

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF KIGOMA)**

AT KIGOMA

APPELLATE JURISDICTION

PC CIVIL APPEAL NO. 22 OF 2021

*(Arising from judgment of Civil Appeal No.8/2021 of Kigoma District Court;
Originating from Civil Case No. 170/2020 of Nguruka Primary Court)*

ADAM S/O MWAKILA.....APPELLANT

VERSUS

NASIBU S/O JUMA.....RESPONDENT

RULING

9th & 18th February, 2022

F. K. MANYANDA, J

This is a ruling on a preliminary objection raised by the Respondent to the hearing of the appeal on one point of law that in terms of Rule 18 of the Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules, GN No. 312 of 1964, the appeal is incompetent since the Appellant was supposed to file an application to set aside *ex parte* judgement.

In this matter, the appellant Adam Mwakila successfully sued the respondent Nasibu Juma at Nguruka Primary Court, hereafter referred to as "the trial court" claiming a sum of Tshs 1,050,000/= together with



15,000/= being compensation for malicious damage to property and courts fees respectively.

After full trial, the trial court decided in favour of the appellant, then, the respondent was aggrieved by the trial court's decision hence, appealed to the District Court of Kigoma. On the hearing date of the appeal, the Appellant didn't enter appearance, as a result the District Court entered *ex parte* appellate judgment after hearing the Respondent only.

Dissatisfied with the said *ex parte* appellate decision, the Appellant is now before this Court appealing against that *ex parte* decision and order of the District Court. He has raised six grounds of appeal, which I need not to list them at this preliminary stage, not being dealing with the appeal itself.

At the hearing of the appeal, the appellant was present unrepresented while the respondent was present and represented by Mr. Moses Rwegoshora, learned Advocate.

As stated above, before hearing of the appeal on merit was held out, the Counsel for the Respondent, Mr. Rwegoshora, raised a Preliminary Objection stating that the appellant ought to have applied to set aside the *ex parte* decision according to GN No. 312 of 1964.

Mr. Rwegoshora submitted in support of the objection arguing that, the rule requires any person who is unsatisfied by an *ex parte* decision to apply to set aside that decision, not to appeal. He therefore, submitted that, the act by the appellant to appeal is in contravention with the law.

He went further explaining that, the right to appeal is available to the parties in a matter where they were dully heard. In this matter since the appellant was not heard, he ought to have applied in the District Court to set aside the *ex parte* decision because it unconscionable to blame the District Court in its appellate jurisdiction. Had it heard him, it could have decided otherwise. He thus called this court to dismiss the appeal with costs.

The appellant on the other hand conceded with the Respondent's Counsel that, it is true that he was not heard in the District Court, because the case was just been adjourned as a result some times, he fell sick and got admitted at Nguruka Hospital. Consequently, on 31/08/2021 when the District Court delivered the *ex parte* judgment he had lost the dates of attendance.

As regard to costs, the Appellant prayed to the court to exempt him. In his rejoinder the Respondent's Counsel insisted that, since the appellant came to this court prematurely, let him bear the costs.



Without much ado, I agree with the preliminary objection raised by learned Advocate that this appeal has been brought prematurely, since the appellant was not heard in the District Court, his immediate remedy is not to appeal to this court, but to apply to set aside the *ex parte* judgment and order thereof in the District Court that entered it so that he could be heard on merit.

The law under Rule 18 of the Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules GN No. 312 of 1964 provides that;

"Where an appeal is heard in the absence of the respondent and judgment is pronounced against him under rule 13(3), he or his agent may apply to the appellate court to re-hear the appeal and if the court is satisfied that the notice was not duly served or that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit."

From the wording of the law, the Appellant in the instant matter after been aggrieved with the decision of the District Court, knocked the doors of this Court seeking to appeal. He contends that his appeal was decided *ex parte* while he was sick admitted in hospital. Yes, this reason might

be one of the grounds that the appellant is supposed to advance in the District Court that decided his appeal *ex parte* but not in this Court. As it is stated in the law cited above that; "***if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing, the court shall re-hear the appeal.....***"

Therefore, under this provision it means that, the only way to fight or challenge an *ex parte* judgment passed by a District Court in its appellate jurisdiction in matters originating from primary courts is to apply for setting it aside.

In the case of **Pangea Minerals Ltd vs Petrofuel (T) Limited and 2 others**, Civil Appeal No. 96 of 2015 CAT at Dar es salaam, in a matter relating to an *ex parte* judgement, this the Court dismissed the appeal reasoning that,

"it is settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to file an application to that effect in the court which entered the judgment."

The same position was held in the case of **Aristibes Pius Ishehabi vs Hassan Issa Likwedembe and 3others**, Civil Appeal No. 5 of 2019 CAT at Mtwara.

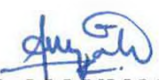
The court has always maintained the principle that, the party who wants to challenge an *ex parte* decision will always be required to apply to set it aside and not to appeal.

In the circumstances of this case and guided by the principles of the law as explained above, I therefore sustain the preliminary objection raised and I find that this appeal has been brought prematurely.

Consequently, I do hereby accordingly dismiss it with costs.

It is so ordered.




F. K. MANYANDA
JUDGE
18/02/2022