

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPEAL NO. 8 OF 2022

(Arising from the Decision of the District Land and Housing Tribunal for Mwanza at Mwanza before Hon. Muriryia (Chairman) dated 24th September 2021, in Land Appeal No. 95 of 2020)

PETER TITUS MARKO ----- APPELLANT

VERSUS

SALOME MUSSA----- RESPONDENT

JUDGMENT

*Last Order: 14.04.2022
Judgement Date: 26.05.2022*

M. MNYUKWA, J.

In Ward Tribunal of Luchebele the appellant instituted a land matter No. 103/2020 against the respondent claiming that, she has invaded the area of Salome Saanane who is the appellant's mother. The ward tribunal decided the matter *ex parte* as the respondent did not show up during the hearing and ultimately ordered the respondent to remove her kiosk from



Salome Saanane's area within seven days. Dissatisfied, the respondent opted to appeal against the ex parte judgement to District Land and Housing Tribunal of Mwanza at Mwanza (herein referred as 1st Appellate Tribunal) via Land Appeal No. 95 of 2020. The respondent raised 7 grounds of appeal as follows;

1. That the Ward Land Tribunal erred in law and in fact in deciding that the suit premises belong to the respondent without according the respondent opportunity of being heard.
2. That the Ward Land Tribunal erred in law and in fact in deciding that appellant has refused to attend without evidence.
3. That the Ward Land Tribunal erred in law and in fact in ignoring the evidence that the appellant has been using the land for a long period that is 20 years without interference from the respondent.
4. That the Ward Tribunal erred in law and in fact in ignoring the evidence that the suit premises belonged to both appellant and respondent having been given to them during their marriage.
5. That the Ward Land Tribunal erred in law and in fact in failing to consider that it had no jurisdiction to entertain the suit as the value of the suit premises is **30,000,000/=** more that Tsh. **3,000,000/=**.



6. The Ward Land Tribunal erred in law and in fact in deciding to award the respondent ownership of the suit premises in irrespective of the contradictions in the testimony of **ADRIAN MAGOMBELA** who stated that it belongs to the respondent; **MECKTRIDA PETRO** stated that it belongs to **SALOME SAANANE WHILE PETER TITUS** who was the applicant stated that it belongs to her mother **SALOME SAANANE**.
7. That, the Ward Tribunal erred in law deciding that the suit premises belong to **SALOME SAANANE** who was not a part to the land case.

The respondent prayed for the following; appeal to be allowed with costs, the respondent be declared owner of the suit premises, and the appellant be prohibited on entering into the suit premises.

Like in the Ward Tribunal, the 1st Appellate Tribunal judgement was also delivered exparte after the appeal was heard in absence of the appellant herein. The exparte judgement of the 1st Appellate Tribunal did not amuse the appellant and he has now appealed to this court with 5 grounds of appeal as follows;

1. That, the trial chairman of the Mwanza District Land and Housing Tribunal erred in law and in fact by entertaining the case while the respondent did not have locus stand due to the fact that the matter from Luchebele Ward was held ex-parte against the respondent.



2. That, the trial chairman of Mwanza District Land and Housing Tribunal erred totally in law and facts by allowing the matter of Land Appeal No. 95/2020 to continue while the respondent did not set aside *ex parte* judgement in order to appear.
3. That the trial chairman of Mwanza District Land and Housing tribunal for Mwanza erred in law and facts in its decision by ignoring the evidence adduced by the appellant.
4. That, the trial chairman of Mwanza the District Land and Housing Tribunal for Mwanza erred in law and in fact in its decision that favored the Respondent who adduced no valid evidence.
5. That, the appellant wrote to the court a letter requesting Hon. Mlilia to be removed from the case due to the fact that he was not impartial and having showing interest in case but Hon Mlilia refused to do so.

On his part, the appellant prayed for his appeal to be allowed, that the decision in Land Appeal No. 95/2020 be quashed, set aside, to be declared owner of disputed land, to be awarded costs and any other relief might be fit and just for the court to grant.

During hearing of this appeal, the appellant had services of Mr. Sostenes Kulola, learned Advocate while the respondent was absent as she refused to acknowledge the served summons as evidenced by the



affidavit sworn by the process server dated 29/3/2022. And therefore, this appeal was heard ex parte.

In his submission the Appellant's counsel adopted the grounds of appeal to form part of his submission. He also opted to argue jointly the 1st and 2nd grounds of appeal and argue the 3rd and 4th grounds together. He also abandoned the 5th ground of appeal.

Arguing on the 1st and 2nd grounds of appeal, the appellant's counsel submitted that, the 1st Appellate Tribunal misdirected itself for failure to follow the procedure concerning ex-parte decision of the ward tribunal. That there is no any law which guide on what to be done after the ex-parte decision of the Ward Tribunal as the law is silent.

He further submitted that, *section 2(3) of the Judicature and Application of Laws Act Cap 358 R.E 2019 and Section 180(1) (b) of the Land Act Cap 113 R.E 2019* put it clear that if there is lacuna the common law will apply. He went on that the common law has two principles that is precedent rule and stare decisis rule, that the decision of the higher courts binds the lower court.



Appellant's counsel referred the court to the decision of the case of **Jaffari Sanya Jussa and Ismail Sanya Jussa vs Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 CAT at Zanzibar at page 7, the Court of Appeal stated that ex parte order can be appealed if the appellant did not challenge that he was not heard. If the Appellant challenged the right to be heard, the court should set aside its decision after receiving the application.

Based on the decision of the 1st Appellate Tribunal, it is clear that the 1st Appellate Tribunal misdirected itself to hear the complaint of the Appellant that she was not given a right to be heard and gave decision on it. The complaint of the right to be heard was supposed to be challenged in the Ward Tribunal and its remedy is to set aside its decision and to afford the Applicant the right to be heard. He finalized his submission on the 1st and 2nd grounds of appeal by citing the case of **Mwita Chacha Gasaya V Abdallah Rashid Mtumbo**, Misc. Land Application No. 4 of 2019, HC Land Division of DSM and submit that the court had the same scenario where the court gave directions on ex parte decision entered by Ward Tribunal.



On the 3rd and 4th grounds of appeal, the appellant's counsel submitted that, it was improper for the 1st Appellate Tribunal to hold that the Ward Tribunal was not vested with Jurisdiction to hear the dispute because there was no issue of jurisdiction in the proceeding of the Ward Tribunal. The 1st Appellate Tribunal stated that the suit premises had value more than 3,000,000/= and there was no evidence which was adduced at the Ward Tribunal to show that the disputed premises plot its value exceeded Tsh. 3,000,000/=.

He further argued that, for that reason the 1st Appellate Tribunal erred by adding the evidence and facts to decide that the Ward Tribunal was not vested with the decision to hear and determine the matter. He prayed the court to quash, revise and set aside the proceedings and judgement of the 1st Appellate Tribunal and upheld the decision of the Ward Tribunal.

After the submission by the Appellant's counsel, this court has one issue for determination which is, whether this appeal has merit. However, before I embark in determining this appeal, I would like to point out that, while passing through the lower courts' records, the filed appeal in the 1st Appellate Tribunal file, connotes to be Land Appeal No. 95/2020, the same



applies to proceedings, petition of appeal, assessors' opinion, affidavit by the respondent to show cause why execution should not proceed and written submissions of the parties before the 1st Appellate Tribunal when arguing preliminary objection.

Unfortunately, the 1st Appellate Tribunal's judgement and decree have different case No. which is No. 124 of 2020. After a carefully consideration I came to the conclusion that, the case Number appearing in 1st Appellate Tribunal's judgement and decree is just a typing error. And so, I proceed to determine this appeal and if parties wish, may go back to the 1st Appellate Tribunal for their copy of judgement and decree to be corrected.

Going back in determination of this appeal, I will start with the 1st and 2nd grounds of appeal as argued collectively by the appellant's counsel. First of all, it is true that The Ward Tribunal Act, 1985 has no any provision that carters for the procedure to follow in challenging an exparte judgement or decision that has been passed by the Ward Tribunal.

I certainly agree with the appellant's counsel that, whenever there is lacuna within the provisions of the Ward Tribunal Act, 1985, the court



has been borrowing the provisions from other laws and case laws to fill that gap. As the Ward Tribunal Act reflects, it does not contain complex procedures including the procedure to be followed following ex parte judgement as the members of the Ward Tribunal itself are not acquaintance of the law.

That is to say the parties that are in position to challenge the said ex parte judgement by borrowing the procedural law from the provision in Civil procedure Code Cap 33 R.E 2019 Under Order IX Rule 13(1) which states that;

Order IX Rule 13(1)

"In any case which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfy the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;...."

That is to say, when a Ward Tribunal has passed an ex parte judgement then the infringed person can still challenge the ex parte



judgement by applying before the same ward tribunal for the exparte judgement passed, to be set aside so that he can enter appearance and defend his case before the ward tribunal. However, he must fulfil the condition that shall satisfy the ward tribunal that, he was either not dully served with the summons to appear or he had reasonable and sufficient cause prevented him to appear on the day fixed for hearing. This was also the holding in the case of **Kuyela Chulugu and Another vs Maua Mgata**, Land Application No. 20 of 2011, where the High court at Iringa held that the proper cause to be taken by the respondent was to apply for setting aside an exparte judgement instead of appeal.

Furthermore, it is a settled principle of law that, a party must exhaust the remedy available on the trial court before taking any other step. However, the question remains that, whether a party is barred to appeal against a decision that has been passed in his absence? The appellant's counsel has also cited case law that has explained the two scenarios concerning exparte judgement that emanates from Order IX Rule 13 that can answer this question. The case of **Jaffari Sanya Jussa and Ismail Sanya Jussa vs Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 CAT at Zanzibar, has provided that, a defendant can also opt not



to challenge the decree passed concerning his right to be heard that has resulted to exparte judgement and instead opt to appeal against the findings on the award that was given on his absence.

This standing was also taken by my learned brother Rumanyika, J (as he then was) in the case of **Sagi Makabwa Mwikwabi vs Magera Kibogo**, Land Appeal No. 1 of 2019. Rumanyika J, in his decision he emphasized on the use of the two option that, a party has to choose either to set aside an exparte judgement for him to be heard on the trial court, or appeal against the merit of the case on an appellate court and he insisted that one can never take both options at once.

This was also emphasized in the recent Court of Appeal case of **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, Civil Appeal No. 13 of 2021 CAT at Dar es salaam, where the court said that a party can apply to set aside an exparte judgement under Order IX Rule 13, or appeal against exparte judgement as provided under section 70(2) of the Civil Procedure Code Cap 33 R.E 2019. The Court of Appeal in this case went further to elaborate that, a party has an automatic right to appeal without being bound with the rule that he must first seek an order to set aside an exparte judgement. But it gave a condition that, a party



who appeals without applying to set aside an ex parte judgement he must not challenge an order for ex parte hearing instead he must focus on the merit of the case as it was held in the case of of **Jaffari Sanya Jussa and Ismail Sanya Jussa vs Saleh Sadiq Osman**(supra). This means that an appellant cannot combine grounds of appeal that challenge an order for ex parte hearing and at the same time combined those grounds that challenge merit of the case for the reason that, the jurisdiction to set aside an ex parte order is exclusively under the trial court.

From these findings, I will now observe the 1st appellate court findings to see if it was right in its decision. From the 1st Appellate Tribunal's decision, the appellate tribunal allowed the respondent's appeal on the basis that the appellant (the respondent herein) was not given right to be heard as there was no any evidence that he was duly served. On the third and fourth ground of appeal the appellate tribunal gave its findings on the merit of the case concerning inadequate evidence given by the appellant, and lastly, he relied his decision on the fact that the Ward tribunal lacked jurisdiction to try the matter.

From the 1st Appellate Tribunal's decision and appellant's (respondents herein) grounds of appeal, it is obvious that the presented appeal had



gone for the two options at once something which is not proper. That is to say, the respondent was both rooting for setting aside an ex parte judgement and meanwhile challenging merit of the award given in the ex parte judgment. As we have seen earlier in the case of **Dangote Industries Ltd Tanzania vs Warnercom(T) Limited** (supra), the respondent was stealing away the exclusive power of the trial tribunal of setting aside an ex parte judgement by including the first ground of appeal challenging for her right to be heard.

Therefore, the 1st Appellate Tribunal misdirected itself in deciding the matter in which it lacks jurisdiction as the power to determine the complaints on the right to be heard and set aside an ex parte order is vested in Luchelele Ward Tribunal. For that reason, the 1st and 2nd ground are hereby allowed.

As the 1st and 2nd grounds of appeal dispose of the entire appeal, I will not labor in determining the 3rd and 4th grounds of appeal as argued by the appellant's counsel.

In the upshot, I allow this appeal, and quash the proceeding and judgement of the 1st Appellate Tribunal. I proceed to uphold the Ward



Tribunal Decision. Considering the relationship of the parties, I make no orders as to costs.

It is so ordered.



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**M. MNYUKWA
JUDGE
26/05/2022**

Right of Appeal explained to the parties.

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**M. MNYUKWA
JUDGE
26/05/2022**

Court: Judgment delivered on 26st May, 2022 in the presence of the Appellant's counsel.

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**M. MNYUKWA
JUDGE
26/05/2022**