th December, 2023.

KAMUZORA, J.

This is an appeal against the decision of the District Land and Housing Tribunal for Arusha at Arusha (the Tribunal) in Misc. Application No. 382 of 2021. Before the tribunal appellant herein instituted Application No 171 of 2020 but it was dismissed for non-appearance. He lodged an application intending to set aside the dismissal order so that the main application could be restored for adjudication but the same was struck out for want of jurisdiction. Aggrieved by the tribunal decision, the appellant preferred this appeal on the following grounds: -

- 1) That, the honourable magistrate erred in law and fact in holding that tribunal has no power to set aside dismissal order under the law cited by applicant.*
- 2) That, the honourable magistrate erred in law and fact in holding that there is no any provision of law which give tribunal power to set aside dismissal order which applicant seek to set aside.*
- 3) That, the honourable magistrate erred in law and fact in holding that, he can not invoke the principle of overriding objective to set aside the dismissal order which applicant seek to set aside.*

Hearing of the appeal was by way of written submissions and as a matter of legal representation, the Appellant appeared in person while the Respondent engaged Mabote & Company Advocates for drafting only. Both parties complied to the submissions schedule save for the rejoinder submission.

The appellant argued jointly all the three grounds and claimed that, his application was struck out by the tribunal on ground that he wrongly cited the enabling provision of law as Regulation 11(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. That, the trial tribunal was of the view that, the above provision was not a proper provision to move the tribunal where the application was dismissed when it was not scheduled for hearing. The Appellant submitted that since the tribunal admitted that there is no exact

provision to cover for the Appellant's circumstance, it was correct to invoke Regulation 11(2). He was of the view that in the absence of the exact provision of law, the tribunal ought to have invoked the oxygen principle as well as section 95 of the CPC which gives powers to issue necessary orders for the interest of justice.

Referring to Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, the Appellant prayed that this court be pleased to administer justice without being tied with technicalities. He also prays that the doctrine of equity be invoked and cemented his submission with the case of **Moshi Mustafa and Others Vs. Ilemela Municipal Council and others**, Civil Appeal No 117 of 2020, TanzLii. The Appellant maintained that the trial tribunal erred in dismissing his application.

In reply, the Respondent submitted that, the Appellant did not make follow up of his case before the trial tribunal and the same was dismissed. Referring the cases of **Moteswa Lusinde Vs. Nokia Solutions & Netwok**, Misc. Application No 101 of 2023 and **Lim Han Yun and another Vs. Lucy Thesea Kristene**, Civil Appeal No 219 of 2019 CAT, the Respondents argued that, a party cannot throw the blame to his advocate as the party is bound to make follow up of his case.

Basing on that submission, the Respondent prays that this court be pleased to uphold the decision of the trial tribunal.

Having read the trial tribunal record, the grounds of appeal and the submissions for and against this appeal, I will likewise deliberate on all the three grounds of appeal jointly as so done by the parties. Looking at the tribunal proceedings, the Appellant was seeking for the trial tribunal to set aside its dismissal order. The record reveals that, when composing the ruling, the chairman suo motto raised the issue of the competence of the application before the tribunal. He doubted if the tribunal had mandate to grant the prayers sought under the chamber application in considering the provision used to move the tribunal to grant the order sought. After a thorough discussion of the cited provision which is Regulation 11(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, GN No. 174 of 2003, the chairman made a conclusion that the tribunal has no powers to grant the prayers sought in the chamber application based on the cited provision. He reasoned that the provision gives powers for the tribunal to set aside the dismissal order where the suit was dismissed on the date it was set for hearing. For him, the application resulting to this appeal was dismissed for the appellant's failure to make follow up of the

same and such situation is covered under Regulation 15 (a) of GN No. 174 of 2003 and not Regulation 11 (2).

It is in record that the respondent never filed counter affidavit or submission opposing the application. Hearing of the application proceeded by way of written submission and an order to that effect was made in the absence of the respondent. The proceedings do not show if the tribunal upon discovering inconsistency in the applicant's application, called upon the appellant to address the tribunal over that inconsistency. The tribunal chairman proceeded to determine the issue raised by him suo motto without requesting parties to address him over the same.

There is number of authorities regarding the procedures to be followed by court when it discovers defects affecting the competency of any case before it. It is settled that cases must be decided on the issues or grounds raised by parties. However, where the court finds other issues which it thinks necessary to be determined, it becomes necessary that parties are notified over that issue and given opportunity to address the court over the same in conformity with the principle of right to be heard. In the case of **Kumbwandumi Ndemfoo Ndossi Vs. Mtei Buss Services Ltd**, Civil Appeal No 257/2018 CAT at Arusha (unreported) the Court of Appeal cited with approval the case of **Abbas**

Sherally and Another vs. Abdul S. H. M. Fa za I boy, Civil

Application No. 33 of 2002 (unreported) where it was held that: -

*" The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. **That right is so basic that a decision which is arrived at in violation of it will be nullified** even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice. "* [Emphasis Origin]


subject to the above decision, irrespective how correct the court or tribunal is in its decision, the circumstance under which such decision was arrived at is paramount. If the decision was made without according parties the right to be heard on the issue which resulted to the disposal of the case, such decision cannot stand as correct decision.

In this case, there is no doubt that the Appellant was not accorded an opportunity to be heard on the issue which resulted to the striking out of his application which is the correctness of the enabling provision. Therefore, the ruling issued by the tribunal in respect of that issue cannot stand as it was issued in contravention of the Appellants right to be heard which is a constitutional right. This, in my view, occasioned miscarriage of justice on the side of the Appellant.

Having said so, I proceed on quashing and setting aside the tribunal ruling. I order the case file to be remitted back to the trial tribunal for it to compose a ruling after hearing the parties (Appellant herein) on the competence of the application before it. The appeal is therefore allowed to the extent above explained. In considering that the circumstance which led to the decision of this court could not be faulted to the parties, I make no order as to costs.

DATED at **ARUSHA** this 20th day of December, 2023.




D.C. KAMUZORA
JUDGE

