

**IN THE HIGH COURT OF TANZANIA
AT MWAZA
(LAND DIVISION)**

LAND APPEAL NO. 35 OF 2008

(Appeal from the decision of the District Land and Housing Tribunal for Mwanza
at Mwanza in Land Application no. 20 of 2008)

**KASSIM FAROUQ
MWAMVUA SHAABANI
CHIKU FAROUQ**

}**APPELLANTS**

VERSUS

ALLY HAMAD NASSOR.....RESPONDENT

JUDGEMENT

L. Mansoor, J.

This is an appeal from the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in Land Application No. 20/2008.

The factual background of this matter is that, the Respondent claims to have purchased Plot No. 493 Blok KK Nyakato Mwanza from the Appellant's mother. He built the barber shop and a room. The Municipal Council demolished it. The Appellants states that the Respondent entered into a lease agreement with their late mother for construction and operation of a business of barber shop. The agreement was in respect of Plot No. 495 KK Nyakato Mwanza. The Respondent built his barber shop on Plot no. 495 but it was demolished by the Mwanza Municipal Council. The Respondent forced himself onto Plot no. 493, which belongs to the 3rd Appellant, and brought the bricks with the intention of building the barber

shop in that land. The 1st Appellant filed a claim before the Ward Tribunal, while the Respondent filed an Application before the District Land and Housing Tribunal for Mwanza. The Application by the Respondent in the District Land and Housing Tribunal was filed first. The Appellants were represented by one Samson Philipo Chigulu, whom the Tribunal found him to be not an Advocate and so he was disqualified from representing the Appellants. After the Appellant's representative was disqualified by the Tribunal to represent them, the Appellants never appeared before the District Land and Housing Tribunal, the case was heard exparte and the judgment was delivered exparte. The Appellants filed this appeal against the exparte judgment delivered by the District Land and Housing Tribunal.

The 1st Appellant is reported dead, and the 3rd Appellant opened a Probate and Administration Cause No. 117/2001 in Mwanza Primary Court since 2011. She failed to prosecute this cause and it was dismissed for non appearance on 10/10/2012. The second Appellant never appeared in Court despite being served with several notices. This Court therefore recorded that the Appeal is dismissed as against the 1st and 2nd Appellant, and the Appeal proceeded with the 3rd Appellant only.

The proper remedy for a person to do when he or she is aggrieved by an exparte order or exparte judgment is to apply before the Court which issued the exparte judgment to have the judgment set aside, and not to appeal to the High Court.

The Appellants ought to have applied before the District Land and Housing Tribunal to have the exparte judgment set aside and on that application they must assign good reasons for their failure to appear when the matter was fixed for hearing.

If the Trial Tribunal shall refuse that application, and if the Appellants shall be dissatisfied of the refusal by the Trial Tribunal to allow them to participate in the proceedings and to set aside the exparte judgment, the proper action is to appeal to this court against that refusal. In the case of Kanyabwera vs. Tumwebaze (2005) 2 EA 86 (SCU), the person who was aggrieved with the exparte judgment did not file an appeal but he filed an application in the Court seeking an order setting aside the exparte judgment. The application to set aside the default judgment should have been made under Order 9 r 13(1) and (2) of the Civil Procedure Code, 1966 which provides as follows:

“in any case in which a decree is passed exparte 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 satisfies 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 aside 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.”

The procedure for setting aside exparte judgment is also provided under r 13 (2) of Order 9 of the Civil Procedure Code, 1966. The whole purpose of applying to set aside a default judgment is that the defendant feels that judgment has been

entered against it irregularly and it has been denied the right to put forward a genuine defense. Once such an application is preferred and the default judgment is set aside, then the defendant would have a chance to put forward his defense and participate in the proceedings at the Trial Court.

Regarding the judgment of the Ward Tribunal, the judgment was irregular as there cannot be parallel suits over the same subject matter between the same parties. The Ward Tribunal was notified of the existence of Land Application No. 20/2008 but it ignored that notice and went ahead to pronounce the exparte judgment against the Respondent herein. The Ward Tribunal Judgment is a nullity and should be quashed.

Having ruled that this appeal is improper before this Court, I need not need to labor efforts in determining the rest of the grounds contained in the memorandum of appeal. I therefore dismiss this appeal with no orders as to costs.

Appeal dismissed.



Latifa Mansoor,

JUDGE

02 November 2012