

TANZANIA / JUDGMENT

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DECIDED
27 May 2024

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IN THE HIGH COURT OF TANZANIA DODOMA SUB-REGISTRY AT DODOMA LAND APPEAL NO. 14447 OF 2024 (Appeal from Mise. Application No. 281 of 2023 in the District Land and Housing Tribunal for Dodoma at Dodoma) MAGALI DOROTHY LUSATO..... APPELLANT VERSUS PETER J. MATAGA..... 1st RESPONDENT FRANCIS KATENGU..... 2nd RESPONDENT

JUDGMENT

5th August & 8h October, 2024 MUSOKWA, J. This appeal emanates from the decision of the District Land and Housing Tribunal at Dodoma (DLHT), in Mise. Application No. 281 of 2023. Briefly, the 1st Respondent herein namely Peter J. Mataga, filed the aforementioned application against the appellant and the 2nd respondent, praying for an order for stay of execution pending the hearing and determination of Land Appeal No. 85 of 2023 in the District Court of Dodoma (Extended Jurisdiction). On 27th May 2024, the DLHT granted the said application, and the execution was stayed pending the hearing of Land Appeal No. 85 of 2023. i Being aggrieved, the appellant filed this appeal based on the following grounds of appeal: -

1. That the honourable chairman erred in law and fact for ordering stay of execution without any justifiable reasons while the applicant (1st respondent) failed completely to meet the requirements of the law.
2. That, the honourable chairman of the District Land and Housing Tribunal erred in law and fact to hear and determine the application for stay of execution ex-parte contrary to the law, and without taking into consideration the written submission of the 2nd respondent which was filed on 03rd March, 2024 and paid through control number 991179617184 as evidenced in exchequer receipt number 924127248071399. On the date scheduled for hearing, the appellant enjoyed the services of Mr. Josephat Mbeba, learned advocate, whereas Mr. Godfrey Wasonga learned counsel, appeared for the 1st respondent. The 2nd respondent was represented by Mr. Denis Odhiambo, learned advocate. Mr. Mbeba for the appellant, submitting on the first ground of appeal averred that the chairman of the DLHT erred to order stay of execution without any justifiable reasons. The appellant's counsel argued further that the applicant in the matter before the tribunal, the 1st respondent herein, failed to meet the requirements of the law. Mr. Mbeba, fortified his position by relying upon Order 39, Rule 5(3) of the Civil Procedure Code, Cap. 33, R.E. 2019 (CPC), read together with

Regulation 25, (4) (a) and (b) of the Land Disputes Courts (the District Land and Housing 2 Tribunal) Regulations, G.N No. 174 of 2003. The provisions stipulate the pre- conditions, before the DLHT can grant an order for stay of execution. The appellant's counsel emphatically stated that the provisions are coached in mandatory terms. Submitting further, Mr. Mbeba stated that, the Chairman of the DLHT, while acknowledging in his ruling that the applicant before the DLHT did not meet the conditions as provided by the law, proceeded to order stay. According to the learned counsel, this is a gross irregularity in the eyes of the law. The appellant's counsel asserted that the appellant, being the decree holder, has the right to enjoy the fruits of the judgment and the resultant decree thereof. In addressing the second ground of appeal, Mr. Mbeba stated that, the chairman erred to determine the application for stay of execution ex- parte; and that this was contrary to the law. The matter before the DLHT was argued by way of written submissions and the 2nd respondent duly filed his written submission on 3rd March, 2024. Ironically, the Chairman stated that the matter shall proceed ex-parte against the 2nd respondent for non-appearance. This is reflected on pages 1 and 2 of the ruling of the DLHT. The appellant's counsel argued that this is a gross infringement of the right of a party to be heard. Further, Regulation 25 (3) of G.N No. 174 of 2003 specifically provides that no application for stay of execution shall be heard ex-parte. The learned advocate added that, the 2nd respondent entered appearance by filing his written submission. The case of Famari Investment TZ Ltd. vs Abdallah Selemani Komba, as administrator of Estate of the Late Shariffa Abdallah Salama, Mise. Civil Appl. No. 41/2018 HC at Mbeya, specifically on pages 2 to 5 was cited to support his point. In conclusion, the learned counsel prayed this court to find this appeal to be meritorious, to quash and set aside the ruling of the DLHT, and further to order the application for Execution No. 223 of 2023 to proceed and to order costs both in the DLHT and in this appeal. Opposing the submission of the appellant's counsel, Mr. Wasonga, advocate for the 1st respondent argued that, these grounds of appeal are unmeritorious and do not suffice to move this court to quash the decision of the DLHT. The reason is that, the first prayer of the appellant in the present petition of appeal is to allow this appeal; and further to order the Mise. Application No. 223 of 2023, for execution, to proceed. It was the submission of the learned advocate that, this court has no jurisdiction to act upon the said prayer as the mandate on execution is conferred upon the Deputy Registrar. The file that is before this court is the Mise. Application No. 281 of 2023. However, the application for Execution No. 223 of 2023 is not before this court. Further, it is not clear in which tribunal the said application has been lodged as the appellant merely stated that the application is before the DLHT, without clearly specifying the respective tribunal. Mr. Wasonga emphasized that the first ground of appeal is not proper. Contending the appeal further, the counsel for the 1st respondent argued that, the decision of the DLHT being issued without any justifiable reasons; and failure by the Chairman of the DLHT to meet the requirements of the law, ought to have been two separate grounds of appeal. Thus, merging the two issues in the same ground of appeal was erroneous. It was the submission of the learned advocate that, contrary to the assertions of the appellant, there were, in fact, justifiable reasons, which guided the Chairman in arriving at the decision which was issued. The said reasons

are provided under page 2 paragraph 2 of the DLHT's ruling. The chairman stated that 'his hands are tied'. It was therefore the wisdom of the chairman to order stay in order to facilitate the determination of the Land Appeal No. 85 of 2023. This was indeed a wise decision and this court should uphold the decision of the DLHT and order the parties to await the decision of the pending appeal. The counsel for the 2nd respondent added that, the appellant has not stated what injuries if any, may be suffered, in the circumstances that the 5 appellant opts to await the final determination of the matter that is pending before this court, to wit, Land Appeal No. 85 of 2023. On the issue of failure to meet the requirements of the law, it was the argument of the learned advocate that the requirement of the law cannot supersede justice. The provisions of Order 39 R. 5 (3) of the CPC read together with Regulation 25 (4) of G.N No. 174 of 2003 were cited. The provisions refer to grant of stay where loss is likely to be suffered; or where security has been furnished. However, these conditions are not absolute. In the matter before the DLHT, the reason was that the tribunal was functus officio. As to the second ground of appeal, the learned advocate submitted that, the said ground is baseless. According to him, the remedy was to file for revision. The learned counsel further stated that Regulation 11 (2) of G.N No. 174 of 2003 provides that, any order of the DLHT that has been made ex-parte may be challenged by way of an application to set it aside within thirty days from the date of the respective decision. Should such an application to set aside be rejected; that is when the aggrieved party can approach this court by way of an appeal. Therefore, the learned advocate prayed that this appeal be dismissed without costs. Mr. Denis Odhiambo learned advocate for the 2nd respondent supported the first ground of appeal. Submitting on the second ground of appeal, 6 Mr. Odhiambo stated that the DLHT erred to determine an application for stay ex-parte, as this was contrary to Regulation 25 (3) of G.N No. 174 of

2003. Thus, he prayed that the decision of the DLHT be quashed and set- aside. In rejoinder, the learned advocate argued that the 1st respondent was grossly misdirected. The prayer before this court, is for this court to allow this appeal; and to quash and set aside the ruling and order of the DLHT. Further, this court to order the application for execution which was stayed, to proceed because this court has jurisdiction to issue the aforementioned orders. The learned advocate further submitted that the first ground is proper and does not contain two different issues as argued by the 1st respondent. Mr. Mbeba further stated that nowhere in the ruling of the DLHT, was it stated that the tribunal was functus officio. According to the appellant, the contents of page 2 of the ruling relate to the background to the matter that was before the DLHT; and was not the reasoning behind the decision which was issued. In addition, justice cannot be seen to be done without observing the requirements of the law. Mr. Mbeba submitted further that; the second ground of appeal is also proper before this court. The appellant argued further that, Regulation 11
- (2) of G.N. No. 174 of 2003 is not applicable to the instant appeal. The learned advocate prayed to maintain the prayers in the petition of appeal. 7 Based on the rival submissions of the parties, as well as additional submissions at the instance of this court; it is not disputed that the Mise. Application No. 281 of 2023 at the DLHT was disposed by way of written

submissions. It is settled in our jurisdiction that the filing of written submission is a substitute of the hearing viva voce. In the case of P3525 LT Idahya Maganga Gregory vs The Judge Advocate General, Court Martial Criminal Appeal No. 2 of 2002 (unreported); it was held that; "...It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing...". This is also the position in the case of Famari Investment TZ Ltd (supra) cited by the counsel for the appellant. Surprisingly, the ruling of the DLHT stated among other things that; "...the 2nd respondent did not enter appearance, thus the matter proceeded ex-parte against him ". Since the 2nd respondent filed his written submissions, and the same were not challenged in any way, an ex-parte order was uncalled for. As correctly submitted by the appellant's counsel an ex-parte order was a violation of the 2nd respondent's constitutional right to be heard. The constitutional principle on the right to be heard or the fair hearing was adequately deliberated by the Court of Appeal of Tanzania (CAT) in 8 the case of Severo Mutegeki and another vs Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (Duwasa), Civil Appeal No. 343 of 2019 (unreported). The CAT held on page 21 as follows: - "The right to be heard before adverse action or decision is taken against a party is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard. This is so because the violation is considered to be a breach of natural justice. See- Abbas Sherali & another vs. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported). Thus, the failure to accord the appellants an opportunity to be fully heard was a breach of natural justice and a violation of a fundamental right to be heard under Article 13 (6)

- (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) which provides: - Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..." [emphasis added] In the circumstances, and being guided by the cited legal authority, the violation of the constitutional right to be heard is a crucial and apparent error on the face of the records. Consequently, the appeal is allowed, an ex parte order and the purported ruling dated 27th May, 2024 by O.Y. Mbega, Chairman are hereby quashed and set aside for being a nullity. 9 Accordingly, I order the case file of Mise. Application No. 281 of 2023 to be remitted to the DLHT, for all parties to be heard expeditiously through their duly filed written submissions. The matter should be presided by another Chairman who will compose a fresh ruling based on the prevailing laws. Each party to bear own costs as the irregularity was prompted by the DLHT. It is so ordered. Right of appeal is explained. DATED at DODOMA this 8th day of October, 2024. *I.D. MUSOKWA Judgment delivered in the presence of the appellant and her counsel, Mr. Josephat Mbega; in the presence of the respondent and his counsel, Ms. Jennifer Baji holding brief for Mr. Godfrey Wasonga; and in the presence of Mr. Dennis Odhiambo, counsel for the 2nd respondent. I.D. MUSOKWA JUDGE io

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Prepared on 14 October 2026 · Esheria