IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
MISCELLANEOUS LAND APPLICATION NO. 38 OF 2022
(Arising from the judgment of the District Land and Housing Tribunal for Nzega in Land Application No. 28 of 2017)

HTT INFRACO LTD ..... APPLICANT

VERSUS

FRANCIS FRANCIS ..... 1ST RESPONDENT
HASSAN KULWA MAKINYA ..... 2ND RESPONDENT
MIC TANZANIA LTD ..... 3RD RESPONDENT

RULING

Date of Last Order: 21.11.2023
Date of Ruling: 13.02.2024

KADILU, J.

This is an application for revision filed by the applicant challenging the decision and orders of the District Land and Housing Tribunal for Nzega in Land Application No. 28 of 2017. The application has been brought under the provisions of Section 41 (1), 43 (1) (a) (b) and (2), Section 51 (2) of the Land Disputes Courts Act [Cap. 216 R.E. 2019], Section 95 and Order XLIII, Rule 2 of the Civil Procedure Code, [Cap. 33 R.E. 2019]. It is also supported by Affidavits of Michaela Marandu, Head of Legal Services of the applicant, and Leonard Masatu, the learned Counsel for the applicant.

In addition, Josephine Makanza, Chief Legal Officer and Company Secretary of the 3rd respondent sworn an affidavit supporting the application. On the other hand, Elibahati Thomas Akyoo, Counsel for the 1st respondent filed a

counter affidavit to challenge the application. For a better appreciation of the matters in dispute, I find it necessary to narrate the factual background albeit briefly. In July 2017, the 2nd respondent filed Land Application No. 28 in the District Land and Housing Tribunal for Nzega against the applicant and the 3rd respondent. He alleged that he is the lawful owner of a piece of land located at Miguwa Village within Nzega District on which the applicant constructed, operated, and maintained its communication tower without entering into a lease agreement with him.

The applicant sought and obtained leave of the court to join the 1st respondent as a third party to the dispute asserting that in September 2015, it leased the disputed land from the 1st respondent. On 29th November 2021 when the applicant's case was called on for hearing before Hon. Waziri (Chairman), the 1st respondent was absent hence, the matter proceeded exparte against him. On that day, the plaintiff's case was heard and closed. The learned Chairman set the hearing of the defence case on the 24th day of February 2022. However, from that date to 18th September 2022, the case kept on being adjourned due to the absence of the assessors. The hearing was then set on 30th September 2022.

On 30th September 2022, Counsel for the applicant appeared before the tribunal ready for the hearing, only to be informed by the Clerk that the dispute was settled out of court via the deed of settlement that was filed in the tribunal on 9th September 2022 followed by an order of the tribunal recording the settlement. Alleging that the said deed of settlement was

tainted with material irregularities, the applicant filed the present application for revision on the following grounds:

(a) *That, the deed of settlement was neither known nor consented by the applicant before the recording by the tribunal.*
(b) *That, the deed of settlement was signed on behalf of the applicant by a person neither known nor authorized by the applicant to sign on her behalf.*
(c) *That, the applicant was not heard before the recording of the deed of settlement by the tribunal.*
(d) *That, the tribunal recorded the purported deed of settlement by the 1st respondent without vacating its earlier hearing exparte order against the 1st respondent.*

In addition to the above grounds, Counsel for the applicant stated in his affidavit that the applicant was not notified that the 30th September 2022 that was set for hearing was changed to 9th September 2022. He stated further that the Chairperson who recorded the settlement deed was not the one presiding over the matter. On her part, the Chief Legal Officer and Company Secretary of the 3rd respondent restated the same grounds in her affidavit in support of the application adding that the 3rd respondent was not aware of the said deed and did not participate in its preparation. In the end, the applicant implored the court to revise the said order of the tribunal with costs.

Counsel for the 1st respondent conceded in his counter affidavit that indeed he entered into a deed of settlement with the 2nd respondent without consulting the applicant and the 3rd respondent, but he did so in good faith considering that the matter had taken almost five years in the tribunal

without settlement. Concerning the change of dates of the hearing, the learned Counsel stated that it was the duty of the tribunal to inform the applicant about the date of settlement. He opined that in the interest of justice, the court should exclude the applicant and the 3rd respondent from being parties to the said deed of settlement and order that the deed was concluded between the 1st and 2nd respondents.

On the day of the hearing of this application, the applicant was represented by Advocate Leonard Masatu who also held a brief for the 3rd respondent's Advocate, with authority to proceed to the hearing. The 2nd respondent appeared in person, unrepresented whereas the 1st respondent never appeared before the court despite various efforts including serving him through publication. As such, the hearing proceeded exparte against the 1st respondent though the counter affidavit filed by his Advocate was fully considered.

Invited to take the floor, Advocate Leonard urged this court to quash and set aside the findings and orders of the tribunal in Land Application No. 28 of 2017 which resulted in the settlement deed dated 9th September 2022. He narrated that after the 2nd respondent's case was closed in the tribunal, the respondent's case was set to be heard on 30th September 2022. On reaching the tribunal on that day, he was informed that the case would not proceed because the tribunal had registered a settlement order marking the matter settled out of court.

He further told this court that, the tribunal recorded a settlement order without vacating its previous exparte order against the 1st respondent. Mr. Leonard referred to Regulation 11 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2002. He also invited me to read the case of ***Yara Tanzania Ltd v DB Shapriya & Co. Ltd***, Civil Appeal No. 245 of 2018, Court of Appeal of Tanzania at Dar es Salaam. Concerning the presiding Chairman, the learned Advocate submitted that the Chairperson who recorded the settlement deed was not the one who was presiding over the matter. He explained that the case file changed hands without assigning the reasons thereof.

Mr. Leonard referred to the case of ***Kinondoni Municipal Council v Anthony Masanza & Another***, Misc. Land Application No. 54 of 2018, High Court of Tanzania at Dar es Salaam in which it was stated that in the administration of justice, the right to information as to any change affecting the proceedings is of paramount importance. He argued that Land Application No. 28 of 2017 changed hands contrary to Order XVIII, Rule 10 of the CPC and the case of ***National Microfinance Bank v Augustino Wesaka Gidimara t/a Builders, Paints & General Suppliers***, Civil Application No. 154 of 2015, Court of Appeal of Tanzania at Dar es Salaam. On the strength of his submissions, Mr. Leonard urged the court to order the remission of the case file to the tribunal for the parties to be heard on merit.

Responding to the submission by Mr. Leonard, the 2nd respondent insisted that he is the rightful owner of the land on which the communication tower

was erected so, he prays to be provided with a lease agreement. He conceded that the 1st respondent gave him TZS. 2,500,000/= before the date on which the case was scheduled for hearing of the defence side by the tribunal. He, however, submitted that he did not understand the transaction therefore, he reported it to the Prevention and Combating of Corruption Bureau (PCCB). He told the court that he had been suffering from epilepsy disease for a long time and the 1st respondent knew it.

Having gone through the entire record and paying due consideration to the submissions by the learned advocates for the parties, the sole issue that calls for the court's determination is whether the present application has merit. I wish to point out from the outset that this court derives its powers of revision over the proceedings or any order from the district land tribunals under section 43 (1) (b) of the Land Disputes Courts Act, [CAP 216 R.E 2019]. The Section provides:

"The High Court may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on an application being made in that behalf by any party or of its own motion, if ***it appears that there has been an error material to*** *the merits of the case* ***involving injustice****, revise the proceedings and make such decision or order therein as it may think fit."*
[Emphasis added].

From the foregoing provision, in an application of revision like the present one, the applicants must show that there is an error material to the merit of the case involving injustice. I have carefully gone through the entire record of the tribunal.

It is not in dispute that the contested deed was signed by the Counsel for the 1st respondent, Mr. Elibahati Thomas Akyoo. He also signed the deed on behalf of the applicant and the 3rd respondent. As hinted earlier, Mr. Elibahati stated that he signed the deed unilaterally but in good faith for speedy disposal of the dispute which was long pending before the tribunal. The said deed of settlement is what is being challenged on the basis that the applicant and the 3rd respondent were not involved, and it was substantially and procedurally tainted with illegalities. Among other faults, it is alleged that the applicant and the 3rd respondent did not authorize Mr. Elibahati to sign the deed on their behalf, they did not participate in its negation and preparation, and they were not heard before the deed was registered by the tribunal.

It is a common legal practice that before rushing to record a deed of settlement, one has to be satisfied that it conforms to the requirements of the law. Order XXIII, Rule 3 of the CPC provides that:

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

The provision implies that the parties have to negotiate a deed of settlement, draft, and sign it. When it is ready, they file it in court whose role is to register it and issue an order or decree based on what the parties have agreed upon. In ***Karatta Ernest D.O and 6 Others v The Attorney General***, Civil Appeal No. 73 of 2014, the Court of Appeal held that the basis of a deed of settlement must be privy to all the parties. That is to say, all parties should take part in the negotiation of the deed of settlement. In ***Natal Martin Charles Ltd v Gapco Tanzania Limited***, Misc. Commercial Application No. 23 of 2021, High Court of Tanzania Commercial Division, the court observed that:

"When considering the lawfulness of the settlement agreement, one has to ***first,*** *be satisfied that both parties to the agreement have freely and voluntarily concluded the agreement.* ***Second****, there is a meeting of minds of the contracting parties;* ***third****, the terms of the deed of settlement are capable of enforcement without recourse to further litigation."*

In the matter at hand, it is apparent on the face of the record that all the parties did not participate in the negotiation of the deed, let alone its signing and registration by the tribunal. Thus, the tribunal recorded the deed of settlement and passed an order marking the dispute settled out of court without satisfying itself as to the lawfulness of the agreement in question. Though under the principle of sanctity of contract, the court is not permitted to interfere with what the parties have agreed upon, where a contract is found to be unconscionable, illegal, or against public policy, the court may be justified to interfere and nullify the said agreement.

In the instant application, I am satisfied that the non-participation of the applicant and the 3rd respondent to the negotiation of the deed rendered the agreement unlawful hence, unenforceable. Additionally, the constitutional right to be heard was violated when the tribunal recorded the settlement deed in the absence of all the parties. The proceedings of the tribunal are clear that on 9th September 2022 when the deed of settlement was recorded, the applicant and the 3rd respondent were absent. I take the liberty to reproduce the relevant part of the proceedings as hereunder:

***Date**: 18/8/2022*
***Before**: Hon. V.A. Ling'wentu – Chairperson*
***Assessors**: Absent*
***Applicant**: Present in person*
***Respondents**: Absent without notice*
***Clerk**: Nyemo Joel*

***Order**:*

1. *Hearing on 30/9/2022.*
2. *Advocates for the parties to attend without fail.*

Signed: V. Ling'wentu,
Chairperson
18/8/2022.

***Date**: 9/9/2022*
***Before**: Hon. V.A. Ling'wentu – Chairperson*
***Assessors**: Absent*
***Applicant**: Present in person*
***Respondents**: Advocate Elibahati Akyoo*
***Clerk**: Nyemo Joel*

Advocate Elibahati Akyoo:

On 30/6/2022, your honourable tribunal advised us to settle the matter and insisted on it on 8/8/2022. On 8/8/2022, I talked to my client about this dispute. We discussed and agreed that he purchased the land measuring 15×15 for TZS. 600,000/= to resolve this dispute. I communicated with Mr. Hassan Kulwa and he agreed to receive TZS. 2,500,000/=. Therefore, I have agreed to pay him that amount of money.

Mr. Hassani Makinya:

We have indeed agreed that he will pay me TZS. 2,500,000/= and the dispute will be resolved. He will continue to own the land on which the communication tower is erected.

Order:

1. *As the applicant has been paid TZS. 2,500,000/= today on 9/9/2022 before the tribunal after having signed a deed of settlement, the dispute has been resolved as agreed upon by the parties.*
2. *The dispute is hereby marked settled by the settlement deed of the parties.*

Signed: V. Ling'wentu,
Chairperson
9/9/2022.

[Translated from Kiswahili to English].

It is crystal clear, looking at the proceedings of the trial tribunal that there was a violation of the right to be heard which is one of the cardinal rules of natural justice the resultant effect of which, is to render the whole decision a nullity. The Court of Appeal in the case of ***Issa Juma @ Magono & Others v R.***, Criminal Appeal No. 378 of 2020 held that, any judicial order made in flagrant violation of any cardinal rules of natural justice is *void ab initio* and vitiates the decision and must be quashed even if the same

decision would have been arrived at if fully observed or even if made in good faith.

From the extract above, it is similarly evident that the deed of settlement was filed on 9/9/2022 and the tribunal's order marking the dispute resolved out of court was made on the same day. I agree with the Counsel for the applicant that the order was made on the date on which the matter was not scheduled. When the case was adjourned on 18/8/2022, it was set for hearing on 30/9/2022, not 9/9/2022. The proceedings indicate as well that on that day, the applicant, the 3rd respondent, and the assessors were absent.

The record is also silent about the hearing exparte order against the 1st respondent that was made by the tribunal on 29/11/2021. There is nowhere indicated that the tribunal vacated its earlier exparte order before registering a deed of settlement filed by the Advocate for the 1st respondent. The record reveals further that the applicant's case was heard by Hon. M.H. Waziri whereas the defence case proceeded before Hon. V.A. Ling'wentu without assigning reasons for the change of chairpersons. I am aware of Order XVIII, Rule 10 of the CPC which allows changing of the case files between judicial officers after the case was partly heard by another officer, but I am also mindful that the successor judicial officer is obliged to give reasons for the change.

In the case of ***M/S. Georges Centre Limited v The Attorney General***, Civil Appeal No. 29 of 2016, the Court of Appeal held that once the trial of a case has begun before one judicial officer, that judicial officer has to bring it to completion unless for some reason he is unable to do so. The reason for a trial started by one judicial officer to be completed by him unless it is not practicable, was stated in the case of ***Duma Ilindilo Pangarasi v R.***, Criminal Appeal No. 470 of 2019, Court of Appeal of Tanzania at Mbeya in which the Court observed that the one who sees and hears the witness is in the best position to assess the witness's credibility. I have established that in the case at hand, the learned Chairpersons of the tribunal exchanged the case file without recording the reasons.

From the foregoing analysis, I agree with the Advocate for the applicant that the contested deed of settlement was tainted with some irregularities and illegalities. Consequently, I nullify the proceedings of the trial tribunal that led to the recording of the said deed of settlement and set aside the tribunal's order marking the dispute settled out of court. I further remit the case file to the District Land and Housing Tribunal for Nzenga for the defence case to be heard on merit. Nevertheless, the parties are still at liberty if they so wish, to settle their dispute out of court in accordance with the law. Each party shall bear its own costs.

Order accordingly.

KADILU, M.J.
JUDGE
13/02/2024.

Ruling delivered virtually on the 13th Day of February, 2024 in the presence of Ms. Elizabeth Kifai, (Advocate) holding brief for Mr. Leonard Massatu, Advocate for the applicant.

KADILU, M.J.,
JUDGE
13/02/2024.