IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 12 OF 2022

(C/F Land Appeal No. 40 of 2021 in the District Land and Housing Tribunal for Moshi at Moshi)

NASHON ANDREA MOSHA
AMON ANDREA MOSHA — **APPELLANTS**
KAMILI ANDERA MOSHA

VERSUS

ZENA ABDALLAH
INDEPENDENT AGENCY AND — **RESPONDENTS**
COURT BROKERS LIMITED
EMMANUEL ANDREA MOSHA

JUDGEMENT

Last Order: 26.03.2024
Judgment: 17.04.2024

MONGELLA, J.

The appellants filed Land Application No. 40 of 2019 before the District Land and Housing Tribunal for Moshi at Moshi (the Tribunal, hereinafter) against the respondents over a piece of land located at Uchira village, Kirua Vunjo Kusini ward, Moshi district, Kilimanjaro region. They sought for the Tribunal to: declare them rightful owners of the suit land, restrain the respondents and their agents from

entering the suit land and using the same, grant them general damages and costs of the suit and any relief it deemed fit.

Since the application was filed on 12.02.2019, there have been several adjournments of the matter. Eventually, the same was fixed for hearing on 01.02.2022 however, on the material day, following certain events, the trial chairman dismissed the matter for want of prosecution. Aggrieved, the appellants preferred this appeal on three grounds, to wit:

1. *That, the trial Tribunal did not give the appellants chance to be heard in order to decide the case on merit at the same time the order was legally baseless.*

2. *That, the trial Tribunal erred in law and fact by giving order based on the allegations of negligence of applicants delaying the hearing while he was the source of the whole process of hearing due to his several absences in his office which cause many adjournments.* (sic)

3. *That, the Tribunal erred in law and fact by giving order of removing the application in favor of the Respondent herein while there was no hearing of neither parties, with allegations that he so decides because of negligence of their Advocate instead of giving the applicants right to be heard without the Advocate.* (sic)

The appeal was resolved by written submissions whereby the appellants were unrepresented while the respondents were represented by Mr. Philemon Justin Shio, learned advocate.

From the submission, it appears that the appellants abandoned the third ground. They as well argued collectively on the 1st and 2nd grounds. Addressing these two grounds. They complained that the trial tribunal denied them the right to be heard rendering the judgment entered baseless. They averred that they were present on the date fixed for hearing together with the respondent and their advocate. That, prior the said date, there were other hearing dates adjourned for more than 7 months. That, on the date fixed for hearing, after the coram was entered, the appellants' advocate requested for a short adjournment to inform their witnesses on their obligation to testify. The averred that this short adjournment was due to the fact that one of the appellants had traveled and two of them had fallen sick for a week, thus needed to be prepared. The appellants complained that their advocate's prayer was rejected by the trial chairman who then dismissed the case on ground that the applicants were negligent and lacking in seriousness.

The appellants further averred that neither were they nor their advocate absent in court on the material day. They found no legal ground for the trial Tribunal dismissing their application. In their view, they said, it would have made sense if the Tribunal only judged their advocate as unserious, but award the appellants the chance to proceed unrepresented.

Citing **Regulation 11 (1)(b) of the Land Disputes (District Land and Housing Tribunal) Regulations, 2003** GN No.174 of 2003, they held the view that the circumstances therein differ from the ones in this

matter and thus the dismissal was baseless. They also referred to **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977** averring that they were denied the right to be heard as their application was dismissed following the presiding chairman being merely annoyed, which was contrary to the law.

The respondents, through Mr. Shio, their learned counsel, opposed the appeal. In reply, Mr. Shio also noted that the appellants had not addressed the 3rd ground. He thus treated the ground as abandoned. He proceeded to submit on rest of the grounds jointly. Addressing the court on these grounds, he contended that the appellants do not understand that the right to be heard can also be exercised for the other party. He averred that, the appellants were given the right to be heard by the Tribunal and were present on date fixed for hearing. That, unfortunately, when the matter came for hearing on 01.02.2022, the 1st and 2nd appellants were not ready to proceed with hearing and their advocate prayed for the matter to be adjourned without assigning any reasons as to why the 3rd appellant should not be heard while he was present before the trial Tribunal. That, the appellants were also asked to proceed without their advocate, but refused to do so.

He further submitted that while the 1st and 2nd appellants were reported to have fallen sick prior to the hearing date and were thus not ready to be heard on the material day, their advocate did not assign reasons as to why the 3rd respondent could not proceed with hearing on the particular day.

Mr. Shio further contended that **Regulation 11(1)(b) of the GN. No. 174 of 2003** provides that the remedy in circumstances where the applicant appears, but has no sufficient reason not to proceed with hearing is for the application to be dismissed. He further cited the case of **John Simon vs. Siya Simon** (Misc. Civil Application No., 59 of 2023) [2023] TZHC 17544 TANZLII in support of his argument.

He insisted that since the 1st and 2nd appellants were not prepared, the 3rd appellant could have proceeded with hearing to save the trial Tribunals' time considering that the matter had been in the Tribunal for more than (3) years. He further challenged the 1st and 2nd for failure to furnish any proof of sickness before and on the day the matter was fixed for hearing.

Mr. Shio further contended that the appellants ought to have filed an application to set aside the dismissal order as they ought to have exhausted all local remedies. He averred that this appeal ought to be dismissed with costs since the appellants did not exhaust all local remedies. He was also of the view that the appellants could also have filed a fresh application rather than coming before this court on appeal.

I have considered the rival submissions by the parties. As evident, the appellants did not address the 3rd ground and the same amounts to abandonment, thus shall not be regarded. Nevertheless, I consider all the grounds revolving around one common argument, that the trial Tribunal erred in dismissing the

appellant's application for want of prosecution. I will thus resolve this appeal basing this central issue.

The dispute between the parties is centered on the events that transpired at the trial Tribunal on 01.02.2022. On that material day, the appellants and their advocate by then, Mr. Priscus Massawe, were present, so was the chairman, assessors and Mr. Shio who stood for the 1st respondent. The 2nd and 3rd respondents were absent. Addressing the Tribunal, Mr. Massawe asked for the matter to be adjourned as the 1st and 2nd appellants, who were the witnesses, had not been prepared. Mr. Shio did not object the prayer, but requested that the adjournment be short. Later, the trial chairman issued an order in which he pointed out how the matter had been in the Tribunal for 3 years.

The trial chairman noted that while Mr. Massawe had stated that he was unable to prepare the 1st and 2nd appellants as they had been sick, he did not indicate the reason for failure to prepare the 3rd appellant if at all the other two witnesses were truly sick. He found the omission an indication of negligence on the counsel's part in regard to prosecuting the case. He further noted that there was no any proof of sickness of the 1st and 2nd respondents and that he requested for such proof, but it was never produced. The Chairman finally dismissed the application with costs.

The record shows that the trial chairman never cited a particular provision of law under which he exercised such authority. Mr. Shio seems to however think that it was **Regulation 11 (1) (b) of the GN No. 174 of 2003**. For ease of reference, this provision states:

> "11 (1) On the day the application is fixed for hearing the Tribunal shall-
> (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:"

I do not find the provision being relevant in the circumstances in the case at hand considering that the appellants were present on the material date. While it is within the discretion of the court to dismiss a claim for want of prosecution, such discretion ought to be exercised judiciously and according to law and procedure. I believe that was not done.

The proceedings of the material day, as I have noted, indicate that Mr. Massawe, the then counsel for the appellants, prayed for an adjournment and Mr. Shio did not object the same. The trial chairman however, came up with an entire argument on the matter being in court for a long time. In his order, he purported to have informed the 1st and 2nd appellants to furnish necessary documentation to prove their claim of illness. However, assertion was never recorded in the proceedings.

It is well settled that proceedings of the court are presumed to be accurate and authentic such that they represent what really transpired in court. See, **Alex Ndendya vs. Republic** (Criminal Appeal 207 of 2018) [2020] TZCA 202; **Stanley Murithi Mwaura vs. Republic** (Criminal Appeal 144 of 2019) [2021] TZCA 688; **Masalu Ipiringa vs. Republic** (Criminal Appeal No.263 of 2019) [2023] TZCA 17401; **Felick Kilipasi vs. Republic** (Criminal Appeal No. 260 of 2021) [2023] TZCA 17941 and; **Security Group T. Limited vs. Steven Gerson Kizinga** (Consolidated Civil Appeal No. 386 of 2020 & 50 of 2021) [2024] TZCA 107 (all at TANZLII). In **Alex Ndendya vs. Republic** (supra), the Court of Appeal stated:

> "It is settled law in this jurisdiction that a court record is always presumed to accurately represent what actually transpired in court. This is what is referred to in legal parlance as the sanctity of the court record."

Whenever there is an issue regarding what transpired in court, then the record should speak for itself. As such, I find the order of the trial chairman raising doubts as to what really transpired on the material day. It is doubtful whether the appellants were really required to furnish proof of their illness and failed, as claimed. It is further questionable whether the trial chairman bothered at all to inquire on why the 3rd appellant could not testify on the material day and whether he could do so on that day. The Tribunal record does not support the Hon. Chairman's allegations.

In addition, upon observing the records, I also noticed that the matter was first fixed for hearing on 22.09.2020. It had indeed been in the Tribunal for a long time as stated by the trial chairman. However, upon perusing the proceedings, the matter had been constantly adjourned since then. I have seen that despite the appellants having an advocate, it was only once that none of them attended. There were also rare scenarios where one of the applicants did not appear. This means, the adjournments were not entirely caused by the appellants. In fact, the record itself is silent on that matter. None of the adjournments made were accompanied with reasons. Only the dates for adjournment were mentioned.

In the premises, I am of the considered view that the blame thrown to the appellants is undeserving of them. Further, given that it was merely a request for adjournment, I believe the chairman had two options being; either to allow the adjournment or to deny the same and have the appellants proceed with hearing. Perhaps if the appellants denied to proceed with the matter, then he would have resorted into dismissing the matter. All this should have been reflected on record.

On the other hand, I still believe that such drastic measures should have not being employed given that their absence was not habitual. Seeing that no reason was allocated for the previous adjournments and there had been an almost perfect attendance

on the appellant's side, I find the dismissal was undeserved and contrary to law and practice.

Mr. Shio pointed out that the appellants had to exhaust all remedies at the Tribunal by filing an application to set aside the dismissal order. Considering that this issue was already resolved by this court on 11.10.2023, I am thus *functus officio* to re-address the same. In that regard, I will not address it.

Concerning Mr. Shio's assertion that the appellants could have also filed a fresh application instead of appealing before this court; I have observed the issued order and it seems the trial Tribunal granted the appellants leave to file a fresh application. I wish to quote the statement by the Tribunal as hereunder:

> "Ni jambo lisilokubalika na ni matumizi mabaya ya chombo hiki kuendelea kukaa na shauri hili tena hapa wakati nia ya wadai kueleza wanachotaka ikionekana ikiwa ndogo. Kwa kuzingatia sababu nilizozieleza hapo juu. Ninafuta Shauri hili ili kuwapa wadai muda wa kujipanga na kuweza kutenga muda wa kuhudumiwa. Nimefuta kwa gharama. Ndivyo ilivyoamriwa"

Despite the order by the Tribunal as above, I do not think the appellants were precluded from filing an appeal or revision given the fact that they were aggrieved by the said order.

In the foregoing, I allow the appeal. I quash the dismissal order issued on 01.02.2022 and herein order the file to be remitted back

to the trial Tribunal for the dispute between the parties to be resolved on merits. Considering that the error was occasioned by the trial Tribunal, I make no order as to costs.

Dated and delivered at Moshi on this 17th day of April, 2024.

X

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