

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

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**LAND CASE APPEAL NO. 69 OF 2022**

*(Arising from the District Land and Housing Tribunal for Karagwe at Kayanga in Land Application No. 13 of 2019)*

**EMMANUEL KABERUKA ..... APPELLANT**

**VERSUS**

**FINCA TANZANIA NATIONAL MICROFINANCE .....1<sup>ST</sup> RESPONDENT**

**BANK (NMB) PLC .....2<sup>ND</sup> RESPONDENT**

**BARIKI ELIAS MUSHI .....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last Order: 17. 05.2023*

*Date of Ruling: 09.06.2023*

*A.Y. Mwenda J.*

Before the District Land and Housing Tribunal for Karagwe at Kayanga in Application No. 13 of 2019, the Applicant Mr. Emmanuel Kaberuka (now the appellant) prayed to set aside the tribunal's *ex parte* hearing order. At the end of the trial the Hon. Chairman held that the applicant has failed to advance sufficient reasons for non-appearance hence *ex parte* hearing order was issued.

During the hearing of this appeal the appellant was represented by Mr. Frank Karoli learned counsel while the 1<sup>st</sup> respondent hired the legal services from Mr. Stephen Kaswahili learned counsel and the 2<sup>nd</sup> respondent was represented by Davis Muzahula learned counsel.

When this matter was scheduled for hearing on 17<sup>th</sup> May 2023, Mr. Muzahula learned counsel for 2<sup>nd</sup> respondent prayed this appeal to be disposed by the

way of written submissions, the prayer which was not objected by the learned counsels for the appellant and the 1<sup>st</sup> respondent. The scheduling order was fixed and the parties complied accordingly.

In his written submissions Mr. Frank, the learned counsel for the appellant submitted that it has been the principle of law that before any adverse action is taken against a person or party to any legal proceedings that other person has to be afforded a right for fair hearing. He submitted that the records shows that summons were issued to the appellant without success and on 6<sup>th</sup> July 2022 the learned counsels for applicants (now the respondents) prayed the application to proceed exparte against the respondent (now the appellant) and the case was scheduled for exparte hearing on 29<sup>th</sup> August 2022. The learned counsel submitted that on 8<sup>th</sup> September 2022 the learned counsel for appellant appeared and prayed the order for exparte hearing be set aside. To support this argument, he cited Order IX Rule 4 of the Civil Procedure Code [CAP 33 R.E 2019] which allows the court to set aside an order for exparte hearing when the party appears and advance sufficient reasons.

The learned counsel further submitted that the appellant gave reasons for his previously non-appearance as required by the law thus denying him the right to be heard was against the rule of natural law and the constitution of this country. He thus concluded his submissions by stating that the reasons by the Hon. Chairman was unjustifiable and hence this appeal should be allowed with

costs by setting aside the order dated 08.09.2022 and order that the appellant be heard.

Responding to the appellant's written submission Mr. Kaswahili, learned counsel for the 1<sup>st</sup> respondent submitted that the appellant was accorded the right to be heard. He submitted that on 19<sup>th</sup> May 2022 the trial tribunal issued ordinary summons to the appellant through court process server but the whereabouts of the appellant was unknown and as a result the trial tribunal ordered summons to be issued by the way of publication the order which was complied with. He further submitted that on 6<sup>th</sup> July 2022 the tribunal issued an order for ex parte hearing to proceed against the appellant. To cement on this, he cited Regulation 11 (1) (c) of the Land Disputes Courts (The District Land and Housing Tribunal) G.N No. 174 of 2003 and the case of ABUTWALIB MUSA MSUYA and TWO OTHERS VS CAPITAL BREWERIES LTD and 2 OTHERS CIVIL REVISION NO.2 OF 2012.

He submitted that during the hearing the counsel for the appellant entered appearance but failed even to name a place where the appellant was located which made the service of summons impossible.

The learned counsel went further by submitting that the appellant was not denied the right to be heard. To cement this, he cited the case of WAMBELE MTUMWA SHAHAME VS MOHAMED CIVIL REFERENCE NO. 8 OF 2016 at page 12. He was of the view that the issuance of the summons by the way of

publication on Mwananchi News Paper afforded the appellant the right to be heard.

The learned counsel further submitted that the application to set aside exparte order was misconceived on two reasons. One that the application was made out of time. He submitted that exparte order was issued on 6<sup>th</sup> July 2022 and the remedy has to be made within 30 days. He said this is in accordance to regulation 11(2) of the Land Dispute Court (The District Land and Housing Tribunal) Regulation G.N No. 174 of 2003. He submitted that oral application to set aside exparte hearing order was made on 8<sup>th</sup> September 2022 after the expiring of 63 days.

Further to that he submitted that the prayer to set aside an order for exparte hearing was made orally. He said that Order XLII Rule 2 of the Civil Procedure Code [CAP 33 R.E 2019] sets conditions for an oral application which is the other party must consent to it. He thus concluded his submissions by stating that based on the two reasons, the oral application was misconceived and the trial tribunal correctly dismissed the application.

With regard to Order IX Rule 4 of the Civil Procedure Code cited by the counsel for the appellant, the learned counsel for 1<sup>st</sup> respondent submitted that this Order is misconceived and the proper remedy is found under Regulation 11(2) the Land Dispute Courts (The District Land and Housing Tribunal) Regulation GN No. 174 of 2003 and the time to set aside the said exparte order is within

30 days. He submitted that the said Order could only be applicable if G.N No. 174 of 2003 is silent. The learned counsel concluded his submissions by stating that what the appellant was required to do is to apply to set aside exparte hearing as pronounced before the trial tribunal or appeal against findings in exparte judgment before this court. To support this, he cited the case of DANGOTE INDUSTRIES VS WARNERCOM (T) LIMITED CIVIL APPEAL NO.13 OF 2021 at page 6. He thus concluded his submissions by stating that this appeal has no merits and it should be dismissed with costs.

On his side the learned counsel for the 2<sup>nd</sup> respondent while responding to the appellant's written submissions submitted that the Hon. Chairman was right to refuse to grant the order sought by the appellant. (i.e. to set aside an exparte hearing order). He submitted that the tribunal has discretionary powers to vacate from the said orders if the applicant assign sufficient reasons.

The learned counsel further submitted that reading through the appellant's submissions he did not advance sufficient reasons to enable the trial tribunal to set aside its previous order. He further submitted that a mere statement that the applicant's counsel appeared on the adjourned date and made an oral application to set aside an order for exparte hearing does not hold any water.

The learned counsel further submitted that the applicant had never entered appearance in the tribunal since 2019 and there was no any affidavit sworn to state reasons as to why he did not enter appearance until when the tribunal

decided to proceed ex parte against him and the said allegation that he was living in remote areas was simply an afterthought.

With regard to the issue of the right to be heard the learned counsel submitted that this being the principle of natural justice one should also not forget that there is also constitutional rule against undue delays in administration of justice. With regard to this point he submitted that the trial tribunal warned itself as stated at page 29 paragraph 2 of the typed proceedings. He said that going through tribunal's proceedings at page 27 to 28 the appellant's learned counsel didn't seem to be ready to proceed even after appearing on the adjourned date.

With regard to the statement of learned counsel for the appellant that the appellant resides in a place where there is communication problems, the learned counsel submitted that since there is no any proof which was tendered to help the tribunal make its decision then the tribunal was right to hold that there is no sufficient reasons advanced.

With regard to Order IX Rule 4 of the Civil Procedure Code [CAP 33 R.E 2019], the learned counsel submitted that, this order provides the conditions in which the court can set aside an order for ex parte hearing and this is by assigning sufficient reasons for non-appearance. He further submitted that also Regulation 11(2) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations GN 174 OF 2003 provide the same conditions to the effect

that upon application the tribunal may make its decision based on the way it assesses the proceedings before it. He thus concluded his submissions by stating that this appeal should be dismissed for want of merits with costs.

Having gone through submissions by both parties the issue for determination is whether or not this appeal is meritorious.

It is trite law that the court is entitled to set aside the *ex parte* order or judgment where there is the existence of numerous cause that prevent the party from appearing in court. This position has been stated in the case of KHALID BAKARI VS RAMADHANI MOHAMED YUSUPH LAND APPEAL NO. 232 OF 2022 while citing in approve the case of ABDALLAH ZARATI VS MOHAMED OMARI, (PC), CIVIL APPEAL NO. 150 -D 68 (1969) HCD.

In the present appeal it is clearly shown from the records that on 8<sup>th</sup> September 2022 when the matter was set for hearing Mr. Chamani learned counsel for the 3<sup>rd</sup> respondent (now the appellant) stated before the tribunal as follows and I quote;

*"Mjibu maombi wa 3 ndio amepata taarifa ya shauri hili siku za karibuni na anapoishi in vigumu sana kupata mawasiliano hivyo wapewe haki ya kusikilizwa."*

On his side the learned counsel for the applicant Mr. Method opposed the prayer as prayed by Mr. Chamani on the ground that an order for *ex parte* hearing has already been granted and they did not advance sufficient reason for the 3<sup>rd</sup>

respondent's nonappearance. He therefore prayed the case to proceed ex parte against the 3<sup>rd</sup> respondent and at the end of the day the tribunal ruled out as follows and I quote;

*"Na sioni msingi wa sababu aliyoitoa ya kuwa anapokaa hawezi kupata taarifa ya shauri ili hali shauri hili chimbuko lake ni yeye na alifahamu lilikuwa linaendelea hivyo sababu hii imekosa msingi."*

That being the case since the learned counsel for the appellant entered appearance on the hearing date and advanced the reasons for non-appearance, this court is of the view that the trial tribunal was required to set aside an order for ex parte hearing. This is so because the records shows that when the matter was set for mention on 17<sup>th</sup> April 2019 Mr. Ally Swalehe learned counsel for the applicant prayed for alternative serves by publication for the 3<sup>rd</sup> respondent which shows that the appellant whereabouts were unknown. On that basis he deserved to be given right to be heard.

From the foregoing observation this court is of the view that since the learned counsel for the appellant appeared on the hearing date then, for the interest of justice unless there are special reasons to the contrary then the said application was required to be heard on merits to both parties. See the case of FFREDRICK SCLenga & ANOTHER VS AGNES MASELE [1983] TLR and MWANZA DIRECTOR



MIS NEW REFRIGERATION CO.LTD VS REGIONAL MANAGER OF TANESCO LTD  
& ANOTHER [2006] TLR 335.

Apart from that also this court also looked at the conduct of the appellant before non-appearance. The record shows that the appellant never entered appearance before the tribunal and that is why the summons was served through publication that alone was a ground to afford him with a right to be heard. This position has been also stated in the case of SHOCKED& ANOTHER VS LODSCHMIDT AND OTHERS [1998] 1 ALL ER 372, that;

*"The applicant's conduct before the alleged non-appearance should be taken into consideration in an application of this nature."*

In the same line in the case of LEIGHTON OFFSHORE PTEV LTD VS DB SHAPRIYA & CO LTD MISC. COMMERCIAL APPPLICATION NO. 13 OF 2018 the Court held inter alia that;

*"That right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions that right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard,*

*because the violation is considered to be breach of natural justice."*

In the view of the above legal positions, this court find merits in the present appeal and it is hereby allowed. It is allowed to the extent of quashing the proceedings and setting aside the exparte decision and any other orders emanating from Land Application No. 13 of 2019 before the District Land and Housing Tribunal for Karagwe at Kayanga. Otherwise, the Appellant should be afforded the right to be heard.

It is so ordered.



A.Y. Mwenda

**Judge**

09.06.2023

Judgment delivered in chamber under the seal of this court by the Deputy Register in the absence of the parties.



A.Y. Mwenda

**Judge**

09.06.2023