

**IN THE HIGH COURT OF TANZANIA**

**MWANZA DISTRICT REGISTRY**

**AT MWANZA**

**LAND APPEAL No. 17 OF 2021**

*(Originating from the Ruling of the District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Land Application No. 46C of 2020)*

**FRANK NGOWI.....APPELLANT**

**VERSUS**

**TANZANIA BUILDING AGENCY MWANZA .....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

Last Order: 18<sup>th</sup> October, 2021

Judgment: 03<sup>th</sup> February, 2022

**TIGANGA, J**

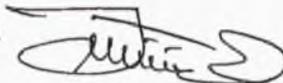
Before the District Land and Housing Tribunal for Mwanza, (hereinafter referred to as DLHT) sitting at Mwanza, the appellant, Frank Ngowi, filed Misc. Land Application No. 46C of 2020, praying for the tribunal to be pleased to extend time for the appellant to file the application to set aside the order which struck out Misc. Land Application No. 46C of 2019 out of time. He also asked for the cost of the application.

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The respondent successfully raised the preliminary objection that the application is an abuse of the court process. That decision was reached after the court has satisfied itself that the appellant had already filed similar applications or applications of similar nature which were dismissed.

The background of this appeal as revealed by the record can be traced way back in 2012 when the appellant filed Land Application No. 46 of 2012 against the respondent claiming the right to priority to purchase the house he was renting which was the property of the 1<sup>st</sup> respondent. The suit was filed along with the application for interlocutory orders that is Misc. Land Application No. 46B of 2012 which was refused on 07/09/2012. While so refusing the application, the tribunal went as far as deciding the main application i.e Land Application No. 46 of 2012 on the ground that, the tribunal had no jurisdiction to compel the owner of the house to sell the same to the appellant.

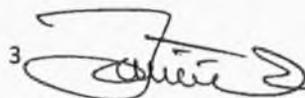
Following that decision, the appellant appealed to the High Court in Land Appeal No. 81 of 2012, in which on 29/09/2015, this Court, Hon. Maige, J (as he then was), allowed the appeal, and ordered the file to be remitted to the trial tribunal and be assigned to another chairperson for re-

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determination of both, the application for temporary injunction and the main application, i.e. Land Application No. 46 of 2012.

However, from there, before the Land Application No. 46 of 2012 was heard on merits, on 05/10/2018, the appellant presented Land Application No. 463 of 2018 raising the complaint that before the DLHT, had complied with the order of the High Court, the respondent evicted the appellant from the suit house. In that respect he asked for various orders which included to be restored in the suit premises. That application was filed along with the Misc. Land Application No. 463B of 2018. There is no record to show that these two applications were heard and determined. Therefore I will not deal with these two purported applications.

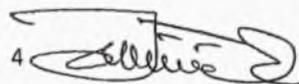
From the records, what is vivid is that on 27/03/2019, Misc. Land Application No. 45B of 2012 was dismissed for want of prosecution following the non appearance of both parties. Following that dismissal order, the appellant filed Misc. Land Application No. 46B of 2019 asking for extension of time to file an application to set aside the dismissal order.

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That application was granted, the applicant was given 14 days within which to file an application seeking for an order to set aside the dismissal order which dismissed Land Application No. 46 of 2012.

From the record, the appellant did not file an application for setting aside within 14 days granted in Misc. Land Application No. 46B of 2019. The appellant filed Land Application No. 46C of 2019 seeking for the tribunal to set aside the dismissal order which dismissed Land Application No. 46 of 2012. Since that application was filed out of time of 14 days granted in Misc. Land Application No. 46B of 2019, the same was struck out for being out of time. Instead of asking for extension of time following the expiry of 14 days, the applicant filed a new application that is Misc. Land Application No. 46C of 2020 seeking for the extension of time to file an application for setting aside the order which struck out, Misc. Land Application No. 46C of 2019 for being out of time.

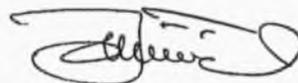
It was that application, i. e Misc. Land Application No. 46C of 2020, which was successfully objected and got dismissed on the ground that, the application was an abuse of the court process.

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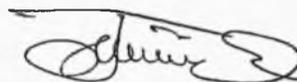
This decision aggrieved the appellant; he decided to appeal to this court challenging the decision of the DLHT in Misc. Land Application No. 46C of 2020. The appellant filed in court a total of 11 grounds of appeal. However most of them are not grounds of appeal as such but they are facts explaining the background of appeal.

However, from those several grounds, the following can be taken to be the grounds of appeal as the same raise the complaints against the decision as follows.

1. That the tribunal erred in its declaration that, the appellant had filed his application to set aside dismissal order on 26 August, 2020 a period of three months and 15 days after the order to file his application within 14 days period.
2. That the tribunal erred when it failed to take into consideration that, the appellant had first filed Misc. Land Application No. 46C of 2019 which was struck out by the tribunal before he had filed Misc. Land Application No. 46C of 2020 which was wrongly dismissed by the tribunal.



3. That the tribunal erred when it failed to take into consideration that, the Appellant had been before the Tribunal since he filed before the tribunal Land Application No. 46 of 2019, Misc. Land Application No. 46B of 2019, Misc. Land Application No. 46C of 2019, and Misc. Land Application No. 46C of 2020, hence the series of applications count day to day delay of the appellant being before the tribunal in pursuance of his land rights.
4. That the tribunal erred in law to dismiss the appellant's application to set aside struck out order including dismissal order.
5. That the tribunal erred both in law and fact to dismiss the applicants application on wrongful ground that, it was an abuse of Court process, whereas in fact it was a good application for the appellant to be sold the Tanzania Railways and Harbours Corporation staff quarter, like the other employees who were sold the said dwelling houses, being employees of the same corporation, that is, Tanzania Railways and Harbours Corporation as per attached Mtanzania Gazette dated 08/05/2004 marked reference No.5
6. That the tribunal erred both in law and fact when it failed to take into consideration the fact that, the appellant was discriminated when his

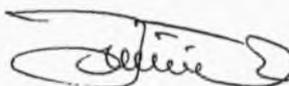


Co- employee were sold the Tanzania Railways and Harbours Corporation staff quarter, but the appellant not sold the one he was allocated as a staff of the Corporation in discrimination.

7. That, the learned trial Land and Housing Tribunal Chairman erred in law and fact when he failed to take into account Article 13(1)(2)(3)(4)(5) of United Republic of Tanzania Constitution 1977 that no discrimination is allowed in Government and or Public Corporations services.
8. That, the learned trial Land and Housing Tribunal Chairman erred in law when he failed to take into consideration the ruling of the High Court of Tanzania, Mwanza Land Appeal No. 81 of 2012 dated 29/09/2015 in which the High Court (Hon. Maige Judge) had directed the main case be heard inter parte and determined on merit.

The appellant prayed for the order that,

- (a) -An appeal be allowed with costs,
- (b) Ruling of the Tribunal be quashed and set aside,
- (c) Any order that, the main suit/application be heard inter partes and determined on merits,

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- (d) Any other relief the honourable court will deem fit and just to grant.

With leave of the Court and consent of the parties, the appeal was argued by way of written submissions. Parties filed their respective submissions as ordered by the court.

For purposes of brevity, I will not reproduce the submissions filed by the parties in support and against the appeal, but I will be referring to them when discussing the grounds of appeal for which the submissions were made. Having summarized at length the background of the appeal at hand, and having passed through the grounds of appeal, I find some of the issues raised as the grounds of appeal are not actually the grounds of appeal in relation to the matter appealed against.

Looking at the background of the case at hand, I find some of the issues raised as grounds of appeal as presented in the 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup>, grounds of appeal, are not actually grounds of appeal in respect of the appeal at hand. They are either the grounds in the main case, i.e. Land Application No. 46 of 2012 or evidence in that case. Therefore in my

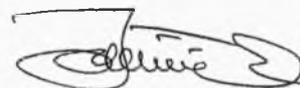
discussion I will deal with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, and 8<sup>th</sup> grounds of appeal as adopted by the parties.

Generally, looking at the grounds of appeal herein above, I find the first, second and third grounds of appeal to be presenting similar complaints. Therefore in this judgment they will be dealt with together. To paraphrase the content of each ground and starting with the first ground of appeal, that the DLHT erred in its ruling dated 26<sup>th</sup> August, 2020 to find that the appellant delayed for 3 months and 15 days to file the application to set aside the dismissal order which dismissed Land Application No. 46 of 2012 and Misc. Land Application No. 46B of 2012 contrary to the order which granted 14 days within which to file that application.

The second and third grounds being that, the tribunal erred when it failed to take into consideration that, the appellant had first filed Misc. Land Application No. 46C of 2019 which was struck out by the tribunal before he had filed Misc. Land Application No. 46C of 2020 which was wrongly dismissed by the same tribunal, hence the series of applications count day to day delay of the appellant being before the tribunal in pursuance of his land right.

With regard to these grounds of appeal, the appellant reminded the Court that the case started before the DLHT for Mwanza way back 2012, as Land Application No. 46 of 2012. That application was however dismissed for want of jurisdiction on the ground that the DLHT had no jurisdiction to compel the owner of the house to sell the house to the appellant. That was before an appeal was successfully lodged to the High Court as indicated hereinabove, and an order for re-hearing of the application on merits to another chairperson.

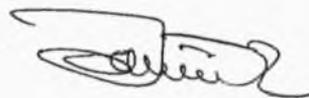
The appellant submitted that, in Misc. Land Application No. 46B of 2019, on 17/04/2020, DLHT ordered the appellant to file an application to set aside the dismissal order within 14 days from the date of delivery of the trial tribunal's ruling. The appellant admitted to have failed to file the said application within 14 days. The reasons he gave for that delay is that he was not immediately supplied with that copy of ruling delivered in Misc. Land Application No. 46B of 2019. According to the appellant, he was supplied with a copy on 11/05/2020 and on 14/05/2020 he promptly filed Misc. Land Application No. 46C of 2019 which was struck out on 14/08/2020 for being out of time.



It is his further submission that, immediately after striking out Misc. Land Application No. 46C of 2019, on 26/08/2020 the appellant filed before the DLHT Misc. Land Application No. 46C of 2020, praying to set aside the order which struck out Misc. Land Application No. 46C of 2019. According to him, that application was erroneously dismissed with costs by the tribunal on 09/04/2021.

Therefore in his view, the DLHT erred in law and in fact to declare that the appellant filed the application to set aside dismissal order on 26/08/2020 a period of three and half months after the order to file the application within 14 days. That order did not take into account the fact that, the applicant had already filed Misc. Land Application No. 46C of 2019 which was struck out before he also filed Misc. Land Application No. 46C of 2020 which was also erroneously dismissed by the DLHT.

In further arguing in support of the appeal, he also informed the court that, failure to file an application for setting aside in time was due to the fact that, he is a lay person, he needed the assistance of a lawyer who needed time to read the documents including the order extending time to file an application to set aside.

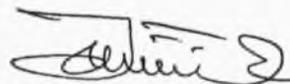


It is his submission also that, taking into account date on which the dismissal order was made, that is, on 17/04/2020 and the date when the said order was supplied, that is, on 11/05/2020 as well as the date when the application to set aside dismissal order was filed, that is on 14/05/2020 then the application was very much in time in terms of section 19(2) of the Law of Limitation Act [Cap 89 R.E 2019].

He supported his arguments by citing the case of **Kalunga and Company Advocate Company Limited vs National Bank of Commerce** (2006) TLR 235 CAT, where it was held that;

*"Courts have discretion to extend time where the time has already expired, but where there is inaction or delay of the applicant, there ought to be some explanations Material upon which the court may exercise the discretion."*

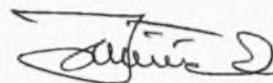
In view of the foregoing, he submitted that the trial DLHT erred in law and fact when it declared that the appellant had filed his application to set aside dismissal order out of time. That order did not take into consideration the fact that the appellant had filed Misc. Land Application No. 46C of 2019 which was struck out by the same DLHT before appellant



had filed Misc. Land Application 46C of 2020 which was erroneously dismissed by the said DLHT.

The reply filed by the respondents through the service of Ms Subira Mwandambo, SSA is in agreement with the historical background of the dispute, but insisted that after the appellant had been given 14 days within which to file the application to set aside the dismissal order which dismissed Land Application No. 46 of 2012 and the application for temporary injunction, the appellant did not file the same within 14 days as ordered. By simple arithmetic according her, the 14 days were expiring on or before 01<sup>st</sup> May 2020. However, he filed the same on 14<sup>th</sup> May 2020 being a default of two weeks and contrary to the schedule of the court.

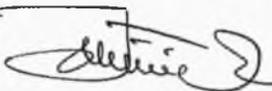
The learned State Attorney insisted that the appellant was really required to comply with the order, and cited this court the provision of regulations 23(3)(4) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003. However, although this provision was cited, and has not been countered, it was cited out of context, because it is the provision which relates to execution proceedings filed before the DLHT. Therefore for that reasons I will in this judgment not deal with the said provision.



The learned Senior State Attorney further submitted that, the order made by the tribunal was binding upon the tribunal and the parties. Therefore, the District Land and Housing Tribunal for Mwanza had no option other than striking out the application for being filed out of time without leave of the tribunal as per ruling and order dated 17<sup>th</sup> April 2020, in the respondent's opinion the order striking out the application was lawful.

She further submitted that, the subsequent application Misc. Land Application No. 46C of 2020 for extension of time for setting aside the order which struck out Misc. Land Application No. 46C of 2019 or setting aside the ruling on previous application No. 46B of 2019 is not tenable because the same had been also applied out of time. According to her that was made at the appellant's own aspiration contrary to the tribunal's procedure and the res judicata principle. As such, she referred to the case of **Paulo Lema vs Wilson Chuma** [1989] TLR 130 in which it was held that the DLHT is barred to decide on the matter which has already been decided.

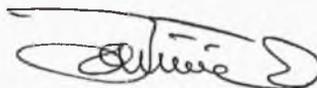
In her view, it appears, the appellant so far did not and has not adduced good cause to justify the delay to file the application for setting aside the dismissal order out of time in spite of the fact that he was

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expressly informed to file the application within 14 days from the delivery of the ruling, say 17<sup>th</sup> April 2020.

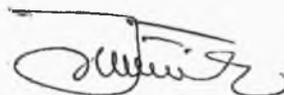
She submitted that the aspect of filing the application out of time without negligence is well addressed in the case of **Damas Assey and Others vs Raymond Mgonda Paula and 8 Others**, Civil Application No. 32 of 2018, where the court is required to take into account the length of delay; the accounting of all days delayed, the diligence of the applicant in his acting, and absence of apathy, negligence or sloppiness in prosecuting of action that he intends to take.

From the record and the submissions made by the parties, it seems there is slightly a confusing perception between the parties on what Misc. Land Application No. 46C of 2020 was seeking. While the appellant contends that it was seeking to set aside the order which struck out Misc. Land Application No. 46C of 2019. The Respondent contends that, Misc. Land Application No. 46C of 2020 was either seeking for extension of time to set aside the order which struck out Misc. Land Application No. 46C of 2019 or for setting aside the ruling on previous application No. 46B of 2019 which in his opinion is not tenable because the same had been further applied out of time.



However, the truth is that, looking at the chamber summons of Misc. Land Application No. 46C of 2020, it indicates to be arising from Misc. Land Application No. 46 of 2019 dated on 27/03/2019. From the records, the order which seems to have been made on 27/03/2019 is the order which dismissed Misc. Land Application No.46B of 2012, the original application which was dismissed for want of prosecution. The dismissed application according to the same order was arising from Land Application No. 46 of 2012. It is following that dismissal, Misc. Land Application No. 46B of 2019 was filed seeking for extension of time to file an application to set aside the dismissal order which dismissed Misc. 46B of 2012. It is under Misc. Land Application No. 46B of 2019 where the appellant was granted the 14 days within which to file such an application. In that chamber summons, the order sought is for extension of time for filing of an application to set aside the order which struck out Misc. Land Application No. 46C of 2019.

This is also reflected in the affidavit filed in support of the chamber summons filed in Misc. Land Application No. 46C of 2020 where in its paragraph 4 shows that the application intends to ask for extension of time to set aside the struck out order.



Now from the record, it is obvious that, the application was seeking for an order for extension of time to set aside the order which struck out the application No. 46C of 2019. It was made under regulation No. 11(2) of the Land Disputes Courts (District Land and Housing Tribunal), Regulation, 2003, G.N No. 174 of 2003 and section 14(1) of the Law of Limitations [Cap. 89 of R.E 2002]. Passing through regulation 11(2), it allows a party who is dissatisfied by the order of the tribunal issued in subsection (1) to apply to the tribunal within 30 days to have the order set aside and on refusal by the DLHT to appeal to the High Court.

For easy understanding of what sub-regulation (1) referred to above entail it is important to look at every paragraph of subsection (1), while

Regulation 11 (1) on the day the application is fixed for hearing the tribunal shall;

- (a) Where the parties are present, proceed to hear the evidence on both sides and determine the application.
- (b) Where the applicant is absent without good cause and had received the notice of hearing or was

present when the hearing was fixed, dismiss the application for non appearance of the applicant.

- (c) Where the respondent is absent and was duly served with the notice of hearing, or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter ex parte by oral evidence.

Now contextually, reading between lines, the provision of regulation 11(1)(a)(b) and (c) it is clear that only paragraphs (b) and (c) are relevant in as far as the right of the party to apply to set aside the order which dismissed his application for his non appearance. He may do so upon good cause for his absence or may apply to set aside an order which ordered the application to be heard ex parte due to his absence.

Now reading between line the provision of the regulation cited herein above, it goes without saying that the provision cited was so cited out of context on the ground that, the application for which the extension of time was sought, was neither dismissed nor heard ex parte as provided by

regulation 11(1)(b) and (c), to the contrary, it was struck for being out of time.

Now the issue is whether a party who has his application struck out for being out of time can still re-file an application to set aside the order striking out the said application which is declared to be out of time. In my considered view, looking at the provision of the law relating to the limitation of time, it is trite law that, limitation of time is one of the jurisdictional ground in that any matter for which the limitation of time has been set either by law or by an order of the court, must be filed within that time.

Failure to do so in time necessitates a party to secure an order extending time. If it is filed out of time and struck out, the remedy is not to file an application to set aside the order striking out the application. The remedy in my view, is to ask for extension or time to file the application which he has been condemned to have filed out of time. If the matter is dismissed he is required to appeal against the dismissal order not to re-file the application which was dismissed or an application for extension of time to set it aside.

In this case, after the order striking out Misc. Land Application No. 46C of 2019, the appellant was not supposed to file Misc. Land Application No. 46C of 2020 seeking for extension of time to file an application to set aside the order which struck out the former application i.e. Misc. Land Application No. 46C of 2019.

Therefore, that being the state of affairs, for the reasons I have given hereinabove, I find the appellant to be wrong when he filed Misc. Land Application No. 46C of 2020 seeking for extension of time to file an application to set aside the order which was striking out the application. For that reasons, I find the DLHT to be justified to hold that the application was an abuse of the court process because it was not supposed to be filed in the first place.

Regarding the facts showing the chances and rights of the appellant to be sold the house like other employees, she submitted that that fact was supposed to be determined in the main Application Land Application No. 46 of 2012; they are therefore not tenable in law in this appeal.

With what has been said herein above, the import of section 19(2) of the Law of Limitation Act [Cap 89 R.E 2019], and the authority in the case

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of **Kalunga and Company Advocate Company Limited vs National Bank of Commerce** [2006] TLR 235 CAT, can not be invoked as they would have been relevant only if the appeal was against the order which struck out Misc. Land Application No. 46C of 2019.

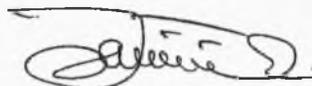
The next ground is that, the tribunal erred both in law and fact to dismiss the applicant's application on wrongful ground that, it was an abuse of Court process, While in fact the appellant was entitled to be sold the Tanzania Railways and Harbours Corporation staff quarter, like the other employees of the same Corporation who were sold the said dwelling houses as per attached Mtanzania News Paper dated 08/05/2004 i.e. reference No.5.

From the outset, this ground of appeal is a misconception. The misconception is grounded on fact that, the abuse of the court process referred to in this ruling of the tribunal in Misc. Land Application No. 46C of 2020, had nothing to do with the appellant's right or otherwise of being sold the suit house like the other employees who were sold the said dwelling houses. If that right was to be determined then, it was to be so done in Land Application No. 46 of 2012 not in the application for

extension of time. That said that ground is also dismissed for being devoid of merits.

On the last ground of appeal, which raises the complaint that, the learned District Land and Housing Tribunal Chairman erred in law when he failed to take into consideration the judgment of the High Court of Tanzania Mwanza Land Appeal No. 81 of 2012 dated 29/09/2015 in which the High Court (Hon. Maige, Judge) (as he then was), had directed the main application i.e. Land Application No. 46 of 2012 and the application for temporary injunction i.e. Misc. Land Application No. 46B of 2012 be heard inter partes and determined on merits.

I entirely agree that, in the decision of Land Appeal No. 81 of 2012 dated 29/09/2015 the High Court, Hon. Maige, J (as he then was) had directed the Land Application No. 46 of 2012 and Misc. Land Application No. 46B of 2012 to be heard inter partes and determined on merit. However, it should also be noted that all applications which were filed by the appellant before the trial DLHT, were filed in the process of trying to implement the order of the High Court in Land Appeal No. 81 of 2012, for had it not been necessary for them to be filed, the appellant would not have filed those

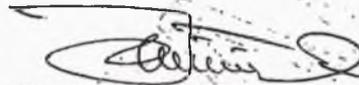


applications. On the basis of the findings hereinabove I also find this ground of appeal to be devoid of merits, it is thus dismissed.

In the fine, I find the appeal to have no merit; it is dismissed with costs basing on the reasons given herein above.

It is accordingly ordered

**DATED at MWANZA, this 03<sup>th</sup> day of February 2022**



**J. C. TIGANGA**

**JUDGE**



ORIGINAL