

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**LAND APPEAL NO. 25 OF 2021**

*(From the Judgment of District Land and Housing Tribunal for Tanga at Tanga (Hon. D. W. Mangure – Chairperson, in Application No. 80 of 2019 dated 26<sup>th</sup> day of May 2021)*

**GEORGE MGAYA.....APPELLANT**

***-VERSUS-***

**EZEKIEL MALEKELO.....RESPONDENT**

**RULING**

*Date of last order:- 25/10/2021*

*Date of Ruling:- 09/02/2022*

**AGATHO, J.:**

This is an appeal against the decision of the District Land and Housing Tribunal for Tanga at Tanga. At the Tribunal the Respondent, the then Applicant filed a Land Application against the Respondent now the Appellant on the following orders;

- 1) A declaration that the Applicant be declared the lawful owner of the land in dispute.
- 2) An eviction order against the Respondent.
- 3) The Respondent be ordered to pay Tshs 32,060,000/= to the Applicant as special damages.
- 4) Any other remedy that the Tribunal deems fit.

## 5) Costs of the Application.

At the District Land and Housing Tribunal, it appeared that the Respondent/Appellant did not file his written statement of defence to respond to the Application brought against him. As a result, the Application was heard *ex parte* pursuant to Order VII Rule 14 (2) (b) of the Civil Procedure Code, Cap 33 R.E 2019. In its Ruling, the Tribunal found the Applicant to have proved his claims on the balance of probabilities and declared the Applicant as the lawful owner of the land in dispute. On the other hand, the Respondent, his agents or any person claiming a right under his capacity were ordered to vacate the land. The Appellant dissatisfied with the decision decided to appeal to this Court on the following grounds;

- 1) That the Honourable Chairperson erred in law and on facts in delivering the judgment which is at variance with the evidence adduced by the parties.
- 2) That the Honourable Chairperson erred in law and on fact by completely misapprehending the substance, nature and quality of the evidence before

itself, resulting in unfair findings and miscarriage of justice on the part of the Appellant.

- 3) That the Honourable Chairperson erred in law and in facts by ignoring the Appellant's right to be heard to by using wrong provision of the law.
- 4) That the Honourable Chairperson erred in law and on facts by delivering judgment in favour of the Respondent while SM2 admitted that the Appellant was the owner of the disputed land (farm).

From the above grounds, the Appellant prays for Judgment and Decree on Appeal as follows;

- (a) That the Honourable Court be pleased to allow the Appeal
- (b) That the Honourable Court be pleased to declare the Proceedings and Judgment of the District Land and Housing Tribunal for Tanga at Tanga null and void.
- (c) That the Honourable Court be pleased to set aside the Judgment and Decree of the District Land and Housing Tribunal for Tanga at Tanga

dated 26<sup>th</sup> day of May 2021 and come to its own finding of the facts and grant the appropriate orders according to the law.

Before the determination of the Appeal, the Respondent filed a Notice of Preliminary Objection on the ground that the appeal is premature since it is against the judgment of the case heard *ex parte*. The Court preferred the hearing of the preliminary objection be conducted by way of written submission. The submissions were filed as scheduled. Whereas the Respondent was represented by Mr. Obediodom S. Chanjarika, the Appellant was represented by Mr. Tumaini O. Bakari, Advocates.

In his submission, the counsel for the Respondent submitted that since the Appellant failed to file his defence and the Court proceeded *ex parte* as per Order VIII Rule 14(1) of the Civil Procedure Code, Cap 33 R.E 2019 then pursuant to Rule 15 of the same Order, the Appellant was supposed to file an application to set aside an *ex parte* judgment within sixty days from the date of the judgment instead of filing an appeal. He therefore prayed the appeal to be dismissed with costs.

On his part, the counsel for the Appellant maintained that the appeal before the Court is proper. He referred the Court to Section 70(2) and Order XL Rule 1 (b) of the Civil Procedure Code Cap 33 R.E 2019 which provide for an avenue to appeal from the original decree passed *ex parte* and from an order made under Rule 14 of Order VIII pronouncing a judgment against a party respectively.

The counsel further submitted that the honourable Tribunal misdirected itself by granting the Respondent an order to proceed *ex parte* against the Appellant with wrong provision of the law. He stated that Order VII Rule 14 (2) (b) of the Civil Procedure Code Cap 33 R.E 2019 does not provide for an order to proceed *ex parte* against the Appellant that the proper provision for an order for *ex parte* proof against the Respondent/Appellant was Order VIII Rule 14(1) of the Civil Procedure Code Cap 33 R.E 2019 and that from the above irregularity, he opted to pursue an appeal instead of an application to set aside *ex parte* judgment. The counsel further submitted that the Appellant was not informed about the consequences of not filing his defence and that failure to file his

defence was neither deliberately nor intentionally. He therefore prayed that the objection be dismissed with costs and the Appeal be allowed to proceed.

Having considered the submissions, the issue to be determined is whether there can be an appeal against an *ex parte* judgment.

A thorough reading of the proceedings of the District Land and Housing Tribunal, it is clear that on the 20<sup>th</sup> July 2020 an order *for ex parte* hearing was granted. The hearing was conducted on the 21<sup>st</sup> of July 2020 and the judgment was delivered on the 26<sup>th</sup> of May 2021. Since it was an *ex parte* judgment and the Appellant was dissatisfied, the proper remedy was to make an application to set aside an *ex parte* judgment at the same Tribunal. In the case of **Mandi s/o Mtaturu v. Mtinangi (1972) H.C.D.150** it was *inter alia* held that the only way to seek to avoid a judgment *ex parte* is to apply to the very court which made the order. This case was referred in a Magistrate's Manual by His Lordship B.D. Chipeta, Judge of the High Court of Tanzania as he then was, at page 179 where he also stated that an appeal only lies from an order refusing an application to set

aside an *ex parte* judgment. There are various case laws that provides for a proper remedy where one is dissatisfied with an *ex parte* judgment, see also the case of **Aristibes Pius Ishebabi vs Hassan Issa Likwembe and three others, Civil Appeal No. 5 of 2019, CAT at Mtwara at page 18** and the case of **Pangea Minerals Ltd vs Petro Fuel (T) Limited and two others, Civil Appeal No. 96 of 2015, CAT at Dar es Salaam at page 11.**

Regarding this matter, it is correct to state that the Appellant was supposed to apply to the District Land and Housing Tribunal for an order to set aside an *ex parte* judgement as per Order VIII Rule 15 of the Civil Procedure Code, Cap 33 R.E 2019 or an order to proceed *ex parte* as per Order VIII Rule 14 (2) of the Civil Procedure Code to substantiate that the Appellant had reasonable grounds of not filing his defence and that there was a procedural irregularity. As such, it is my view that the Appeal is premature before the Court and it is hereby dismissed with costs.

It is so ordered.

**DATED** at **TANGA** this 09<sup>th</sup> Day of February, 2022



*[Handwritten signature]*

**U. J. Agatho**  
**JUDGE**  
**09/02/2022**

Date: 09/02/2022

Coram: Hon. Dr. U. J. Agatho, J

Appellant: Tumaini Bakari Advocate

Respondent: Chanjarika Advocate

C/C: Zayumba

**Court:** Judgment delivered in the presence of Appellant's Counsel, and the Respondent's Counsel.

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**U. J. Agatho**  
**JUDGE**  
**09/02/2022**

**Court:** Right of Appeal explained.



*[Handwritten signature]*

**U. J. Agatho**  
**JUDGE**  
**09/02/2022**



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**LAND CASE NO. 15 OF 2021**

**JUMA SELEMAN MBIFYA.....PLAINTIFF**

***-VERSUS-***

**MAHEZANGULU VILLAGE COUNCIL.....1<sup>st</sup> DEFENDANT**

**SALUMU MCHOMVU.....2<sup>nd</sup> DEFENDANT**

**RICHARD MBEGA.....3<sup>rd</sup> DEFENDANT**

**ATTORNEY GENERAL.....4<sup>th</sup> DEFENDANT**

**BUMBULI DISTRICT EXECUTIVE DIRECTOR.....5<sup>th</sup> DEFENDANT**

**RULING**

*Date of Last Order: 11/05/2022*

*Date of Last Ruling: 20/05/2022*

**AGATHO, J.:**

The present ruling emanates from the Preliminary Objection raised by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants that the suit is bad in law for misjoinder of the party and suing a wrong party contrary to the requirements of Section 26(3) and 12(1(b) of the Local Government (District Authorities) Act [Cap 287 R.E. 2019]. On 28/03/2022 the court directed the parties to dispose the PO by way of written submission, a schedule was drawn, and the parties complied with.

The parties' submissions were divergent. While the Defendants supported the PO, the Plaintiff vehemently opposed it. I have read the parties submissions. The Defendants submitted that the suit is bad in law for misjoinder of the party and suing a wrong party Contrary to Section 26(3) and 12(1)(b) of the Local Government (District Authorities) Act [Cap 287 R.E. 2019]. To appreciate the substance of the PO or otherwise, I will reproduce the said provision.

"Notwithstanding subsection (2), the District Executive Director shall have the right to be joined as a party in any suit or matter instituted by or against the Village Council, and for that purpose the Village Council shall have a duty to notify the District Executive Director of any impending suit or intention to institute a suit or matter against the Village Council."

What is gathered from the above provision of the Cap 287 R.E. 2019 is that the District Executive Director (DED) has the right to be joined in any matter instituted by or against the Village Council. That is the first limb of the said provision. And on this the Plaintiff rightly joined the DED as Defendant (5<sup>th</sup> defendant). Therefore, requirement of the law is fulfilled.

The second limb of Section 26(3) of Cap 287 R.E. 2019 requires the Village Council whenever it is sued or want to sue must notify the DED. This latter obligation is of the Village Council not the Plaintiff. A good thing about the present suit is that the Plaintiff has joined the DED, relieving the Village Council the burden of notifying the DED of the suit filed against the said village council. I am afraid the learned State Attorney's submission that the Plaintiff sued a wrong party is misconceived. Section 12 (1)(b) of the Local Government (District Authorities) Act [Cap 287 R.E. 2019] requiring the suing the District Council as proper party does not eliminate the requirement of joining the DED under Section 26(3) of Cap 287 R.E. 2019. In fact, it is my view that both the DED and the District Council ought to be joined. Misjoinder of non-joinder of a party is a curable defect.

As rightly pointed out by the Plaintiff in his submission that it is the law that a suit cannot be defeated by reason of misjoinder of the parties. For clarity, Order 1 Rule of the Civil Procedure Code [Cap 33 R.E. 2019] is quoted below:

*"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal*

*with the matter in controversy so far as regards the rights and interests of the parties actually before it..."*

In lieu of the foregoing, the preliminary objection is overruled. Each party to bear its own costs.

**DATED at TANGA** this 20<sup>th</sup> Day of May 2022.



**Date:** 20/05/2022

**Coram:** Hon. Agatho, J

**Plaintiff:** Zaujia Jacob Advocate for

1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants: Rashid Mohamed, State Attorney for

2<sup>nd</sup> defendant:

3rd defendant

**B/C:** Debora

**JA:** Ms. Husna Mwiula

**Court:** Ruling delivered by on this 20<sup>th</sup> day of May, 2022 in the presence of Zaujia Jacob plaintiff's Advocate and Rashid Mohamed, State Attorney for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

