theIN THE HIGH COURT OF TANZANIA

(SUMBWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

MISC. LAND CASE APPEAL NO. 01 OF 2023

(Arising from the District Land and Housing Tribunal Misc. Land Application No. 216 of 2021 and originated from Mpui Ward Tribunal in Land Case No. 7 of 2020)

SULBESTO MINANGO ..... APPELLANT

VERSUS

SEVARINO MPATWA ..... RESPONDENT

JUDGMENT

26th February & 28th March, 2024

MRISHA, J.

This is an Appeal against the decision of Sumbawanga District Land and Housing Tribunal in Misc. Land Application No. 216 of 2021 (the appellate tribunal) which originated from the Land Case No. 7 of 2020 adjudicated by Mpui Ward Tribunal hereinafter referred to as the trial tribunal.

The Appellant, **Sulbesto Minango** filed with the court a petition of appeal which is predicated into three (3) grounds of appeal namely: -

1. That, Sumbawanga District Land and Housing Tribunal, erred in law and fact in deciding that the Misc. Application No. 216/2022 has been overtaken by event.
2. That, Sumbawanga District Land and Housing Tribunal, erred in law and fact to decide that Misc. Land Application No. 185/2021 has been executed, report filed and file closed.
3. That, the appellant was neither given any notice of execution nor handed over the land in dispute.
4. WHEREFORE, I prays before this Honourable Court to quash the decision of Sumbawanga District Land and Housing tribunal, allow me to appeal out of time, since there is triable issue which hinged on Pecuniary jurisdiction of Mpui Ward tribunal before the amendment Land Dispute Court Act specifically section 13(1), (2), (3) and (4) of Land Dispute Court Act Cap 216.

When this matter was called on for hearing the Appellant appear in person, unrepresented and the respondent as well. The parties agreed to let the matter be heard by way of written submissions, thus the appeal was ordered to be disposed by way of written submissions and both of them complied with the order of the court by filing their submissions within the scheduled time.

Arguing in support of the first ground of appeal, the appellant submitted that the appellate tribunal erred in law and fact in deciding that the Misc. Land Application No. 216 of 2022 has been overtaken by events. He argued that the application for Execution No. 185 of 2021 was filed on 12th October, 2023 and the appellate tribunal ordered the appellant to vacate from the suit land within 14 days from the judgment. Dissatisfied, the appellant filled Misc. Land Application No. 216 of 2023, challenging the decision of appellate tribunal.

He argued further that, he neither vacated the disputed land nor did he hand over the land in dispute to the respondent. That nothing has been complied with regarding to the Misc. Land Application No. 185 of 2021, thus, the execution is still in progress as no notice or summons has been issued to him. He was of the view that, the decision of the appellate tribunal was unlawful; the ward tribunal had no pecuniary jurisdiction to entertain the land in dispute. He has implored this court to order trial *de novo* by the competent Tribunal.

Turning to the second ground in which the appellant complains that the appellate court erred in law and fact to decide the Misc. Land Application No. 185 of 2021 which has been executed, its report filed and file closed, he submitted that it is the legal requirement that notice for execution has to be sent to the village authority and be witnessed by the village authority. However, the appellant

argued, neither notice was availed to village nor village leader for them to witness the said execution.

Still arguing on that point, the appellant added that he was not there during handling over of the land in dispute which according to him is contrary to the requirement of the law, thus making the order of closing file of execution to be unlawful and contrary to execution procedures.

Arguing in respect of ground three of the appeal, the appellant referred the court to Order XXI, Rule 20(1)(a) of the Civil Procedure Code [Cap 33 R.E. 2022] henceforth the CPC which declares that notice to show cause shall be issued to the person against whom the execution applied for and give reasons why decree should not be executed. He complained that the appellate tribunal did not avail a notice to the village leader and let it be witnessed by the village authority.

He submitted that he was never given a notice of execution nor was he handed over the land in dispute which is contrary to the procedure stipulated under Order XXI, Rule 20(1)(a) of the CPC which requires the court or tribunal to issue a notice to show cause to the person against whom the execution is applied for.

He further argued that Order XXI, Rule 20(1) of the CPC speaks on the right to be heard which is the rule of fair hearing and Article 13 of the Constitution of

United Republic Tanzania, 1977 enshrines the right of equality before law. Hence, the appellant argued that notice is a starting point of hearing of execution proceedings, thus, he was not given notice to the alleged execution which indicates that he was not afforded an opportunity of defending himself.

In a bid to bolster his stance, he made reliance on the case of **Ongujo Wakibara Nyamarwa v Prime Catch (Exports) Co Ltd and Zulfikar Jessain**, Commercial Case No. 80 of 2016 (unreported) that:

> *"Furthermore, in fulfilling the requirement under Order XXI rule 20(1) of the Civil Procedure Code, Cap 33 R.E. 2019 (the CPC), the Court in carrying out its task, has to make sure that, the principle of natural justice is judiciously observed and parties are fairly and justly treated by being afforded opportunity to be heard before any adverse order is made against any of the parties."*

Having relied on the above case, the appellant submitted that appellate tribunal failed to comply with Order XXI, Rule 20(1)(a) of the CPC. Thus, he implored this court to dismiss the decisions of both appellate tribunal as well as ward tribunal and order a trial de novo by the tribunal with competent jurisdiction.

In his response to the above submissions, the respondent submitted that the appellant's first and second grounds of appeal are misconceived. He argued that at the time application to enlarge time to file appeal was filed, the decree sought to be appealed against had already been executed. Consequently, the appellate tribunal hold and determined the Misc. Application No. 216 of 2022 which had been taken by events. To bolster his proposition, he cited the case of **Felix Emmanuel Mkongwa v Andrew Kimwaga**, Civil Application No 249 of 2016 CAT (unreported).

In regard to the third ground of appeal, the respondent submitted that all procedures regarding execution of the decree were properly complied with, including service of notice to the appellant (decree holder). He stressed that the impugned decree was already executed, thus making the appellant's complaint an afterthought.

Regarding the issue of pecuniary jurisdiction of Mpui Ward Tribunal, the respondent submitted that the appellant had failed to prosecute his case for non-appearance; hence, raising the issue of jurisdiction at this stage is an afterthought. Based on the above submissions, the respondent prayed to the court to dismiss the instant appeal with costs.

In rejoinder, on the issue of extension of time, the appellant submitted that the respondent's submission contains mere words and not supported by any evidence. He also reiterated his previous submission in chief that the execution has not taken place.

On the argument that the procedures regarding execution of decree were properly followed, the appellant submitted that the respondent's submission tainted by mere words with no proof that notice of execution was issued and served to the appellant.

Also, the appellant argued that the issue of jurisdiction can be raised at any time including during appeal. To support his proposition, he cited the case of **Tanzania Revenue Authority v Tango Transport Company Ltd,** Civil Appeal No. 84 of 2009 CAT (unreported) which stated that: -

> *"Principally objection to the jurisdiction of a court is a threshold question that ought to be raised and taken up at the earliest opportunity, in order to save time, costs and avoid an eventual nullity of the proceedings in the event the objection is sustained. The law is well settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the court suo moto, as it goes to the root of the trial."*

With the above submission, the appellant prayed for the court to dismiss the decision of the appellate tribunal as well as that of Ward tribunal and order trial de novo by a competent tribunal.

On my side, having gone through the above rival submissions together with the case laws referred thereto by the parties, the entire records of the Ward tribunal and the district land and housing tribunal as well as their impugned judgments, I find that the issue for determination is whether the present appeal has merits.

I will start dealing with the first ground in which the appellant has argued that the appellate tribunal erred in law and fact in deciding that the Misc. Application No. 216 of 2022 has been overtaken by events. The present appeal originates from Misc. Land Application No. 216 of 2021 where the applicant (appellant in this appeal) applied to the appellate tribunal for extension of time to file an appeal out of time, and the appellate tribunal dismissed the application on the ground that the application had been overtaken by events. This is shown at page 1 of the impugned judgment where it was recorded thus:

> *"Bila ya kupoteza muda wa hili Baraza ni kuwa maombi haya yamepitwa na wakati (application is overtaken by the events) kwani tayari hukumu iliyokuwa imetolewa kwenye Madai No.7/2020 na Baraza la Kata ya Mpui*

ambayo mleta maombi huyu ana nia kuikatia rufaa tayari imeishatekelezwa na hili Baraza kupitia Maombi Madogo Na 185/2021.

Hivyo maombi haya yanafutwa"

The above excerpt clearly depicts that the appellate tribunal dismissed the application on the ground that the same had been overtaken by the events with a reason that the judgment which the appellant intended to appeal against had already been executed by the appellate tribunal via Misc. Land Application No. 185 of 2021. The nagging question here is whether the application for extension of time was decided by the appellate tribunal.

In dealing with the application for enlargement of time, the court/tribunal shall be guided by the principle of the law that the applicant must advance good cause for delay. He also has the duty to account for each day of delay. This position is echoed by section 14 (1) of the Law of Limitation Act, Cap 89 R.E. 2019 which provides that:

"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made

either before or after the expiry of the period of limitation prescribed for such appeal or application."

Conversely, the application for extension of time is granted in the exercise of Court's discretionary and must be exercised judiciously depending on the circumstance of each case subject to the good or sufficient cause given by the applicant. See **Lyamuya Construction Co. Ltd v Board of Registered of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 and **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (all unreported). In **Osward Masatu's** case (supra), the Court stated inter alia that:

"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise it discretion."

Going by the above position, the appellate tribunal was supposed to consider whether there was good or sufficient cause for delay advanced by applicant in his affidavit and determine the application by looking whether the applicant had advanced some good cause for delay. In the present appeal, the record of the

appellate tribunal reveals that the applicant filed Chamber Summons supported by affidavit of the applicant on 29th October, 2021, applying for enlargement of time.

Indeed, the applicant mentioned his reasons for delay on paragraphs 3, 4, 5, 6 and 7 of the applicant's affidavit, but those reasons were not tested by the appellate tribunal. In my view, the appellate tribunal had not exercise its discretionally powers to determine whether the applicant advance some good cause for the delay or has account for delay as provided under section 14(1) of the Law of Limitation Act, Cap 89 R.E. 2019, more or less the tribunal decide on merit of the appeal.

In my view, that was an irregularity of the law as correctly submitted by the appellant. The tribunal was required to deal with the application of extension of time first before dealing with the intended appeal which was by that time, not before the tribunal.

Again, the execution of the impugned decree which was already done, does not prevent the appellant from filing extension of time to file an appeal. Thus, owing to the foregoing reasons, I find the first ground of appeal has merit.

In dealing with the second ground of appeal, the appellant has submitted that notice for execution has never been sent to the village authority nor witnessed with village authority, hence, contrary to the law.

On the other side, the respondent has contended that procedure of execution of execution was properly adhered to as the appellant was notified, but ignored.

It is a settled law that where an application for execution is made more than one year after the date of the decree, the court executing decree shall issue a notice to show cause to the person against whom execution is applied for. This position is echoed under Order XXI rule 20(1) of the CPC.

Again, the executing court is allowed to initiate execution processes without issuing summons to show cause if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice. This is stated under Order XXI, Rule 20(2) of the CPC.

In the present case, the respondent neither annexed notice under Order XXI, Rule 20(2) of the CPC nor proof of the reasons recorded by the executing court on why notice was not issued. However, the respondent in his reply to petition of appeal at paragraph 3, responded by stating that:

"There is ample evidence that the appellant was notified of the execution done by the tribunal, but he ignored."

On my part, I would expect the respondent to annex a notice to show cause, summons to appear or proof of the reasons recorded by the executing court why notice was not issued, but nothing was attached to the respondent's reply.

Moreover, the Hon. Chairperson dismissed the application on the ground that the application had been overtaken by the events with the reason that the judgment which the appellant intended to appeal, had already been executed by the appellate tribunal via Misc. Land Application No. 185 of 2021.

My concern here is on Order XXI, Rule 9 of the CPC which govern the holder of a decree who desires to execute it that he shall apply to the court which passed the decree. It appears that the respondent has no copy of the documents relating to the application of execution to annex in his reply. Still, the records of the trial court are silent on whether the respondent filed an application for execution.

The rationale behind issuing notice to show cause under Order XXI, Rule 20(1) of the CPC is that the court in carrying out its duty has to make sure that the principle of natural justice enshrined under article 13 of the URT Constitution, is

judiciously observed and parties are fairly and justly treated by being afforded opportunity to be heard before any adverse order is made against any of them. See **Ongujo Wakibara Nyamarwa v Prime Catch (Exports) Co. Ltd & another** (supra).

Hence, in the light of such discrepancies, I am settled view that notice show cause was not issued by the tribunal which is contrary to Order XXI, Rule 20(1) of the CPC. I therefore, find that the second ground of appeal has merit.

On the issue of pecuniary jurisdiction of the Ward tribunal, the appellant contended that the Mpui Ward Tribunal had no pecuniary jurisdiction to determine land dispute whereas the respondent has argued that the issue of jurisdiction could have been raised at the trial tribunal and not at this stage.

It is a trite law that the issue of jurisdiction can be raised at any stage of the case even at the appeal stage. There is a numerous number of cases of High Court and Court of Appeal on this issue. In the case of **Ibrahim Omary v The Inspector General of Police and 2 others,** Civil Appeal No. 20 of 2009, for instance, the Court of Appeal held that:

> *"There is no dispute that in law jurisdiction is a matter which can be raised at any stage of the trial in a case. In this sense, although it is a bit unusual*

and unfortunate that the issue was raised at the late stage of the case, strictly speaking, the judge did not error in raising it at the end of the judgment."

Going by the above provision, I do not agree with the respondent's argument, but subscribe to the submission of the appellant that the issue of jurisdiction of the court/tribunal can be raised at any time. However, the issue of pecuniary jurisdiction could be a good or sufficient cause for extension of time which fall under illegality. This position was stated in the case of **The Principal Secretary Ministry of Defence and National Service v. Devlan Valambya** [1992] TLR 189 where it was stated that:

"Where the issue of illegality and irregularity in the decision sought to be impugned is raised the court is required to extend the time even if it means that the applicant has failed to account for the delay."

It is therefore, my settled view that since the application for extension of time had never been determined by the appellate tribunal, the fourth ground of appeal has merit.

The above being said and done, I allow the present appeal with costs, quash the proceedings as well as the impugned judgment of the appellate tribunal, set

aside orders passed thereto and direct the appellate tribunal to rehear the appellant's (applicant's) application vide Misc. Land Application No. 216 of 2021 subject to the available procedures, as described hereinabove.

It is so ordered.

A.A. MRISHA
JUDGE
28.03.2024

DATED at **SUMBAWANGA** this 28th day of March, 2024.

THE HIGH COURT OF TANZANIA

A.A. MRISHA
JUDGE
28.03.2024