

TANZANIA / JUDGMENT

amelile mwansule vs karashi tisho

2023 tzhc 22700 14 november 2023

COURT
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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB-REGISTRY AT MBEYA LAND APPEAL NO. 28 OF 2023 (Originating from Misc. Land
Application No. 8 of 2022 of the District Land and Housing Tribunal for Mbeya at Mbeya)
AMELILE MWANSULE.....APPELLANT VERSUS KARASHI
TISHO.....RESPONDENT

JUDGMENT

28h October & 14h November, 2023 MPAZE, J.: The appellant was successfully sued by the respondent in the District Land and Housing Tribunal for.; Mbeya via Application No. 116 of 2020 over the land measuring half an acre located at Ofisini Hamlet, Kapunga village within Mbarali District in Mbeya region. Upon service of the application to the appellant, he appeared and prayed to file a written statement of defence (WSD), the tribunal granted him twenty-one days within which to file WSD. On the hearing it transpired that WSD was filed out of time, this prompted the respondent's counsel to pray to proceed ex-parte, the prayer the chairman granted. Hearing continued in the presence of the appellant but without taking part in the proceedings. At the end of the hearing, the application was in favour of the applicant who is the respondent in this matter. This prompted the appellant to apply to set aside the ex-parte judgment. In the application, he complained that he was not served with notice of an ex-parte hearing and the date the matter was scheduled for

judgment.

The respondent resisted the application it was averred that the appellant was present on the date the order to proceed ex-parte was made and scheduled for judgment. The chairman after hearing the parties dismissed the application hence this appeal on the following grounds;

1. The trial tribunal erred in law and in fact for failure to set aside ex-parte judgment without considering that the applicant advanced sufficient reason as he was not properly served with a summons for attending ex-parte judgment.

2. The trial tribunal erred in fact and law for failure to set aside the ex-parte judgment as the same denied the appellant's right to be heard thus curtailing his natural justice. 2
3. That the trial tribunal erred in fact and law for failure to set aside the ex-parte judgment as the same contains irregularities. On the hearing date, the appellant appeared in person with no legal representation whereas the respondent was represented by Ms. Caroline Mseja, learned counsel. Being a layman, he did not have much to submit, he was so brief in each ground whereas the first and second grounds were submitted together. Submitting in respect of grounds one and two he just said he was not served with notice of judgment while the matter was heard ex-parte in the tribunal and this denied him his basic right to be heard. On the third ground, he faulted the trial tribunal for failure to set aside the ex-parte judgment as it was tainted with illegalities and irregularities. Thus, prayed for the appeal to be allowed. Responding to the appellant's submission Ms. Mseja submitted that the appellant was vigilant in taking steps because after the matter was ordered to proceed ex-parte he applied for a temporary injunction instead of an application to set aside the ex-parte order. 3 It was further argued that the appellant was appearing on all dates the matter was called for hearing including the date the matter was scheduled for judgment and on the date of judgment. To the respondent's counsel, there was no need to serve notice of judgment while the respondent was present in the tribunal. Submitting on ground two, Ms. Mseja admitted that the right to be heard is a constitutional right, which the appellant was afforded. However, he failed to exercise this right. On the complaints that the ex-parte judgement is tainted with illegalities, Mr. Mseja contended that no irregularities in the tribunal judgment. She prays the appeal be dismissed with costs. In rejoinder, the appellant just insisted he was not given the right to be heard. I have considered the appeal document together with the argument presented. From the nature of the matter giving rise to this appeal, it is settled law that to successfully move the court to exercise its discretion power to set aside the ex-parte judgment the applicant must advance good

reasons.

4 Further, it is the law that the appellate court has no power to interfere with the discretionary power of the lower court unless it was not exercised judiciously. See *Metro Petroleum Tanzania Limited Others vs United Bank of Africa*, (Civil Appeal 147 of 2019), published on the website www.tanzlii.org. [2021] TZCA 751. In this appeal, like in the tribunal, the reason advanced to set aside ex-parte judgment is the failure to serve the appellant with notice of judgment. It was responded that there was no such need because the appellant was present on the date the tribunal set to deliver judgment and on the judgment date. From the contending argument, it is the settled law that once the case proceeds ex-parte then the respondent must be served with notice of the matter is set for judgment so that he can take necessary steps if he wishes to challenge the same. This was well expounded in the case of *Cosmas Construction Co, Ltd vs Arrow Garments Ltd* [1992] TLR 127 in which the court stated; party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte, but that is the furthest extent he suffers. Although the matter is therefore 5 considered without

any input by him, he is entitled to know the outcome. He has to be told when the judgment is delivered so that he may if he wishes, attend to take it as certain consequences may follow.' [See also: Abutwalib Musa Msuya & Others vs Capital Breweries Ltd & Others, (Civil Revision 2 of 2012) published on the website, www.tanzlii.org [2016] TZCA 549 The respondent has no qualms with the above law but he argued that the appellant was present when the matter was set for judgment in the tribunal. I have gone through the proceedings of the tribunal and found that although the matter was heard ex-parte the appellant kept appearing on all dates which the hearing took off. On 26th May 2022, the assessors read their opinion and the appellant was present it is when the judgment was set to be delivered on 25th June 2022. Although it was not delivered on that date, rather on 29th July 2022, it shows that the judgment was delivered in the presence of the appellant. From the record it is now clear that the appellant was present when the matter was set for judgment and on the date of judgment, it is incontrovertible that the appellant on such circumstances needed notification 6 of the date of judgment. His presence was sufficient notice and he cannot be heard to complain on that. In my view the requirement to serve notice to the respondent when the matter is heard ex-parte was not meant to apply when the order was given in his absence. Luckily this is not the first time this court is faced with the same issue. In the case of Lucy Daniel Mpiluka vs Access Bank Tanzania Ltd (PC. Civil Appeal No. 15 of 2019), published on the website, www.tanzlii.org [2020] TZHC 41 My sister Mongolia, J. had a chance to deal with the same issue and she held that; 'In my settled view, notifications of appearance in court are only served to parties who are not present in court. If parties are present in court, then the orders given by the court in their presence require no further notification.' I subscribe to the above holding as being the correct position of the law and it serves as the general rule to the requirement of serving the respondent with notice of the date of judgment on the matter heard ex-parte against him. The first ground therefore is dismissed. In respect of the second and third grounds, the appellant complained that he was not given the right to be heard and that the judgment had irregularities and illegalities. The respondent's counsel argued that the 7 appellant was accorded the right to be heard but defaulted himself from exercising such right and that the ex-parte judgment is free of any irregularities and illegalities. The grounds have two limbs; one, illegalities and irregularities; and two, not being given the right to be heard. I will start with the first limb that the tribunal judgment is tainted with illegalities and irregularities, unfortunately, the appellant did not explain what are those illegalities and irregularities which he wants to challenge. Even if the appellant had pointed any, after my perusal of the record, I have found that the same was not raised in the tribunal. The settled law is that the matter not raised in the lower court cannot be taken on appeal. In the affidavit in support of the application before the tribunal, the appellant never raised the issue of illegality and irregularities hence this court has no jurisdiction to go beyond what was deliberated in the tribunal. Coming to the second limb that the appellant was not accorded the right to be heard, the appellant did not again state in what aspect he was not heard. I have gone through the proceedings of the tribunal and found that the application was heard through written submission and the 8 appellant filed his submission as per scheduling order. With that note the complaint is unmerited. From the foregoing reasons, this court finds that the chairman properly exercised his discretionary powers, and have no reason to fault him. The appeal is therefore dismissed with costs. Dated at Mbeya this 14th November,

2023. M.B. PAZE JUDGE 14/11/2023 Court: Judgement delivered in the presence of the appellant and Ms. Caroline Mseja for the Respondent this 14th day November, 2023. M.B. MPAZE JUDGE 14/11/2023 9

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