IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND APPEAL NO. 05 OF 2020

(Arising from the Judgment and Decree of the District Land and Housing Tribunal of Mwanza in land Case No. 07 of 2016)

ILLEMELA MUNICIPAL COUNCIL ---------- APPELANT

VERSUS

NGAIZA FRANCIS BYENGARO----------RESPONDENT

JUDGMENT

Last Order: 20/09/2021
Judgement Date: 29/10/2021

M. MNYUKWA, J.

This is land appeal arising from the judgment and decree of the DLHT of Mwanza at Mwanza in Land Case No. 07 of 2016. The brief background of this instant appeal is that sometimes in 2011, the respondent applied for providing a toilet service to the community at Kirumba fish Market and was paying rent at a tune of Tsh 75, 000/=. In 2015, the respondent saw a tender advertisement in the newspaper concerning the toilet facilities he was running. The respondent sued the appellant for the breach of contract. The DLHT entered judgment ex parte in favour of the

respondent. The appellant was aggrieved with the decision of the DLHT and filed this instant appeal with three grounds of appeal.

i. The trial tribunal acted irregularly and illegally when it denied the appellant the right to be heard which is a natural right without justification.

ii. That the tribunal acted with serious irregularity and illegality when it determined the matter without jurisdiction.

iii. That the tribunal was wrong and with material irregularity in awarding specific performance of the contract that had expired and without specifying the end of the reinstatement.

By the order of this court dated 11.08.2021, the matter was argued by way of written submissions whereby both parties complied with the order. The appellant filed his written submissions on 26.08.2021 and the respondent filed his reply on 08.09.2021 and there was no rejoinder filed. The appellant was represented by Patric Muhere, the state attorney from Ilemela Municipal Council and the respondent had a service of Kelvin Christian Mutatina, learned advocate.

Submitting on the 1st ground of appeal, the appellant learned counsel avers that, DLHT entered judgment in favour of the respondent without affording the appellant the right to be heard. he went on that the

absence of the appellant at a tribunal was with good cause but the tribunal did not consider the same. Citing the case of **Abas Shera Ally and Another vs Abdul Fazalboy,** Civil Application No. 33 0f 2002 quoted by the CA in the case of **M/S Darsh Industries Limited vs M/S Mount Meru Millers Limited,** Civil Appeal No. 114 of 2015 he insisted that the decision arrived in violation of the right to be heard is nullity. He insisted that the decision of the DLHT in Land Application No. 07 of 2016 was in violation of the right to be heard therefore a nullity. He therefore prays this court to quash and set aside an order which was made and the file be remitted back to the tribunal to proceed where it ended.

On the 2nd ground of appeal, he avers that the tribunal tried the matter without be clothed with jurisdiction. Citing section 167(1) of the Land Act Cap 113 RE. 2019 and the Courts (Land Dispute Settlement) Act No. 02 0f 2002 that the DLHT was established specifically to hear and determine matters arose out of land. Insisting he cited the case of **Charles Rick Mulaki vs Wiliam Jackson Magero,** Civil Appeal No. 69 of 2017 HC that the tribunal is excluded from hearing and determining matters arose from lease agreement. He cited the case of **Exim Bank(T) Limited vs Agro Impex (T) and Others,** Land Appeal No. 29 of 2008 which hold that in order to assess the jurisdiction of the court, one has to

look at the pleaded facts and to the reliefs claimed. He went on that, the claim of the respondent against the appellant was not concerned to land rather a breach of lease agreement and the relief was to order the specific performance. He went on that, since the claim was on breach of lease, the matter was to be filed in the district court and not at the DLHT. Insisting he cited section 107 of the Land Act, Cap 113 RE: 2019.

On the 3rd ground of appeal, he avers that, taking into consideration the time which the lease was to operate, that the trial tribunal ordered the appellant to perform the expired contract. He avers that the tribunal had an option to grant damages upon making its findings that there was a breach of lease agreement. He went on that the DLHT award was unjustifiable for it is trite law that the specific damages must be specifically pleaded and proved.

He therefore prays this court to allow the appeal, quash the judgment and ordered the DLHT to proceed with the matter from where it ended or to be filed at a proper court with competent jurisdiction.

Responding to the appellant submissions, the respondent opposed that the appellant was denied the right to be heard as claimed. Referring to the records of the trial tribunal, he avers that the appellant through his advocate attended the matter severally from when the matter was

instituted to the closure of the applicant case, and the appellant could not enter appearance to defend his case which resulted the matter to be decided ex-parte. He avers that, the appellant was never denied his right to be heard rather he slept over his rights for he could not enter his defence. Citing the case of **Kilimanjaro Plantation Limited vs Nicholaus Ngowi,** Labour Revision No. 40 of 2020, he insisted that this ground of appeal lacks merit.

On the second ground of appeal, that the trial tribunal has no jurisdiction, he avers that the issues framed at the hearing was as to whether the respondent was forceful evicted from the disputed premises and thus the respondent was claiming on the usufructuary rights which falls under land right under section 167 of the Land Act Cap 113. He went on that the appellant is not certain because there is a time when he claims that the trial tribunal has no jurisdiction, and at some time he prays this court to remit the matter to the trial tribunal to proceed from where it ended. He insistingly that the tribunal has jurisdiction to entertain the dispute

On the third ground that the trial tribunal was wrong to award the respondent specific performance on the expiry contract, he claims that the lease agreement was from July 2012 to 30th June 2018 and on records

the lease agreement was breached on 05. 06. 2015 which made the time not performed to be three years. He went on that, the tribunal was right to allow the respondent to resume its remaining time for the lease was not expired. He went on that all along the entire submissions, the appellant conceded to have breached the lease agreement and he is trying to persuade the court to award the damages to the respondent. He added that the DLHT was right to allow the respondent resume his remaining period which was actually terminated without any reason. He concludes his submission avers that the DLHT held that the specific damages must be strictly pleaded and strictly proved that's why the tribunal ruled that the respondent be resumed in his original place as if nothing had happened. He therefore prayed the appeal to be dismissed with costs and the judgement and decree of the DLHT be upheld.

I have gone through the available record in the court file and the parties' submission and giving careful consideration to the arguments raised by the appellant as well as the respondent. I find the central issue for determination is whether the appeal is meritious.

After carefully going through the grounds of appeal as advanced by the appellant, it would appear to me the first ground of appeal seeks to challenge the ex-parte decree that was entered against the appellant

without being afforded a right to be heard. The second and third ground of appeal challenge the ex-parte decree on merit.

It goes without say that the first ground of appeal can form an independent appeal from the other two grounds of appeal which can also form its own independent appeal. Upon observing that, I was convinced to know as to why the appellant would not have made an application before the DLHT to set aside the ex-parte judgement if at all he aimed to challenge the denial of a right to be heard and if at all he aimed to challenge the ex-parte judgement on merit, why he included ground one on his Petition of appeal.

Upon going through the entire file, I found the appellant filed an application under certificate of urgency to set aside ex-parte judgement in the DLHT. The application was admitted on 07/2/2020 and registered as a Misc. Application No 7C of 2020. Surprisingly, upon perusal of the entire file it is neither the proceedings nor Ruling which has been seen in relation to that application. This compel me at a time of composing judgement to call the parties to address me on that matter.

It was the appellant who submitted first and stated that the Application No 7C of 2020 was filed but it was not heard because after the decision of the Application No 07 of 2016 was delivered and the

execution was done, the appellant file the said application but also file an application before the High Court for extension of time to appeal out of time. Therefore, the chair of the DLHT informed him that he could not proceed with the application to set aside ex-parte judgement because there was an order from the High Court to call the records of the DLHT. He went on that, on his surprise there was a complaint filed by the respondent before the DLHT after they had filed their application to set aside exparte judgement and an application for extension of time before the High Court and the same was heard and determined.

The counsel for the respondent when addressing the court on that issue stated that, what he knows after the decision of Application No 7 of 2016 the same was executed and the court broker filed its report. But when the respondent continued to enjoy the fruits of the award he was interfered and intimidated by the appellant which resulted to file a complaint and the same was heard and determined.

Before I resolved the merit of the present appeal, it is better to appreciate the meaning of ex-parte decree. An ex-parte decree simply means a decree passed in the absence of the defendant. When the plaintiff appears and the defendant fails to appear while he was duly served with the summons, the court may hear the case ex-parte and may

pass ex-parte decree. The ex-parte decree may be set aside upon the defendant showing good reasons that prevented him from appearance when the suit was coming for hearing, this is provided for Order 9 Rule 9 of the CPC, Cap 33 R.E 2019.

In the event the court which passed an order for the matter to proceed ex-parte refuses to set aside its order, the affected party can appeal under Order XL Rule 1 of the CPC, Cap 33 R.E 2019. There is vast of decisions on setting aside ex-parte judgement includes the case of **Yara Tz Ltd vs Dr. Shariprya & Co ltd,** Civil Appeal No 245 of 2018, CAT at Dar es Salaam, **Ramadhani Kasase vs Tabu Ramadhani,** Misc Land Appeal No 31 of 2019, HC at Mwanza and **Mwita Chacha v Abdallah Rashid Mtumbo,** Misc Land Application No 04 of 2019 HC Land Division at Dar es Salaam. (both unreported)

On the other hand, an ex-parte judgement is appealable on merit under section 70(2) of the CPC, Cap 33 R.E 2019. The section provides that:

"An appeal may lie from an original decree passed ex-parte".

The above section does not impose any condition before appealing against an ex-parte judgement. It gives an appellant the automatic right

of appeal against the original decree. In other words, the appellant may invoke section 70(2) to appeal against exparte decree on merit only.

When commenting on the provision of section 70(2) of the CPC, Cap 33 R.E 2019, Hon. Judge Maige in the case of **Registered Trustees of Pentecost Church in Tanzania vs Magreth Mukama (A minor by Her Next friend, EDWARD MUKAMA,** Civil Appeal No 45 of 2015, HC at Mwanza stated that:

> *" In my opinion therefore, since the provision of section 70(2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an ex-parte judgement, it is not for the court to, by way of interpretation, cut down its scope by speculating that the legislature intended to impose such a precondition. I have therefore no doubt from the foregoing authorities; that a right to appeal against an exparte decree on its merit is automatic and does not depend upon there being a prior attempt to have it set aside.*
>
> *If however, contrary to the opinion I have articulated, an appeal against an ex-parte judgement was conditional upon the appellant exhausting all the available remedies, an*

appeal against an ex-parte judgement would not arise until the appellant had exhausted the available remedies, namely appealing against an order refusing to set aside the ex-parte judgement in terms of Order XL rule 1 (d) of the CPC in the event of failure, a second appeal to the Court of Appeal."

In our case at hand the appellant attempted to ride two horses at a same time, he filed an application for setting aside the ex-parte judgement in relation to application No 7 of 2016 before the DLHT, while this application was pending, he filed an application for extension of time to the High Court to file appeal out of time against the decision delivered by DLHT in the same application, that is in application No 7 of 2016 in which later on he filed an Appeal. As a result, the application for setting aside was not determined. That action taken by the appellant to prefer two actions together, that is setting aside the ex-parte judgement which is within the mandate of the DLHT to determine if there is a sufficient reason to set aside its order. Upon refusal is when the appellant may come in this Court to appeal against the dismissal order passed by the DLHT. Again, if he will be dissatisfied with the decision of this Court, may appeal to the Court of Appeal.

On the other hand, even if the determination of the ex-parte decree on merit from the DLHT is mandated to this Court but the same was not supposed to challenge the right to be heard before he could have exhausted the remedy available in the DLHT which is to file application for setting aside ex-parte judgement.

It is my opinion that the two matters which is filed and mandated to be determined by two different courts cannot be invoked simultaneously. This is due to the fact that, if both of them will be entertained, it may result into a conflicting decision if the same are determined simultaneously. This is because there is still a pending application before the DLHT on setting aside ex-parte judgement. It is undisputed that the two matters are different and independent statutory remedies established by different provisions of law. As it was stated in the case of **Registered Trustees of Pentecostal Church in Tanzania**, (supra) that:

> *"An appeal against a decision refusing to set aside an ex-parte judgement if successful has the effect of maintaining the status quo by restoring the suit. It would thus follow that once the suit is restored, there remains nothing to be appealed against, Contrariwise, an appeal against an ex-parte decree if successful will have the effect of finally and conclusively disposing of the dispute. There is*

therefore, no way the two causes of action can be preferred together."

The Court of Appeal in the case of **Jafari Sanya Jusa and Another vs Saleh Sadiq Osman,** Civil Appeal No 54 of 1997, CAT at Zanzibar when addressing the issue of the concurrent jurisdiction between the High Court of Zanzibar, and the Court of Appeal of Tanzania, made an and emphasis to exhaust the remedies of setting aside an ex-parte order in the first place. On the issue of whether both jurisdictions can be invoked simultaneously it held that:

"We think that the sequence is orderly, logical and avoids confusion and the duplication of litigation as was the case here."

Based upon the above discussion, it is my considered view that the act of the appellant to prefer two applications simultaneously is the abuse of court processes as this may result into a conflicting decisions and unnecessary multiplicity of suits. I am therefore find that this appeal is premature and incompetent and it accordingly struck out.

Costs to follow event. It is so ordered

M.MNYUKWA
JUDGE
29/10/2021

The right of appeal explained to the parties

M.MNYUKWA
JUDGE
29/10/2021

Judgement delivered on 29th day of October, 2021 via audio teleconference whereby all parties were remotely present.

M.MNYUKWA
JUDGE
29/10/2021