IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF SHINYANGA

AT SHINYANGA
LAND APPEAL NO. 21 OF 2023
[*From Application No. 30/2022 of Kahama District Land and Housing Tribunal*]

ESTER DAVID .....APPLICANT

VERSUS

DAVID SAMANYA MBOYA .....RESPONDENT

RULING

Oct. 31st & Nov. 3rd, 2023

Morris, J

The appellant above stands dissatisfied with the judgement of the District Land and Housing Tribunal of Kahama (DLHT) in Application No. 30 of 2022. She has, thus, preferred this appeal. One ground is fronted. She alleges that the trial tribunal denied her the right to be heard.

The parties' dispute before the DLHT involved allegations of breach of a tenancy agreement between them. The subject contract was executed in respect of lease in the respondent's warehouse located at Plot No. 15 Block 'I' Malunga Industrial Area at Kahama. Before the trial tribunal, the

respondent sued appellant claiming that the latter defaulted in paying him rent for the warehouse. The appellant denied the claim. She instead averred that the respondent mishandled the electricity in his warehouse which anomaly ultimately caused damage to her machine.

The respondent at the trial DLHT gave his evidence as PW1. His case was closed on 8/9/2022. Subsequently, the matter was adjourned to 19/9/2022 for defence. On the latter date, both parties appeared but, for undisclosed reason(s), the matter was adjourned to 26/9/2022. However, on such scheduled day, the appellant defaulted. The DLHT made some efforts to summon the appellant for defence hearing but she had several occasions of recorded non-appearance. On some days, such absence was without her notice to the tribunal.

After a number of adjournments, on 10/2/2023, the respondent prayed for judgement. The DLHT, however, fixed the matter for Assessors' opinion on 17/02/2023. Nonetheless, on that later date both parties appeared. The assessors' set of opinion were read. The appellant recorded that;

"Sikubaliani na maoni haya kwani si ya haki kwa kuwa mpangaji aliyepangishwa na David aliunguza mashine yangu. Nitaenda kulalamika kwa RAIS."

The matter was then fixed for judgement which was delivered on 28/2/2023. The appellant was declared a trespasser; ordered to remove her machine from the warehouse; and hand over vacant possession to the respondent. She was further ordered to pay arrears of rent from 2/4/2021 to the date of giving the subject vacant possession. The appellant herein was dissatisfied, hence, this appeal.

Before the appeal was set for hearing, this court noticed that the sole ground advanced attracts the remedy of setting aside the judgement and/or orders of the DLHT on the basis of want of the right to be heard. Parties were moved to address this matter first. That is, the court wanted to determine the appropriateness of the appeal which seeks to set aside a one-sided decision of the trial DLHT before the subject tribunal being moved to adjudicate on such matter.

During the hearing, the appellant was represented by Ms. Godfrida Simba, learned advocate. The respondent, however, was unrepresented.

Ms. Simba submitted first. She argued that the appeal is competent because the DLHT decision was titled '**judgement**' not '***ex-parte* judgement**'. Therefore, to her, the tribunal did not issue an *ex parte* order after the appellant defaulted appearance. Further, the appellant's counsel reasoned that at page 17 of the proceedings (dated 10/2/2023) the tribunal did not order the matter to be concluded on *ex parte* basis. Moreover, because the DLHT analyzed the averments in written statement of defence in arriving at its decision (page 2 of the judgment) such decision cannot be termed as *ex-parte*.

She, nevertheless, submitted that the appellant was denied her right to defend the case by producing her line evidence. To her, the appellant appeared before the DLHT in person (pages 1 to 4 of the proceedings) and engaged an advocate to take over (pages 5 to 6 of the proceedings). Further, at page 11 of the proceedings, the defence case was supposed to be opened. But the trial was adjourned. Though the appellant appeared, the matter kept on being adjourned. Therefore, the DLHT proceedings did not qualify to be referred to as *ex parte*. The counsel, thus, insists that the

appeal is competent for it did not arise out of *ex-parte* proceedings and/or judgement.

However, the respondent was of the view that the appellant was duly served with summonses but she opted to default appearance on repeated instances. He also argued that, the matter was being adjourned by the DLHT on grounds which were acceptable to parties all the time.

I have considered the submissions of parties. From the outset, the irony of this matter is that, while the appellant's counsel is strenuously arguing that the matter at DLHT did not take the form of *ex-parte* proceedings; the sole ground of appeal herein is that the appellant was denied her right to be heard. The learned counsel is of the view that since the DLHT did not write the '***Ex-parte* Judgement**' as a tittle, its decision cannot be said to be *ex parte*. Also, to her, the DLHT did not order the case before it to proceed on *ex parte* mode.

Perhaps, I will not be out of place to briefly elucidate the meaning or essentials of *ex parte* judgments. Without strain of muscles, the term "*ex-parte"* is a Latin word whose literal meaning is "**by or for one party**." According to ***Black's Law Dictionary***, 8th Edn. (p. 1737) it connotes to

"without notice to or argument from the adverse party". In its combined nomenclature, therefore, an *ex-parte* judgement means the decision reached by a court of law/tribunal without hearing evidence of the opposite party. In this matter, it is evident that the appellant's defence was heard by the DLHT. After closure of the respondent-applicant's case, obviously, the appellant was supposed to be accorded with an opportunity to present her evidence in opposition of the application.

On record, the matter was adjourned and a date set for defence proceedings. However, that stage was not realized until the delivery of the judgement. Indeed, at page 2 of the subject judgement, the DLHT recorded the following: -

> *"Baada ya mwombaji kufunga ushahidi wake, mjibu maombi alipewa muda kufungua upande wa utetezi wake lakini alikwepa kuja kutoa ushahidi, hivyo maombi haya yalihitimishwa.'"*

From the foregoing excerpt, it is apparent that hearing proceedings of the case were closed without appellant's evidence. The appellant's counsel argued that the DLHT judgment (page 2)

considered the appellant's defence. With adequate respect, that argument is untrue. What the DLHT includes at the mentioned page is not a decision but rather preliminary information about the trial. There is no analysis of evidence or law necessary for the decision at that stage of composing the judgement.

In addition, by allowing the assessors to render their respective opinion, hearing of evidence was marked closed. More so, in the total exclusion of the defence evidence because the same were adduced at and taken by the DLHT. Hence, not included in the judgement. In view of this court, *ex parte* judgement is determinable not by its form but contents.

It is a cardinal law, that when a party is challenging his right to be heard against the decisions passed on one-sided basis (*ex parte*), he/she must first apply to set aside the said judgement. In the case of ***Dangote Industries Ltd Tanzania v Warnercom (T) Limited***, Civil Appeal No. 13 of 2021 (unreported) the Court of Appeal held, at page 7, that;

> *"Thus, the requirement that an aggrieved party should not appeal before attempting first to set aside an ex-parte*

judgement, does not apply where the appellant is not interested to challenge the order to proceed ex-parte or was the plaintiff at the trial court."

In this matter at hand, the appellant is faulting the DLHT for denying her the right of being heard. As I have alluded to earlier herein, the DLHT allowed the assessors to read their opinion which order precluded the appellant's defence. In such connection, therefore, DLHT proceed to decide the case *ex-parte*.

It goes without overemphasizing, therefore, as I hereby find; if the appellant intends to challenge the DLHT's adopted mode of the trial and/or subsequent verdict, she must first endeavor to set aside the said *ex parte* decision. See, for instance, the cases of ***Jaffari Sanya & another v Saleh Sadiq Osman***, Civil Appeal No. 119 of 2014; ***Yara Tanzania Limited v D B shapriya & co Ltd***, Civil Appeal No. 245 of 2018; ***The Registered Trustees of Pentecostal Church in Tanzania v Magreth Mukama*** (***A minor by her next friend, Edward Mukama***); Civil Appeal No. 45 of 2015 (all unreported). In the last case, this Court articulately held, in this

regard that, "the aggrieved party may appeal without a prior attempt to have it set aside provided that the appeal does not seek to challenge the order allowing the decree holder to proceed *ex-parte*."

As I steer this ruling towards conclusion, I will sound the rationales of taking the above approach (setting aside the one-sided decision) first. **One**, for the court to ably determine whether or not the right to being heard was denied, it must delve into the reasons/grounds which prevented the aggrieved party from being heard. Such grounds may take various forms, including the party's non-appearance; abandoning the trial; refusal to prosecute or defend while present in court; and failure to take necessary steps, such as, filing the requisite written statement of defence or intentional refusal to attend mediation proceedings.

In law, the foregoing grounds will normally be brought in court in as evidence (depositions) in affidavits. The opposing party will then get a chance to oppose or controvert them. Therefrom, the court will make a founded analysis and make its decision. This pack of advantage is not found in the appellate proceedings. In the latter, parties do not usually exchange contentious evidence.

Two, in line with the philosophy or autonomy of court hierarchy, litigants are obligated to start from the lowest competent institutions empowered to resolve their dispute. In ***Dangote Industries' case*** (supra) the Court of Appeal luridly reaffirmed this principle 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".

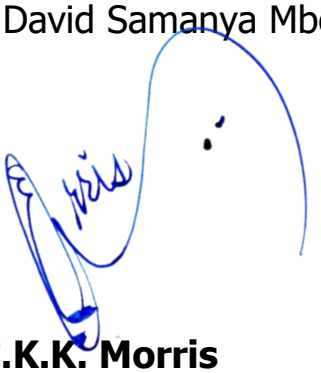
The above said and done, I hold that this appeal was filed prematurely. I hereby strike it out for want of competence. The respondent is awarded costs. It is so ordered. Parties' right of appeal is fully explained to them.

C.K.K. Morris

Judge

November 3rd, 2023

Ruling is delivered this 3rd day of November 2023 in the presence of Ms. Ester David, the appellant and Mr. David Samanya Mboya, the respondent.



C.K.K. Morris

Judge

November 3rd, 2023