

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC .CIVIL APPLICATION NO. 62 OF 2021

(C/f Application No 47 /2010 at the District land and housing Tribunal at Arusha)

NOAH SAGIRAKI(Legal representative of the late Titus Saigiraki).....1ST APPLICANT

NOAH SAIGIRAKI.....2ND APPLICANT

Vs

SAMWEL MEYAN.....RESPONDENT

RULING

Date of the last order: 15-2-2022

Date of ruling: 9-3-2022

B.K.PHILLIP,J

Before me is an application for extension of time for filing an appeal against the decision of the District Land and Tribunal of Arusha at Arusha which was delivered on 28th November 2017.The application is made under section 14 (1) of the law of Limitation Act .It is supported by an affidavit sworn by the applicant. The respondent filed a counter affidavit in opposition to the application.

Upon being served with the application, the learned Advocate L.S. Loitha who appeared for the respondent filed a notice of preliminary objection couched as follows;

- " *That this honourable Court does not have the jurisdiction to entertain this Misc. Land Application No. 62 of 2021 as the same is contrary to Rule 11(2) of land Disputes Courts (The District Land*

and Housing Tribunal) Regulation 2002 and Order IX Rule 13 (1) and (2) of the Civil Procedure Code, Cap 33 , R.E.2019”

The learned Advocate John Msue, appeared for the applicant. I ordered the application to be disposed of by way of written submissions.

Before proceeding with the determination of the point of preliminary objection, let me give a brief background to this application for better understanding of the coming discussion.

In the year 2010, the applicants herein lodged a case against the respondent herein at the District Land and Housing Tribunal of Arusha at Arusha (Henceforth “the Land Tribunal”) vide Application No.47 of 2010. On 28th November 2017, the said application was dismissed with costs, pursuant to Order IX Rule 8 of the Civil Procedure Code,(“CPC”) for failure of prosecution since the applicants did not enter appearance before the Land Tribunal. Thereafter, the respondent applied for extension of time to lodge his bill costs. The same was granted. He lodged his application for bill of costs which was heard ex-parte following the non appearance of the applicants before the Tribunal. On 5/3/2021 the ruling in respect of the bill of costs was delivered. The respondent was awarded costs to a tune of Tshs 2,678,000/=.

Now, back to the point of preliminary objection, the learned advocate Mr. Loitha submitted as follows; That the applicants erred in law for filing this application in this Court since the same emanates from Land

Application No. 47 of 2010 which was dismissed for failure of prosecution with costs and then an application for bill of costs was filed and heard ex-parte. He contended that according to Regulation 11(1) (c) and (2) of the Land Disputes Courts (The District Land and Housing Tribunal Regulation, 2002) (Henceforth, "the Tribunal Regulation, 2002"), the applicants were supposed to lodge an application for setting aside both the dismissal order and the ruling in respect of the bill of costs at the Land Tribunal within 30 days from the date of dismissal of the application and the ruling for the bill of costs, but they opted not to do so. He pointed out that the orders in respect of main application and the bill of costs were delivered on 28th November 2017 and 5th March 2021 respectively. He went on submitting that the applicants filed this application after the expiry of four years from the date of dismissal of the application and nine months from the date of the ex-parte ruling in respect of the bill of costs. Mr. Loitha strongly argued that this Court has no jurisdiction to entertain this application because the applicants have not attempted to set aside the dismissal order and the ex-parte Ruling for the bill of costs. To cement his arguments he referred this Court to the following cases; **Auguster Salanje Vs Musa Mohamed Pemba, (1992) TLR 62, John Sangawe Vs Rau River Village Council (1992) TLR 90** and **Māndi Mataturu Vs Nianga (1972) HCD 150**, in which the Court while deliberating on an application which originated from ex-parte order of the lower Court had this to say;

" The application was brought prematurely since the only way to seek to avoid a judgment ex-parte is to apply to the very Court made the order in the this case if the respondent was aggrieved by the ex-parte judgment against him he had to approach the Mbeya Primary Court and convince it that he had sufficient cause to be absent at the trial and if he succeeded then the matter would be determined in the same Court without resorting to the Court of Appeal"

In addition, Mr. Loitha argued that Order IX rule 13 (2) of the Civil Procedure Code, ("CPC") provides that a party aggrieved by an ex-parte judgment or ruling can apply to set aside the same within twenty one (21) days from the date of the order.

In rebuttal, the learned Advocate John Mseu, submitted that the applicants were not notified on the hearing date of the application and the same was fixed in their absence. Referring this Court to the provision of Regulation 8(2) (b) of the Tribunal Regulations , 2002, he argued that the Tribunal is duty bound to notify the parties who are absent on the hearing date once it fixes an application for hearing. He contended that in Land Application No. 47 of 2010, the subject of this application, the Land Tribunal fixed the hearing date in the absence of the applicants and they were not notified of the same.

With regard to the application for bill of costs, Mr. Mseu maintained that the applicants were not aware of its existence. They were never served with any summons in respect of the same. The applicants become aware of the ex-parte order when they were served with the summons for an application for execution of the ex-parte order.

Moreover, Mr. Mseu argued that Application No. 47 of 2010 was dismissed under the provisions of Order IX Rule 8 of the CPC, therefore the provisions Regulation 11(1) of the Tribunal Regulations 2002, are irrelevant in this matter.

Lastly, he submitted that all cases cited by Mr. Loitha are irrelevant in the instant application. He implored this Court to grant this application.

In rejoinder, Mr. Loitha reiterated his submission in chief and insisted that the applicants were aware of the hearing dates for the main application and the bill of costs.

I have dispassionately analyzed the rival arguments made by the learned advocates as well as perused the provisions of the law and authorities cited by Mr. Loitha.

To start with I wish to point out one misconception in this application. The arguments raised by both advocates seem to suggest that this application is for extension of time for setting aside both the dismissal order in respect of the application and the ex-parte Ruling in respect of the bill of costs, which is not correct. The order sought by applicant in this application is very clear. It is in respect of the dismissal order in application No. 47 of 2010 which was delivered on 28th of November 2017.

Having said the above, it is now clear that the arguments in respect of the ex-parte order in the application for bill of costs are irrelevant in this application. Also, I have noted that Order IX Rule 13(1) and

(2) of the Civil Procedure Code, mentioned in the point of preliminary objection is a dead law as it does not exist. There is no such provision of the law in the Civil Procedure Code Cap 33, R.E 2019. However, this does not affect the point of preliminary objection because Rule 11(2) of Land Disputes Courts (The District Land and Housing Tribunal) Regulation 2002, is relevant in this matter.

From the foregoing, I shall confine myself to the arguments regarding the dismissal order in respect of the application which was delivered on 28th November 2017.

To start with, let me say outright here that the case of **Auguster Salanje** (Supra), **John Sangawe** (supra) are irrelevant in this matter. However, the case of **Mandi Mataturu** (Supra) is relevant in this application though it was concerned with an ex-parte order not dismissal order because the remedy available to a party aggrieved by an ex-parte order is to make an application for setting aside the order in question before the very Court/Tribunal which issued the ex-parte order. Similarly, a party aggrieved by a dismissal order has to make an application for restoration of the case before the very Court/ Tribunal which issued the dismissal order. This is logical because the Court /Tribunal which issued the order is in a good position to revisit its records and see what transpired before the issuance of the order in question. Therefore, can rectify the mistake quickly, if any and the matter can be heard on merits without wastage of time.

As correctly submitted by Mr. Mseu, the application, the subject of this ruling was dismissed under the provisions of Order IX rule 8 of the CPC. The pertinent legal issue which arises here is what is the remedy available to the applicants upon the dismissal of their application. In other words can the applicants appeal against the dismissal order to this Court?. As I have elaborated herein above, the applicants are supposed to file an application for setting aside the dismissal order at the Land Tribunal. However, since the facts of this application reveal that the time for making such an application has already expired, then, the applicants are supposed to file an application for extension of time for setting aside the dismissal order at the Land Tribunal.

From the foregoing, it is the finding of this Court that the point of preliminary objection has merits. I hereby uphold it and dismiss this application with costs.

Dated this 9th day of March 2022.



A handwritten signature in black ink, appearing to read 'B.K. Phillip'.

B.K.PHILLIP

JUDGE.