IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLANOUS LAND CASE APPEAL NO. 32 OF 2012

(From the Decision of the District Land and Housing Tribunal of **KIBAHA** District at **KIBAHA**. In the Land Case Appeal No. 20 of 2011 and Original Ward of Kerege Ward in Application No. 141 of 2008)

FUNDYA KILANGI .....APPELLANT

VERSUS

KIKUNDI CHA NGUVU KAZI
MIKOCHE MIREFU .....RESPONDENT
C/O RAMADHANI JUMA

JUDGMENT

FIKIRINI, J:

Fundya Kilangi being aggrieved by the ruling of the District Land and Housing Tribunal for Coast region at Kibaha appeals to this court. The appellant had four grounds of appeal namely:

1. *That the Tribunal erred in law and in fact in that it failed to make a decision on the Application for extension of time that was before it for determination;*
2. *That the Tribunal erred in law in holding that ex parte judgment entered by the Ward tribunal cannot in law be revised by the Tribunal;*
3. *That the Tribunal erred in law in raising suo motto issue of revisional jurisdiction of the Tribunal and proceeded to determine the same without giving parties right to be heard.*
4. *That the tribunal erred in law and in fact in failing to grant the application for extension of time on the strength of the uncontroverted evidence and submission on record that the appellant was not informed of the date of judgment in time.*

Based on the above the appellant was therefore praying for this court to quash with cost the decision of the District Land and Housing Tribunal and grant the application for extension of time to file revision against the Ward Tribunal's decision granted.

The appeal was argued by way of written submissions. It was the appellant's submission through his counsel MM Attorneys, that the appellant was required to give reasons for delay justifying the grant of extension of time sought. The appellant's counsel cited the case of ***Felix Tumbo Kissima v. Tanzania Tele-Communication Co Ltd and Another [1997] TLR 57*** where the Court of Appeal considered the reasons for delays as the basis of extension of time.

It was further submitted that the appellant was neither given notice of the case nor date of judgment at the Ward

Tribunal. The matter therefore proceeded ex parte. This was contrary to the position in held in the case of ***Cosmas Construction Co. Ltd v. Arrow Garments Ltd [1992] TLR***

127. Whereby it was concluded the appellant was entitled to the notice of the date of judgment just in case he want to take further steps. That was according to the appellant's counsel sufficient reasons to grant the application. He further cited the case of ***Digitel Holdings Ltd v. Tanzania American international Development Corporation 2000 Ltd Commercial case No. 81 of 2006,*** where Luanda,J. emphasized on application of Order IX Rule 9 (1) of the Civil Procedure Code, Cap.33.

In another case of Said Said v. Said Mohamed [1989] TLR 206, Maina,J. as he then was concluded that delay in securing a copy of judgment in time was sufficient reasons to delay in filing for an appeal.

It was therefore, the appellant's counsel submission that the fact the appellant was not given notice of the case at Ward Tribunal, neither notified of the judgment date, he was thus entitled to extension of time as prayed in the application for extension of time. But instead of the chairperson at the District Land and Housing Tribunal to determine the application and grant for extension of time, left the application undetermined. Failure to do so was according to the appellant's counsel Tribunal's abdication of its duty.

Further in their submission, the counsel submitted that the District Land and Housing Tribunal's decision was erroneous as section 36 (1) and (2) of the Lands Disputes Courts Acts, No.2 of 2002, was clear as they grant the

Tribunal with revisionary jurisdiction over Ward Tribunal's decisions without any exclusion of the decision to be revised. Otherwise, the appellant's counsel submitted that the observation that a party aggrieved by an ex part judgment must first seek to set aside is neither supported by the law or decided cases. The counsel labored further on the above raised point by citing the case of Kulwa Daudi v. Rebecca Stephen [1985] TLR 116, where section 44 (1) (b) of the Magistrate's Court's Act, 1984 which is pari material with section 36 (1) of the Land Disputes Court Act, 2002 was referred to. That ex parte judgment as any other decision was revisable the Tribunal therefore erred in concluding that the ex parte judgment by ward Tribunal was not revisable.

Another ground submitted on was on the Tribunal raising suo moto the issue of provisional jurisdiction without inviting parties to be heard. The failure to observe that fundamental principle of decision making makes the decision irregular. The counsel cited the case of ***East African Development Bank v. Blue line Enterprises Ltd, Civil Appeal No. 110 of 2009, pg 39. And Mire Artan Ismail & Zainab Mzee v. Sofia Njati, Civil Appeal No. 75 of 2008 at Dar es Salaam, pg 10.***

Finally, the counsel submitted that the fact that the appellant was not aware of the judgment date was not controverted. Therefore the appeal had merits.

In reacting to the submission the respondent's counsel started by highlighting that the appeal had been filed in a wrong registry. That instead of titling the appeal to have been filed in the High Court (Land Division) which was established under section 3 (1) of the Courts (land Disputes

Settlements) Act No. 2 of 2002 the same was titled High Court of Tanzania, Dar es Salaam Registry which was established under the High Court Registries Rules, 1964 as amended. Therefore since the same was filed in a wrong registry it has to therefore be struck out with costs and the appellant is he wishes so can refile the case in a proper way and according to the law.

As for the rest, it was the respondent's counsel submission that the only remedy in this ex parte judgment situation was to file an application to set aside the ex parte judgment within 21 days and if he missed that then had to apply for leave to file application to set aside ex parte order out of time. According to the counsel Order IX Rule 13 (1) of the CPC, Cap 33 R.E. 2002 is very clear. And all the good authorities cited were not relevant to the case at hand nor the submission by the appellant counsel that there was no provision or case law requiring for the aggrieved party in the ex part judgment to apply to set aside the said ex parte judgment.

It was their further submission that the important thing for consideration is what were the reasons for delay and if there is likelihood of successes of the intended appeal. To cement this point, the respondent's counsel cited the case of: ***Samson Kishosha Gabba v. Charles Kigongo Gabba (1990) TLR 133,*** Mwalusanya, J: as he then was.

As for the revisional jurisdiction, it was the counsel's submission that there are occasions whereby revision is called for, but not this one. Apparent error on the record could compel the higher court to proceed by way of revision but not otherwise. Moreover this can be taken as a last resort where there is no any other remedy available and not

as it is in this case. Counsel referred this court to the Court of Appeal decision in the case of ***Transport Equipment Ltd v. Devram Valambhia [1995] TLR 161,*** Kisanga, Ramadhani and Mfalila, JJA. As then were.

Referring to the cited case of ***Kulwa Daudi*** (supra), the respondent's counsel submitted that section 44 (1) (b) of the Magistrate's Courts Act, 1984 cannot be applicable. The proper provision was section 51 (1) of the Courts (Land Disputes Settlements) Act, No. 2 of 2002. Otherwise "***sufficient cause"*** is the only reason which can move the court to grant application for extension of time as observed by Lubuvs,J: in the case of ***Caritas Kigoma v. KD Dewsi Ltd [2003] TLR, 420***.

As for the claim that the chairman raised the revisional issue ***"suo moto***", the respondent's counsel's refuted the claim and submitted that the chamber summons filed by the appellant requested for the exercise of revisional proceedings and not the chairman as allege.

The counsel as well challenged the submission on not being served notice of the date of judgment as premature and therefore prayed for the appeal filed to be dismissed with costs as it has not legs to stand on.

In rejoinder submission the appellant basically reiterated his earlier submission but with emphasis on some points such as that the issue of wrong registry was not raised therefore should not be entertained. At most parties should be bound by their pleadings as well stipulated in the Court of Appeal decision in the cited case of ***Peter***

Karant & 48 others v. the Attorney General and 3 others, Civil Appeal No. 3 of 1988, pg 9.

It was further submitted that order of the court on now the matter before it was going to be disposed had to be adhered to. More so, section 3 (1) and (2) Act, 2002 cited by the respondent did not support their contention. Otherwise the law does not state which specific land registries land disputes should be filed neither do they restrict filing of the land appeals in any of the High Court Registries. What is important is the land matters be instituted in courts vested with jurisdiction and that include the High Court.

I have carefully read the record and the submissions by the parties through their respective counsels MM Attorneys for the appellant and Upright Attorneys for the respondents, and I am satisfied that this appeal has no merit. From perusing the record it is clear that the appellant's case was heard and judgment given ex parte. Therefore the best remedy was to challenge that ex parte decision. There are other remedies such as revision but in order for that to take place there has to be an apparent error on the face of the record which need to be corrected by the higher court, in this instance the District Land and Housing Tribunal. There is, from my analysis of the tribunal's record no such error which needs to be corrected and hence calling for the invoking of the revisional power. This echoed the position in the ***Valambhia*** case (supra). Side stepping of proper remedy if entertained randomly chances are the whole idea of having procedures in place to be followed would be useless. On the higher note this will be abuse of power and the court process.

Order IX Rule 13 (1) of the CPC, 33 R.E. 2002 is very clear on what should be done when there is an ex parte order. I do not find any good reason of parting from that procedure. The appellant I arguing this appeal before the District Land and Housing Tribunal relied on the submission that there was no notice of the case at the Ward Tribunal as well as notice of the date of judgment. Those to my view are the good grounds to call for the Ward tribunal to set aside its ex parte judgment. Of course the appellant is already out of time since the 21 one days prescribed by the law have elapsed long ago. But he can apply for leave to file for application to set aside the ex part orders out of time. As said above with good grounds I do not see why his application should not be granted. In light of the above it is therefore my position that the Chairman did not fail to make decision on the application for extension of time for leave to file revision out of time. In my view the Chairman correctly arrived at his decision of time to file revision out of time was not proper, since the order supposed to be dealt with was that of an ex parte judgment.

From the foregoing I conclude that this appeal has no merit and consequently proceed to dismiss it with costs.

It is so ordered.

Judgment Delivered this 30th day of August 2012 in the presence of the parties.

P.S. FIKIRINI

JUDGE

30TH AUGUST 2012

Right of Appeal Explained.

P.S. FIKIRINI

JUDGE

30TH AUGUST 2012