

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO.128 OF 2021**

(Arising from the District Land and Housing Tribunal for Morogoro at
Morogoro in Land Application No.117 of 2013, Misc. Land
Application No. 100/2015 and Misc. Application No.100/2017)

**ANGELICA KOKUTONA WAGWA (Administrator of the
Estate of the late Stephen R. Angelo) APPELLANT**

VERSUS

FRANCIS SIMON MUTALEMWA RESPONDENT

JUDGMENT

Date of Last order: 21.10.2021

Date of Judgment: 26.10.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal ownership of a parcel of landed property situated at Kihonda within Morogoro Region. The decision from which this appeal

stems is the Ruling of the District Land and Housing Tribunal in Application No.100 of 2015 and Misc. Application No. 100 of 2017. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and was appointed as an administrator of the estate of the late Steven Rumanyika Angelo. In July, 2015 the appellant was informed by one Consolata Salanga that the house located in Kihondo, Morogoro was auctioned. The appellant lodged a case before the District Land and Housing Tribunal for Morogoro. The matter proceeded ex parte against the respondent. The tribunal determined the matter and dismissed the application with costs.

Believing the decision of the District Land and Housing Tribunal for Morogoro was not correct, the appellant lodged this appeal on three grounds of complaint seeking to assail the decision of the District Land and Housing Tribunal. The grounds are as follows:-

- 1. That, trial Tribunal erred in law when delivered a ruling a Misc. Land Application No. 100 of 2015 which was already decided upon by a previous Chairman (Mbega) instead of delivering the ruling on Misc. Land Application No 100 of 2017.*

2. *That, the trial Tribunal Chairman erred in law when treating the hearing of the application to be viva voce instead of hearing the appeal by way of oral submission (which he allowed).*
3. *That, the Tribunal Chairman erred in law when decided that there was no proof of the death of Stephen R. Angelo while the Respondent did not oppose the application.*

The parties' contending arguments were, pursuant to the parties' request and Court' consent parties argued the appeal by way of written submissions in conformity with the revised scheduling order drawn on 13th October, 2021. The respondent was absent while the appellant enlisted the fabulous services of Ms. Esther Shoo, learned counsel.

Prof. Binamungu started his onslaught by seeking to consolidate all three grounds and arguing them together. In his longwinded submission, the learned counsel for the appellant claimed that an affidavit is a substitute for oral evidence. To fortify his submission he cited the case of **Robert S. Lova and Mohamed v Ministry of Natural Resources and Tourism & AG**, Revision No.742 of 2018 HC at Dar es Salaam (unreported), this court observed that an affidavit being a substitute for oral evidence should only contain true statements of facts and

circumstances which the witness depose either of own personal knowledge or from information believed to be true.

The learned counsel for the appellant also referred this court to the cases of **Majuto O. Chikawe & Another v The Trustees of Tanzania National Park**, Misc. Labour Application No.08 of 2021 HC at Mwanza and **Hi Bro- Canvas & Tents Ltd v I & M Bank (T) Ltd**, HC, Commercial Division at Dar es Salaam (unreported). This court observed that a party opposing an affidavit is not expected to call for strict proof of his opponent's evidence, but she is expected to produce a counter affidavit to disapprove the opponents' depositions'. The learned counsel for the appellant argued that the appellant's affidavit was evidence to show that Steven Angelo passed away. He claimed that the respondent did not oppose the application but the Chairman criticized the evidence demanding that an original copy of the death certificate ought to have been produced during the hearing by the counsel for the appellant. Prof. Binamungu valiantly argued that the Chairman had no basis to critique the affidavit by the appellant while the respondent did not oppose. He went on to state that failure to file a counter affidavit means the application is not opposed. Supporting his position he cited the case of **Emmanuel**

Gidahotay v Gambanyashita Muhala, Misc. Application No.42 of 2017, HC (unreported).

Prof. Binamungu continued to submit that there are two files; Misc. Application No. 100 of 2015 and Misc. Application No. 100 of 2017. He added that the first one was disposed of by Hon. Mbega by granting an extension of time to file an application to set aside *ex parte* judgment and the same file had another prayer of setting aside *ex parte* order. He went on to submit that Misc. Application No.100 of 2017 focused on setting aside an *ex parte* judgment. It was his view that there is a mixed-up of court files thus he urged this court to rectify the mistake.

On the strength of the above submission, he urged this court to allow the appeal with costs and allow the appellant to file a written statement of defense against application No. 117 of 2013.

In reply, the respondent started by stating that the appellant in his submission was not clear as to which decision of the tribunal he is contesting. It was his view that the appellant has overlooked the ruling annexed to the memorandum of appeal. He submitted that an affidavit is an evidence as governed by the Evidence Act, Cap.6 [R.E 2019] that the

claimant has a burden to prove. He went on to submit that the information availed in an affidavit and documents thereto are not conclusive proof of what is being therein presented and the court has a legal duty. He added that the Chairperson was correct in denying to admit the appellants' documents. He added that in his ruling the Chairman inquired and inspects the truthfulness of the contents of the affidavit deponed and annexures thereto. He added that the Chairman raises doubt his concern on the authenticity of the purported photocopy documents such as death certificates since the same was not certified. To support his submission he referred this court to the case of **First National Bank Tanzania Ltd v Hussein Ahmed Salwar t/a Pugu Hardware & Another**, Commercial Case No. 2019, HC at Dar es Salaam, this court observed that documents are not simply admitted because they have been referred to in the affidavit but because they have as well complied to the rules in place.

He continued to submit that section 65 of the Evidence Act, Cap.6 requires the best evidence to be proved by primary evidence. He added that section 66 of the Evidence Act, Cap.6 is concerning the admissibility of a photocopy but it has to be a certified copy of the original. The respondent further submitted that Hon. Mogasa is clear in terms of its

contents since he reproduced the appellant's prayers and reliefs. He ended by stating that in case of any error found in the cited case then the same can be corrected by this court without disturbing the substantive rights decided by the court of original jurisdiction.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs.

In his short rejoinder, the respondent has nothing new to rejoin rather he reiterated his submission in chief. He urged this court to allow the appellant to be heard and challenge the *exparte* decision. To bolster his position, he referred this court to the case of **Frank Kinona v Yuda Wenstelaus Ndamu**, Land Case Appeal No.12 of 2012 (unreported). The courts of the tribunal should always ensure that substantial justice is occasioned and give parties the opportunity to argue their case on merits brought before them instead of ending the case on technicalities.

In conclusion, he submitted that the appeal has merit the same be allowed with costs and the appellant be allowed to file a written statement of defense in Application No.117 of 2013.

After a careful perusal of the record of the case and the final submissions submitted by both parties. In determining the appeal, the central issue is *whether the appellant had sufficient advanced reasons to warrant this court to allow the appeal.*

The circumstance of the case will lead this court to determine the matter before it. In my determination, I will start with determining each ground of appeal separately.

On the first ground of appeal, the appellant's main complaint is concerning the District Land and Housing Tribunal for Morogoro in Land Application No. 100 of 2015 whereas he is claiming that Hon. Mogassa, has determined the same Land Application No. 100 of 2015 which was already been determined by Hon. O.Y. Mbega. I have gone through the District Land and Housing Tribunal for Morogoro and noted that the Land Application No. 100 of 2015 was before several Chairman including Hon. O.Y.Mbega and Hon. Mogasa. The matter before Hon. O.Y.Mbega was Land Application No.100 of 2015 for extension of time to lodge an application to set aside *ex parte* judgment and its Decree dated 30th May, 2014. Before hearing the matter on merit, the respondent raised

preliminary objections whereas the tribunal determined the case and overruled the objections vide the tribunal ruling dated. 10th July, 2017.

The matter was to set proceed on merit before Hon. O.Y. Mbega, then the matter was before Hon. P.J.Makwandi, parties were ordered to argue their application by way of written submissions. The file changed hands from Hon. Khasim to Hon. Mogasa, who was supposed to determine the Land Application No. 100 of 2015 for extension of time to file an application to set aside the exparte judgment. In the record, it shows that Hon. Mogasa has determined an application for extension of time which was not determined on merit by Hon. Mbega. Therefore, there is no any confusion as stated by the learned counsel for the appellant since Hon. Mogasa determined the application of extension of time and Hon. Mbega only determined a preliminary objection in regard to the extension of time.

As to the third ground of appeal, the tribunal Chairman erred in law when decided that there was no proof of death of Stephene R. Angelo while the respondent did not oppose the application. When Hon. Mogasa determined the application in his ruling, he found that affidavit was defective, the authenticity of the death certificate was questionable. The issue here is not that the respondent did not oppose the application but

the parties were not given an opportunity to address the tribunal on the issue of proof of the death of Stephen R. Angelo or on the defectiveness of the affidavit.

The record speaks it all that the Chairman dealt with a point raised by himself in the course of composing the ruling without giving the parties chance to submit it, and subsequently, he was satisfied that it was defective as a result he dismissed it with costs. It is my view that the Chairman was wrong to decide on that point without affording the parties an opportunity to be heard. He was **supposed to call the parties to address him on the points of law before proceeding suo mottu even if he could have ended striking out or dismissing the application.**

It must be emphasized at this point in time that the right to be heard (*audi alteram partem*) is a fundamental principle which the courts of law jealously guard against. This has been stressed in a range of cases, including **Mbeya - Rukwa Autoparts and Transport Ltd v Jestina George Mwakyoma** [2003] T.L.R.251, **Ausdrill Tanzania Limited v Musa Joseph Kumili & another**, Civil Appeal No. 78 of 2014 delivered on 23rd March, 2015, **Selcom Gaming limited v Gaming Management (T) Ltd and Gaming Board of Tanzania** (2000) T.L.R. and **Mire Artan**

Ismail & Another v Sofia Njati, Civil Appeal No. 75 of 2008, CAT (unreported). In the case of **Mbeya - Rukwa Autoparts** (supra) the Court of Appeal of Tanzania cited with approval the case of **Ridge v. Baldwin** [1964] AC 40, it highlighted that:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard among the attributes of equality before the law... "

Analogous to the situation facing the Court in the present case, are those cases where the Court may have raised an issue and decided it without giving the parties the right to address it as was the case in **EX-B.8356 S/SGT Sylvester S. Nyanda v The Inspector General of Police & Another**, Civil Appeal No. 64 of 2014 CAT (unreported). In that case, the Court quashed the decisions of the trial High Court upon being satisfied that the learned trial judge determined the suit in disregard of the principle of the right to be heard.

As I have pointed out earlier that the Hon. Chairman unfortunately has not observed the principle of the right to be heard in the circumstances of the present case. In the premise, I am constrained to find and hold that

the omission to afford the parties the right to be heard on the point it raised *suo motu* amounted to a fundamental procedural error and occasioned a miscarriage of justice. Having reached this finding of the application, I deem it superfluous to deal with the remaining one ground of appeal as by so doing amounts to deal with a sterile exercise.

In the premise, I resort to the provisions of section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 on the basis of which I quash the judgment of the District Land and Housing Tribunal for Morogoro in Land Application No. 100 of 2015. I remit the file to the District Land and Housing Tribunal for Morogoro with a direction to afford the parties' right to be heard. Parties to appear before a different Chairman.

Order accordingly.

Dated at Dar es Salaam this date 26th October, 2021.



A.Z.MGEYIEKWA

JUDGE

26.10.2021

Judgment delivered on 26th October, 2021 via audio teleconference whereas Mr. Binamungu, learned counsel for the appellant, and Mr. Francis, learned counsel for the respondent were remotely present.



A.Z.MGEYEKWA

JUDGE

26.10.2021

Right of Appeal fully explained.