

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB - REGISTRY)
AT MOROGORO

LAND APPEAL NO. 15 OF 2022

(Arising from the decision of the District Land and Housing Tribunal for Ulanga, at Mahenge in Land Application No. 15 of 2020)

BETWEEN

SABINA NGWEMBE.....APPELLANT

VERSUS

RASHID MOHAMED KAYUNI (As an Administrator of the Estate of the Late Mohamed Kayuni)RESPONDENT

JUDGMENT

4th October, 2023

CHABA, J.

On the 21st day of May, 2020 Rashid Mohamed Kayuni, respondent herein sued the appellant, Sabina Ngwembe before the District Land and Housing Tribunal for Ulanga, at Mahenge (the DLHT) over trespassing on a parcel of land measuring three (3) acres, located at Manjore area, Mavimba Ward within Ulanga District in Morogoro region.

As background, the parties' pleadings before the trial DLHT reveals that, the late Mohamed Kayuni died in 1992 and the appellant was one among the family friend of the late Mohamed Kayuni. It is on record that, the deceased legally acquired and owned the parcel of land in disputes since 1975. After the demise of Mohamed Kayuni, the appellant maintained the relationship as a

family friend of the deceased. According to the records, sometimes in between, she requested a parcel of land from the family of the late Mohamed Kayuni for doing her own agricultural activities. Her requested was affirmatively accepted and she was given three (3) acres in 2013, which is the subject of the present disputes between parties. Later on, the respondent was appointment as an administrator of the estate of his late father Mohamed Kayuni, and when he stated executing his administratorship over the disputed land, the appellant refused to vacate from the disputed land claiming that she was the lawful owner.

On 21st September, 2020 the appellant filed before the DLHT her written statement of defence against the respondent's averments and claimed that, the disputed land belongs to her husband, one Elias Mayanja who had been peacefully in occupation for 28 years. She further claimed that, the chaos arose in 2019 when the respondent herein was appointed as an administrator of the estate of his late father Mohamed Kayuni, though the record is silent in respect of the whereabouts of the appellant's husband one Elias Mayanja.

Looking at the trial DLHT's proceedings and judgment thereof both are clear that, although both parties were present when the matter was fixed for hearing and the respondent showed his readiness to proceed with the hearing of the matter, the appellant herein on other side prayed to stay the same, pending hearing and determination of the appeal which she filed before this Court against the ruling of the trial DLHT dated on 6th July, 2021. Upon heard

both parties, the Hon. trial Chairperson on the same day, on 24th August, 2021 ruled that even if the appellant (respondent) had a receipt bearing Nos. 25017275 which showed that she paid for the intended appeal No. 147 of 2021 on 27/07/2021, but he decided to proceed with the hearing of the matter *ex-parte* against the appellant. Afterwards, on the 1st February, 2022 the Tribunal delivered its *ex-parte* judgment and declared that, the disputed land belongs to the late Mohamed Kayuni. It is against this *ex-parte* Judgment and Decree of the trial DLHT the appellant has preferred the present appeal determined to challenge the same on the following three (3) grounds of appeal as hereunder:

1. That, the trial District Land and Housing Tribunal erred in law and fact by denying the appellant the right to be heard, and time to prepare and present her case against the respondent.
2. That, the District Land and Housing Tribunal erred in law and fact by making judgment in favour of the respondent, basing on the weak and contradictory evidence adduced by the respondent and his witnesses during the trial and ignored the strong opinion of assessors and completely based on contradiction.
3. That, the trial District Land and Housing Tribunal erred in law and fact by making judgment in favour of the respondent, basing on over-reliance on procedural technicalities.

During the hearing of the appeal, the appellant was represented by Mr. Abdul Bwanga, learned advocate while the respondent enjoyed the legal services of Ms. Catherine Mushi, also learned advocate. By consensus, parties

agreed to dispose of the appeal by way of written submissions and both parties complied with the Court's scheduled orders.

However, for the reasons which will be apparent soon, I will neither reproduce the parties' submissions in support for or against the grounds of appeal, nor dwell on the grounds of appeal. I say so because, during preparation and composition of this judgment, I discovered that the present appeal was pre-maturely lodged in this Court something traumatized the competence of the entire appeal. Perhaps, such a legal defect did not come to the attention of the learned advocates and eventually escaped their minds during the hearing of the appeal.

As I have stated earlier on, the trial DLHT proceeded to hear and determine the matter before it, *ex-parte* against the appellant, Sabina Ngwembe. As exhibited by the trial Tribunal's records and the typed copy of judgment on page 2, the same read:

"Shauri lilikuja kusikilizwa tarehe 24/08/2021. Wadaawa

wote walikuwa barazani, lakini mjibu maombi hakuwa tayari

kuendelea na usikilizwaji wa shauri akidai alikuwa amekata

rufaa kwenda Mahakama Kuu ya Tanzania dhidi ya uamuzi

uliofuta mapingamizi ya awali ya kisheria aliyokuwa

ameibua. Baraza liliamrisha shauri kusikilizwa

upande mmoja dhidi ya mjibu maombi kwa sababu

uwepo wa rufaa dhidi ya uamuzi wa mapingamizi ya awali

hauzuii shauri kuendelea, na hakuna amri yoyote kuzuia shauri lisiendelee, hivyo mwombaji alitakiwa kuthibitisha madai yake."

Based on the above except of the judgment of the trial DLHT and the proceedings thereof, as hinted above, the appellant has preferred the instant appeal. However, before going any further I feel obliged to point out that, since an appeal is a creature of law, the same must be exercised in compliance with the relevant law and not in accordance with the party or parties' own choice. I say so because, during scrutiny of the instant appeal, I found that the same knocked the door of this Court in contravention of the guiding and controlling provision of the law in particular, Regulation 11 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 - Government Notice No. 174 of 2003 (The Regulations) which provides that: -

"Regulation 11 (1) - On the day the application is fixed for hearing the Tribunal shall: -

(a) Where the parties to the application are present proceed to hear the evidence on both sides and determine the application.

(b) Where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant.



(c) Where the respondent is absent and was duly served with notice of hearing or was present when the hearing or was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter *ex-parte* by oral evidence.

(2) A party 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 so to do and in case of refusal appeal to the High Court. [Bold is mine].

In this appeal, it is apparent that the appellant is challenging an *ex-parte* judgement issued by the trial DLHT. The guiding law as provided under the Regulation 11 (2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 - GN. No. 174 of 2003 is plain that, a party to an application may, where he is dissatisfied with the decision of the tribunal under sub-regulation (1) within thirty (30) days apply to have the orders set aside, and the tribunal may set aside its orders if it thinks so to do and in case of refusal appeal to the High Court.

It has been held that, the rules of procedures are the handmaidens of justice and not the mistress of justice. In this spirit and as a matter of procedure, when the trial DLHT proceeded to hear and determine the matter *ex-parte* against the appellant (respondent at trial) and finally pronounced its



ex-parte judgment, the appellant being a part to the said application, upon dissatisfied with the decision of the trial DLHT, the proper avenue for her was to apply to have the orders set aside within thirty (30) days. And if the trial Tribunal would have refused her application to set aside the *ex-parte* judgment, the next option was to approach this Court by way of appeal like what she did in this Court. As per dictates of the law, an appeal can be exercisable only if other remedies have ended in vain. It is trite law that, an *ex-parte* judgment is not appealable unless the aggrieved party has exhausted all the remedies available, notably, setting aside such an *ex-parte* judgement. This spirit of the law is also clearly provided under Order IX, Rule 9 of the Civil Procedure Code [CAP. 33 R. E. 2019], where the law articulates that:

"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."
[Emphasize added].

The above provision of the law has been clarified and interpreted by this Court and the Court of Appeal of Tanzania through a number of decisions and provided guidance on the procedure of setting aside an *ex-parte* judgment and decree. **See - Jaffari Sanya Jussa and Ismail Sanya Jussa Vs. Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997, **Paul A. Kweka and Hilary P. Kweka Vs. Ngorika Bus Services and Transport Company Limited**, Civil Appeal No. 129 of 2002, **The Government of Vietnam Vs. Mohamed Enterprises (T) Ltd**, Civil Appeal No. 122 of 2005 and **MIC Tanzania Limited Vs. Kijitonyama Lutheran Church Choir**, Civil Application No. 109 of 2015 (All unreported).

In another case of **Pangea Minerals Ltd Vs. Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (unreported), the Court of Appeal of Tanzania was faced with akin situation in which the appellant, Pangea Minerals Ltd, instituted an appeal before it challenging the *ex-parte* judgment and decree of this Court (Commercial Division) at Dar Es Salaam dated 24th October, 2014 in Commercial Case No. 29 of 2012 and held *inter-alia* that:

"It is settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that 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 which entered the judgment. In the circumstances, we are satisfied that the

appellants have lodged the appeal and the cross appeal prematurely without exhausting all the available remedies in the High Court, hence rendering the same incompetent. Eventually and for the foregoing reasons, the incompetent appeal and the cross appeal are hereby struck out with costs".

For better understanding of what actually transpired at the trial DLHT, I find it pertinent to reproduce the records dated 24th August, 2021; and I quote:

"... 24/08/2021

Akidi: R.W. Mbandoo- Mwenyekiti.

Wazee wa Baraza: 1). Raymond A. Mgonja (Me).

2). Asma N. Masambe (Ke).

Wadaawa: 1). Mwombaji - yupo.

2). Mjibu maombi - yupo.

Baraza: Shauri linakuja kwa ajili ya kusikilizwa leo, wadaawa wote wapo barazani.

Signed

24/08/2021

Mwombaji: Nipo tayari kuendelea na shauri nina shahidi mmoja, mwingine anaumwa.

Mjibu Maombi: Sipo tayari kusikiliza shauri hili kwa sababu hukumu ya pingamizi nilikata rufaa Mahakama Kuu. Nina risiti ya malipo ya rufaa ya

Mahakama Kuu ya Tanzania. Sishiriki usikilizwaji wa shauri hili.

Signed

24/08/2021"

From the foregoing, no doubt that the appellant being a layperson was unrepresented. She had no knowledge of the legal effect of the preliminary objections which does not affect the main suit. I think in my view that, perhaps the appellant like any other laypersons chose to seek what she believed to be her justice by way of filing an appeal as the only remedy to challenge the order or ruling of the DLHT upon overruled her points of objections instead of continuing with the hearing of the matter on merits.

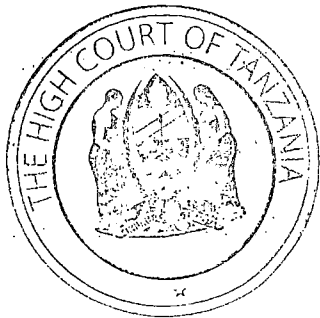
Besides, I am of the firm view that, on his party, the Hon. trial Chairperson failed to accurately discharge his duty to inform and / or educate the appellant and fully elaborate upon her on the legal effect of *ex-parte* judgment. As the facts suggests, he was in a better position to advise her or even advice on how to access justice by seeking legal aid services from the responsible authority. In my considered opinion, the trial DLHT in attaining justice, could have even adjourned the case rather than proceeding with the hearing of the same while the appellant was present in the Court room.

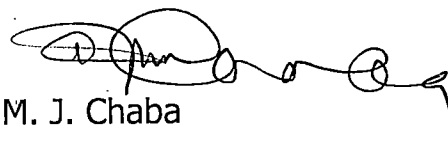
Nevertheless, whatever the case may be, the approach taken by the appellant to knock the doors of this Court is untenable in law. As it was expounded by the Apex Court in the case of **Pangea Minerals Ltd** (supra) in which it stated *inter-alia* that, ***we wish to emphasize that one should only come to this Court as a last resort after exhausting all available***

remedies in the High Court. In similar way, I wish to state that, in the circumstance of this case, it would be practicable for the appellant to seek redress before the trial DLHT which passed the decree *ex-parte* by lodging an application to set aside an *ex-parte* judgment and decree in accordance with the law instead of filing her appeal in this Court.

In the premises, I am satisfied that the appellant herein has lodged the instant appeal pre-maturely without exhausting all the available remedies before the District Land and Housing Tribunal for Ulanga, at Mahenge, thus rendering the same incompetent. Ultimately and for the foregoing reasons, the incompetent appeal is hereby struck out with no order as to costs. **It is so ordered.**

DATED at **MOROGORO** this 4th day of October, 2023.



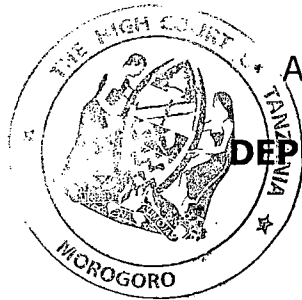

M. J. Chaba

JUDGE

4/10/2023

Court

Judgment delivered under my hand and the Seal of the Court in Chamber's
this 4th day of October, 2023 in the absence of both sides.



A.W. MMBANDO
A.W. MMBANDO

DEPUTY REGISTRAR

4/10/2023

Court:

Rights of Appeal to the parties fully explained.



A.W. MMBANDO
A.W. MMBANDO

DEPUTY REGISTRAR

4/10/2023