IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF BUKOBA)

AT BUKOBA

LAND CASE APPEAL NO. 63 OF 2021

(Arising from the District Land and Housing Tribunal for Bukoba at Kagera in Land Application No. 82 of 2020)

SAMWEL RETERAN..... APPELLANT

VERSUS

RESPICIUS BABIRIGI..... 1ST RESPONDENT

MUKAKURAS KATARAIYA .....2ND RESPONDENT

LUTTA DIOCLES.....3RD RESPONDENT

JUDGMENT

Date of Judgment: 08.04.2022

A.Y Mwenda, J.

On 11th June 2021, the District Land and Housing Tribunal for Kagera at Bukoba in Application No. 82 of 2020 rendered down a ruling in favour of the Respondents by striking out the application. The Tribunal at page 5 of the ruling held that:

> *"Hivyo basi kwa kuzingatia sababu zilizoainishwa hapo juu ninakubaliana na hoja za wakili Dastani Mujaki kwamba mwombaji hana mamlaka ya kushtaki hivyo pingamizi la awali la kisheria lililoibuliwa na wajibu maombi linakubalika na shauri hili linafutwa kwa gharama."*

However, the decision and reasons of the decision did not please the Appellant as a result on 19th July 2021 he preferred the present appeal. The reasons of appeal are depicted in the Petition of Appeal, where the appellant is complaining on: firstly, that the trial tribunal erred to entertain matter of fact as matter of preliminary objection on point of law; secondly, that the trial tribunal erred for failure to ascertain whether the advocate for the respondent had been served with written submission by the appellant or his advocate and thirdly, that the tribunal erred for failure to dismiss the preliminary objection raised by the respondent while knowing that the appellant's pleadings had been attached with clan member minutes.

When the appeal was scheduled for hearing on 17th March 2022, both parties invited the services of learned counsels. The Appellants hired Mr. Mathias Rweyemamu whereas the Respondents hired the legal services of Mr. Dastan Mujaki to argue the appeal for them.

During submissions Mr. Mathias the learned counsel for the appellant prayed to argue the 1st and 3rd ground together and the 2nd ground separately.

In his submission in chief with regard to the 1st and 3rd ground of appeal Mr. Mathias submitted that, during the hearing before the trial tribunal the Hon. chairman entertained a matter of fact as a preliminary objection on point of law. He stated that the pleading before the tribunal contain list of documents to be

relied on including the Abaganga clan members resolutions and it is from that clan members' minutes that they appointed Samwel Reteran as the head of the clan to sue on behalf of the clan council.

He submitted that before the trial tribunal the respondents raised preliminary objection alleging that the appellant had no Locus standi to sue. He said the Hon chairman upheld the preliminary objection on two grounds, one that the respondent is not the administrator of estate and two that he was not appointed by clan members to represent them. He further submitted that, this issue ought to be proved by evidence during the hearing but the Hon Chairman upheld it as a point of law despite the pleadings showing that the clan members appointed the appellant as a representative. In support to his arguments, he cited the case of ***Mount Meru Flowers TZ LTD vs. Box Board TZ LTD Civil Appeal No. 260 of 2018*** (unreported) Court of Appeal at Tanzania where the Court showed what is termed as preliminary objection.

The learned counsel for appellant further submitted that, Hon Chairman stated that the clan members resolutions were not annexed with the pleadings and he made reference to ***regulation 10 (1) of the Land Dispute Court (District Land and Housing Tribunal) Regulations GN. 174 of 2003*** which stated that at the first day of the hearing the chairman may accept documents which were not annexed to the pleading and these documents are required to be produced at any stage before hearing. He further submitted that, since in the Written

Statement of Defense the respondent contested it then this means that they were served with it and the tribunal was also served.

In regard to the 2nd ground of appeal Mr. Mathias submitted that following the scheduling order for filing written submissions, the counsel for respondent filed the said written submission but he did not serve him. He submitted that when they convened before the Hon. Chairman on the mention date, they were told that they have failed to comply with the scheduling order and they were condemned unheard. He therefore prayed for this appeal to be allowed with costs and the order by the trial tribunal be dismissed. He also prayed this court to issue an order that this case to be remitted back to the District Land and Housing Tribunal so as parties should be heard by calling witnesses.

In reply to the submissions by the counsel for the appellant, Mr. Mujaki, the learned counsel for the respondent submitted that, the appellant's appeal has no merits. With regard to the right to be heard in respect of 2nd ground of appeal, the counsel for the respondent submitted that this is an appeal against an exparte judgment because written submission is as good as entering an appearance before the court and failure to file written submission is as good as nonappearance. He submitted that before filing the present appeal the learned counsel for appellant ought to have applied for an order to set aside the exparte judgment. He further submitted that, it is a trite law that if the judgment is exparte then the appellant cannot appeal against it on merit and what the appellant is complaining of before

this court was to be raised before the trial tribunal. He thus prayed for this appeal to be struct out so as the appellant should go back to the lower tribunal and apply to set aside exparte ruling. To cement his argument, he cited the case of ***Dangote Industry Ltd Tanzania vs. Warnercom (T) Ltd Civil Appeal No. 13 of 2021*** (unreported).

In regard to the appellant's allegations that he was not served with written submission by the respondent, the counsel for the respondent submitted that, written submissions are filed in court and left there for the other party to collect. He said from the proceedings it is clear that when the matter was set for mention to set a date for judgment the appellant's advocate stated that this matter is coming for hearing while scheduling order for written submissions were complete. He submitted that this is negligence on the part of the counsel for the appellant for his failure to file written submission as he was present when the scheduling order was made.

With regard to 1st and 3rd ground of appeal the counsel for respondent submitted that, the counsel for appellant was required to set aside exparte judgment before the tribunal. He said the said preliminary objection was on a point of law as the applicant was not an administrator of the estate of the late Reteran. He further said that the law requires if one sues on behalf of the deceased, he is to either have distributed the said properties and the inventory are closed or he must be an administrator or administratrix of the estate. In regard to this he said in their

pleadings at para 6, the applicant alleged to have inherited the land from the late Reteran and he however did not state how. He said he was required to attach form No. IV in the pleading and failure to do so means he had no Locus standi from the very beginning. To support his argument, he cited the case of ***Sekunda Mbwambi vs. Rose Ramadhan (2004) TLR 439*** and ***Lujuna Shubi Ballonzi Senior, vs Registered Trustees of Chama Cha Mapindizu (1999) TLR 203.*** He said the act of learned advocate to stay quite on this issue of administratorship means he conceded that appellant was not appointed as the administrator.

On submission by Mr. Mathias that the appointment of the appellant by Abaganga clan gives him mandate to sue, the learned counsel for respondent submitted that under para 6(b) of the pleadings the clan meeting resolutions was mentioned as document to be relied on but the chairman perused and he did not see it as it was not attached on the pleadings and he said Regulation 10 of GN 174 of 2003 allows additional document it however cannot be applied in this case. He further submitted that the real or actual head of Abaganga clan is the 1st respondent who is Respicius Kabirigi as seen in attachment A1 and he is the chairman to date.

He concluded by submitting that a point of law emanates from facts or pleadings. So, the issue of administrator ship emanates from pleadings and as such he ought to have proved the same. He referred the case of ***Mount Meru Flowers (supra)*** in support of this point. He therefore prayed this appeal to be struck out with costs for being incompetent.

In rejoinder the learned counsel for the appellant submitted that their application before the tribunal was properly pleaded and at para 6(b) of the pleadings there is a list of relevant documents to be relied upon and one of them is clan council's meeting resolution and the respondent were served with and they challenged it. In regard to Rule 10 (1) of GN 174 of 2003 he submitted that since the matter was not on the hearing stage, it was wrong to dwell on it without affording them opportunity to produce it.

On the administrator ship of the estate, the learned counsel for the appellant submitted that he did not dwell with it because this matter is the matter of succession under customary law. He said the land in dispute is not Reteran's property as he acquired it through appointment by clan council. He submitted that since the clan head was appointed then this ought to be contested through evidence.

In regard to the judgment being exparte (judgment) the counsel for the appellant submitted that for it to exist it has to comply to GN. No. 174 of 2003 under regulation 11 (c).

He further submitted that it is true that when the case came for mention before Hon. Chairman to fix a date for judgment, he prayed for hearing date because he was not served with written submission. He said parties are duty bound to serve the documents through court brokers in which the respondent did not.

Following Mr. Rweyemamu's raising a new issue the counsel for respondents prayed to respond. This court being cautious to a principle of fair hearing granted him this prayer. The learned counsel responded to the submission that customary succession is different from other succession law (i.e India succession and Christian law). In that the process involved is the same but the laws are applicable in different court. He said while the process of appointment of administrator is the same both in customary and Indian succession, customary law is applicable in Primary Court which is concurrent with the High Court. On the other hand, India succession starts from District Court. For that matter, he said, the appellant was required to obtain letter of administration whether under customary or Indian succession law.

In regard to the argument that the land was not the property of Reteran, the counsel for the respondent submitted that in the Application No. 82 of 2020 at para 6 the appellant stated that he inherited the land from his late father so if the appellant inherited the said land, then the land was property of the late Reteran and so he prayed for this appeal be dismissed with costs.

Having gone through the submissions by both parties and the trial tribunal records the issue for determination before this appeal is whether this appeal is meritorious. In the present appeal the counsel for the appellant is complaining for being condemned unheard before the trial tribunal and on the raised preliminary point objection that the appellant had no locus standi. This court went through the trial

tribunal's records and noted that before the tribunal the respondents raised a preliminary point of objection on point of law in that the appellant had no locus standi to sue. Before the tribunal, the learned counsel for the respondent prayed for the said preliminary objection to be argued by the way of written submissions and the counsel for the appellant did not object. Thereafter the scheduling order was set by the Hon. Chairman and the respondent complied by filing his written submission but the appellant did not do so and when the date for mention with a view of fixing a judgment date came, the appellant did not give any explanation for his failure to comply with the scheduling order before the trial tribunal. Instead, he prayed for a hearing date as a result the said application was dismissed.

During hearing of this appeal, the counsel for appellant alleged his failure to comply with the scheduling orders was due to respondent's failure to serve him with their submissions. This court thinks this is an afterthought. If what he tried to impress this court is true, he then ought to have raised it before the trial tribunal on the day the appeared for fixing a ruling date and the tribunal would have made necessary orders. His act of praying for hearing date while knowing the case was meant to fix a judgement or ruling date was uncalled for. I think the learned counsel for the appellant is aware that written submission is equivalent to oral hearing of the matter and failure to comply with the scheduling order is as good as nonappearance on the day fixed for hearing. Therefore, the judgment in that respect is as good as exparte judgment.

In the case of ***Longrine Charles Kessi vs Charles Henry Kessi & Another Misc. Land Application No. 06 of 2019*** this court held that;

> ***"It is now a settled law in our country that the practice of filing written submission is equivalent to an oral hearing of the appeal or application. Therefore, failure to comply with a schedule order for filing written submission without sufficient cause is equal to non-appearance."***

Since Mr. Rweyemamu did not comply with scheduling order and did not address the Hon. Chairman on any challenges he faced, then the Hon. Chairman was justified to enter a ruling and the appellant if aggrieved, ought to have applied before the same tribunal for an order to set aside the said exparte ruling.

It is trite law that once there is an exparte judgment or ruling the only remedy is to set it aside. This position was discussed by this court in the case of ***Kusi A. Mkamba vs Serikali ya Mtaa wa Mindu Misc. Land Appeal No. 96 of 2017*** where the court held that,

> ***"It is my belief that the remedy for Exparte Judgment of a person like Appellant is to file an Application for setting aside the Exparte***

order/Judgment so that the parties be

heard inter parties."

That being said, this court is of the view that the ruling before the District Land and Housing Tribunal is an exparte ruling and the available remedy which the appellant has is to set it aside. This court also considered the submission by both parties with regard to locus standi of the appellant and is of the view that the proper forum to deal with it, in the circumstances of this case is before the trial tribunal and since he alleges, he was condemned unheard then application to set aside exparte ruling will in the cause dealt with it.

In line with above cited authorities as well as the record of evidence of the trial Tribunal, this Appeal is incompetent before this court and it is hereby stuck out with costs.

It is so ordered.

HIGH COURT OF TANZANIA BUKOBA

A.Y. Mwenda

Judge

08.04.2022

This judgment is delivered in chamber under the seal of this court in the absence of the appellant and in the presence of Mr. Dastan Mujaki the learned counsel for the respondent.

HIGH COURT OF TANZANIA BUKOBA

A.Y. Mwenda

Judge

08.04.2022