

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**MISC. LAND CASE APPEAL No. 31 OF 2019**

**(Arising from the Decision of the District Land and Housing Tribunal  
in Land Appeal No. 30 of 2018 Originating from the decision of Ward  
Tribunal of Kalangala in Dispute No.70 of 2013 )**

**RAMADHANI KASASE.....APPELLANT**

**VERSUS**

**TABU RAMADHANI.....RESPONDENT**

**JUDGMENT**

21<sup>st</sup> April & 21<sup>st</sup> May 2021

**TIGANGA, J.**

The appellant herein was the respondent in Land Dispute No. 70 of 2013 before Kalangalala Ward Tribunal which dispute was heard and decided *ex parte* against him. Aggrieved by the decision, the appellant (then respondent) lodged an appeal before the District Land and Housing Tribunal for Geita. However, the appeal was not successful as the same was dismissed in a ruling dated 31<sup>st</sup> May, 2019, after the respondent successfully filed a preliminary objection that, first, the appellant had not filed an application to set aside the *ex parte* judgment and second, that since execution had already been effected then the pending appeal had been overtaken by events. The appellant was again unsatisfied with the



decision of the District Land and Housing Tribunal, hence this appeal the grounds of which are as follows;

1. That the Geita District Land and Housing Tribunal Chairperson misdirected herself to hold that the applicant is entitled to file revision in the circumstance of the case.
2. That the Geita District Land and Housing Tribunal Chairperson badly misdirected herself on the directives she gave to the appellant.
3. That the Geita District Land and Housing Tribunal Chairperson wrongly dismissed the appeal before her.

The appeal was argued by way of written submissions whereby the appellant was represented by the learned counsel Mr. Rwechungura, and the respondent by Mr. Mashauri, also learned counsel.

Counsel for the appellant, Mr. Rwechungura, combined and argued all three grounds of appeal together that the appellate tribunal was wrong to rule that the appellant was supposed to go for revision stating that revision is not an automatic right to a party and that a party to a case can only resort to revision when the appellate right has been blocked by the judicial process. He argued that in the case at hand the appeal process was open to the appellant. He cited the case of **The**



**Managing Director Precision Air Services Ltd vs Leonard F.**

**Kachebonaho**, Civil Appeal No. 8 of 2009, HC-Bukoba (unreported).

He argued further that looking at the grounds of appeal filed by the appellant in the appellate tribunal, he was challenging the merit of the suit and that the same was unmaintainable as it was instituted in the tribunal with no jurisdiction as the land in question was situated in Nyankumbu Ward but the case was instituted in Kalangalala Ward Tribunal.

He in the end stated that the appellate Chairperson, basing on the above legal position, wrongly dismissed the appeal before her and also wrongly advised the appellant to file revision proceedings in lieu of the appeal. He prayed that the appeal be allowed and an order that the appeal be heard on merit with costs.

In his reply to the submission by the appellant, counsel for the respondent began his submission by narrating the background of the matter at hand and stated that the central issue of the appeal and the submission by the appellant is whether an *ex parte* decision is appealable. He stated that although counsel for the appellant claimed that it is appealable, he was of the contention that it is not appealable.



He stated that the law requires that whenever a person is confronted with an *ex parte* judgment, the remedy is to apply for setting it aside. He cited Order IX Rule 13(1) of the Civil Procedure Code, Cap 33 [R.E 2019]. He also referred this court to **Capital Drilling (T) Ltd vs Said Hamad**, Civil No.16 of 2009, HC-Mwanza (unreported) cementing his contention that it has been a cherished principle that *ex parte* judgments are not appealable and that the remedy is to apply to the court which passed it to set it aside. He prayed that the appeal be dismissed with costs as the same lacks merit.

Having examined the grounds and records of this appeal plus the submissions advanced by the counsel for the parties for and against the appeal, the main issue for determination at this point, is whether this appeal has merits.

It is evident from the records that this appeal was triggered by the dissatisfaction that resulted from the decision of the District Land and Housing Tribunal dismissing the appellant's appeal against the decision of the Ward Tribunal which was given *ex parte* against the appellant.

The arguments by the counsel for the appellant are that the District Land and Housing Tribunal was not right to dismiss the appeal for the reasons that the appellant was supposed to apply to have the *ex*



*parte* decision set aside or to apply for revision. The counsel for the respondent was of the strong view that the only remedy available to the appellant was to apply to set aside the impugned decision of the Ward Tribunal and not to lodge an appeal.

It is a well settled practice that the first available remedy to a party against a decision that was passed *ex parte* against him or her is to first apply to the court or tribunal as the case may be, that passed the said decision to have it set aside and if the application to have it set aside is refused, then that party can appeal against the decision refusing to set aside the *ex parte* decision.

It would mean therefore that the appellant herein was required to first apply to the Ward tribunal to have the *ex parte* decision set aside and if the application was refused, he would then appeal to the DLHT against the order of refusal to set it aside.

The counsel for the appellant backed his argument that he was right to appeal to the DLHT against the *ex parte* decision given by the Ward Tribunal by making a reference to the case of **The Managing Director Precision Air Services** (supra) which basically blessed the possibility that an appeal can lie against a decree that was passed *ex parte*. However, the cited authority touched the provisions of section



70(2), Order IX rule 13 and Order XL rule 1(d) of the Civil Procedure Code, which are inapplicable in the matter at hand.

Even if we take just the gist of the cited authority without giving much attention to the provisions that were referred to, it still would not be in favour of the appellant simply because the same provided for the limitation that if the person aggrieved by the *ex parte* decision opts to appeal, then he will not be allowed or rather be heard to challenge the order posting the suit for *ex parte* hearing by the trial court or existence of a sufficient case for his nonappearance.

Looking at the grounds of appeal that were raised before the District Land and Housing Tribunal, there is no doubt that the appellant wanted to challenge, among other things, the order by the trial Ward Tribunal to proceed *ex parte*. This can be evidenced in the second ground of appeal in which the appellant was challenging the order to proceed *ex parte* without giving him the right to defend his case.

Going by the principle in the cited authority, the appellant would not have been allowed to challenge that *ex parte* order on appeal but he would be allowed to challenge it, if only he had applied to set aside the *ex parte* decision, the remedy that he opted not to take.

I have passed through the law governing the procedure of conducting proceedings before the Ward Tribunal, I found no provision providing for procedure to be adopted by the trial Ward Tribunal on setting aside the decision of the Tribunal passed *ex parte*, however, the procedure requiring the person aggrieved by the decision of the court or tribunal to first apply to set aside before exercising the right to appeal has jurisprudential importance, in that, the person needs first to have the decision which did not consider his or her defence set aside, his defence heard and incorporated in the decision so that he can challenge the decision on merits.

In the circumstances where the law does not provide, and having considered the importance of the principle at hand, I find it justified to seek inspiration of the law governing civil proceedings before the Primary Court which also provides for the simplest procedure aimed at promoting accessible justice. This law is Magistrate's Courts (Civil Procedure in Primary Courts) Rules, G.Ns. Nos.310 of 1964 and 119 of 1983, which provides that,

*"30 (1) Where a claim has been proved and the decision given against a defendant in his absence, the defendant may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, apply to the*



*court for an order to set aside the decision and if the court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the proceeding was called on for hearing, the court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit.*

*(2) Where an application is made under this rule, the court shall appoint a day for the hearing of the application and shall give the claimant and other parties to the proceeding, if any, notice of such hearing."*

I have decided to seek inspiration of this law, as properly submitted by Mr. Pauline learned counsel that the provisions of Civil Procedure Code [Cap 33 R.E 2019] do not apply to the proceedings originating from the Ward Tribunal. The procedures so applicable were supposed to be made by the Minister as directed under section 21 of the Land Disputes Courts Act, [Cap. 216 R.E 2019] to make regulations governing the procedure of appeal from the Ward Tribunal which to the best of my recollection, the same have not been made. I adopt the procedure applicable in Primary Court on the bases I have already pointed out above.

Having said as above, I find that the appellate tribunal Chairperson was right to order that the appellant ought to have applied before the





Ward tribunal to have the *ex parte* decision set aside before appealing against the said decision. This appeal therefore lacks merits and is thus dismissed. The decision of the District Land and Housing Tribunal is hereby upheld, as it was properly passed though slightly on different ground. The appellant is advised to go back to the Ward Tribunal and apply to set aside the *ex parte* judgment passed by the tribunal against him.

It is accordingly ordered

**DATED at MWANZA** on this 27<sup>th</sup> day of May, 2021.

  
**J.C.TIGANGA**

**Judge**

**27/05/2021**

Judgment delivered in open chambers in the presence of the advocates for the parties.



  
**J.C.TIGANGA**

**Judge**

**27/05/2021**