

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 14 OF 2019

*(From High Court at Mbeya in Land Appeal No. 11 of 2014 and
Original Land Application No. 166 of 2011)*

MWAKINGILI NGAILE MWALUNGWE.....APPLICANT

VERSUS

NATIONAL BANK OF COMMERCE LTD.....1ST RESPONDENT

YONO AUCTION MART.....2ND RESPONDENT

EMMANUEL KAISON MDOPE.....3RD RESPONDENT

ABRAHAMU GWANGU MWALEGWA.....4TH RESPONDENT

R U L I N G

Date of the last order: 15/10/2019

Date of Ruling: 02/03/2020

NDUNGURU, J.

This ruling is a result of point of preliminary objection raised by the first respondent on 30th day of May, 2019 to the effect that; the applicant's application is incompetent before this Court for contravening Order XXXIX Rule 21 of the Civil Procedure Code (Cap 33 R.E. 2002). On 04th day of September, 2019 the Court ordered the preliminary objection to be disposed of by the way of written submission and the parties

complied with the order of the Court. Ms. Mary Mgaya learned advocate appeared for the applicant whereas Mr. Sabato Ngogo learned advocate appeared for the first respondent.

In his submission the learned counsel for the respondent submitted that the failure to file written submission on time as ordered by the Court amounts to non-appearance to the party who failed to file the submission. He went on to submit that the judgment which led to this application was an ex parte judgment against the applicant.

He further submitted that the law has provided clearly remedies for an ex parte judgment under Order XXXIX Rule 21 of the Civil Procedure Code (Cap 33 R.E. 2002), which provide that the aggrieved party is required to file an application on the same Court which has entered a judgment to re hear an application following sufficient reason why he/she did not appear during the hearing of the case. He cited the case of **Mandi Mtature Vs. Mtinangi Mtinangi (1972) HCD** and the case of **Managing Director of NITA Corporation Vs. Emmanuel LT Bishanga (2005) TLR** to cement his submission. Finally, he is praying that this application be struck out with costs.

In responding to the point of preliminary objection Ms. Mary Mgaya learned advocate submitted the issue raised by the first respondent does not amount to preliminary objection. She referred to this Court the case of **Alliance Insurance Corporation Ltd Vs. Arusha ART Ltd.**, Civil Appeal No. 297 of 2017, Court of Appeal of Tanzania at Arusha (Unreported) to support her contention.

She continued to submit that the said judgment was not an ex parte judgment and even if the same could be an ex parte judgment it cannot wash away the right of appeal to an aggrieved party. To cement her argument Ms. Mary Mgaya cited the case of **Awinia Mushi Vs. Tropical Pesticised Research Institute**, Civil Application No. 2 of 2006, Court of Appeal of Tanzania at Arusha and the case of **Gabriel Lugala Vs. Abdallah Mbuma**, Misc. Land Appeal No. 6 of 2009 (both unreported). Finally, she prayed for the Court to overrule the preliminary objection raised by the respondent with cost.

In his rejoinder the Mr. Sabato Ngogo contended that this preliminary objection does not need to call any evidence to verify its truth as the counsel for the applicant proposes. He went on to submit that the ex parte judgment is not appealable. This is obvious for a

reason that a party who did not exercise his/her right to be heard cannot challenge evidence in records as was not controverted.

He further submitted that the case of **Awinie Mushi** cited by the applicant's counsel is not applicable in the case at hand. He added that the case of **Alliance Insurance Corporation Ltd** cited by the counsel for the applicant is distinguishable with the present one in that in the former the appellant had rejected hearing for lack of confidence in the chairman while in the later case the applicant did not file his written submission hence the appeal proceeded without his input in the judgment.

Having scanned submission in support and against the preliminary objection, I wish to state at the outset that whether the judgment given in the Land Appeal No. 11 of 2014 was an ex parte judgment or not.

In the first place, it is settled principle that the failure to lodge written submission in time is tantamount to being absent without notice on the date of hearing. See the case of **Godfrey Kimbe Vs. Peter Ngonyani**, Civil Appeal No. 41 of 2014 (unreported). Also it is trite law that when the appellant or applicant fails to file written submission in time is tantamount to failure to prosecute one's case. See the case of **National Insurance Corporation of (T) Ltd & another vs.**

Shengena Limited, Civil Application No. 20 of 2007 (unreported). In the side of respondent or defendant is tantamount to failure to defend her/his case. Therefore, the judgment which led to this application was an ex parte judgment against the applicant.

Also, the question before was this Court whether this preliminary objection met the condition set in the case of **Mukisa Biscuit Manufacturing Company Ltd. Vs. West end Distributors Ltd (1999) EA 696**. This issue is answered in affirmative because the objection is based on the point of the law and secondly if this objection sustain will dispose this application.

Back to the main issue of this ruling, whether this a preliminary objection has merits or not.. In my understanding the party can appeal against the ex parte Judgment/order only where an appeal to the High Court is against the decision of the subordinate Court. This is well provided under Section 70 (1) of the Civil Procedure Code (Cap 33 R.E. 200) which provides as follows:-

"Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every passed by a Court of a resident magistrate or a district Court exercising original jurisdiction."

Also Subsection (2) of the same provision provides that:

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

Further I had opportunity to pass through the Appellate Jurisdiction Act (Cap 141 R.E. 2002), to cross check whether it allows a person to appeal to the Court of Appeal of Tanzania against ex-parte the decision of the High Court in exercising appellate jurisdiction, I have found nowhere in the said Act.

For easy of reference I find a need to reproduce the provision of law which governs civil appeal from the High Court to the Court of Appeal of Tanzania.

Section 5 (1) (a) of the Appellate Jurisdiction Act (Cap 141 R.E. 2002) provides as follows:

"(1) In civil proceedings, except when any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Tanzania-
(a) Against any decree, including an ex parte or preliminary decree made by High Court in a suit under Civil Procedure Code, in the exercise of original jurisdiction."

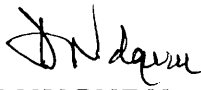
From the wording of the provision of law cited above, it is clear that a person can only appeal to the Court of Appeal of Tanzania against an ex parte judgment of the High Court when exercising its original jurisdiction and not when exercising of appellate jurisdiction. Therefore,

the applicant at the present application has no room to appeal to the Court of Appeal of Tanzania against an ex parte judgment of this Court in Land Appeal No.11 of 2014.

In that regard, that, the only remedy available to the applicant is apply to the said Court to re-hear the appeal by showing reasonable and sufficient reasons which prevented provide him/her to appear when the appeal was called for hearing as per Order XXXIX Rule 21 of the Civil Procedure Code (Cap 33 R.E. 2002). In this case the reason which presented her/him from filing the submission within the range of time provided.

In the light of those observations, I find out that this point of the preliminary objection raised by the counsel for the first respondent has merit and holds a point of law hence, the preliminary objection is sustained. Further I hereby dismiss this application for being incompetent before this Court with costs.




D. B. NDUNGURU
JUDGE
02/03/2020

Date: 02/03/2020

Coram: D. B. Ndunguru, J

Applicant: Present

For the Applicant: Ms. Rehema Mgeni – Advocate holding brief of Mary Mgya

For the 1st Respondent:

For the 2nd Respondent:

For the 3rd Respondent:

For the 4th Respondent:

Absent

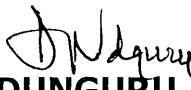
B/C: M. Mihayo

Ms. Rehema Mgeni – Advocate:

We are ready for ruling.

Court: Ruling delivered in the presence of Rehema Mgeni holding brief of Ms. Mary Mgya and in the absence of the respondents.




D. B. NDUNGURU
JUDGE
02/03/2020

Right of Appeal explained.