

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LAND APPEAL NO. 129 OF 2022**

**(C/F Application No. 19 of 2022 in the District Land and Housing Tribunal  
for Babati at Babati)**

**DANIEL MUHENDI.....1<sup>ST</sup> APPELLANT**

**GIDAMEYESHI DEGE .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**BALAGI HHANDO.....RESPONDENT**

**JUDGMENT**

04<sup>th</sup> May & 09<sup>th</sup> June 2023

**TIGANGA, J**

This is the first appeal arising from the decision of the District Land and Housing Tribunal for Babati at Babati (the trial tribunal) where the appellants were sued jointly by the respondent for trespassing on his land measuring six acres. By the order of the trial tribunal, the hearing proceeded ex-parte and thereafter an ex-parte judgment was entered in favour of the respondent whereupon the respondent was declared as the lawful owner of the disputed land and the appellants were ordered to vacate the suit land and pay costs of the suit.

Aggrieved by the ex-parte judgment the appellants have filed the present appeal containing four grounds of appeal, however when the matter was called for hearing the appellants dropped grounds number 2 and 3 and proceeded to argue on grounds number 1 and ground 4 which shall in this judgment be styled as grounds 1 and 2 as follows;

1. That the whole judgment and decree in Application No. 19 of 2022 involves serious irregularities and is tainted with illegalities and gross abuse of the court process.
2. That the trial tribunal erred both in law and in fact when it condemned the appellants unheard.

When the matter was scheduled for hearing, the 1<sup>st</sup> appellant enjoyed legal services from the learned counsel Mr. Raymond Joachim Kimu on the other hand the 2<sup>nd</sup> appellant appeared in person unrepresented, the respondent on the other hand was represented by Mr. Omary Gyunda learned Advocate.

Arguing in support of the first ground of appeal Mr. Raymond submitted that, there are irregularities in the ex-parte judgment as on the date when the chairman ordered for ex-parte hearing the WSD was already filed and the 1<sup>st</sup> appellant was present in court.

The counsel went further to argue on ground number four which is ground number two that in this judgment, the right to be heard is a constitutional right, under article 13(6)(a) of the Constitution of the United Republic of Tanzania and the same has been interpreted in a number of cases including the case of **DPP vs Sabina Tesha and Others** [1992] TLR 257. He contended that the appellants herein were denied the right to be heard by the court and therefore he prayed the judgment decree and proceedings of the trial tribunal be quashed.

Responding to the grounds of appeal Mr. Omary challenged the competence of the appeal before this court. It was his view that the appeal at hand has been pre-maturely filed since it is the requirement of the law that a matter that was heard ex-parte before the tribunal should be set aside and if the application for setting aside is denied then, the aggrieved party can appeal. He supported his assertion with the decision of the Court of Appeal of Tanzania in the case of **Dangote Industries Ltd Tanzania vs Warnercom (T) Limited**, (Civil Appeal No. 13 of 2021) [2022] TZCA 34 (17 February 2022) where the Court referred the case of **Pangea Minerals Ltd vs Petrofuel (T) Limited and 2 others**, (Civil Appeal No. 96 of 2015) [2020] TZCA 185 (15 April 2020) where the Court made it clear that if the appellant is challenging the merit of the

appeal and the order which proceeded ex- parte, then he must apply to set aside instead of filing an appeal.

As to ground number 2, it was his view that the right to be heard is not absolute. In his view, the appellant denied himself his right to be heard for not complying with the order of the tribunal. Mr. Omary further argued that, the contention by the appellant Advocate that on the material date when the matter was fixed for ex-parte hearing the 1<sup>st</sup> appellant was present, is not backed up by the proceedings as they are very clear that on that particular date, all the appellants were absent and even the WSD was filed on 24/03/2022 and not 23/05/2022 as alleged. He thus concluded that with the above argument, there are no irregularities therefore the appeal be dismissed with costs.

In the rejoinder, Mr. Raymond submitted that the appeal at hand is not premature as in the matter at hand the option is to appeal as its basis is on failure to file WSD. He thus urged this court to determine the appeal.

I have had time to study the judgment and proceedings of the trial tribunal in line with the grounds of appeal and the rival submissions, it appears that the main issue to be determined by this court is whether the appeal before this court is competent, and if competent then it is allowable.

In determining this issue, I wish to commence by citing the decision in the case of **Dangote Industries Ltd. Tanzania vs Warnercom (T) Limited (supra)**; in this case, the following was observed by the Court;

*"It would appear to us to be the principle in the said authorities 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 to the lowest court first."*

With the above principle in mind, and going by the grounds of appeal together with the submission of the appellants, it is plain that the appellants are challenging the ex-parte order made by the trial chairman. This can be gleaned from the appellants' submission as it was argued that there were irregularities on the material date when the trial chairman made an order for an ex-parte hearing the 1<sup>st</sup> appellant was present and therefore they argued that they were denied the right to be heard.

From the findings of the Court of Appeal in the above-cited case, it appears and as correctly submitted by Mr. Omary that since the appellants

are aggrieved by the order of the trial chairman to proceed ex-parte then they ought to have exhausted remedied at the trial tribunal by setting aside the ex-parte judgment, instead of filing this appeal. Had it been that the appellant had filed an application for setting aside the ex-parte order and the same was denied then the option of filing an appeal would have been in their favour.

This above proposition has also been enunciated under regulation 11 (2) of the Land Disputes Court (The District Land and Housing Tribunal) Regulations G.N No. 174 of 2003 where it has been put clear that a party dissatisfied by the order to proceed ex-parte may within thirty (30) days apply to have the ex-parte order set aside.

The same position was also observed by the Court of Appeal of Tanzania in the case of **Jaffari Sanya & Another vs Saleh Sadiq Osman**, Civil Appeal No. 119 of 2014 (Unreported) where it was stated that;

*"Based on the above provision and authorities, it is settled that where a defendant against whom an ex parte judgment was passed, intends to set aside the 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 that entered the judgment."*

That being the principle and, in the circumstances, it is the finding of this court that the appeal before this court is incompetent consequently it is hereby struck out. The appellants are to bear the costs of this appeal.

It is accordingly ordered.



A handwritten signature in blue ink, appearing to read "J. C. Tiganga", is written over a horizontal line.

**J. C. TIGANGA**

**JUDGE**