

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOKA DISTRICT REGISTRY

AT BUKOKA

LAND APPEAL NO. 40 OF 2022

(Arising from Land appeal Number 110 of 2016 of the District land and Housing Tribunal for Kagera at Bukoba, Originating from Civil Case Number 61 of 2015 Nyakato Ward)

DICKSON JOHN BIITA (Administrator of the estate of one deceased Simon Biita)... **APPELLANT**

VERSUS

MTEGEYA BYAYERA (Administrator of the estate of the late Tegeya Byayera)... **1ST RESPONDENT**

ADIJA HASSAN.....**2ND RESPONDENT**

JUDGMENT

08/09/2022 & 30/09/2022

E. L. NGIGWANA, J.

This is an appeal against the judgment and decision of the District Land and Housing Tribunal for Kagera at Bukoba in Land Appeal No. 110 of 2016 handed down on 22/02/2018.

A brief background of this appeal is that, one Simon Biita, now deceased and 2nd respondent, Hadija Hassan were sued by the first respondent Mtegeya Byayera (Administrator of the estate of the late Tegeya Byayera) in the Nyakato Ward Tribunal in Civil Case No. 61 of 2015 for encroaching into his land that situates at Bukulwa Hamlet in Burogo Village .Upon trial, the Ward Tribunal decided the matter in favour of Simon Biita.

The first respondent Mtegeya Byayera (administrator of the estate of the late Tegeya Byayera) was aggrieved by the decision of the trial tribunal

hence appealed to the District Land and Housing Tribunal for Kagera at Bukoba vide land Appeal No. 110 of 2016. The matter was heard *ex parte* and finally decided in favour of the Appellant, now 1st respondent. In other words, the Appellate tribunal was satisfied that the disputed land belongs to the 1st respondent Mtegeya Byayera after he had bought it from the 2nd respondent Adija Hassan. The judgment of the DLHT was delivered on 22/02/2018.

The current Appellant was not satisfied by the decision of the DLHT but filed no appeal within the prescribes appeal time; therefore, he lodged Misc. Application No. 71 of 2018 seeking for extension of time within which to appeal out of time. He was granted extension of time, therefore filed Land appeal No. 14 of 2020 in this court, but on 27/09/2021, the same was struck out for incompetence. Thereafter, the appellant filed Misc. Application No. 113 of 2021 seeking for extension of time whereas, in its ruling delivered on 08/04/2022, the Applicant, now appellant was given 30 days within which to file appeal out of time, hence the present appeal .

In the petition of Appeal drawn and filed by Mr. Projestus Prosper Mulokozi, learned advocate from Orbit Attorneys, three (3) grounds have been raised, to wit;

- (1) *That, the appellate tribunal erred in law and fact to hear and determine an appeal without proof that the appellant was served with the summons hence denying him the right to be heard.*
- (2) *That the appellate tribunal erred in law and fact to disregard strong evidence of the appellant adduced in the trial tribunal and to hold that the 1st respondent proved his case.*

(3) That, the appellate tribunal erred in law for failure to find out that the 1st respondent's testimony in the trial tribunal was based on hearsay and not corroborated.

Wherefore, the appellant is praying for this court to allow this appeal with costs, quash and set aside the judgment and orders of the appellate tribunal and uphold the decision of the Ward Tribunal.

Since it was not possible to serve the 2nd respondent Adija Hassan in an ordinary way, I ordered the service of summons through substituted service. She was therefore served by Publication vide Mwananchi News Paper dated 21/07/2022, but yet, she entered no appearance personally or through her advocate. The hearing of this appeal therefore proceeded in her absence.

At the hearing of this appeal, the appellant had the legal services of Mr. Peter Matete, learned advocate from Orbit Attorneys while the 1st respondent appeared in person, unrepresented. Arguing the first ground of appeal, Mr. Matete submitted that in the DLHT, the appellant was condemned unheard because he was not informed/notified of the hearing date. He added that the DLHT records revealed that no summons was served to the appellant. He went on submitting that, the right to be heard is so fundamental, and where it has been violated, it renders the proceedings and resultant judgment a nullity. He therefore invited this court to nullify the proceedings of the DLHT, quash the judgment and orders thereto.

Arguing the 2nd and 3rd grounds of appeal together, Mr. Matete submitted that the DLHT did not consider the evidence adduced by the 1st respondent in the Ward Tribunal that it was hearsay evidence. He further stated that, in the Ward Tribunal, the 1st respondent told the trial tribunal that there was a "Will" left by his deceased father, but he never explained whether the disputed property was mentioned therein or not. The learned counsel added that, the said "Will" was also not tendered in the trial tribunal. He further submitted that at the time of the demise of the 1st respondent's father, the 1st respondent was very young and his witnesses admitted that the disputed land was the property of the 2nd respondent Adija Hassan therefore; Adija Hassan had the right to dispose it.

The learned counsel ended his submission urging the court to allow the appeal with costs, quash and set aside the decision of the DLHT, and confirm the decision of the Ward Tribunal.

In reply, the 1st respondent argued that, the appellant was duly served by way of publication. As regard the argument that his evidence is hearsay evidence, but direct evidence. He also added that the 1st respondent argued that his evidence was not hearsay evidence since clan members appeared before the Ward Tribunal and testified.

In his rejoinder, Mr. Peter Matete, learned advocate submitted that, the 1st respondent's argument that the appellant was served by way of publication is an argument which is not supported by record of the DLHT.

Having carefully examined the lower court records and dispassionately considered the respective submissions of the parties and in support and

opposition of the appeal, the issue for determination is whether this appeal is meritorious. The appellant's complaint in the first ground of appeal is that he was not served with the summons to appear when the matter was scheduled for hearing, therefore, he was condemned unheard since the matter proceeded ex parte.

It is trite that where an aggrieved party is not interested to challenge the order of the court or tribunal which proceeded ex parte, but interested to challenge the merit of the ex parte judgment, the requirement that an aggrieved party should not appeal before attempting first to set aside an ex-parte judgment does not apply. This position was emphasized by the Court of Appeal of Tanzania in the case of **Dangote Industries Ltd Tanzania versus Warnercom (T) Ltd**, Civil appeal No. 13 of 2021 CAT where it was held that;

"The requirement that an aggrieved party should not appeal before attempting first to set aside an ex-parte judgment does not apply where the appellant is not interested to challenge the order to proceed ex parte."

The question which may arise here is, what does the law say if an aggrieved party wants to challenge both the order of the court to proceed ex parte and merits of the ex parte judgment?. The answer to this question is not far to fetch because it has been answered by the Court of Appeal in the case of **Dangote Industries Ltd Tanzania versus Warnercom (T) Ltd** (Supra). The Court held that;

"Where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings before dealing with the application to set aside the ex parte judgment first."

See also **Pangaea Minerals Ltd versus Petrofuel (T) Limited and 2 Others**, Civil Appeal No.96 of 2015 CAT (Unreported). Furthermore, in the case of **Jafari Sanya and another versus Salehe Sadiq Osman**, Civil appeal No. 119 of 2014 CAT (Unreported), it was held that;

"This rule of setting aside an ex parte decree will only benefit the defendant. But there are two possible scenarios in an ex parte decree. One, a defendant might not want to set aside an ex parte decree but may wish to contest the findings of the award. Two, a plaintiff, notwithstanding that the decree is in his favour might nevertheless wish to challenge the finding of the award."

In the matter at hand, reading the grounds of appeal, it goes without saying that the appellant is challenging both the order of the DLHT to proceed ex parte and the merit of the findings in the ex parte judgment

It is again common knowledge that the jurisdiction to set aside an ex parte judgment is exclusively conferred to the trial court/tribunal thus it cannot be addressed by way of appeal. If the principle stated in the hereinabove Court of Appeal authorities is applied in the circumstances of this case, one can easily to conclude that this appeal was prematurely filed, hence incompetent.

However, considering the fact that this matter originated from the Ward Tribunal, and that, the District Land and Housing Tribunal dealt with it in its appellate jurisdiction, it is apparent that section 11 of the (District Land and Housing Tribunal) Regulations, 2003 does not apply because the

regulation governs applications which are heard by the District Land and Housing Tribunal in its original jurisdiction.

Section 11 (2) of the (District Land and Housing Tribunal) Regulations, 2003 provides that;

"A party to an application may, where he is dissatisfied with the decision of the Ward Tribunal under sub-section (1) within 30 days apply to have the orders set aside, and the tribunal may set aside its orders if it thinks fit so to do and in case of refusal, appeal to the High Court."

According to Regulation 24 of the District Land and Housing Tribunal) Regulations, 2003, any party who is aggrieved by the decision of the Tribunal shall **subject to the provisions of this Act**, have the right to appeal to the High Court. Considering the fact that neither the Parent Act, that is to say; the Land Disputes Courts Act, Cap 216 R: E 2019 nor the (District Land and Housing Tribunal) Regulations, 2003 has a specific provision which regulates the procedure to be followed by an aggrieved party who wants to have an ex parte order issued by the Tribunal exercising its appellate jurisdiction over matters originating from Ward Tribunals, set aside, it is my considered view that the remedy is to appeal as per regulation 24 of the Regulations. With that view, this appeal is properly before this court therefore, I proceed to determine it.

As stated earlier, the appellant's complaint in relation to the first ground of appeal is that, he was not served with the summons to appear when the matter was scheduled for hearing.

Upon careful perusal of the typed proceedings of the DLHT from page 1-7, I found that the appellant had never entered appearance in the DLHT. I also came across a summons issued by the DLHT on 12/07/2016 to one Simon Biita, but the same had not reached him because it was returned to the DLHT with endorsement of the Village Chairman one Jovin Gratian that the appellant was hospitalized at Bukoba Referral Hospital.

At last, the DLHT proceeded with the hearing in the absence of the appellant. In the circumstances, I am of the considered view that the appellant was not served in accordance with the law; therefore, the DLHT had no justifiable reasons to proceed with the hearing in the absence of the appellant.

Considering what transpired in the appellate tribunal, it is apparent that the decision was reached arbitrarily contrary to rules of justice because the appellant was denied the right to be heard, the irregularity which renders the proceedings and resultant judgment of the appellate tribunal a nullity.

Addressing on the importance of the right to be heard, the Court of Appeal of Tanzania in the case of **Rukwa Auto Parts and Transport Ltd Versus Jestina George Mwakyoma**, [2003] TLR 251 had this to say;

'In this country, natural justice is not merely a principal of common law; it has become a fundamental constitutional right Article 13 (b) (a) includes the right to be heard amongst the attributes of equality before the law, and declares in part;

- (a) *Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamizi na Mahakama au chombo kinginecho kinacho husika, **basi mtu***

huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."

In another case, Abbas **Sherally and Another Versus Abdul Fazalboy, Civil Application No. 33 of 2002**, the Court of Appeal emphasized the importance of the right to be heard as follows;

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

Now, being guided by the herein above cited authorities, it is apparent that the decision of DLHT giving rise to this appeal cannot be allowed to stand on account of being arrived at in violation of the constitutional right to be heard. This suffices to nullify and put to rest the impugned decision and, for that matter, I refrain from taking any stand with respect to the 2nd and 3rd grounds of appeal.

In the upshot, I am constrained to invoke revisional powers of this court under section 43 (1) (b) of the Land Disputes Act Cap 216 R: E 2019 to nullify the proceedings of the DLHT, quash and set aside judgment and orders thereto. The petition of appeal remains intact. Having done so, the case file is remitted back to the DLHT to re-hear Land appeal Number 110 of 2016. For the interest of justice, I direct that the said be heard by another Chairperson and new set of assessors. Given the fact that the anomaly was caused by the DLHT, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 30th of September, 2022.

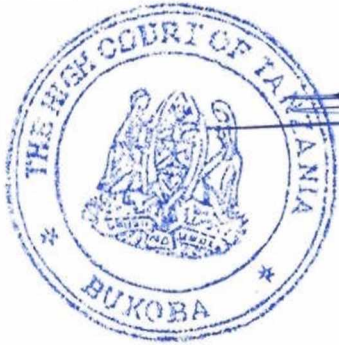


E. L. NGIGWANA

JUDGE

30/09/2022

Judgment delivered this 30th day of September, 2022 in the presence of Mr. Projestus. Mulokozi, learned advocate for the appellant, 1st respondent in person, Hon. E.M. Kamaleki, Judges' Law Assistant and Ms. Mwashabani, B/C.



E. L. NGIGWANA

JUDGE

30/09/2022