IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)
AT ARUSHA

MISC. LAND APPEAL NO. 35 OF 2019
(C/F from the District Land and Housing Tribunal for Manyara Region at Babati Appeal No. 2 of 2016, Originating from the Boay Ward Tribunal Application No.2 of 2016)

JUMANNE RAMADHANI ..... APPELLANT

VERSUS

JUMA RAJABU ..... RESPONDENT

JUDGMENT

Date of Last Order: 02/03/2020
Date of Judgment: 29/05/2020

Masara, J.

Juma Rajabu, the Respondent herein, successfully sued the Appellant at Boay Ward Tribunal (the Trial Tribunal) claiming possession of a piece of land measuring a total of eight acres. The Appellant refused to enter appearance at the trial tribunal, claiming that the matter before it had already been decided in his favour by the District Land and Housing Tribunal for Manyara Region at Babati vide Application No. 85 of 2011. In the event the case was heard ex parte and decided in favour of the Respondent. The Appellant herein was aggrieved, he appealed to the District Land and Housing Tribunal for Manyara Region at Babati (the First Appellate Tribunal). He again repeated his claims that the matter before the trial tribunal was res judicata. The decision was given in favour of the

Respondent. Further dissatisfied, the Appellant preferred the instant appeal on the following grounds:

> *a) That, the Trial Tribunal grossly erred in law and fact by pronouncing judgment in favour of the respondent without visiting the site which is in dispute;*
> *b) That, the appellate Tribunal grossly erred in law and fact on its judgment without considering all the grounds of appeal as they were filed before the Tribunal;*
> *c) That, the Appellate Tribunal grossly erred in law and fact for not considering the size of the disputed land; and*
> *d) That, the trial Tribunal grossly erred in law and fact for allowing the respondent to take the land while he was not the proper party to the case.*

At the hearing of this appeal, the Appellant engaged the services of Ms. Tevienda Mgalla, learned counsel. The Respondent appeared in person unrepresented. On the 2nd March 2020 when the appeal came for hearing, it was resolved that the appeal be disposed of by way of written submissions. The schedule for filing the submissions was set. The Appellant was to file his written submissions by 16th March, 2020. The Respondent was to file his reply submissions by 30th March, 2020 and rejoinder if any was to be filed by 6th April, 2020. The judgment to be delivered on 8th May, 2020.

The Appellant complied with the scheduled order by filing his submissions on 16th March, 2020. The Respondent in turn did not file reply submissions as ordered by the Court and has not applied for an extension up to this moment. Therefore, it is evident that he has forfeited his right to be heard on his side of the case. It is trite law that failure to file written submissions

as ordered by the court has the same effect as non-appearance on the day the case is set for hearing. There are numerous Court of Appeal decisions instructive on this aspect. In ***National Insurance Corporation of (T) Ltd & another Vs. Shengena Limited,*** Civil Application No. 20 of 2007 (Unreported); the Court made the following observation;

> *"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the Applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case"*

Similar holdings were made in ***Mechmar Corporation (Malaysia) Berhard Vs. V.I.P Engineering and Marketing LTD***, Civil Application No. 9 of 2011 CAT (Unreported) and ***Richard Mlagala and Others Vs. Aikaeli Minja and Others,*** Civil Application No. 160 of 2015 CAT (Unreported).

As the Respondent has not entered appearance as per the law, his side of the story regarding this appeal has not been taken into consideration. I will only make a decision based on what the Appellant informed the Court and the record of the lower Tribunals.

Submitting on the substance of the appeal, regarding the first ground of appeal, the Appellant contended that the trial tribunal did not visit *the locus in quo* so as to satisfy itself as to whether the land in dispute is the same one that the Respondent claims. Consequently, the Appellant argued, the first appellate Tribunal erred in disregarding this issue, for had it

considered it justice would have been done. Submitting on the second and third grounds of appeal combined, the Appellant reiterated that the first appellate Tribunal failed to appreciate the fact that the Appellant was in possession of the suit land for a period of 50 years as he bought it from the late Athuman Mafita in 1954. Therefore, it was wrong for the court to enter judgment in favour of the Respondent based on hearsay evidence adduced by the Respondent.

Regarding the fourth ground of appeal, the Appellant averred that the first appellate Tribunal failed to consider the size of the disputed land. He stated that the size of the disputed land is not 8 acres as claimed by the Respondent but it was only 4 acres which the Appellant acquired in 1954. The Appellant further stated that the first appellate Tribunal and the trial Tribunal erred in giving the Respondent the land while he was not the proper party to the dispute as the dispute was between the Appellant and Iddi Rajab Suleiman and not the Respondent as since 2011 when the case started it was between the Appellant and the said Iddi Rajabu.

Having gone through the Appellants' petition of appeal and submissions thereof, the issue for determination is whether the appellate Tribunal was justified in dismissing the Appellant's appeal before it. That seems to be the gist of all the four grounds of appeal.

I have examined the record of the trial tribunal and that of the Appellate Tribunal, I am inclined to agree with the Appellant entirely. I have noted

that the record and subsequent judgment of the trial tribunal leaves a lot to be desired. Although the document containing the judgment (Hukumu) dated 9th December, 2016 says that the matter proceeded *ex parte*, the same does not amplify the Respondent's case and why the trial Tribunal concluded that the Respondent had proved his case on the balance of probabilities. It appears that the decision was made to serve as a lesson to the Appellant who is said to have "disrespected" the trial tribunal. The relevant part of the said judgment states:

> *"Hivyo shauri hilo limesikiliza lalamiko upande moja (sic) na kutoa hukumu. Kuwa eneo lenye mgogoro nI eneo la Juma Rajabu Selemani kwa sababu:*
> *(A) Hakutoa maelezo yoyote wala vielelezo*
> *(B) Hakuleta mashahidi wake*
> *(C) Amelikataa baraza la Ardhi la kata na kusaini maelezo yake*
> *(D) Kudai shauri lake lilifanyika mahakama ya (w) Ardhi na kupewa eneo hilo*
> *(E) Kulishtaki baraza polisi jambo ambalo limefanya utendaji wetu wa kazi kuwa mgumu kutokana na vitisho vya polisi kuingilia majukumu tuliyopewa na Kata.*
> *Baraza hilo limetoa hukumu kuwa eneo lenye mgogoro ni mali ya Juma Rajabu Selemani* ***pia Baraza imetoa hukumu hiyo ili iwe fundisho na kwa wengine wanaokaidi amri za Mahakama.***
>
> ***Sgd*** *Mwenyekiti* ***Sgd*** *Katibu."* (Emphasis added)

The quoted part of the decision does not show what transpired during the ex parte hearing nor the reasoning thereof. It appears to me that the trial tribunal felt offended that the Appellant wanted the case transferred to the District Land and Housing Tribunal and the fact that the Appellant had reported the matter to the police. The record, unfortunately do not contain the proceedings of the trial tribunal in full. There appears on record the

written statements of witnesses for the Respondent but there is no record that such texts were scrutinised by the said tribunal. The said statements are also not dated and appear to have been written by one person whose identity is not shown. In the circumstances, I find no cogent proof that the trial was conducted and a fair decision given. It is also noted that in the letter/statement made by the Respondent he appears to acknowledge that the Appellant was in possession of a judgment with respect to 4 acres of land which he claimed to be from the estate of his late father. No evidence was led to prove the size of land that the Respondent claimed, that is 8 acres. Making a blanket award as was done in this case may have adverse consequences when the matter goes to execution.

The decision of the first Appellate Tribunal is even more confusing. The Chairman might have had different records from the ones that were availed to this Court. At the top of page 4 of the typed judgment, the Chairman wrote:

> *"To start with the first category of the grounds of appeal which involves the first fourth and sixth grounds: both parties herein were given an opportunity to call witnesses and tender evidence to support ownership over the suit land, of which they complied with and the respondent herein was able on the standard required by law to prove ownership over the suit land. So the contention by the Appellant that the Respondent did not adduce sufficient evidence to entitle him ownership over the suit land is unfounded.* ***The evidence adduced by the respondent was strong compared to that of the Appellant at the Trial Ward Tribunal,*** *this (sic) ground of appeal is thus lacking in merit."*(Emphasis added)

From the wording in the quoted paragraph, the Chairman of the Appellate Tribunal presents that the trial had proceeded inter partes, which was not the case as demonstrated by the decision of the trial tribunal. This, to me, is proof that the appellate Tribunal did not properly scrutinise the trial tribunal's records. Had it done so; it would not have come to the decision it made.

Thus, without traversing the grounds of appeal one by one and the submissions thereof, I find that there are serious errors apparent in the decisions of both lower tribunals requiring the intervention of this Court. I feel obligated to invoke revisional powers conferred to me under section 43(1)(b) of the Courts (Land Disputes Settlements) Act, Cap. 216 [R.E 2002] to nullify and quash, as I hereby do, the entire proceedings and judgments of both the trial and Appellate Tribunals. Consequently, parties herein are restored to their original positions before the decision of the trial tribunal. If any party is still interested to pursue the matter, he is at liberty to institute a fresh suit before the trial Tribunal lawfully constituted.

Consequently, the appeal is hereby allowed on the grounds given above. Since the anomalies and irregularities giving rise to the nullification of the proceedings at the trial are not attributable to any of the parties herein, I make no orders as to costs.

I order accordingly.

Y. B. Masara

JUDGE

29th May, 2020