

TANZANIA / JUDGMENT

bodi ya wadhamini uru secundar vs laban masaule msumanje 2020 tzhc 4578 14 december 2020

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA AT MOSHI MOSHI DISTRICT REGISTRITY LAND APPEAL NO.II OF 2020 (C/F Msc. Land Application No. 298 of 2019 Moshi District Land and Housing Tribunal Originating from Mabogini Ward Tribunal in Land Case. No 30 of 2018) BODI YA WADHAMINI URU SECONDARY..... APPELLANT VERSUS LABAN MASAULE MSUMANJE..... RESPONDENT 12th November 2020 & 14th December 2020.

JUDGMENT

MKAPA, J; Bodi ya Wadhamini URU Secondary the appellant, aggrieved by the Moshi District Land and Housing Tribunal (the tribunal) decision delivered on 16th January 2020 appealed to this court. The appellant had raised five grounds of appeal and the Respondent contested the appeal. The factual brief of the matter that originated from Mabogini Ward Tribunal is that the present respondent filed a complaint vide Land Case No. 30/2018 against the appellant claiming back a piece of land measuring four (4) acres located at Josho Ward Mtakuja village within Moshi District Kilimanjaro Region. The matter was decided Ex-parte in favour of the Respondent. Aggrieved, the present appellant filed an application before the tribunal praying for extension of time to file out of time an application to set aside an ex parte decision where he lost hence this appeal. The five grounds of appeal argued before the court are;-

1. That, the District Land and Housing Tribunal erred in law and fact in hearing application for extension of time when the advocate for the appellant was outside the tribunal building thus was not given the right to defend applicant's application No. 298 of 2019.
2. That, the proceedings were conducted by Mr. P.T Makwandi the Chairman, while the Ruling was composed by Mr. J. Sillas, also Chairman which is un-procedural. In addition the proceedings were conducted in the absence of members of the tribunal (assessors) thus were unable to give their opinion as required by the law.

3. That, the award in Land Case. No. 30/2018 by Mabogini Ward Tribunal was a nullity as the respondent whom the decision was in his favour had no locus standi while the appellant was a wrong party hence the decree derived there from cannot be executed.
 4. That the Mabogini ward tribunal was not properly constituted and further that, the appellant and his representative were not accorded the right to be heard.
 5. That the tribunal's Ruling was delivered on 16th January 2020 but proceedings were supplied on 31st March 2020 thus the appeal is within the prescribed time as required by section 19
- (1) of the Law of Limitations Act, Cap 89 [R.E 2002] On the date this appeal was set for hearing it was agreed by parties that the appeal be heard by way of written submission. The appellant was represented by Mr. G. M. Shayo learned advocate while the respondent appeared in person unrepresented. Submitting in support of the first ground of appeal Mr. Shayo submitted that on the date of hearing the Chairman of the tribunal time the appellant was denied right to be represented by his advocate contrary to Regulation 13 of the Land and Dispute Court (The District Land and Housing Tribunal) which allows parties to the proceeding to be represented by an advocate or other representative. Mr. Shayo submitted further that the right to representation is also a Constitutional right. In support of his submission he cited article 13 (6) (a) of the Constitution of the United Republic of Tanzania. On the second ground Mr. Shayo contended that the tribunal's proceedings in Misc. Land Application No. 298 of 2019 were conducted by Mr.P. J. Makwandi (Chairman) while the ruling was composed by Mr. Silas also (Chairman) which is contrary to the law. Mr. Shayo contended further that, the tribunal's proceedings were conducted without the aid of the assessors thus in reaching his decision the chairman did not take into account assessor's opinion contrary to section 23 (1) of the Courts (Land Dispute Settlement) Act No. 2 [R.E 2002] which provides for the composition of the District Land and Housing Tribunal to the effect that; "the District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors" To support his contention he cited the decision in the case of Sikuzani Said Magambo, Kirion Richard V. Mohamed Roble Civil Appeal No. 197 of 2018 (Unreported) where the Court of Appeal Tanzania at Dodoma had this to say; "in view of the settled position of the law, where the trial has been conducted with the aid of assessors..... they must actively and effectively participate in the proceedings so as to make meaningful 3 their role of giving their opinion before the judgment is composed Arguing on the third ground Mr. Shayo briefly submitted that the disputed piece of land is valued more than three million shillings, thus the Ward tribunal had no jurisdiction in entertaining the matter as per section 15 of the Ward Tribunal Act 1985 which is categorical on the jurisdiction of the Ward Land Tribunal in all proceedings of civil nature relating to the land which is limited to three million shillings. As regards to the fourth ground, Mr. Shayo averred that Bodi ya Wadhamini Uru Secondary is not the right person to be sued as Uru Secondary School is under the Registered Trustees of Catholic Diocese of Moshi as owners of Uru Secondary School capable of suing and being sued. Mr. Shayo did not argue on the 5th ground. He finally prayed for the court to grant the application sought

due to illegality in the whole proceedings and decision of the tribunal. Contesting the appeal the respondent submitted that at the hearing before the tribunal both parties were present and argued orally Land Case No. 30 of 2018 without the appellant mentioning the fact that he was being represented by an advocate. Thus the argument that the appellant was not accorded the right to be heard is misplaced. Submitting on the second ground it was the respondent's argument that the insertion of the name of Mr. P.J. Makwandi as Chairman at page 3 and 4 of the tribunal's proceeding was an unintentional typographical error as the coram at page 1 and 2 of the proceeding mentioned Mr. J. Silas as the chairman thus the Misc. Application No.298 of 2019 was not heard by two chairmen as allegedly the appellant. 4 Reacting to the issue of improper composition of the tribunal for lack of assessors and their opinion, the respondent submitted that the assessors are meant to assist the chairperson in factual issues. It was respondent's view that, sections 23 and 24 of the Land Disputes Court's Act 2002 are only applicable to the hearing of the main application or suit as provided for under section 34 (1) of the Lands Disputes Courts Act 2002. As to the third ground of appeal the respondent elaborated that, the instant appeal is against the refusal by the tribunal in granting extension of time to file out of time an application to set aside Ward tribunal's Ex parte decision and not an appeal against the decision of the Ward tribunal. Further that, the issue of pecuniary jurisdiction was never raised as sufficient ground for extension of time and that there was no proof of value of the suit land. As regards to the fourth ground the respondent reiterated his argument submitted earlier on while arguing the 1st, 2nd and 3rd grounds as the same were related. Finally, the respondent prayed for the court to dismiss the appeal with costs. Rejoining, counsel for the appellant Mr. Shayo reiterated his submission in chief and maintained that improper procedure at the tribunal's proceedings and suing a wrong party is sufficient reason warranting for extension of time. He finally prayed for the appeal to be allowed. Having considered both arguments for and against the appeal the question for determination is whether the appellant has shown good and sufficient cause to warrant for extension of time. It is settled law that extension of time is entirely in the discretion of the court and further that the Court may exercise its discretion to grant extension of time only if there is sufficient cause. Thus a party seeking for an extension of time has to show good and sufficient cause for the delay. In the case of Eliakim Swai and Another V. Thobias Karawa Shoo, Civil Application No. 2 of 2016 (CAT) at Arusha (Unreported) the Court has set the following guiding principles;

- (a) The applicant must account for all the period of delay;
- (b) The delay should not be inordinate;
- (c) The applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and;
- (d) If the court feels that there are other sufficient reasons such as the existence of point of sufficient importance such as the illegality of the decision sought to be challenged. The requirement of accounting for each day of delay has been emphasized by the Court in the case of Bushiri Hassan V. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)

and Dar-Es-Salaam City Council V. Group Security Co. Ltd, Civil Application No.2 of 2010 where the Court observed; "Delay of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing periods within which steps have to be taken" Reverting back to the facts of the instant appeal, the appeal is against the decision of the tribunal refusing to grant extension of time to file an application to set aside an ex-parte decision of the Mabogini Ward Tribunal. From the appellant's submission it is clear that the appellant vide the 3rd and 4th grounds of appeal has spent unnecessary energy and efforts in arguing the appeal against the decision of the Mabogini Ward tribunal instead of arguing for 6 reasons for extension of time against the decision of the tribunal, thus the 3rd and 4th grounds of appeal should not detain me much as the same are misplaced. My perusal of the tribunal's records and records of proceedings, it is undisputed the fact that the appellant has failed to show good cause for the delay. Nevertheless, what I have observed on the 2nd and 3rd grounds of appeal is the illegality in the decision appealed against. It is evident the fact that, at the hearing the tribunal adopted an improper procedure in arriving at its decision as the tribunal was not properly constituted for lack of assessors as mandatorily required by section 23 (1) and (2) of the Land Disputes Courts Act which stipulates as follows; "(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessor^"

- (2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the

judgment.

The importance of assessors to participate actively and effectively where the trial has to be conducted with the aid of assessors has been underscored by the Court of Appeal in the landmark case of Tubone M warn beta V. Mbeya City Council, Civil Appeal No. 287 of 2017 (unreported) where the CAT had this to say; 7/7 view of the settled position of the law where the trial has to be conducted with the aid of the assessors they must actively and effectively participate in the proceedings so as to make meaningful their role of giving their opinion before the judgment is composedsince Regulation 19 (2) of the Regulations requires every 7 assessor present at the trial at the conclusion of the hearing to give his opinion in writing such opinion must be availed in the presence of the parties so as to enable them to know the nature of the opinion and whether or not such opinion has been considered by the Chairman in the final verdict." It is plain clear from the tribunal's proceedings at the hearing on 16/01/2020 none of the assessors was present hence unable to give their opinion in writing as required by the law, which in my considered view vitiated the whole proceeding and for interest of justice this illegality cannot be left to stand as was reiterated in the decision in the case of the Principal Secretary Ministry of Defence and National Service Services V. Darram Valambia

(1992) TLR 182 where it was held that; "A claim of illegality of the challenged decision constitutes sufficient cause for extending time regardless whether the applicant gives reasonable explanation for the delay. Having regard to the facts of the instant matter, I am of the opinion that the illegality of the tribunal's improper procedure in arriving at its decision as evidenced in the tribunal's records is reasonable and sufficient cause for granting extension of time. Accordingly, appeal is allowed. The appellant is at liberty to file out of time to the tribunal application for setting aside *Ex parte* decision in Land Case No. 30 of 2018 delivered by Mabogini Ward Tribunal within 14 days from the date of this judgment and the same be heard by another Chairman. It is so ordered. Dated and Delivered in Moshi this 14th day of December 2020. 8 JUDGE 14/12/2020 9

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