

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 264 OF 2023

(Originating from Land Application No. 178 of 2020 of the District Land and Housing Tribunal of Temeke at Temeke delivered on 13th April 2023)

SEBASTIAN GANGATA APPELLANT

VERSUS

COLIN JAMES HIGGINS RESPONDENT

JUDGMENT

Date of last Order: 14/9/2023

Date of Judgment: 29/9/2023

A. MSAFIRI, J.

The appellant Sebastian Gangata having been dissatisfied with the judgment and decree of the District Land and Housing Tribunal of Temeke (herein as the trial Tribunal), in Land Application No. 178 of 2020 which was delivered on 13/4/2023, has appealed to this Court and advanced six (6) grounds of appeal namely;

- 1. That, the trial tribunal erred in law and fact by failing to correctly evaluate the evidence adduced hence reached to erroneous decision.*
- 2. That, the trial Tribunal erred in law and fact by declaring that the respondent has the right to sale the landed property with Certificate No. 166949 TMK LO. No. 74321 Plot No. 468 Block I Temeke.*

Alle

3. *That, the trial Tribunal erred in law and fact by failing to consider that the commitment bond was void from its beginning as the property does not belong to either of the part to the said commitment bond.*
4. *That, the trial Tribunal erred in law and fact by entertaining the dispute without having jurisdiction to entertain the said matter.*
5. *That, the trial Tribunal erred in law and fact by failing to consider that the 1st respondent was sued wrongly.*
6. *That, the trial Tribunal erred in law and fact to entertain the dispute with serious material irregularities.*

The appeal was heard by way of written submissions whereby the submission in chief and rejoinder by the appellant was drawn and filed by Ms. Happy Mgallah, learned advocate and the reply submissions by the respondent was drawn and filed by E.E Wamunza, learned advocate.

Before going through the submissions, the brief back ground of the dispute is apposite.

According to the evidence on record and submissions, the appellant and the respondent entered a contract whereby the respondent lend a loan of USD Dollar 13,200 to the appellant and as security for that debt, the appellant offered a house on Plot No. 468 Block I located at Temeke area, Dar es Salaam.

Alle

It was on record that the house offered as security for loan was owned by one Enver Fadhili who voluntarily offered the said house to the appellant to be used as security and he sworn an affidavit to that effect. It was agreed that the said loan was for a duration of 30 days and on default, the respondent will have a right to sell the house.

The appellant failed to pay the loan within the agreed time, hence the respondent filed an Application No. 178 of 2020 at the trial Tribunal seeking among other reliefs for the Court's order for sale of the property which was offered as security. The trial Tribunal granted the sought order in favour of the applicant and declared that the applicant (respondent) have a right to sell the said property. The appellant was aggrieved hence the current appeal.

Ms. Mgallah combined the first and sixth grounds of appeal and argued them together. It was her grievance that the trial Tribunal erred by failing to correctly evaluate the evidence, and entertained the dispute which has serious material irregularities.

She submitted that the respondent failed to establish the fact that he entered into contract with the appellant for car hire for the consideration of US Dollar 13,200 as alleged. That, the respondent failed to establish the case on required standard of a proof in civil case. She

Adls-

added that the evidence by the respondent which were relied upon by the trial Tribunal was not corroborated by any other evidence be it oral or documentary evidence.

Ms. Mgallah argued that the testimony of the respondent was not pleaded nor supported by any other evidence hence it was wrong for the trial Tribunal to give such evidence credit in determination of the dispute before it.

Counsel for the appellant argued further that, another irregularity was that the respondent sued the appellant and one Enver Fadhili (who was the 2nd respondent during trial). That, the said 2nd respondent is a non-existing person as he is said to be dead before the institution of the application before the trial Tribunal. She submitted further that on 30/6/2021 the trial Tribunal was informed that the second respondent was dead, but the trial Tribunal ruled that there was no evidence that the said respondent was dead hence it went on to determine the matter on merit. That, the trial Tribunal ought to consider that the evidence of death of the 2nd respondent might take time to get, and that it ought to order substitution of the deceased with his administrator of his estate.

On the second ground of appeal, the counsel for the appellant stated that the trial Tribunal erred by declaring that the respondent has

Alls

the right to sell the landed property. She submitted that it is clear that the 2nd respondent during the trial was not party to the agreement as alleged by the respondent herein. And that the said 2nd respondent at the trial was also not party to the commitment purported to be entered between appellant and respondent. She added that, going through the affidavit purportedly to be sworn by the then 2nd respondent, it does not show that the said house was given to secure any amount in favour of the respondent herein.

She argued that in absence of clear claim and clear consent from the 2nd respondent before the trial Tribunal, the same erred to order the sale of the property.

On the fourth ground of appeal, the counsel for the appellant submitted that the trial Tribunal erred by entertaining the dispute without having jurisdiction to do so.

That, the origin of the claims of the respondent was from the car hire agreement which was alleged to be entered between the respondent and the appellant; and that the respondent owed the appellant an amount of USD 13,200. The counsel for the appellant argued further that it is clear that the alleged transaction between applicant and respondent arrived out of car hire agreement hence it was a commercial transaction. That, due

Alle

to the fact that the debt was accrued from the car hire transaction which was purely commercial transaction, the trial Tribunal ought to declare that it has no jurisdiction to entertain the matter.

The counsel for the appellant pointed out that, the trial Chairman proceeded with delivery of judgment in absence of the respondent as there was no summons served to the respondent considering the matter was heard ex-parte. She prayed for the appeal to be allowed with costs.

On the reply, Mr. Wamunza before submitting on the grounds of appeal, he bring to the attention of the Court that the appeal is time barred. That the judgment of the trial Tribunal was delivered on 13th April 2023 and it was ready for collection on 18th May 2023. That the appellant filed the memorandum of appeal in this Court on 05th July 2023. He argued that from the date of judgment to the date of filing of appeal is a total of 82 days. From 18th May 2023 when the judgment was ready for collection to the date of filing the appeal, it is a total of 48 days.

Mr. Wamunza, argued further that under Regulation No. 4(2) G.N No. 174 of 2023 of the Land Dispute Courts (District Land and Housing Tribunal) Regulations, it is provided that every appeal to the High Court (Land Division) shall be filed within 45 days after the date of decision or order. *Adls*

Mr. Wamunza averred that the appellant was aware of the date of judgment because on the 17th January 2023 when the Hon. Chairperson pronounced that the date of judgment shall be on 13th April 2023, the appellant's advocate Mr. Kiombo was present. He pointed that the appellant did not file an application for extension of time so as to give reasons for his delay, hence the appeal should be dismissed with costs for being time barred.

In rejoinder, Ms. Mgallah responded that, the argument by the respondent's counsel that this case is time barred is unfounded and intend to mislead this Court.

She argued that, indeed the Judgment and decree was delivered on 13th April, 2023, however the said judgment was not ready for collection. That on 04th May 2023 the appellant wrote a letter to the trial Tribunal to be supplied with the certified copies of judgment and the decree, but he was orally informed that the said copies were not yet ready. That, the appellant continued to make follow ups until 16th June 2023 when he was supplied with the said copies.

She submitted that the Land Disputes Courts Act, Cap 216 R.E 2019 provides that the appeal from the District Land and Housing Tribunal shall be filed to the High Court within 45 days from the decision or order. And *Alb.*

that, Section 19(2) of the Law of Limitation Act, Cap. 89 R.E 2019 provides that in computing the period of limitation prescribed for an appeal, the day on which the impugned judgment was delivered and the time requisite for obtaining a copy of decree or order appealed against, shall be excluded.

Ms. Mgallah stated that, from the cited provision of law, it is clear that the days which the appellant was waiting to be supplied with the certified copies of judgment and decree should be excluded when computing time limit to lodge this appeal.

That, as the copies were supplied on 16th June 2023 and this appeal was lodged and approved online on 30th June 2023 and physically on 5th July 2023, it is only 20 days which has passed hence the appeal is within time. She added that even from 18th May 2023 to when the appeal was lodged and successfully approved online which amount to filing as per Section 21 (1) of the Electronic Filing Rules, 2018, the matter is still within the time.

To cement her points, she cited the case of **Kivaria Shengena vs. Flora D. Ruta**, Misc. Land Application No. 49 of 2023, HC Land Division DSM (unreported).



Having heard the submissions from parties, I have noted that, in the course of hearing of the appeal on merit by written submissions, the respondent has raised a point of law to the effect that this appeal is out of time as it has been filed beyond the 45 days prescribed by the law and with no leave of the Court.

The appellant, while rejoining, has contended the raised objection and submitted that the appeal is within the time limit as required by the law.

Therefore, my duty is to determine whether this appeal before me has been filed within the time prescribed by the law. I feel I should point that although it is procedure that the preliminary objection should be officially raised and served to the opponent party so as to avoid surprises, but as a point of law it can also be raised orally and the Court may entertain it if it sees fit and as point of law, it can be raised at any stage.

In addition, the appellant had the opportunity to respond to the raised preliminary point of law.

Section 41 (2) of the Land Disputes Courts Act provides as follows;

*An appeal under subsection (1) may be lodged
within forty-five days after the date of the decision*

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or order. Provided that, the High Court may, for the good cause, extend the time for filing an appeal either before or after the expiration of such period of forty-five days.
(Emphasis mine)

The above provision makes it clear that if a party wishes to appeal from the decision of the District Land and Housing Tribunal in the exercise of its original jurisdiction, to do so within 45 days.

However, the law recognize the circumstances where an aggrieved party may wish to appeal but for some reasons, failed to do so within the prescribed time. If a party has failed to appeal within the prescribed time, then he has to seek for the High Court's leave to do so out of time. The party has to move the Court with sufficient reasons, so that it can grant an extension of time. By this, the party intending to appeal cannot lodge an appeal out of time without first seeking the leave of this Court to do so.

In the appeal at hand, the impugned judgment was delivered on 13th April 2023. It was certified on 18th May 2023. This appeal was filed in this Court on 05th July 2023 as per the exchequer receipt. Hence this shows clearly that the appeal was lodged out of 45 days required by the law without seeking the leave of Court. If the days are counted from the

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date of delivery of judgment i.e. on 18th May 2023, more than 45 days have lapsed. If the days are counted from the date of certification of copy of judgment, also it is a total of 48 days which is out of time.

In her submissions, the counsel for the appellant stated that the appellant had made efforts to follow up to the trial Tribunal seeking for requisite copies but they were not availed to him on time until 16th June 2023. It is my view that this argument should be among reasons advanced in application for extension of time. As I have observed earlier, once a party has failed to appeal on time for whatever reasons, he has first to seek for Court's leave (this Court) to allow him to file the said appeal out of time.

The appellant's counsel has also submitted on electronic filing as per Section 21(1) of the Judicature and Application of Laws (Electronic Filing) Rules of 2018. She said that, this appeal was lodged and approved online on 30th June 2023 hence counting from that date to 18th May 2023, the appeal is within time.

It is the position of the law that although Rule 21(1) of the Electronic Filing Rules states that a document is deemed to have been filed in Court when it is submitted through electronic filing system, the filing process is said to be complete when the Court fees is paid. (See the cases of *Atle*

Mwaija Omary Mkamba vs. Mohamed Msuya, Land Appeal No. 142 of 2020, HC Land Division at Dar es Salaam (unreported), and **Stephano Mollé & 40 others vs. A1 Hotel and Resort Ltd**, Revision Application No. 90 of 2020, HC at Arusha (unreported).

According to the exchequer receipt, this appeal was filed in Court on 05th July 2023 which is way out of 45 days as the date of judgment is 13th April 2023 and the same was ready for collection on 18th May 2023.

For the foregoing reasons, I find that this appeal was filed well out of the prescribed time and it is hereby dismissed with costs.



**A. MSAFIRI
JUDGE
29/9/2023.**

