

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(BUKOBIA DISTRICT REGISTRY)
AT BUKOBA**

LAND CASE APPEAL NO. 53 OF 2022

(Arising from Land Case Misc. Application No. 27 of 2022, Misc. Application No. 390 of 2020 and Application No. 42 of 2019 all of the District Land and Housing Tribunal for Kagera at Bukoba)

CLETUS MWOMBEKI CLEMENCE APPELLANT

Versus

RWAMASHONGA VILLAGE COUNCIL RESPONDENT

RULING

15th November 2022 & 10th February 2023

OTARU, J.:

This Ruling is in respect of preliminary objection raised by the Respondent that the Appeal is incompetent before this court for emanating from non-appealable order.

A brief historical background of the case is such that on 10th April 2019, the Appellant sued the Respondent vide Application No. 42 of 2019 in the District Land and Housing Tribunal for breach of a lease agreement. It is on record that when the matter was scheduled for hearing, Rwechungura Joseph Katereka, the officer of the Respondent (the then acting chairman of Rwamashonga Village) refused service of Summons, resulting in the case being heard *ex-parte*. Surprisingly, the same officer is recorded to have testified as one of Appellant's witnesses. Aggrieved, the Respondent successfully challenged the *ex-parte* judgement and order, which were then set aside with costs. Not amused, the Appellant appealed to this court. Before hearing of the Appeal, counsel for the Respondent raised two

points of preliminary objection; one of which is that the appeal is incompetent for emanating from non-appealable order. The other one is on limitation of time.

The matter was heard by way of written submissions. Both parties complied with the scheduling order, although the Respondent opted not to file a rejoinder. The Respondent's 'Submissions' were drawn and filed by Seraphina Rwegasira, learned State Attorney representing Missenyi District Council, while the Appellant's 'Submissions in Reply' were drawn by Pereus Mutasingwa Sarapion, learned Advocate for purposes of drawing only.

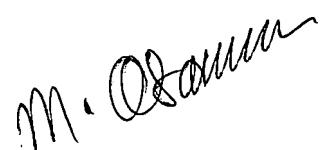
Counsel for the Respondent argued that an order setting aside *ex-parte* order is not appealable. She argued further that what is appealable, is a **refusal** to set aside such an order by virtue of Regulation 11(2) of **Land Disputes (the District Land and Housing Tribunal) Regulations** (GN No. 174 of 2003). She further argued that the law does not provide for the right of appeal where an *ex-parte* order is set aside because that order does not conclusively dispose of the case. As the order is interlocutory, it cannot be appealed against. In support of her contention, the learned counsel cited a persuasive case of **Vodacom Tz Public Co. Ltd and Planetel Communications Ltd**, Application No. 251 of 2018, HC-Commercial Division (Dsm) (unreported), where the court defined *interlocutory orders* as '*... orders which essentially do not finally and conclusively determine the matter*'. Finally, the counsel stated that the Appellant was not supposed to appeal against the order which allowed the Respondent to defend a case for fair hearing. She then prayed for dismissal of the Appeal with costs.

M. Othman

In reply, the Appellant vehemently resisted the preliminary objection. Citing the case of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Contributors Ltd** [1969] EA 696, counsel argued that the point did not qualify to be a preliminary objection as it was not a pure point of law as defined in **Mukisa Biscuit's** case but evidence on facts was required. He further stated that in any case, Regulation 11(2) of GN 174 of 2003 does not prohibit appeals against such an order, as intention of the statute is to make such an order appealable in order to promote administration of justice as well as to afford parties equal opportunity to be heard, among others. Counsel further contended that the order against which he is appealing has finally determined the matter, as such, it is not interlocutory and therefore appealable. Counsel cited a number of authorities in support of his contention. He then prayed for the preliminary objection to be dismissed with costs *for the interest of justice*.

I have gone through the rival submissions, the relevant statutes as well as the case law. Since the question of limitation of time can only arise if the order is appealable, I have considered the issue of appealability first. The question before this court is thus whether the order setting aside the *ex-parte* order is appealable and therefore if the Appeal is incompetent before this court or otherwise.

The law governing procedure of appeals from District Land and Housing Tribunals to the High Court is the **Land Disputes Courts Act**, (Cap 216, R.E. 2019) and **Land Disputes Courts (District Land Housing and Housing Tribunal) Regulations**, GN No. 174 of 2003. Regulation 22(d) of GN No. 174 of 2003 states clearly that a ruling on any interlocutory application which has no

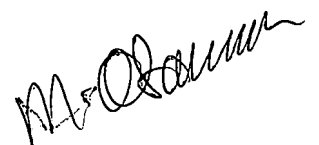


effect of deciding the case to its finality is not appealable. Equally, the **Civil Procedure Code** (Cap. 33 RE 2019) (hereinafter **CPC**), which is applicable to this case pursuant to Section 51 of **Land Disputes Courts Act** (supra), is clear as to which orders are appealable and which ones are not. Section 74(2) of the **CPC** also bars appeals in respect of a preliminary or interlocutory decisions or orders unless such decisions or orders have an effect of finally determining the case.

The wording of Regulation 22(d) of GN No. 174 of 2003 and Section 74(2) of the **CPC** is similar to what is provided under Section 5(2)(d) of the **Appellate Jurisdiction Act** (Cap. 41 R.E. 2019) (**AJA**) which had been interpreted by the Court of Appeal in the case of **Tanzania Motor Service Limited & Another v Mehar Singh t/a Thaker Singh** (supra) (the case also cited by the Appellant). The Court cemented the legal position that interlocutory orders are not appealable unless they finally dispose of the case. Having said so, I now have to determine if the order made by the trial tribunal of dismissing the *ex-parte* order was interlocutory as argued by the Respondent.

The definition of interlocutory order as provided in the persuasive decision of **Vodacom** (supra) cited by the Respondent, is not disputed. The question is if the order in question is one. The Court of Appeal in **MIC Tanzania Ltd and 3 Others v Golden Globe International Service Ltd**, Civil Application No. 1/16 of 2017 CAT - DSM (unreported) provided guidance as to how to determine whether the order is interlocutory or otherwise;-

'... the proper test for determining whether or not an impugned order is preliminary or interlocutory is patently discernible from the



language of the provision, itself. That is to say the test is whether or not the order desired to be revised [appealed against] had the effect of finally determining the suit.'

Asking the same question in the present case; did the order setting aside the *ex-parte* order have the effect of finally determining the suit? The answer is no. On the contrary, the order has restored the case for the hearing to proceed *inter partes*. The Respondent is given back the right to be heard and defend the case. It is for that reason interlocutory, hence, not appealable. I am also persuaded by the finding of Hon. Kahyoza, J. in the case of **Hassan Juma Mambo v Juma Idd**, Land Appeal No. 31 of 2021 (HC Mwanza) (unreported), where the court was to decide on the appeal against a decision of the tribunal setting aside the dismissal order and restoring the appeal. The court held that;-

'the order setting aside the dismissal order and restoring an appeal dismissed for want of prosecution is not appealable'.

The point being legal in nature, it is a proper point within the definition of preliminary objection as per **Mukisa Biscuits** case (supra). I am but wondering why would the Appellant resist the Respondent from defending the case (while it is his right to do so), if his claim is genuine and the rights real. Unless, he knows that he cannot win the case with the Respondent in the picture. The Appellant's counsel strongly submitted about affording equal opportunity for parties to be heard, the appealed order has this exact effect. In the same interest of justice that the Respondent is making reference to, he should let the Respondent be heard by the tribunal as well.

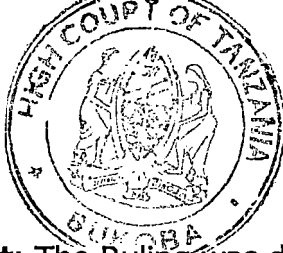
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I am in agreement with the Respondent that the law allows an appeal when an application for setting aside a dismissal order is rejected but not when it is granted. In the upshot, I sustain the preliminary objection that the order setting aside the *ex-parte* order is not appealable and therefore the Appeal is incompetent before this court.

Consequently, I dismiss the Appeal with costs and order the District Land and Housing Tribunal for Kagera at Bukoba to proceed determining the pending Application No. 34 of 2020 *inter-partes*.

It is so ordered.


DATED at BUKOBA this 10th day of February, 2023.




M.P. Otaru
Judge

Court: The Ruling was delivered in the absence of the parties, who were notified.




M.P. Otaru
Judge
10/02/2023