IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 11 OF 2022

(Originating from the Decision of the District Land and Housing Tribunal of Songea in Land Application No. 78 of 2019)

MELKION M. NDOMBA ..... APPELLANT

VERSUS

HELMANA EDWARD KOMBA (Administratrix of the Estate of the Late Edward M. Komba) ..... RESPONDENT

JUDGMENT

Date of last Order: 10/01/2023

Date of Judgment: 09/02/2023

U.E. MADEHA, J.

To begin with, in this appeal, the Appellant is challenging the *ex-parte* judgment of the District Land and Housing Tribunal of Songea at Songea, whereby he was declared to be the trespasser and ordered to pay the costs of the suit.

On the same note, the Respondent told the Trial Tribunal that in the year 2018, the Appellant had intruded on her late father's twenty-four (24) acres of land. In that regard, the claims were sent before the District Land and Housing Tribunal of Songea which heard and determined the dispute and found that the land was the property of Respondent's late father. The Respondent further added that she is the lawfully administratrix of the estate of her late father (Edward Markus Komba). She stated that, she was given that power by the Court and she was to distribute the estate to the deceased's relatives and his maids.

It is worth considering that, witnesses on the Respondent's side explained that the farm was invaded by the Appellant. As a result, she decided to follow legal procedures in order to resolve the dispute. In addition to that, witnesses on the Respondent's side explained that the farm was the property of the Respondent's late father. In fact, there was evidence that indicated that the deceased (the Respondent's late father) left a document indicating that the disputed farm was his property and he had leased. Summons was served, the Appellant failed to appear in Court. Therefore, the Trial Tribunal was heard the case *ex-parte* at the end of the day the Respondent won the case.

The Appellant was found to be the invader in that area and he was ordered to leave and pay the costs of the suit. Having been dissatisfied with the decision of the District Land and Housing Tribunal of Songea, the Appellant filed an appeal on the following grounds of appeal.

i. *Kwamba, Baraza la Ardhi na Nyumba la Wilaya lilikosea kisheria na kimantiki kwa kuamua mgogoro uliopo mbele yake wakati huo ukijikita na ushahidi uliogushiwa kwamba eneo bishaniwa liliazimishwa kwa Mrufani toka kwa baba wa Mrufaniwa na watu wengine jambo ambalo halikuwa na ukweli wowote.*
ii. *Kwamba, Baraza la Ardhi na Nyumba Wilaya lilikosea kisheria na kimaelezo kwa kutoa hukumu ya upande mmoja (ex-parte judgment) bila kumpatia Mrufani wito wa taarifa ya tarehe ya hukumu hiyo kama sheria inavyomtaka kufanya hivyo.*
iii. *Kwamba, Baraza la Ardhi na Nyumba Wilaya lilikosea kisheria na kimaelezo kwa kuamua mgogoro upande mmoja kwa kumpendelea Mrufaniwa wakati huo Mrufaniwa ameshindwa kubainisha mipaka sawa sawa kwa mujibu wa sheria kufanya kuwa dosari ya msingi inayoifanya hukumu hiyo kushindwa kutekelezeka.*
iv. *Kwamba, Baraza la Ardhi na Nyumba la Wilaya lilikosea kisheria na kimaelezo kusikiliza mgogoro huo na kuamua dhidi ya Mrufani wakati limeshindwa kubainisha thamani ya eneo blshaniwa hivyo kushindwa kutambua kama baraza lina mamlaka ya kisheria kusikiliza au la.*

As a matter of fact, this appeal was canvassed by way of written submission, whereby the Appellant and Respondent have no representation that is they appeared in person.

Principally, the Appellant submitted that he was not satisfied with the decisions of the District Land and Housing Tribunal in respect to Application No. 78 of 2019, whose decision was issued on 22nd July, 2022 and the case was heard *ex-parte.* Following his dissatisfaction, he filed this Appeal on the above grounds. He averred that the District Land and Housing Tribunal erred legally and logically by deciding the dispute before it by basing on falsified evidence that the disputed area was leased to the Appellant by the Respondent's father, which was not correct at all. He made reference to the exhibits that were presented before the Trial Tribunal as part of the evidence that the Tribunal considered in reaching its decision. He contended that the exhibits lacked validity because they were forged documents. To add to it, he stated that those documents were used against the law, he prayed this Court to set aside the *ex-parte* decisions made by the Tribunal's Chairman. He also stated that it is a legal requirement for any Court before using the document to ensure that it does not have any legal flaws. Moreover, he emphasized that there was no

evidence from the Village Chairman to prove that the document was prepared by him. He further contended that, the disputed land was leased to the Appellant and not to the Appellant's father. Likewise, he stated that the exhibits do not show the size of the area or its boundaries. In fact, it is not a lease agreement as stated by the Respondent in his evidence. Therefore, it is his humble opinion that this Court should not consider the exhibits tendered because they lack legal weight.

As much as the second (2nd) ground of appeal is concerned, the Appellant submitted that the District Land and Housing Tribunal erred legally and descriptively by issuing an *ex-parte* judgment without giving the Appellant a summons to appear on the date of the judgment as the law requires. In that regard, he contended that it is a legal requirement that, the Tribunal must issue summons to both parties to appear before it on the date fixed for *ex- parte* judgment. Since, the Appellant was not given his right to be called in order to appear on the date of the decision or judgment, it was actually against the law. In fact, he stated further that he was not given his right and he prayed this Court to set aside the decision made by the Tribunal.

Moreover, on the third (3rd) ground of appeal he submitted that the Tribunal made a legal and descriptive error in deciding the dispute *ex – parte*, and deciding in favour of the Respondent who failed to specify the boundaries of the disputed land. He further averred that according to the law, that was a fundamental flaw that makes the judgment unenforceable. To add to it, he contended that the boundaries defined in the disputed area, which were given by the Respondent before the Trial Tribunal are different from the boundaries of the disputed area.

He further submitted that, before the Trial Tribunal the Respondent testified that the disputed area with the size of twenty-four (24) acres is located at Mpitimbi "B" Village, Songea Rural Area within Ruvuma Region and it is bordered by the family of Thobias Komba in the Eastern side, the Western side is bordered by Ponera family, the Southern side is bordered by Edmund Komba while the Northern side is bordered by Mbinga Mhalule road, something that is not true. In that regard, he further stated that the area where the decisions was made by the Tribunal is different from the disputed area and he prayed for this Court to set aside the decision made by the Trial Tribunal.

Apart from that, on the fourth (4th) ground of appeal, he stated that the District Land and Housing Tribunal made a legal and descriptive error in hearing and decided the dispute against the Appellant without determining the value of the disputed area. He argued that failure to determine the value of the disputed land, made the Tribunal to decide the dispute without ascertaining it's pecuniary jurisdiction to determine the matter. He concluded that it is a legal requirement that before hearing any matter, the Tribunal must check if it has jurisdiction to determine it. Conclusively, he prayed this Court to set aside the decisions of the Trial Tribunal since the documents used as part of the evidence were forged, the Respondent failed to prove the boundaries and value of the disputed area as well as the failure of the Trial Tribunal to call the Appellant when the *ex-parte* judgment was delivered.

On the contrary, the Respondent submitted that with regard to the arguments submitted by the Appellant in support of his first (1st) ground of appeal as it appears in the petition of appeal, the District Land and Housing Tribunal was correct and it exercised properly its powers of hearing the matter and deciding it based on the adduced evidence, which was found to hold water. He averred that the documents that were tendered during

hearing were found to have merit and they were admitted as exhibits. He contended that if the said documents were illegal as alleged by the Appellant, he could have raised a Preliminary Objection at the earliest stage of pleading or before the judgment since he had an ample time to file a written statement of defence but he purposefully failed to do so. To add to it, she further stated that on top of that there is no material time for the Appellant to file a criminal case regarding what is alleged as per the aforementioned documents tendered during the hearing. Therefore, she argued that the Appellant's allegations are baseless.

She emphasized that it is also clearly found from the records of the Trial Tribunal that the Respondent described all relevant facts as required in Form No. 1, in which, apart from other things, she identified the size, boundaries and value of the disputed land. She referred also to pages 1 and 2 of the judgment from the District Land and Housing Tribunal in Land Application Number 78 of 2019 dated 22nd July, 2022 which stipulates and emphasizes the same. Principally, she argued that this appeal has no merit rather than wasting the precious time and resources of this Court. Apart from that, she contended that the arguments submitted by the Appellant in

support of his second (2nd) ground of appeal as it appears in the petition of appeal are baseless and has no merit at all.

As a matter of fact, he argued that the records from the Trial Tribunal reveals that the Appellant had a record of not appearing before the said Tribunal several times without reasonable grounds. That on 29th November, 2020 and 7th April, 2021, he received the summons in respect of Land Application Number 78 of 2029 and he signed it. However, he ignored or refused to file a written statement of defence despite being given ample time. He submitted further that the arguments of the Appellant that he was not summoned before the Trial Tribunal are not correct.

Moreover, she argued from the records of the Trial Tribunal, particularly on page one, which clearly stipulated that the said application proceeded *ex-parte* since the Appellant failed to enter appearance on several times including on the 12th May, 2022 when he was given the last chance to file the written statement of defence. That the Appellant purposefully did not comply with such an order, and as a result, the Trial Tribunal issued an order for *ex-parte* hearing. She further submitted that the Appellant also failed to support his argument since not every dispute

requires proof from documentary evidence. The Appellant failed to give any legal authorities, neither statutory provision nor case laws. Eventually, the Appellant should not rely on irrelevant facts that have no standing before this Court. With regard to the arguments submitted by the Appellant in support of his third (3rd) ground of appeal, the Respondent stated that, that the ground of appeal together with the argument in support of it is irrelevant.

She stated further that it is clearly revealed from the records of the Trial Tribunal and proceedings that, during the hearing, all parties and their witnesses had an opportunity to adduce evidence before the said Tribunal. On the same note, the Respondent submitted that she proved his claims on the balance of probabilities that the land in dispute is the property of her late father that is none other than one Edward M. Ndomba.

To crown it all, the Respondent argued that she is just the legal administratrix of the deceased's properties, including the disputed land on which the Appellant has trespassed. In that case, she emphasized that the evidence from PW1 and PW2 was also clearly cemented that the land in dispute belongs to the Respondent's late father. In that regard, she averred that the Appellant and two (02) others were just invitees and not

the legal owners of the said land. This was made clear on pages 2, 3 and 4 of the judgment from the Trial Tribunal. She argued that, as a result, the Appellant has nothing to own in the said land. To put in a nutshell, she added that the Appellant is trying to cook the facts without any colour of light while knowing that his claims have no legs to stand.

Basically, with regard to the arguments submitted by the Appellant in support of his fourth (4^{th}) ground of appeal as it appears in the petition of appeal, the Respondent was of the view that the ground of appeal together with the argument in support of it are baseless and has no merit. In addition, she further argued that to make things clear, the Respondent previously filed Land Application No. 78 of 2019 before the District Land and Housing Tribunal, in which he described all the facts with regard to the said land, including the value of the subject matter as it has been stipulated in the judgment issued by the said Tribunal.

As a matter of fact she stated that, if what was alleged by the Appellant was the case, then this matter could not have proceeded in the Trial Tribunal since the issue of identification and the value of the subject matter is a mandatory requirement. Reference was made to the case of; **Ali Kapalama v. Omary Ligomba**, Land Appeal No. 11 of 2015,

Alexander Mashauri v. Peter Nyamhanga, Misc. Land Appeal No. 66 of 2020, H.C. of Tanzania at Musoma, **Ndekya Kashinga v. Mboje Masunga,** Land appeal No. 11 of 2018, High Court of Tanzania at Tabora.

Consequently, she stated that from the above cited cases, it is clear that, in the Trial Tribunal ail legal requirements were adhered to, including identifying the value of the said disputed land. In that regard, she stated that the Trial Tribunal was correct in its decision and the reasons for its decision are genuine and have merit for the interest of justice. As a result, she requested that this appeal to be dismissed with costs.

Moreover, the Appellant in his rejoinder submissions, he requested that the *ex-parte* judgment be set aside by this Court, which is the first (1st) appellate court. For more clarification and emphasis, he quoted his submission as follows: *"The District Land and Housing Tribunal erred legally and descriptively by issuing a unilateral judgment (ex-parte judgment) without giving the appellant a summons; they did not notify the Appellant of the date of the judgment as the law requires."* He contended that, according to the law, the Tribunals are required, before issuing an *ex-parte* judgement to have the responsibility to ensure that both parties are notified on the day of judgment. He contended that since, the

Appellant was not given his right to appear on the date of judgment, which is against the legal procedure he asked this Court to set aside the decisions made by the Trial Tribunal.

As a matter of fact, in this appeal the Appellant is challenging the decision reached by the Trial Tribunal and an order which ordered the matter to proceed *ex parte* against the Appellant who was the Respondent in Land Application No. 78 of 2019, before the District Land and Housing Tribunal of Songea. He is praying for this Court to set aside the *ex parte* judgment since he was not heard. The Appellant also is complaining that the Respondent failed to prove her claim on the disputed land before the Trial Tribunal.

From the grounds of appeal and the submissions made by both the Appellant and the Respondent, I find there is only one issue which needs to be addressed by this Court in resolving the controversy. The issue is whether an *ex parte* judgment can be appealed against without first attempting to set it aside.

This Court is aware that section 70 (2) of the *Civil Procedure Code* (Cap. 33, R. E 2019) gives an automatic right to any person who is aggrieved by the decision of the Court to appeal against that decision.

But the legal procedure for a party who is aggrieve by an *ex parte* judgment in both the High Court and Subordinate Courts including the District Land and Housing Tribunal is set out under Order 9 Rule 9 (1) of the *Civil Procedure Code* (supra). According to this rule an *ex-parte* judgment may be set aside if the judgment debtor assigns good cause that cause him not to enter appearance on the date when the court allowed the decree holder to proceed *ex-parte*. An application to set aside an *ex parte* judgment must be filed before the Court which passed that decision.

For ease of reference and clarity, I find it is better to reproduce part of Order IX, Rule 9 of the *Civil Procedure Code* (supra). It reads as follows:

> *"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,*

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:"

The two provisions provided under section 70 (2) and Order 9 Rule 9 of the *Civil Procedure Code* were well interpreted by the Court of Appeal of Tanzania in the case of **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited,** Civil Appeal No. 13 of 2021, where it stated that:

" ... where the defendant intends to challenge both the order to proceed ***ex parte*** *and the merit of the findings in the* ***ex parte*** *judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the* ***ex parte*** *judgment first. This principle is based on the long-standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. He has to exhaust all available remedies to the lower court first".*

As much as I am concerned, I find that this appeal was prematurely brought before this Court. The Appellant was to exhaust all available remedies before the Trial Tribunal. He has to file an application before the Trial Tribunal to set aside the *ex-parte* judgment rather than lodging this

appeal. The Appellant is praying for this Court to set aside the ex parte judgment but this Court has no power to set aside the *ex parte* judgment delivered by the District Land and Housing Tribunal. That remedy is available before the Trial Tribunal.

The Appellant in his grounds of appeal and submission was complaining that the Respondent failed to prove that the disputed land is her property as the boundaries given by the Respondent are not correct. This Court cannot deal with that claim before the Appellant exhausting the remedies available before the Trial Tribunal. I am inclined to adopt the principle stated in the decision of the Court of Appeal in the case of **Dangote Industries Ltd Tanzania v. Warnercom (T) Limited** (supra) that, where the defendant intends to challenge both the order to proceed *ex parte* and the merit of the findings in the *ex parte* judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the *ex parte* judgment, the Appellant has to exhaust the remedy available before the Trial tribunal before lodging this appeal.

In the circumstance and for the reasons stated above, I find this appeal has no merit and it is dismissed with costs. It is so ordered.

DATED and **DELIVERED** at **SONGEA** this 9th day of February 2023.

U. E. MADEHA

JUDGE

09/02/2023