

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

**[IN THE DISTRICT REGISTRY OF ARUSHA]**

**AT ARUSHA**

**LAND APPEAL NO 43 OF 2022**

*(C/F Misc. Application No. 10 of 2022 and Misc. Application No. 20 of 2019 all original from Application No. 20 of 2019 from the District Land and Housing Tribunal of Mbulu at Dongobesh)*

**MURE GEMUA.....APPELLANT**

**VERSUS**

**MODEST BADE..... RESPONDENT**

**JUDGEMENT**

03 & 06 October, 2022

**KOMBA, J**

This is an appeal from the decision of District Land and Housing Tribunal (the Tribunal) Dongobesh within Mbulu District where Mure Gemua lodge four ground of appeal challenging exparte order of the tribunal and decision to upheld the preliminary objection under application No. 20 of 2022 delivered on 14/03/2022.

What happened at tribunal is this. The two, applicant and the respondents (one of them was not subject of this appeal) had land case at the Tribunal which they use to attend. In Several occasions the advocate for respondent failed to appear and that on 10/02/2022 when the matter was for hearing

the applicant in this appeal (applicant in the tribunal) informed the tribunal that was not around as he has the matter in Mbulu District court and apply for adjournment of the matter. The tribunal denied the application on the ground that non appearance of their advocate has been persisted and make an order for exparte hearing which was scheduled to take place on 10/03/2022. In the exparte order for the Land Application No. 20 of 2019 the Chairman of the tribunal started that because the advocate failed to appear five consecutive time without good cause by mentioning the dates which the advocate was absent. Chairman explains further that first respondent did not appear without notice and because the second respondent appeared and fail to proceed with the hearing, tribunal issue an order for expert hearing.

Being aggrieved by that order, the second respondent (appellant in this appeal) file ana application to the Tribunal applying for setting aside exparte order issued on 10/02/2022 giving among other reasons, that his advocate attended another matter in Mbulu District Court and that the appellant appeared in person but failed to proceed in defending the matter. On the other side the respondent in this appeal file counter affidavit together with Preliminary Objection on the point that the application was bad in law on the

ground that the tribunal has no jurisdiction to entertain the application. The Preliminary Objection was upheld by the tribunal on the ground that application to challenge the order of tribunal was supposed to be filled to High Court.

The appellant was dissatisfied by the decision of the Tribunal against the Preliminary Objection hence this appeal which has four grounds which are;-

- 1. That this Honourable Chairman of the trial Tribunal erred in law and fact by delivering the order of ex parte hearing against the 2<sup>nd</sup> Respondent while the 2<sup>nd</sup> Respondent entered appearance in the tribunal.*
- 2. That, trial Chairman of the District Land and Housing Tribunal erred in law fact by entertaining the preliminary objection raised by the counsel or Applicant without considering his previous order which did not specified the regulation under which it was granted or issued.*
- 3. That the trial Chairman erred in law by refusing to grant to the Appellant an opportunity to proceed to cross examine the witnesses of the Applicant and hence jeopardized the Appellant to have the right to be heard on the defence.*
- 4. That, the trial Chairman erred in law and fact stating the fact that the Appellant has refused to proceed with the matter himself where he entered appearance before the trial Tribunal and there was no evidence that the Appellant as the 2<sup>nd</sup> Respondent refused to cross examine the witnesses.*

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During hearing of this appeal on 03 October, 2022, Appellant was represented by Mr. Salehe Salehe and respondent enjoyed the service of Abdalah Kilogwa. Hearing was done by way of oral submission.

Mr. Salehe while adopting appellant affidavit said the tribunal prejudice the appellant as missed the right to be heard and right to fair trial. He said the applicant appeared and ask for enjoinder as his advocate was attending another matter and that application to set aside ex parte order of 10/03/2022 was non meritorious because the order did not cite any provision of law. He denied the fact that an ex parte order was made under regulation 13(2) while insisting that among the four (4) elements as propounded in the **case Adam Mohamed Zuberi V Kulwa Mashaka Civil Application No. 175 of 2018 Court of Appeal of Tanzania Dar-es-Salaam**. one element was missing. This fact is strongly disputed by Mr. Abdala and it is well supported by the record of tribunal. The appellant fault to appear, the non appearance was for no good cause, there was no proof that advocate appeared to other superior court and the appellant failed to defend himself when he was awarded right to do so. As a matter of fact, the law allows a party to prosecute his case as an alternative where the advocate fails to attend.

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It is an undeniable fact that the appellant was given that chance. Let's have a quick perusal in records, in the order of the DLHT the chairman wrote;

*'....na kwakuwa mdaiwa wa pili ameshindwa kuendelea na shauri hili mwenyewe Baraza linatoa amri kuwa shauri hili litaendelea kusikilizwa upande mmoja dhidi ya wadaiwa.'*

Thereafter the Chairperson issue an order after failure of the appellant to prosecute his case. The relevant Regulation 13 (2) of the Regulations reads:

*"(2) Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, **the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case**, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate. (Emphasis is Mine).*

That provision, necessitates the Chairman to allow the applicant himself to prosecute his case if the applicant's advocate is not present in Court. That was done as per the record. That being the case, the appellant failed to exercise the rights accorded to him, thus he cannot complain. I agree with



the four elements to be tasted before granting ex parte hearing as analysed in **Adam Mohamed Zuberi case (supra)**. In Zuberi case, while advocate justifies his nonappearance to the tribunal, he produced relevant travelling document to support his claim that he was on safari for official duties. Contrary to this appeal at hand where there was no proof of where about of the appellant advocate. Mr. Salehe in his submission said the Advocate was attending criminal case in Mbulu without explaining not only case number but he never bothered to tender cause list to that effect. In that line the first ground is non meritorious.

Mr. Salehe further argues that Preliminary Objection to set aside ex parte order was illegally entertained because the order which was subject to Preliminary Hearing was contrary to regulation 13(2). He suggested that the tribunal could use regulation 11(2) which allows it to quash its own order and that the decision in Preliminary is after thought. First, I want to put in record one thing, that it is not in dispute that the appellant enjoyed the service of advocate while the matter was in Tribunal. That being the fact, the law is clear, when non appearance is entered by the respondent himself and the tribunal order ex parte hearing the same can be set aside by the very tribunal as stipulated under regulation 11(2). In the appeal at hand,

respondent had an advocate how failed to appear and because the order was given following non appearance of an advocate then it goes without say that the correct Regulation is 13(2).

It is normal practice of the court to deal with Preliminary Objection before dealing with the matter as was articulated by court in **Standard Chartered Bank & Another V. VIP Engineering & Marketing Ltd & Others** (Civil Application 222 of 2016) [2021] TZCA 344 (02 August 2021); [2021] TZCA 344 that :-

*'Since as stated above, the respondent had raised a preliminary objection challenging the competence of the application, the objection had to be determined first'.*

For that matter, the Tribunal was correct to entertain the Preliminary Objection which was properly before it and was correctly entertained before it proceeds to other matter.

The ex parte order which is the subject of this appeal was made due to non appearance of advocate as narrated in previous paragraph, the tribunal had no jurisdiction to set aside its order as provided under regulation 13(4) that:-

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*'The tribunal shall not have powers to set aside its own order made under sub-regulation (2) and any aggrieved party may appeal to the High Court'.*

From the provision above and analysis the second ground is worthless.


On the last two grounds which are ground 3 and 4 of the appeal Mr. Salehe based his argument on the right to be heard and that the decision is nullified for failure to observe that right as was in **Mbeya Rukwa Autoparts and Transport Ltd V Justina Taji Mwakyama (2003) TLR 250**. He prayed the court to be guided by S. 3A and 3B of Civil Procedure Code and principle in **Allience one Tobacco case** to uphold the appeal for the sake of justice. The right which counsel for appellant is arguing in these last two grounds are results of the order issued by the tribunal which was discussed in the first ground of this appeal which was found to be non-meritorious. Because there was an order for expert hearing which was not set aside, then it was unbearable for party to appear and defend his case. The overriding objectives which is the principle enshrined in **Allience one Tobacco case (supra)** must be exercised judiciously and it has no room in the current appeal. As the 3<sup>rd</sup> and 4<sup>th</sup> ground originated from the 1<sup>st</sup> ground, these two

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grounds of appeal is found to have been misplaced, and therefore, they are sucked.

Am of the considered view that the appellant appeal is devoid of merit, and I entirely dismiss it with costs.

  
**M. L. KOMBA**  
**JUDGE**  
**06/10/2022**

Judgment delivered on 6<sup>th</sup> October in chamber in the presence of parties.

  
  
**M. L. KOMBA**  
**JUDGE**  
**06/10/2022**

