

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO.39 OF 2006

(From the Decision of the District Land and Housing Tribunal of KINONDONI
District at KINONDONI In Land Case NO.230 of 2005)

MOHAMED MSELEM MKALANGWE APPELLANT

VERSUS

ZULEKHA MOHAMED MARANDE RESPONDENT

J U D G M E N T

Longway, J.

The appeal before the court seeks to impugn the decision of the District Land and Housing Tribunal of Kinondoni issued *ex parte*. The appellant raises five grounds challenging the locus standi of the respondent in the Application No.230 of 2005, in which matter the appellant as respondent, was refused to file written statement of defence. That the trial did not regard the pendency of the Probate and Administration Cause No.216 of 2005. That the Hon. Chairman refused to review the order refusing the appellant to file written statement of defence and lastly, that it was erroneous for the Hon. Chairman not to consider that it was not bound by technicalities.

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In their reply, the respondent resist the grounds raised contending that the respondent had locus as proven in the Tribunal.

That in view of the appellants default to file defence the decision was justified so he should not complain. As regards the Probate Cause No.216/2005, the respondent contends it is a sham, non existent whose copy is not attached. That no legal issues were raised in the appellant's letter of the 28th October, 2005. Lastly, that the law of procedure used or applied, was in accordance with needs for the administration of justice.

Before going through the Submissions by which the parties had agreed to argue the appeal before the court, I have opted to look at the proceedings of the lower Tribunal as pertains to the issues raised.

On the 30/8/2005 the respondent in the Application No...../200... was given 21 days to file defence from date of service. On the 15/6/2005, the matter was set for another mention on the 11/10/2005, again on 8/11/2006, 16/12/2005, 19/12/2005 and 8/2/2006 on all these dates, the parties were present. On the latter date the record reads:

"8/2/2006

Coram: R.L. David – Chairman

Members: Billa/Mafuru/Mlole

Applicant: Present

Respondent: present

C/C: Dunga

Tribunal

This case is coming for hearing. The respondent has not bothered to file any decree and its shocking to see Mr. Luguwa advocate who is representing him has never taken any legal ship to rescue his client. As much as there is written statement of defence I direct the applicant to proceed with her case exparte by oral evidence. It is so ordered.

Signed

R.L. David – Chairman

8/2/2006”

The record of proceedings of the Application No.230/2005, shows that the advocate for the respondent had never made appearance. On the one occasion, he had sought to be excused by virtue of having to appear before a superior forum. On the other hand the respondent appeared throughout up to the 8/2/2006. I have no problem with the castigation of the advocate for his default in representation of his client, but since the respondent (client) was in attendance and had a copy of the defence that was wanting, an opportunity to defend himself and file defence should have been availed. His conduct on record was indicative of an intention to represent his case, and be heard. In my considered view, this is the import of the provisions of the Regulations 7(4) of 13(2) Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2003: GN No.174 of 27/6/2003.

Observing further from the record of the application above state, I see that the matter was continued on the 10/4/06 thus:

"10/4/2006

Coram: R.L. David – Chairman

Members: Jarufu/Mwiru

Applicant: present

Respondent:

C/C: Dunga

Applicant:

I have 5 witnesses today

1st Assessor: Mr. Mwiru

Let us proceed

2nd Assessor: Mr. Jarufu

It is right

Tribunal:

Hearing of the applicants' case to continue"

At the end of the Applicants case assessors 'H.Jarufu' and 'B. Ngombas' are shown to have given their opinion before judgment. These are not the assessors who sat with the Hon. Chairman on the start of the hearing on 8/2/2006. The law providing on this issue, the section 23 of the Courts (Land Disputes Settlements) Act No.2 of 2002 provides:

23 (1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence."

In the instant matter, applying the above provisions, since the three assessors present at the commencement of the proceedings were absent on 10/4/2006, the Hon. Chairman should have continued and concluded the proceedings alone. The Hon. Chairman sitting with fresh assessors on the 10/4/06 was objectionable because the two assessors had not sat with him from the start of proceedings. the continuation of proceedings was unlawful.

But over and above, the advocate for the respondent (appellant) had sought to be excused by virtue of having to appear before Shangwa, J. at the High Court in a specified matter. This letter was filed on due payment of fees, and a good cause was given as required.

The sum total of the defects in proceedings add up to a breach of law of procedure whose consequence denied substance justice being availed to the appellant.

On the procedural aspect alone, I am satisfied that I quash and set aside the proceedings as I do, all the proceedings of the District Tribunal with the result that the matter be retried by another Chairman of similar competence. As a further result of my option to deal with the basis of the trial, the appeal in my view also collapses. I make no orders as to costs.




M.H.C.S. Longway

JUDGE

29/10/08