

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 175 OF 2018**

**ADAM MOHAMED ZUBERI ..... APPELLANT  
VERSUS**

**KULWA MASHAKA .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania,  
Land Division at Dar Es Salaam )**

**(Makuru, J.)**

**dated the 21<sup>st</sup> day of December, 2016**

**in**

**Land Appeal No. 100 of 2015**

.....

**JUDGMENT OF THE COURT**

15<sup>th</sup> & 25<sup>th</sup> day of February, 2022

**MAIGE, J.A.:**

This appeal is against the decision of the High Court, Land Division at Dar es Salaam (“the first appellate court”) confirming the decision of the District Land and Housing Tribunal for Kinondoni (“the trial tribunal”) refusing to set aside an *ex parte* judgment of the trial tribunal. The factual materials giving rise to this appeal can be summarized as hereunder.

The respondent instituted a suit against the appellant and Jibrea Auction Mart (“the third party”) for among others, vacant possession of a landed property at Plot No. 13 Block 35 A, Mwananyamala, Dar

es Salaam (“the suit property”). For the reason of non- appearance of the appellant and/ or his advocate on the date when the matter came for defence hearing, the defence hearing in respect of the third party proceeded in the absence of the appellant and finally a judgment in favour of the respondent was pronounced. Aggrieved, the appellant filed an application for setting aside the *ex parte* judgment which was dismissed for want of justification of non-appearance of the appellant and/ or his advocate. Once again aggrieved, the appellant preferred an appeal to the first appellate court which was dismissed and hence this appeal.

In this appeal, the appellant through his advocate Mr. Audax Vedasto Kahendaguza lodged a memorandum of appeal containing nine grounds and subsequently filed a detailed written submissions amplifying the said grounds. In the same way, Mr. Samson Joseph Nnko, learned advocate for the respondent, filed written submissions to contest the appeal. At the hearing, each of the advocates adopted his written submissions as part of his oral submissions with emphasis and clarifications on some points which they found appropriate so to do. We commend the counsel for their well-researched submissions which have been of much assistance in composing this judgment.

The first five grounds of appeal in our careful reading raise one pertinent issue namely; whether or not the non- appearance of the appellant and his counsel on the date when the trial tribunal ordered the trial to proceed *ex parte* was justified. The last three grounds raise one issue whether the first appellate court should not have allowed the appeal on ground of illegality. It occurred to us that, in the course of presenting his oral submissions and upon probing by the Court, Mr. Kahendaguza abandoned the last three grounds of appeal and we marked it so. In the circumstance, there is only one issue to be considered.

In the address of the issue, Mr. Kahendaguza submitted, in the first place that, since the application for setting aside the *ex parte* judgment was premised on justification of non-appearance of both the appellant and his advocate, it was wrong for the first appellate court to base its decision on the proposition that, the order to proceed *ex parte* was made under regulation 13 (3) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN. No. 173 of 2003, ("the Regulations"). In his taking, the respective provision is only relevant in establishing if an advocate was prevented from appearance

by reason of attending a case in a higher court. He submitted therefore that, since the application combined justification for absence of both the appellant and his advocate, the trial tribunal was not restricted to consider appearance to the higher court in determining the application. He submitted further that, since the claim by the appellant's counsel was not that he was prevented from appearance by the reason of attending a case at a higher court, regulation 13(2) of the Regulations was also inapplicable.

In the alternative, it was his submission that, if the order to proceed *ex parte* was made under regulation 13(2) of the Regulations, it would have been *ultra vires* the power of the trial tribunal under the respective provision in as much as the default to appear was not for two consecutive dates as envisaged in the respective provision.

In the second place, Mr. Kahendaguza faulted the first appellate court in not considering the weight of the reasons for absence contained in the affidavit in support of the application. In the said affidavit, submitted the counsel, advocate Hassan did put it very clearly that he was appearing in the District Court of Mtwara in an execution proceeding which was extremely urgent. That, he clarified, was even

brought to the attention of the trial tribunal by advocate Mwajasho who was holding the brief for advocate Hassan on the date when the order to proceed *ex parte* was pronounced. In the humble opinion of the counsel, that would be a sufficient reason for setting aside the *ex parte* judgment. As these facts were not disputed, and in view of the fact that the non-appearance was for only one day, he added, the two lower courts should have considered the principle that, an order to proceed *ex parte* comes as a last resort. The counsel cited several decisions of the High Court to substantiate his position including **Fredrick Selene and Another v. Agnes** [1983] T.L.R. 99 and **Mwanza Director M/S New Refrigeration Co. Ltd v. Mwanza Regional Manager of TANESCO Ltd** [2006] T.L.R . 329.

In response, Mr. Nnko started by commenting on the relevancy of regulation 13 (2) and (3) of the Regulations. In his understanding, which is premised on the provision of section 11 of the Interpretation of Laws Act [Cap 1 R.E. 2019] the two provisions are distinct and separate. Sub-regulation (2), he submitted, is relevant where an advocate default appearance for two consecutive days and there is no proof that he was appearing in a superior court. He submitted further that, once an order to proceed *ex parte* is made under sub-rule (2),

the trial tribunal becomes *functus officio* and in terms of sub-regulation (4), if a party is aggrieved by the order, the only remedy is to appeal to the High Court.

Sub-regulation (3), said the counsel, comes in when the sole reason for the advocate's non-appearance is attending a matter at a superior court. In his view therefore , the order to proceed *ex parte* was made under the said provision.

On the merit of the grounds for non-appearance, he submitted that, even the evidence in the summons that, the appellant's counsel was appearing at the District Court of Mtwara is wanting for absence of an indication that it was addressed to such an advocate.

We have prudently deliberated on the rival submissions and we shall consider the merit or otherwise of the appeal. We shall first address the issue of the provision under which the order to proceed *ex parte* was issued. So as to appreciate the nature of the contention, we shall reproduce hereunder the relevant extract of the proceedings which constitute the order. It is at pages 68 and 69 of the record and it is as follows:

*"MR. MWAJOSHO*

*Mr. Hassani is in Mtwara at the High Court. He prays for another date of hearing. There a summons to prove (sic)*

*MR. NNKO*

*I object as Mr. Hassan was aware of this date and that case is before a District Court. According to the Land District Courts, the matter can be adjourned if an advocate appears to the High Court and not otherwise. Since this matter has been pending before here for a long time, I pray that the matter proceeds in the absence of Mr. Hassan.*

*MR. MWAJOSHO*

*The only instructions I have is that Mr. Hassan appears at the District Court. However we pray for a short adjournment for Mr. Hassan to appear so that justice can be done.*

*TRIBUNAL*

*There could have been a good reason for adjournment if the advocate would have been at the High Court. There is no such proof I order that the matter proceeds to defence".*

What can be noted from the above extract is that the proceedings constituting the order to proceed *ex parte* was silent on the provision on which it was made. We do not think however that

the omission can affect the substance of the proceedings of the trial tribunal so long as it enjoyed jurisdiction to proceed as it did.

In his comments on this point, Mr. Kahendaguza criticized the High Court Judge in holding that, the order under scrutiny was made under regulation 13(3) of the Regulations. In her judgment, the High Court Judge observed that, since the appellant was represented, the general rule under regulation 11(1) would not apply. Instead, it is the provision of regulation 13 (3) which would apply. It provides as follows;

*(3) Where a party advocate is absent for the reason of attending the proceedings in the High Court or Court of Appeal, the Tribunal shall not believe any other evidence as a proof for being in superior court other than producing summons to the advocate and cause list from such court.*

Like the High Court judge, Mr. Nnko submitted that, the above regulation provides for the power of the trial tribunal to proceed *ex parte* where the reason for non-appearance by an advocate is attendance to a superior court. With due respect, we cannot agree with him. There is nothing from the wording of the above provision to imply such power. As rightly submitted for the appellant, the provision sets out mechanism through which attendance to a superior court can



be proved. The appropriate provision dealing with non-appearance by an advocate is, in our reading, regulation 13 (2) which provides that:

*(2) Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such as orders as may be appropriate.*

It is our view however that, for the trial tribunal to make an order under the above provision, four conditions must be cumulatively established. **One**, the party's advocate must have defaulted to appear for the two consecutive days. **Two**, the non-appearance should be without good cause. **Three**, there should have no proof that the said advocate is appearing at a superior court. **Four**, the party himself must have been requested to fend himself and unreasonably refused.

The use of the clauses "without good cause" and "no proof such an advocate is appearing in the High Court or Court of Appeal" in the respective provision, we agree with Mr. Kahendaguza, is a signification that, the intention of the drawer of the Regulation was not to limit the

justification of advocate's appearance with attendance to a superior court. Otherwise, the clause "without good cause" would be superfluous. In our opinion therefore, justification for non-appearance under the respective provision may include other reasons available for justification of a party himself including sickness and other unavoidable circumstances.

It is, as we have noted above also the law that, for the trial tribunal to be justified to give an order to proceed *ex parte* or dismiss the application under the respective provision, a party whose advocate is in default must have been given an opportunity to fend himself and refused. The rationale behind being that, the finding that the non-appearance by the advocate is not attributed to any good cause or appearance in a superior court, leads a presumption that the advocate is unable or not serious to represent his client. Directing a party to proceed in his person implies, in our view, that the representation has ceased. Consequently therefore, if a party unreasonably refuses to prosecute or defend his case in person upon being directed to proceed under the respective provision, the dismissal is deemed to be for want of prosecution and the order to proceed *ex parte* for want of defence. It is certainly for that reason that an order made under the said

provision can only be faulted by way of appeal to the High Court. In effect therefore, an order to proceed *ex parte* under the respective provision is deemed to be for default of both the advocate and a party.

In this case, it is apparent that, the justification of the appellant's advocate was not appearance at a higher court. It was instead appearance to the District Court of Mtwara. We therefore, agree with Mr. Kahendaguza that, the test of proof under regulation 13(3) of the Regulation was inapplicable. In his order to proceed *ex parte*, the trial chairperson refused the adjournment because the advocate was not appearing at a higher court. No wonder the trial chairperson has it in his mind the provision of regulation 13(2) of the Regulations. He did not at all direct his mind on the right of the appellant to represent himself in person or his right to justify his non-appearance. That was also not done in an application for setting aside as well as in the decision of the first appellate court.

In his affidavit, the appellant deposed that he could not appear because he was on safari outside the country executing his official duties. He produced relevant travelling documents to support his claim. Neither the trial tribunal nor the first appellate court considered this

claim. They just rationalized their findings on the presence of the appellant on the last time when the matter came for hearing. That however does not mean that a person who is aware of the date of hearing cannot be prevented by good cause from appearing on the hearing date.

In our view, the trial tribunal was bound, before giving an order to proceed *ex parte*, to make a finding on whether and if not why the appellant was not given a right to proceed in person. Similarly, in the application for setting aside an *ex parte* judgment, the trial tribunal was also bound to consider, which it did not, the non-appearance of a party himself. In refusing so to do, there is no doubt that, the appellant was denied a right to be heard. As a necessary prerequisite of an order under regulation 13(2) of the Regulation was not adhered to, it cannot be said that the order to proceed *ex parte* was made under the said specific provision. To the contrary, the same is deemed to have been made under the general provision of regulation 11 (1) of the Regulations.

In view of the foregoing, we find that both the trial tribunal and the first appellate court were wrong in not considering the justification

of the non-appearance of the appellant in person. As the appellant's claim in his affidavit that his absence in the tribunal was associated with him being outside the country for official duties was not rebutted in the counter affidavit, the trial tribunal should have granted the application on that account. The appeal is thus with merit.

Before we wind up our judgment, we find it imperative to make a comment on the appropriateness of the provisions of law upon which the application to set aside the *ex parte* judgment was made. The submission for the respondent on this point was that, the application was brought under a wrong provision of law or it was barred by the provision of regulation 13 (4) of the Regulations. Since we have already held that, the order to proceed *ex parte* was not made under regulation 13 (2) but the general rule under regulation 11(1) of the Regulations, the issue of prohibition under regulation 13 (4) does not arise. The reason being that, what is prohibited to be set aside under regulation 13(4) is an order to proceed *ex parte* pursuant to regulation 13(2).

At the trial tribunal, the application to set aside the *ex parte* judgment was made under regulations 11(2) of the Regulations and

Order IX Rule 13 (1) of the Civil Procedure Code, Cap. 33, R.E. 2019, herein after referred to as “the CPC” among others. We wish to state right from the outset that, neither the Land Disputes Courts Act [Cap. 216 R.E. 2019] (henceforth “the LDCA”) nor the Regulations provides for the right to set an *ex parte* judgment aside. The remedy in regulation 11(2) of the Regulations in our reading relates to the order to proceed *ex parte* itself and not the *ex parte* decree made under regulation 11 (1). With such a *lacunae* in the land law, we think, the tribunal could resort to the provision of the CPC. This is in accordance with section 51(2) of the LDCA which provides as follows:

(2) *The District Land and Housing Tribunal shall apply the Regulations made under section 56 and where there is inadequacy in those regulations it shall apply the Civil Procedure Code.*

In this case, the trial tribunal rightly applied Order IX rule (13(1) of the CPC to entertain the application. The combination of the said correct enabling provision and some irrelevant provisions did not, in our view, affect the substantial validity of the application. The application was thus properly before the trial tribunal.

Having remarked so, we allow the appeal. We thus quash and set aside both the judgment of the High Court on appeal and the ruling of the trial tribunal refusing to set aside the *ex parte* judgment. We as well quash all the proceedings subsequent to an order to proceed *ex parte* and direct that, the defence hearing proceed in the presence of both parties.

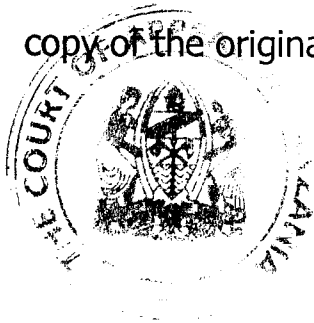
**DATED** at **DAR ES SALAAM** this 24<sup>th</sup> day of February , 2022.

M. A. KWARIKO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

The Judgment delivered this 25<sup>th</sup> day of February, 2022 in the presence of Mr. Samson Joseph Nnko holding brief for Mr. Audax Kahendaguza Vidasco, learned counsel for the appellant and Mr. Samson Joseph Nnko, learned counsel for the respondent is hereby certified as true copy of the original.



  
A. L. Kalegeya  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**