IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL CASE No. 92 OF 2021

(Arising from the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 167 of 2015)

KARUNDE MNUBI ..... APPELLANT

Versus

LUTI JEJE MNUBI ..... RESPONDENT

RULING

31.05.2022 & 16.06.2022

Mtulya, J.:

Two (2) enactments were subject of contest in this court on 31st May 2022 on two (2) distinct rights enshrined in section 41 (1) of the **Land Disputes Courts Act** [Cap. 216 R.E 2019] (the Act) and Regulation 11 (2) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations,** 2003 GN. No. 174 of 2003 (the Regulations).

Section 41 (1) of the Act regulates appeals from the **District Land and Housing Tribunals** (the tribunals) to this court in respect of any proceedings originated in the tribunals in the exercise of their original jurisdiction. Regulation 11 (2) of the Regulations on the other hand regulates the right to be heard in the tribunals in a situation where applications are heard and determined *ex-parte*.

The standard on the subject is enshrined in the Bill of Rights under article 13 (6) (a) of the The **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution). Precedents of this court and Court of Appeal (the Court) have already cherished the course by producing a bunch of decisions in favour of the rights. The yard-stick which was set on both courts is that: parties must enjoy the rights without any reservations, unless there are sufficient reasons or a party in any proceedings has declined to appreciate the same (see: **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018; **Ponsian Kadangu v. Muganyizi Samwel,** Misc. Land Case Appeal No. 41 of 2018; **Christina John Mwita v. Paschal Maganga**, Land Case Appeal No. 50 of 2021; **Trustees of the Tanzania National Parks v. Ernatus I. Aron**, Labour Revision No. 19 of 2021; and **Priscah Mathias v. Rusalina On'wen**, Misc. Land Appeal Case No. 70 of 2020).

The law in the provision of section 41 (1) of the Act provides, in brief, that:

> *...all appeals, revisions and similar proceeding from or in respect of any proceedings in a District Land and Housing Tribunal in the exercise of its original jurisdiction shall be heard by the High Court.*

Whereas Regulation 11 (2) of the Regulations provides that:

A party to an application may, where he is dissatisfied with the decision of the tribunal under sub-regulation (1), within thirty days apply to have the orders set aside, and the tribunal may set aside its orders, it thinks fit so to do and in case of refusal, appeal to the High Court.

Sub Regulation 1 which is referred in Regulation 11(2) of the Regulations provides that on the day the application is fixed for hearing, the tribunal shall:

(a) Where the parties to the application are present proceed to hear the evidence on both sides and determine the application;

(b) Where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant;

(c) Where the respondent is absent and was duly served with the notice of hearing or was present when the hearing or was present when the hearing date was fixed and has not furnished the tribunal with good cause for

his absence, proceed to hear and determine the matter ex-parte by oral evidence.

According to Mr. Joachim Almas, who appeared for the appellant, the right as enacted in section 41(1) of the Act cannot be subjected to the requirement of Regulation 11 (2) with respect to what occurs in Regulation 11(1) (c) of the Regulations. In his opinion, the Act is the Parliamentary Statute whereas the Regulations were made from the mandate of the Act hence cannot override the Act which provides the right to appeal, in case the application was heard *ex-parte* at the Tribunal. In order to bolster his argument, Mr. Almas contended that the Act gives sixty (60) days leave to appeal to this court whereas the tribunal provides for thirty (30) days leave to appeal.

The submission was protested by Mr. Daud Mahemba, learned counsel for the respondent arguing that the Act under section 41 (2) provides for forty five (45) days leave to prefer an appeal in this court, and the right is exercised after exhaustion of available remedies in the tribunal. In his opinion, the Regulations were enacted for smooth running of the activities and administration of the tribunal hence Regulation 11 (2) and section 41 (1) are at par. In order to substantiate his claim, Mr. Mahemba submitted that the appellant has no evidence in the record of appeal that is why the

Regulations require him to pray for set aside order in the tribunal to register his material evidences. Mr. Mahemba contended further that the Act is a general statute which must be expanded by specific provisions in form of Regulations. Finally, Mr. Mahemba submitted that the right of appeal to the appellant is not curtailed by enactment in Regulation 11(2) of the Regulations, but he is required to exhaust all available procedures in the tribunal and when refused may prefer an appeal in this court according to section 41 (1) of the Act.

The record in the present appeal shows that on 13th November 2020, the Respondent had preferred **Land Application No. 167 of 2015** (the application) in the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal) against the appellant and three (3) other persons for land located at lake side area of Mchilongo Busekela Village in Musoma District. On 6th April 2021, the tribunal ordered ex-parte hearing, and on 30th September 2021 an *ex-parte* judgment was pronounced against the appellant and the other three (3) persons. The appellant was aggrieved by the decision hence individually and in person approached this court and registered **Land Appeal Case No. 92 of 2021** (the appeal) complaining for the right to be heard and filed seven (7) reasons to justify violation of the right.

The appeal was scheduled for hearing on 31st May 2022, but was protested by two (2) points of preliminary objection (the objection) challenging the jurisdiction of this court on: first, the appeal being premature for want of Regulation 11(2) of the Regulations; and second, the appeal is bad in law for failure to join necessary parties. The second point of the objection, did not detain the parties, and this court too will not be detained. In brief, Mr. Mahemba submitted that the appellant on his own volition rushed to this court without joining the other three (3) persons who were parties to the application in the tribunal. In his question, what will happen to the other three (3) persons, in a situation where the appellant succeeds in the appeal or it is found one of the three (3) persons is displayed by facts as a rightful owner of the land. The reply from Mr. Almas was very brief that the appellant agreed to represent the other three (3) persons who are not displayed in the petition of appeal.

As I indicated above the second point will not detain this court. Mr. Almas may have a very wonderful idea, but the record is silent to support his statement. There is no any document in the record which substantiated his submission or leave of this court to rectify the situation. I do not see if that is proper under the law. I am aware of the precedents of this court in **Said Peter Kataluka v. Nobert Mahigila Gwebe,** Land Revision Case No. 10f 2020 and

Court of Appeal in **Abdullatif Mohamed Hamis v. Mahmood Yusuf & Another**, Civil Revision No. 6 of 2017 on the need of necessary parties in disputes filed in our courts.

However, the determination of a necessary party in disputes depends on circumstances of each particular facts. In some cases, non-joinder or mis-joinder may be cured by section 3A (1) of **the Civil Procedure Code** [Cap. 33 R.E. 2019] by inviting the principle of overriding objective or Order I Rule 9 of the Code on practicability of the decree. In the present case, however, the other three (3) persons claimed right in the disputed land as against the respondent and any decree emanating from the dispute will also affect them. They were supposed to be parties in the present appeal or register any document to give mandate to the appellant.

I am quietly aware that the Act is a principal statute and Regulations are subsidiary legislation, and in any case the Regulations cannot override the Act. I am also mindful of the mandate of Minister responsible for lands matters in enacting the Regulations under section 56 of the Act. According to the laws and practice regulating pieces of subsidiary legislation, an enactment of the Minister under section 56 of the Act cannot override the Act. However, reading the present dispute and scanning the law in section 41 (1) & (2) of the Act and Regulation 11(2), two (2)

distinct issues can be displayed in terms of time limitation and right of appeal.

The enactment in section 41 (2) provides for forty five (45) days leave for an appeal from the tribunal to this court, whereas Regulation 11(2) provides for thirty (30) days leave to access this court in appeals originated from refusal orders of the tribunal in applications for setting aside *ex-parte* decisions of the tribunal. In other words, a person may find himself out of thirty (30) days time in the tribunal and invite section 41 (1) & (2) of the Act as escape route to have his dispute heard in this court within forty five (45) days. This court cannot be part of forums which promote exit routes whenever penetrations are spotted in land disputes.

In my considered opinion, the enactment in section 56 of the Act was intended for smooth running of the activities of the tribunal. To borrow the words in the enactment: *for better carrying out of the provisions of this Act*. In better carrying out *ex-parte* decisions of the tribunal, the Minister abided with section 56 (2) (a) and (b) of the Act to enact Regulation 11 (2) to prefer public policy as reserved in section 3 (1) of the Act; section 62 & 3(1) (a), (m) and (n) of the **Village Land Act** [Cap. 114]; and section 3 (1) (m) & 167 of the **Land Act** [Cap. 113 R.E. 2019].

Section 3 (1) of the Act categorically states that: every dispute or complaint concerning land shall be instituted in the court having jurisdiction to determine land disputes in a given area and Land Policy requires land disputes to be mostly resolved in lower tribunals than in this court, unlike normal civil disputes. From the practice and establishment of land tribunals, record shows that they are mostly located in wards and districts levels of our nation. The Regulations were made in consideration for easy access and determination of land disputes in the levels, which every villager in this country will be able to access.

Similarly, since in *ex-parte* decisions the right to be heard is curtailed, the Minister enacted Regulation 11 (2) for complainants to have the right be re-considered at the same level to have the reasons of either delay or absent on the hearing date. The regulation cannot be said to violate individual right to access this court or breach of section 41 (1) of the Act. The Regulation provides procedural requirement that has to be complied by the parties in disputes at the tribunal.

This court and Court of Appeal have said in a bunch of precedents that: *it is now settled that when a party is aggrieved with an ex-parte, summary, or default judgment, he must first exhaust the alternatives or remedies available in the court or tribunal that*

rendered the decision, before registering an appeal or revision (see: **David Mugarula v. Leonard Mugoha**, Misc. Land Case Application No. 51 of 2020 and **Yara Tanzania Limited v. D. B. Shapriya & Co. Limited**, Civil Appeal No. 245 of 2018). In the present appeal, Mr. Almas did not produce sufficient reasons why he is avoiding to exhaust the available procedure in the Regulations.

Assuming the argument of Mr. Almas is taken on board in this bench, it will not be supported by either laws in statutes or precedents. Both the Regulation and Act are silent in support of the move on direct appeals for want of a right to be heard in this court for *ex-parte orders* emanated from the tribunals. In any case, a party who is not aggrieved by *ex-parte order*, may refer an appeal in this court without complaining of *ex-parte order* or right to be heard in the tribunal.

I am aware of the citation of section 70 (2) of the Code which is alleged to be *pari materia* to section 41(1) of the Act and some quotas of persons contending that the Act may be interpreted in favour of direct appeals against *ex-parte* orders from the tribunal and cite a bundle of precedents in **The Registered Trustees of the Pentecostal Church in Tanzania v. Magreth Mukama** (a minor by her next friend Edward Mukama), Civil Appeal No. 45 of 2015, **Mtondoo v. Janmohomed** (1970) HCD 325, **Sosthenes**

Kagyabukana v. Theobald Kayungulima (1968) HCD 25, **Managing Director, Precision Air Services Ltd. V. Leonard. F. Kachebonaho,** Civil Appeal No. 8 of 2009.

However, this court has already distinguished the provisions and precedents in favour of Regulation 11 (2) of the Regulations (see: **Leonidas Karani Kitambi v. Gregory Mushaijaki,** Misc. Land Case Application No. 38 of 2021). This court cannot depart from its previous decisions unless it is right to do so and for interest of justice.

I agree with the directives of our superior court that rigid adherence to the doctrine of precedent may lead to injustice in a particular case and unduly restrict proper development and transformation of the law (see: **Jawadu Kamuzora v. Standard Chartered Bank (T) Ltd,** Civil Appeal No. 11 of 2019). However, the present appeal is not one of the cases which invite stretch of the law in section 41(1) of the Act to cover disputes of right to be heard in *ex-parte* decisions emanated from the tribunals.

In the precedent of **Jawadu Kamuzora v. Standard Chartered Bank (T) Ltd** (supra), the Court determined an appeal originated from a labour dispute on payment of statutory compensation. The enactment in Regulation 11(2) of the Regulations gets its gist from land policy intending to protect interest of poor communities in

Tanzania to resolve their land differences at the lowest level possible for every party to enjoy the right to access and heard in land tribunals.

I am quietly aware of the precedent of the Court of Appeal delivered early this year in **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021 on the issue whether an *ex-parte* judgment can be appealed against without first attempting to set it aside. The reply of the issue is found at page 8 of the decision that: *the right of appeal against an ex-parte decree is automatic and does not depend upon there being a prior proceedings to be set aside the ex-parte judgment.* The reasoning of the Court is that:

> *...the provision of section 70(2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an ex-parte judgment. It is not for the court to narrow down its scope by implying that the legislature intended that such an appeal would be conditional upon there being an attempt to set the ex-parte judgment aside.*

However, the Court in the precedent had dispensed a contractual obligation on specific performance emanated from a breach of contract of the parties and invited a bunch of provisions

in the Code, including section 70 (2), Order IX Rule 9 & 13 (1) and Order XL Rule 1 (d). The bundle of provisions regulates civil disputes with no specific provisions on time limitation as the case in section 41 (1) of the Act and Regulation 11 (2) of the Regulations. Similarly, the provisions in section 70 of the Code regulates appeals from original decrees passed by courts of resident magistrates or district courts in exercising their original jurisdiction and mostly invited when the law regulating *ex-parte* orders is silent.

For *ex-parte* decisions brought in this court originating from land tribunals to complain on the right to be heard or setting aside decisions of tribunals, which is an obvious prayer on penetration through a back door to challenge an *ex-parte* decisions, the appeals cannot be entertained by this court. Parties in land disputes filed in tribunals, and in any case receive *ex-parte* decisions, must exhaust the available remedies within thirty (30) days without any further delay. That is the land policy, and must be appreciated by parties in land disputes, learned counsels and this court. It is part of our land laws, as indicated above.

I am quietly aware of the recent precedent of the Court delivered just a day before yesterday, that is 14th June 2022, insisting on jurisdiction of this court and requirement of exhaustion of available remedies (see: **Commissioner General Tanzania**

Revenue Authority & The Attorney General of the United Republic of Tanzania v. Milambo Limited, Civil Appeal No. 62 of 2022). The Court after citation of several precedents of its own on the subject, including **The Attorney General v. Lohay Akonaay & Another** [1995] TLR 80; **Tanzania Revenue Authority v. Kotra Company Limited**, Civil Appeal No. 12 of 2009; and **Tanzania Revenue Authority v. New Musoma Textiles Limited**, Civil Appeal No. 93 of 2009, concluded at page 23 of the judgment that:

> *In view of what we have endeavoured to discuss, the High Court embarked on a nullity having wrongly assumed jurisdiction which was expressly ousted by the prescribed specific forums [established by the law].*

This bench has said in a bunch of decisions that it will not assume powers which are expressly ousted by the specific forum tribunal via enactment in Regulations 11 (2) of the Regulations and further will not depart from its previous decisions, unless there are sufficient reasons to do so or receive the directives of the Court. Similarly, the two provisions in section 41 (1) and Regulation 11 (2) of the Regulations may be harmonized by drafters through new enactment with regard to: first, time limitation; second, procedure in favour of direct appeals against *ex-parte* orders emanating from tribunals in the Act and Regulations.

Having carefully considered the materials registered in this record, and noting the directives of our superior court on want of jurisdiction and exhaustion of available remedies, I have decided to uphold that the two (2) points objection raised by the respondent and hereby strike out the appeal for want of exhaustion of available remedies in the tribunal. I do so without any order to costs. Each party shall bear its costs. The reason is obvious that the appellant and Mr. Almas are lay persons unaware of court practice and procedures, and in any case, the dispute may take its course again at the tribunal for want of a rightful owner of the disputed land.

Ordered accordingly.

Right of appeal explained.

F. H. Mtulya

Judge

16.06.2022

This Ruling was delivered in chambers under the seal of this court in the presence of the parties, Mr. Karunde Mnubi and Luti Jeje Mabusi and in the presence of Mr. Joachim Almas for the appellant and Mr. Daud Mahemba, learned counsel for the respondent.

F. H. Mtulya

Judge

16.06.2022