THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IRINGA DISTRICT REGISTRY

AT IRINGA

LAND APPEAL NO. 21 OF 2021

(Originating from the Decision of the District Land and Housing Tribunal for Iringa, at Iringa, in Land Application No. 28 of 2020).

ZAINABU MGUBILA..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF EVANGELICAL LUTHERAN CHURCH IN TANZANIA – IRINGA DIOCESE.....RESPONDENT

JUDGEMENT

8th February & 24th March 2022.

UTAMWA J.

This in an appeal against the decision of the District Land and Housing Tribunal for Iringa, at Iringa (the DLHT) in Land Application No. 28 of 2020. The background for the appeal is this: The Registered Trustees of Evangelical Lutheran Church in Tanzania- Iringa Diocese (the respondent) sued Zainabu Mgubila (the appellant) for *inter alia*, a declaration order that the respondent was the lawful owner of the suit land and compensation due to damages caused by her in the land. The DLHT decided the matter *exparte* in favour of the respondent. Being aggrieved

by the whole decision of the DLHT (the impugned judgment), the appellant preferred the following 3 grounds of appeal to this court:

1. That, the honourable DLHT erred in both law and facts by entertaining and deciding the matter in favour of the respondent who sued a wrong party.
2. That, the DLHT erred both in law and facts by entertaining and deciding the matter in favour of the respondent who did not prove her case on the balance of probabilities.
3. That, the DLHT erred in law by delivering an unenforceable decision.

The appeal was argued by way of written submissions. The appellant was represented by Mr. Leonard Lazaro Sweke, learned counsel whereas Mr. Asifiwe Isack Mwanjala, learned counsel appeared for the respondent.

In the course of constructing the judgement however, the court discovered some crucial legal issues that had not addressed to by the parties. The issues emanated from the fact that, the court had noted from the record, the existence of the following facts: the proceedings of the DLHT dated 4th April, 2020 show that, the DLHT decided the matter against the appellant (in this appeal) *exparte*. This was because, she had been duly and properly served, but refused the service. The record however, does not show that upon the impugned judgment being made *exparte*, the appellant applied before the DLHT for setting it aside. She instead, preferred the appeal at hand directly. I thus, suspected that, the course taken by the appellant was apparently against the mandatory procedure provided under regulation 11 (2) of the Land Disputes Courts (the District

Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003, (henceforth the GN). These provisions guide *inter alia,* that, where a party to an application is aggrieved by an *exparte* judgment or order of the DLHT, the remedy is to apply for setting it aside before resorting to an appeal to the High Court of Tanzania (the HCT).

I also noted that, the pleadings (the document which was filed by the respondent to institute the suit before the DLHT) identified the disputed land merely as being located at "RUAHA MBUYUNI, MATANDIKA VILLAGE WITHIN KILOLO DISTRICT," see at paragraph 3 of the document. The document thus, specified neither the plot number nor the boundaries of the land at issue. I thus, sniffed that, this course apparently offended the provisions of regulation 3 (2) (b) of the GN. These provisions require an application of this nature to indicate the address of the suit premises or location of the land involved in the dispute to which the application relates. The provisions of law thus, basically guide that, parties involved in land disputes should properly identify the land at issue sufficiently enough to differentiate it from other pieces of land adjacent to it.

Owing to the above reasons, I re-open the proceedings by directing the parties to address this court on the following issues:

i. Whether or not the appellant in the appeal at hand violated regulation 11 (2) of the GN cited above.
ii. Whether or not the applicant before the DLHT (now the respondent in this appeal) offended the provisions of regulation 3 (2) (b) of the GN cited supra.

iii. In case the answers to both preceding issues or to any of them is affirmative, then what is the effect of the violation (of the respective law cited above), to the proceedings and the impugned judgment of the DLHT?

iv. Which orders should this court make depending on the answers to the three preceding issues?

Parties were ordered to file written submissions in respect of the issues raised by the court (court issues). The court thus, undertook to consider the submissions by the parties on the court issues and their original submissions on the grounds of appeal cumulatively, hence this judgement.

The above discussed course of re-opening the proceedings was based on the guidance of the Court of Appeal of Tanzania (the CAT) in the cases of **Zaid Sozy Mziba v. Director of Broadcasting, Radio Tanzania Dar es salaam and another, CAT Civil Appeal No. 4 of 2001, at Mwanza** (unreported) and **Pan Construction Company and Another v. Chawe Transport Import and Export Co. Ltd, Civil Reference No. 20 of 2006, CAT at Dar es Salaam** (unreported). These precedents essentially guide that, where in the course of composing its decision a court discovers an important issue that was not addressed to by the parties at the time of hearing, it is duty bound to re-open the proceedings and invite the parties to address it on the discovered issue.

In this judgment therefore, I will firstly consider the court issues and the respective submissions by the parties regarding them. If need will arise, I will also consider their submissions on the grounds of appeal. This

plan is based on the nature of the court issues. They in fact, relate to procedural irregularities that may negatively affect the proceedings of the DLHT in case the answers to the first and second court issues, or any of them, will be affirmatively.

Regarding the first court issue, the appellant's counsel submitted that, it is an undisputed fact that his client violated Regulation 11 (2) of the GN by lodging the appeal at hand without firstly applying before the same DLHT for setting aside the *exparte* impugned judgement. She acted so for being desperate since she had filed before the DLHT Misc. Land Application No. 22 of 2021 for setting aside an order for temporary injunction. Nonetheless, the application was refused on the ground that she had refused to sign summons issued to her (as the respondent before the DLHT). The appellant thus, believed that the envisaged application to set aside the *exparte* judgment/decree would also be dismissed by the DLHT for the same refusal to sign the summons. The remedy is therefore, for this court to strike out the appeal as it lacks jurisdiction. He referred the court to the cases of **Melisho Sindiko v. Julius Kaaya [1977] LRT 18** and **William Rajabu Mallya and Two Others v. Republic (1991) TLR 83** to support his stance.

On the second issue, the appellant's counsel submitted that, the respondent who was the applicant before the DLHT violated the provisions of Regulation 3 (2) of GN No. 174 of 2003 which requires parties to properly identify the land at issue sufficiently enough to differentiate it from other pieces of land adjacent to it. In his opinion, the DLHT was

bound to strike out the application for such failure. To cement this position, he cited the case of **Daniel Dagala Kanunda (As the Administrator of the Late Mbalu Kushaha Buluda) v. Masaka Ibeho and 4 Others, Land Appeal No. 26 of 2015, HCT**, at Tabora (unreported).

Ultimately, and apparently in an attempt to answer the third and fourth issues, the learned counsel for the appellant urged this court to nullify the proceedings of the DLHT, set aside the impugned judgment and advice the parties that, if they wish they should file a fresh suit. He also urged the court to order for each party to bear his own costs since the issues under discussion were raised by the court *suo moto.*

On his part, the learned counsel for the respondent submitted in relation to the first court issue that, the appellant has admitted on violation of Regulation 11(2) of the GN by preferring this appeal. The reason adduced by her as the basis for her failure to make an application for setting aside the *exparte* decree is baseless.

With regard to the second issue, the respondent's counsel submitted that, the land in dispute is not surveyed, hence no any reference numbers could be cited by respondent (as the applicant before the DLHT). The respondent however, properly showed the location of the said property through physical features therein. Such features are the church building and graves as demonstrated under paragraphs 3 and 6(a)(iii) of the pleadings before the DLHT (the application form).

The respondent's counsel also submitted that, during the hearing of the application before the DLHT (as shown at page 4 of the typed proceedings), P.W 1, one Kipuyo Chacha and PW.3, one Mrisho Ngecha gave evidence identifying the land in dispute by mentioning the neighbouring boundaries. He cited the **Daniel Dagala case** (supra) to support his contentions. He further argued that, the precedent observed that, the location of a disputed land may be described by witnesses in their testimony.

As an apparent endeavour to answer the third and fourth court issues, the respondent's counsel prayed for this court to proceed with the hearing of the appeal at hand on merits.

I have considered both counsel's submissions, the record and the law. I will now consider the court issues one after another

Regarding the first court issue, it is common knowledge that both learned counsel are at one that, the DLHT made the impugned judgment *exparte* against the appellant. They also do not dispute that the appellant did not make any attempt to apply for setting aside the *exparte* decree as the law requires. They are further in accord that, owing to section 11(2) of the GN, once an *exparte* judgement is entered, a party who did not take part in the *exparte* proceedings cannot appeal against the *exparte* judgement, but can only apply to the DLHT within 30 days for setting aside the *expert* verdict. The two counsel are therefore, in agreement that the appellant offended those provisions of the law.

On my part, I thoroughly agree with both counsel on their agreed stance of the law. In fact, the pertinent provisions of regulation 11(2) of the GN are preceded by, *inter alia*, regulation 11(1)(c) of the same law that empowers a DLHT to decide a land dispute against a defendant *exparte*. Regulation 11(2) is, indeed, couched in clear terms. I quote it for a readymade reference:

> "A part to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (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.**" (Bolded emphasis is mine).

According to the above quoted provisions of the law, it is conspicuously guided that, once a DLHT decides a matter *exparte* against any party, such party, if aggrieved by the decision, has no option of appealing to this court until when he applies for the DLHT to set aside the decision and the same refuses to do so.

The provisions quoted above therefore, need no any further interpretation for their clarity. It is a cardinal principle of statutory interpretation that, where the wording of a statute is clear and unambiguous, it does not need interpretation; see the decision by the CAT in the case of **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited, Civil Appeal No. 13 of 2021, CAT, at Dar es Salaam** (unreported) following it previous decision in the case of **The Board of Trustees of the National Social Security Funds v. The New Kilimnanjaro Bazaar Limited, Civil Appeal No. 16 of 2004** (unreported).

I actually, understand that, in normal suits, as differentiated from land cases like the one under consideration, the position is a bit different and apparently unclear to some extent. This is because, a reading of some precedents in our jurisdiction gives an impression that there are two schools of thoughts underlining two different legal positions as demonstrated below.

Some court decisions basically hold the view that, a defendant against whom a suit has been decided *exparte*, cannot appeal against such decision unless he exhausts the remedy available before the trial court by applying for setting aside the *exparte* decree. I will hereinafter refer to this position of law as the *First Legal Position* for the sake of smooth discussions in this ruling. The *First Legal Position* results from interpreting Order IX rule 13(1) of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC) (but currently, after some amendments the provisions are under Order IX rule 9 of the same CPC, but R.E. 2019). Indeed, the wording of the former rule 13(1) of Order IX is slightly different from the current rule 9 of the same Order of the same CPC. Nonetheless, the two rules embody a similar context in relation to the remedy of setting aside the *exparte* decree before resorting to an appeal.

The current rule 9 of Order IX of the CPC reads thus, and I quote it for the sake of a prompt reference:

> "In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing,

> the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

The *First Legal Position* highlighted above was underscored by the CAT in decisions like the **Pangea Minerals Ltd v. Petrofuel T. Ltd and Others, Civil Appeal No. 96 of 2015, CAT at Dar es Salaam** (unreported) following its previous decisions that included **The Government of Vietnam v. Mohamed Enterprises (T) Ltd, Civil Appeal No. 122 of 2005, CAT at Dar es Salaam** (unreported). This court also underscored that legal position in the cases of **Asha Hassan Almas and another v. Benard Mugeta Manya, Civil Appeal No. 17 of 2002, HCT, at Mwanza** (unreported, by Mihayo, J. as he then was), **Maruna Tumbo Tumbo and another v. Medard Girion, Civil Revision No. 89 of 2002, HCT, at Dar es salaa** (unreported by Urio, J. as she then was) and **Managing Director of NITA Corporation v. Emmanuel L. T. Bishanga [2005] TLR. 378** (by Luanda J, as he then was).

The other position of the law essentially guides that, owing to the provisions of section 70(2) of the same CPC, a defendant who does not wish to set aside the *exparte* decree by showing reasons for his previous default, but intends to challenge the finding of the award, may automatically appeal against it without firstly attempting to set it aside. He cannot however, appeal for purposes of both remedies, i.e. of setting aside the *exparte* decree and for challenging the award. This is because, these two remedies are judicable before two different courts. The former is

justiciable only before the trial court while the latter can be entertained exclusively by the appellate court. I brand this other legal stance the *Second Legal Position* so as to different it from the first legal position discussed above, for the same purpose of smooth discussion in this judgement. This *Second Legal Position* was recently underlined by the CAT in the **Dangote Case** (supra). Indeed, in that precedent, the CAT ended up ordering the High Court to hear the appeal on merits, which said appeal was against an exparte decree that had been passed by a subordinate court.

Section 70(2) of the CPC upon which the *Second Legal Position* was mainly based, shortly and clearly guides thus, "*An appeal may lie from an original decree passed ex parte.*" These provisions were not affected by the amendments of the CPC hinted above. They thus, survived intact since the CPC RE. 2002 to the CPC RE. 2019.

On my part, had it been necessary to decide which position to follow between the first and the second legal positions discussed above, I would prefer the latter to the former. This is for some reasons including the following: in the first place, the latter (the *Second Legal Position*) is fortified by section 70(2) of the CPC which belongs to the Principal Act of Parliament (i.e. the CPC itself). On the other side, the *First Legal Position* is solely based on Order rule 9 of Order IX of the CPC (or formerly rule 13(1) of the same Order of the CPC) which belongs to the First Schedule to the CPC as its mother Act. In my further opinion, the status of the first schedule to the CPC is that of a mere Subsidiary Legislation. The reason for

this opinion is that, according to section 81 of the CPC, the schedule can be amended by the Chief Justice with the consent of the Minister responsible for legal affairs. The law also provides that, a subsidiary legislation cannot contradict its mother Act under which it is made or any other Act of parliament, otherwise, it is considered to be void to the extent of such inconsistency. This is the clear spirit under section 36 (1) of the Interpretation of Laws Act, Cap. 1 RE. 2019. The other reason is that, section 70(2) of the CPC is clear and unambiguous, hence needs no interpretation as per the cardinal principle of statutory interpretation that, where the wording of a statute is clear and unambiguous, it does not need interpretation, underscored in the **Dangote case** (supra).

Upon considering the above discussions, I conclude that, since the present matter is undisputedly a land case, and since there are specific laws on land disputes which include the GN and the Land Disputes Courts Act, Cap. 216 R.E. 2019 under which the GN was made, then these specific laws apply to the matter at hand being a land case by nature. It follows thus, that, the said Order IX rule 9 of the CPC, being the general procedural law for civil suits in our jurisdiction does not apply to the land matter under consideration.

My further conclusion is that, since the wording of regulation 11(2) of the GN on one hand are different from the wording of Order IX rule 9 of the CPC (all quoted above), neither Order IX rule 9 nor section 70(2) of the CPC nor the precedents cited above interpreting these provisions of the CPC can be relevant to the land matter at hand. It is more so because,

written laws on land disputes do not have any provisions equivalent to those embodied under section 70(2) of the CPC. It is obvious, for instance, that, regulation 24 of the GN and section 41(1) of Cap. 216 only guide that, an appeal against a decision of a DLHT exercising its original jurisdiction lies to the HCT. They mention nothing about an automatic appeal against an *exparte* decision of that tribunal the way section 70(2) of the CPC (quoted above) does.

Owing to the above reasons, I find that, this appeal was prenatally filed before this court, hence incompetent. This court thus, lacks the requisite jurisdiction to entertain it since courts of law in this land do not have mandate to entertain incompetent matters.

Based on the above reasoning, I answer the first court issue affirmatively that, the appellant in the appeal at hand violated regulation 11 (2) of the GN by preferring the appeal at hand without firstly applying before the DLHT for setting aside the *exparte* impugned judgement/decree.

On the second court issue, I am of the view that, upon considering the submissions by the respondent's counsel and revisiting the record of the DLHT, especially paragraphs 3 and 6(a)(iii) of the pleadings (application form) which instituted the matter before the DLHT, it is clear that, paragraph 3 only named the location of the suit premises as "RUAHA MBUYUNI, MTANDIKA VILLAGE WITHIN KILOLO DISTRICT". However, paragraph 6(a)(iii) mentions the church building and graves as the features into the suit land. It also refers to an annexure attached to the pleadings

being the Minutes of the Mtandika village which had allocated the land to the respondent according to the pleadings. In the first page of the annexure, it is shown that, the land at issue measured 5 acres and its boundaries were clearly declared. It is the law that, an annexure is part of the pleadings to which it is attached.

I therefore, agree with the learned counsel for the respondent that there was adequate description of the land at issue by the respondent in her pleadings before the DLHT. Indeed, I thank him for his highlight on the fact that did not easily come to the court's attention. It is nonetheless, my alert to the respondent's counsel and other counsel of this court and subordinate courts thereto, that, it is a better practice for material facts upon which a suit is based, to be conspicuously pleaded within the body of the pleadings (and supported by annexures, if any), instead of pleading them by merely making reference to the annexures of the pleadings in which such facts are contained. This envisaged practice will efficiently assist courts to easily appreciate such key facts of the cause of action and avoid unnecessary delays that may be caused for the court or adverse parties seeking clarifications.

Owing to the above reasons, I answer the second issue negatively that, the applicant before the DLHT (now the respondent in this appeal) did not offend the provisions of regulation 3 (2) (b) of the GN as it was previously suspected by this court.

Regarding the third court issue, I am of the following settled views: that, according to the nature of the court issues and the answers I have

provided for the first and second issues above, it is now convenient, to skip it (the third court issue) for having been rendered inconsequential. This is because, I answered the second issue (relating to the effect of the proceedings before the DLHT and the impugned judgment) negatively that, the respondent (who was the applicant before the DLHT) did not commit any violation against regulation 3 (2) (b) of the GN. Besides, the effect of such proceedings and the impugned judgment may be well dealt with latter through the orders that may be made by this court upon considering the fourth court issue.

I now consider the fourth court issue. Owing to the findings I made regarding the three preceding court issues, and since I held above that the appellant violated the provisions of regulation 11(2) of the GN by filing this appeal instead of applying before the DLHT for setting aside the *exparte* decree, I assess that violation as fatal. The appeal at hand cannot thus, stand and is liable to be struck out as proposed by the appellant's counsel himself. I am fortified in this legal stance by the long standing rule of procedure that, one cannot go for an appeal or other actions to a higher court if there are remedies at the lower court, he has to exhaust all the available remedied to the lower court first. This rule was underlined by the CAT in the **Dangote case** (cited earlier) basing on rule 44 of the Tanzania Court of Appeal Rules, 2009 (in relation to the CAT) and section 13 of the CPC (regarding this court and subordinate courts thereto).

Moreover, I do not think if the irregularity committed by the appellant in filing this appeal before exhausting the remedy of setting aside the

exparte decree under 11(2) of the GN can be cured under the principle of overriding objective. The rationale for this view is that, the requirement to exhaust the remedy under regulation 11(2) of the GN is that; the same is intended to ensure that, parties before a DLHT prosecute their cases without default. In case of any *exparte* decree owing to a default due to good cause, then the defaulting party is duty bound to apply for setting aside the *exparte* decree upon providing good caused before the same court which made the *exparte* verdict. I am further fortified in this view by my firm belief that, law makers had intended to expedite land disputes, hence the enactment of specific land laws (including the GN and Cap. 216 cited above) so as to exempt such cases from the governance of the general rules of procedure like the CPC as I hinted previously.

It follows thus, that, if courts will not observe the requirement under regulations 11(2) of the GN, the same will be rendered nugatory. Dishonest parties to court proceedings will, for trivial grounds or even deliberately neglect suits so that they can simply prefer appeals in case of any *exparte* decrees. This trend will cause unnecessary chaos and delay of land cases, hence occasioning unfair trials to the adverse serious parties to proceedings who genuinely approach the land tribunals for search of justice. These absurd results will not achieve the legislative objectives hinted above.

Now, owing to the above reasons, the respondent's counsel could not be expected to pray to this court for the present appeal to be heard on merits amid such serious irregularities committed by the appellant whose

counsel also admits to the irregularity and concedes to the fact that the only legal remedy to the appeal is to strike it out.

Having made the above findings, I am settled in mind that, it is needless to consider the grounds of appeal and arguments originally made by both sides. This is so because, the findings are legally forceful enough to dispose of the entire appeal without considering the grounds of appeal, otherwise I will be performing a superfluous or academic exercise which is not the core objectives of judicial proceedings like the appeal at hand.

Owing to the above reasons, I strike out the appeal for incompetence and direct that, each party shall bear his own costs since the issues discussed above, which have led to the disposal of this appeal, were raised by the court *suo motu*. The appellant, if he still wishes and she had good cause for defaulting before the DLHT, may approach it for setting aside the *exparte* decree which is, according to the findings I made above, still subsisting. Obviously, the appellant shall do so subject to the law on time limitation. It is accordingly ordered.

J.H.K Utamwa

JUDGE

3rd March, 2022

24/03/2022.
CORAM; Hon. Malewo, M. A -DR.
For the Appellant: Absent.
For Respondents: Absent
BC; Ms. Gloria. M.

Court: Delivered in the absence of the parties, Ms. Gloria Makundi (Clerk) present. Right of appeal explained.

MALEWO, M. A

DEPUTY REGISTRAR

24/03/2021.