

TANZANIA / JUDGMENT

SHUKURU MEENA

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 281 OF 2023 SHUKURU BARTHOLOMEW MEENA 1st APPELLANT SELYBERT M. MKOPE.... 2nd APPELLANT VERSUS NICAS JOHN KIMOLO... 1st RESPONDENT EVARIST BILUYA MWIZALUBI..... 2nd RESPONDENT

JUDGEMENT

Date of Last Order: 24/04/2024 Date of Judgement: 30/04/2024 S.D. MWAIPOPO, J This Appeal arises from Misc. Application No. 251 of 2022 decided by Hon. J. M Bigambo, Chairman of Ubungo District Land and Housing Tribunal (DLHT) in respect of an Application No. 411 of 2020 initially filed at Kinondoni District Land and Housing Tribunal. The latter case i.e. Application 411/2020 was dismissed for want of prosecution hence the Appellant/ Applicant then filed Misc. Application No. 251/202 for purpose of seeking an extension of time with a view to setting aside the dismissal order and restoring to life an Application No. 411 of 2020. Upon hearing Misc. AppllGatlon No. 251 of 2022, the DLHT for Ubungo dismissed the same for want of merit, with costs. Aggrieved by the said decision, the Appellant filed this Appeal before the High Court of Tanzania containing 3 grounds which in substance are as follows; That the Trial Tribunal erred in law and in fact in failing to examine the court file records and proceedings in Application No. 411 of 2020 for;

1. Not considering the Applicability of Regulation 15 (a) of the Land Disputes Courts (The District Land and Housing. Tribunal) Regulations, GN No. 174 of 2003 and proceeded to dismiss the Application.
2. Not considering the court file records and proceedings, which bears out that before the file was placed to him, it was placed to another Chairman and came to him without proper notice.
3. Not considering the clear facts stipulated in the Application No. 411 of 2020 under paragraph 8(a)(i) (iii)(v) and (vi). Wherefore the Appellants prayed as follows; a) That the Appeal be heard and allowed with no order as to costs, and that once the Appeal is allowed it will enable parties to prosecute their original Application and cure the dispute. b) Any other relief(s) that this Honourable court would deem just and equitable to grant. The hearing of the Appeal proceeded by way of written submissions pursuant to the timetable drawn by the

court. In preparing the written 2 submissions, the Appellants enlisted the services of learned advocate Ferdinand T. Masoy while the Respondent were represented by learned Advocates Fabian Donatus and Pancrasia Protas. Arguing in support of the Appeal the Appellants submitted as follows; With regard to the first ground of Appeal; the proceedings in the Application No. 411 of 2020 show that on 13/11/2022, the matter was before Hon. Rugabamu Chairman after the transfer of Hon. Warhbili who was presiding over the matter. That Hon Rugabaramu had reassigned the matter to Hon. Mwakibuja for mention on 21/2/2022, however, on the material day, the matter was called before Hon. Mwakibuja where both parties appeared and the matter was not heard due to the fact that the file was missing and the parties were informed to come on other dates for making follow up on the missing file. Following perusal which was done, the proceedings revealed that the file was placed before Hon. Bigambb on that date arid not before Hon. Mwakibuja and none of the parties appeared. The matter was then adjourned to 17.3.2022 by Hon Bigambo, whereby none of the parties appeared and the matter was adjourned for hearing to 20/4/2022 whereby the counsel for the Respondents appeared and prayed for the dismissal of the matter for want of prosecution. The Appellants contended that counting from 17.3.2022 to 20.4.2022 it makes a total number of 35 days and not 90 days or three months required for a case to be dismissed. The Appellants further argued that there,are no records to show; 3

- i. Summons were given to the parties after the file was found. ii. Any document to show that the matter has been placed to Hon Bigambo and not Mwakibuja as ordered by the court before Hon. Rugabamu on 13/1/2022. The Appellants thus prayed for the matter to be dismissed. With regard regard to the second ground of Appeal, the Appellants contended that, upon hearing the matter, the court file appeared misplaced hence both parties waited for the court to file be found. After several follow ups. Appellants were informed by the court clerk that all matters originated from Ubungo have been shifted to DLHT for Ubungo at Ubungo. The appellants made a follow up at Ubungo Tribunal and found out that the matter has been dismissed for want of prosecution on 20.4.2024. After perusal of court file, the learned counsel found out that the file was assigned to another Chairman but was called for mention before a different Chairman who later dismissed the matter for want for want of prosecution. The learned counsel contended that there were no summons given to the parties after the court file was found hence no proper procedure of law was followed before dismissing the matter. Regarding the third ground of appeal the Appellants contend that the Appellant is the lawful owner of the property described as Kitongwa Shina No. 08 Goba Ward, Ubungo District Dar es salaam since June 2010 and the 2nd Appellant was the lawful owner of the plot described above that is Kitongwa Shina No. 08 Goba Ward, Ubungo District, DSM but he sold the said property to the Appellant That on 28.06.2010, the 1st Appellant legally bought a piece of land Ideated at Kitongwa Shina 08, Goba Ward, Ubungo District, DSM from the 2nd Appellant after the inquiry from neighbours and Local Authority whereby the Sale Agreement was drafted, signed and witnessed by neighbours and a lawyer. In November 2019, the Appellant noted that a small building had been erected in the said land. Upon enquiry, the 1st Appellant later in the early December 2019 learnt that it was the

Respondent who had trespassed onto the said land. The 1st Appellant approached the 1st Respondent and asked him to vacate the said land but to his dismay, the PV Respondent refused to heed to the 1st Appellant's plea and stated that he had bought the said piece of land from the 2nd Respondent and they have signed the agreement to that effect. The learned counsel argued that the nature of the main case, that is amended Application No. 411 of 2020 is purely caused by double allocation of the land, which ought to be cured. Leaving the way, it will render the Appellant's right to be heard nugatory, as he has merely suffered considerable loss and embarrassment. 4th the learned counsel referred the court to the case of Mohamed Yasin Warmahaye VS. Marungu Sisal Estate Ltd and another Misc^{ed} Land Case Application No. 1,4 of 2019 before Hon Mruma 3, whereby he implored the court to apply section 95 of the CPC Cap 33 RE 2002. In conclusion he prayed for the court to allow the appeal and quash the decision of the Tribunal which dismissed the matter for want of prosecution and prayed for the matter to be restored for hearing. Submitting in rebuttal, the learned counsel for the Respondents began by giving a background of the Misc. Application no 251/2022 which was filed for extension of time and restoration of amended Application no. 411/2020. The same was dismissed for want of adduction of sufficient reasons by the Appellants. With regard to ground 1 of appeal, the Appellants contended that the Appeal lacks merit and ought to be dismissed since Regulation 15(a) of the Tribunal is very clear from its plain meaning. That the Tribunal has powers to dismiss an Application which was left unattended by the Applicant for a period of three months. The Tribunal applied this Regulation properly since neither the Appellants nor their advocates appeared to prosecute their case for a period of more than three months. That is before Hpn. Wambili on 14/1/2021, 8/4/2021 and 21/10/2021 where on this date the Tribunal opted to adjourn the matter for the last time. On the 13/1/2022 the Appellants appeared and the matter was scheduled for hearing before Hon. Mwakibuja under his presence but still the appellants defaulted appearance from 21/2/2022 to 20/4/2022 when the court dismissed their Application for want of prosecution. That the Appellants defaulted for a period exceeding three months and the Tribunal applied Regulation 15(a) to dismiss the matter based on its true meaning. They also referred the court to case of DPP vs Julieth Simin Peleka (The Administrator of the Estate of the late Gebu Ichoma Sayi Criminal Appeal no. 94/2019(unreported) Regarding ground no. 2 of appeal, the Respondents contended That, the Appellants are alleging that the case file was misplaced and that they were waiting for the file to be found. This court should find that the Appellant discovered that their case was dismissed when the DLHT for Ubungo shifted from Kinondoni building to its own buildings at Luguruni- Kibamba area. The Appellants were not aware that the DLHT for Ubungo started its operation in the same building with the DLHT for Kinondoni at Mwananyamala and the Respondents entered appearance while in the same building and the matter was dismissed. It was their humble submissions that the Appellants never visited the court making follow up of their case. Had they visited they could know this important information. He contended that the file shifted from one chairman to the other due to the circumstances which prevailed then. That is from Hon wambili to Hon. Rugarabamu, Hon. Mwakibuja and Hon. Bigambo after the establishment of the DLHT for Ubungo. However, during this time the Tribunal was sitting in the same

building and the process was announced in public whereby the Respondents managed to enter appearance. The learned counsel further argued that there is no any evidence from the Appellant indicating that the Appellants visited the court premises or not or even wrote a letter evidencing their follow ups in the Tribunal. This is , contrary to section 110 of the Evidence Act since they have failed to provide proof. Similarly, he submitted that the Appellants are trying to impeach the court records by introducing facts which are not contained in the records. This is contrary to the case of Halfan Sudi vs Abieza Chichili 1998 TLR 527 which held that; Court records constitute a serious document and it should not be impeached lightly as there is presumption, they accurately represent what happened in court. As for ground no 3 of appeal, the Respondents contended that the Appellants have argued to be granted extension of time merely because it is a land dispute resulting from double allocation and that failure to grant the Application is equal to denying them the right to be heard. The Appellants argued that this is a total distortion and misconception of law there is no any double allocation with regard to the land in dispute since it is part of the land previously owned by the Respondent who sold the said piece to the Respondent while the remaining land sold to other persons except the Appellants herein. The learned counsel contended that the Appellants attached the Sale Agreement indicating that the transfer of land originates from one Reuben Yego. However, this person was not made a part to the case insinuating that that the Appellants bought land from a conman. They also argued that the Appellants in their Application for extension of time could not adduce sufficient reasons, their Affidavit only contained one reason that they were not aware that their case was dismissed. However, they went on adducing other reasons during hearing which were not contained in their Affidavit such as their case was dismissed for wrong application of regulation 15(a) of GN no. 174/2003 and that the matter involves double allocation. He contended that the Appellants were duty bound to prosecute their case. See the case of Huruma Katunzi John vs Johanitha Nyakato John Misc, civil Application no. 74/2021 HC and that the Tribunal was correct to dismiss their Application since the Appellants did not adduce sufficient reasons. See the case of Mwaluko kasuga vs Jafeti sabugo Misc. and appeal No. 32/2022 In rejoinder, the Appellants reiterated their submissions in dn\ef. I shall not reproduce their submissions but refer to them as appropriate in my

analysis.

Having gone through the grounds of appeal, the broad question to be resolved is whether the appeal has merit. In other words, whether the Tribunal was right to dismiss the Application for extension to set-aside the dismissal order. In analysing or determining the grounds of appeal I will begin with ground no. 2 which is to the effect that the Tribunal erred in law and fact in not considering the court file records and proceedings which bear out that before the file was placed before the chairman it was placed to another chairperson and came to him without proper notice. In his submissions on this ground, the Appellant submitted that in the course of hearing the matter; the court file got misplaced hence both parties waited for the court file to be found. That after several follow ups he was informed by the court clerk that all matters originating from

ubungo were shifted to the relevant DLHT for Ubungo at Ubungo and upon making follow up there he discovered that the file had been dismissed for want of prosecution on 20.4.2024. After perusal of the court file, he also found out that the file was assigned to another Chairman but was called for mention before a different Chairman who dismissed it for want of prosecution. The Appellants also argued about lack of issuance of summons to the parties after the court file was found hence no proper procedure of law was followed for dismissing the matter. The Respondents on their part argued that, the matter was dismissed due to lack of follow up on the part of the Appellants and lack of awareness that the matter was shifted to DLHT for Ubungo. The process of shifting was also announced in public and on their part they managed to enter appearance. They further argued that the Appellants failed to provide proof of misplacement of the file. In dealing with the situation at hand, I perused the records of the Tribunal in Misc Land Application No. 251/2022 and observed that among the reasons advanced by the counsel for the Appellants for extension of time was loss of track of proceedings of Land Application No. 411/2020 due to transfer of the Chairperson and transfer of files to DLHT for Ubungo. With regard to transfer of chairpersons, the learned counsel for the Appellants contended that the matter was shifted from Hon. Wambafi to Hon. Rugarabamu for reassignment following his transfer. When they appeared before Hon. Rugarabamu, he informed him that the matter would be assigned to another Chairperson Mwakibuja, for mention on 21/2/2022. However, on the same date the matter was not called before Hon. Mwakibuja. This prompted them to go back to Hon. Rugarabamu who instructed his clerk to trace the file and inform the Appellants once it is found. 10 He thus continued to follow up the status of the file until the day, he was informed by the clerk working under Hon. Mwakibuja that, the files were sometimes in February shifted to the DLHT for Ubungo. He however could not trace the file on the list of files shifted to Ubungo, he followed up to the Ubungo DLHT physically to trace the file however, the same was not found. The learned counsel for the Appellants then made efforts to pursue the Incharge of the DLHT at Ubungo who ordered for the same to be traced, whereby upon the tracing exercise the file was found and he informed the Appellants. The Appellants then agreed to institute the Application for extension of time. They discovered that the matter was dismissed on 20/4/2023 before Hon. Bigambo Chairman. The learned counsel further noted that when the matter was called before Rugarabamu on 21/2/2020 it was supposed to be mentioned before Hon. Mwakibuja. However, that did not happen and instead it was mentioned before Hon. Bigambo and both parties never appeared. The matter was again fixed for mention before Hon. Bigambo on 17/3/2022 whereby both parties did not appear since there was no gny information to that effect. On that day, the matter was set for hearing on 20th April 2024, however on that date the Appellants/Applicants again did not appear and the Respondents appeared and prayed for the dismissal of the matter. Rurthei; the learned counsel for the Appellants was thereafter supplied . 11 with the copy of ruling and after noticing that the case had been dismissed since 20/4/2022 he decided file an Application for extension of time based on the averments contained in his Affidavit. I have also perused the proceedings of the Tribunal and observed that, much as the Appellants were not appearing before the Tribunal for their case, there are records of the file indicating that the same was reassigned by the Chairman in charge to another Chairman and when the parties appeared to the particular Chairman, the parties found out that the case was actually not assigned there.

See the averments related to the file being placed before Hon. Mwakabuja vyhile in Tact it was not true, and instead the matter was placed before Hon. Mwakibuja. Refer to proceedings dated 13/1/2022. The matter Was fixed for mention before Hon. Mwakibuja on 2/12/2022 however, according to the true records contained in the file the matter fixed before Hon. Bigambo. This made parties not to appear to the rights chairman where the file was placed and consequently lost track of the case for the subsequent dates. This is also indicated on proceedings dated 17/3/2022 where by the Applicants/Appellants did not appear and Respondents as well and consequenti y the file was dismissed on 20/4/2022 for non-appearance of the Applicants/ Appellants. I have also observed that, it turned out in the Judgement that the matter was fixed before Hon Bigambo due to the establishment of the DLHT of Ubungo for Ubungo whereby all matters originating from Ubungo were shifted there. All these contributed to the loss of track of proceedings 12 including the actual control of the proceedings as well. With regard to misplacement of files, I have also observed that the dates, which have been recorded, for proceedings in the file are not consistent and coherent, they leave a room for interpretation in respect of misplacement of the file. This can also be noted on proceedings dated 14th January 2021 whereby the matter was set for hearing on 2/3/2021. However, there is no record to show what transpired on 2/3/2021 and instead the date has skipped to 8/4/2021, this begs the question as to what happened in the previous dates if not for the fact that the file indeed got misplaced on these dates. In view of these inconsistencies stated above, I find that it will be just and fair to rule them in favour of the Appellants since in one way or another they contributed to the loss Of track and control of proceedings on the. part of the Appellants which led to the delays on the part of the Applicants/ Appellants to know the fate of their Application (dismissal) and react within the time stated in accordance with the law and be able to challenge The dismissal orden These incohstistences on the records which: have ^been occasioned by the Tribunal are sufficient on my part to warrant extension of time and set aside the dismissal order in Land Application no. 251/2022, in the interest of justice. I further order that Application no.41iy2020 shall proceed for hearing by a different chairman, from where it ended, before the dismissal order. I have also considered the fact that these orders were also prayed for in Application no. ?51/2022. , / ■■■ 13 Therefore, I proceed to allow the Appeal based on ground No. 2. I will not labour on ground 1 and 3. The circumstances of this matter are such each part shall bear its own costs. It Is so ordered. The right of appeal ls fully explained. Dated at Dar es salaam this 30th day of April 2024 /yxSy.- -- / ^V A""- S. D. MWAIPOPO JUDGE 30/04/2024 14

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