**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**
**MOSHI SUB - REGISTRY**
**AT MOSHI**

**LAND APPEAL NO. 54 OF 2023**

*(Arising from the decision of District Land and Housing Tribunal of Moshi at Moshi in Application No. 19 of 2022 before Hon R.Mtei-Chairman.)*

**1. EMMANUEL N. MBISE .....APPELLANT**
**2. KAMBELE INVESTMENT GROUP.....APPELLANT**

**VERSUS**

**GODLISTEN CHRISTIAN KILEO.....RESPONDENT**

## RULING

7th & 14thMarch 2024.

**A.P. KILIMI, J.:**

The appellants hereinabove being the respondent at the District Land and Housing Tribunal of Moshi at Moshi were both sued by the plaintiff herein the respondent for the trespass of the suit land situated at Bomang'ombe area within Hai District. When the matter was called for hearing at the trial tribunal, the appellants dodged an appearance leading for the matter to proceed *ex-parte* and consequently an *ex-parte* judgment was handed down on 23/06/2023 by the trial tribunal.

It was from such findings of the trial tribunal the appellants knocked the door of this Court appealing against the trial tribunal findings be quashed and set aside basing on the following grounds;

1. That the trial tribunal erred in law and fact when it failed to evaluate evidence properly leading to unfair decision
2. That the trial tribunal erred in law and in fact when it reached its decision without reasonable proof of the case to the required standard
3. That the trial tribunal erred in law and in fact when it failed to determine other issues and judgment was not based on facts, evidence and issues on records
4. That the trial tribunal erred in law and in fact when it reached its decision without according the appellant the right to be heard,
5. That the trial tribunal erred in law and in fact when it reached its decision yet the proceedings of the trial tribunal are tainted with irregularities and the trial tribunal did not have jurisdiction.
6. That the trial tribunal erred in law and in fact by giving judgment in favour of the respondent on unreliable evidence.

When replying to the petition of appeal, the counsel for the respondent raised a Preliminary objection that the appeal was not properly before this Court as the appellant ought to set aside an *ex-parte* judgment first instead of appeal, hence this ruling.

When the matter came before me for hearing of the said Preliminary objection, the appellants were represented by Ms. Ednah Mndeme learned counsel while the respondent was represented by Mr. Philemon Shio learned counsel.

In support of the Preliminary Objection raised, Mr. Shio argued that the appellants ought to firstly exhaust all other remedies including setting aside an *ex-parte* judgment before filing an appeal. To support his point the counsel referred to order IX rule 9(1) of the Civil Procedure Code Cap 33. R.E.2019 hereinafter "CPC" The counsel further submitted that he was aware of section 70 (2) of the CPC which gave parties right to appeal but the same was not like the case at hand.

He further submitted that as Land application No.19 of 2022 was passed *ex-parte*, under regulation 11(2) of the **Land disputes courts ( the District land and Housing tribunal) Regulations GN No.174 of 2003** provides for the time limit in filing an order to set aside an *ex-parte* judgment. Therefore, if appellants wanted to appeal before this Court they were supposed to appeal only on merits of the case and not to give reasons to set aside the trial tribunal judgment as cited in ground number

4 of their appeal which the counsel was of the view that such ground goes directly on challenging an *ex-parte* judgment of the trial tribunal. To emphasise his contention, the counsel referred the decision of the court in **Dangote Industries Limited Tanzania vs Warnercom T. Limited** [2022] TZCA 34 (TANZLII) and prayed this appeal be dismissed with costs.

Ms. Mndeme on the other hand, strongly refuted the ground that the appeal was prematurely filed. The counsel replied that the authority referred by the counsel for the respondent at page 11 were nonexistence as there were no place written what he contended. Further the counsel argued that at page 8 of a referred authority the Court of Appeal quoted section 70(2) of the CPC, and at page 11 to 12 of the said authority the court was of the opinion that, that was like an appeal they have filed where the court allowed without setting aside the judgment.

In regard to the referred regulation 12(2), the counsel replied that word used under such provision was 'may' meaning that was not mandatory, further the counsel submitted that under order IX rule 9 the word used was also 'may'. The counsel then replied that respondent counsel did not tell and show where he got the authority that it must set

aside an order first. In regard to section 70(2) of the CPC the counsel was of the opinion that interpretation of that section was done by different authorities. She then added that the counsel for respondent pointed out only ground number four and no other grounds of appeal, then the counsel concluded if other grounds were proper, they should not be ignored, thus in her view thereof, prayed preliminary objection has to be overruled with costs for want of merit.

In a brief rejoinder, Mr Shio reiterated his submission in chief and added that section 70(2) of the CPC, the word used 'may, is used only on the merits of the findings that were founded by the trial tribunal and not raising any grounds to move the court to set aside the decision passed by the tribunal. He further submitted that words 'may' are used purposely to denote if the appellant may set aside *ex-parte* judgment by filing an application in the tribunal that passed the judgment, the act which the appellant did not do. The counsel then concluded that ground number 4 was mentioned to show that the appellant memorandum of appeal put such ground to set aside an *ex-parte* judgment. Consequently, the counsel said this flawed the law and prayed this appeal be dismissed as it was prematurely filed in this Court.

Having considered the rival submissions of both parties, the issue for determination is whether the objection raised has merits. In answering the raised issue, I wish to reproduce the following provisions which shows the way forward for the part aggrieved over an *ex-parte* judgment. Starting with Regulation 11(1)(2) of the **Land Dispute Courts (The District Land and Housing Tribunal) Regulations, GN No.174 of 2003** provides that;

> *"11(1) on a day the application is fixed for hearing, the tribunal shall;*
>
> *(a) N/A*
>
> *(b) N/A*
>
> *(c) Where the respondent is absent and was duly served with the notice of hearing or was present when the hearing date 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 thirty days* ***apply to have the orders set aside, and the tribunal may set aside its orders, if think fit to do so and in case of refusal, appeal to the High Court.***

[Empasis supplied].

Further under Order IX rule 9 of the Civil Procedure Code [CAP 33 R.E 2019] provides 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 think fit , and shall appoint a day proceeding with the suit."*
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> [Empasis supplied].

Also, in Section 70(2) of the Civil Procedure Code (supra) provides that;

> *"an appeal may lie from an original decree passed ex-parte"*

From the above cited provisions, it is crystal clear that, **first**; an *ex-parte* judgment is set aside upon showing good cause to the court which

passed it, **second;** upon the Court refusal in setting aside, the aggrieved part may then appeal to the High Court, **third;** Section 70(2) of the CPC (supra) further allows parties to appeal against an *ex-parte* judgment. Therefore, according to the above law *ex-parte* judgment are appealable even without first exhausting all other remedies including setting aside. In this regard, I subscribe to the contention by the counsel for the appellant when referred the decision in **Dangote Industries Ltd Tanzania** (supra), at page 8 when the court had this to say;

> *"..we can thus hold without any hesitation that, the right to appeal against ex-parte decree is automatic and does not depend upon there being a prior proceeding to set aside the ex parte judgment"*

Therefore, from the above excerpt of law, gives two positions, first, appealing direct to the higher court against the *ex-perte* and second appealing against the decision of the trial court/tribunal after refusing to set aside *ex-perte* judgment. The crucial issue now becomes, what is the position to be followed in the circumstances of this matter.

In my scrutiny, the above positions were cleared by case laws, in the case of **Dangote Industries Ltd Tanzania** (supra) the court of this land

referred the principle stated in its earlier cases of **Jaffari Sanya & Another vs Salehe Sadiq Osman**, Civil Appeal No. 119 of 2014 and **Pangea Minerals Ltd v. Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (both unreported) and at page 9 of Judgment observed 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. For the Court of Appeal, this principle is stated in rule 44 of the Tanzania Court of Appeal Rules, 2009 (the Rules) whereas for the High Court and subordinate courts, it is stated in section 13 of the CPC."*
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> [Empasis supplied].

In respect to the circumstances of this matter, Mr. Shio contention is that the appellant has raised a ground which intend this court to set aside the ex-parte judgment of the tribunal, whereas Ms. Mndeme averred that the respondent counsel pointed only ground number four and urged that in respect to other grounds remained, if the same are proper before this court should not be ignored, thus be heard in this appeal. Having this contentious in mind, I my view it seems that Ms. Mndeme does not dispute the said ground number four the way it was postulated, but urges this court to proceed with the other grounds appeal on merit. For purpose of certainty, the said ground reads as follows;

> *"4. That the trial tribunal erred in law and in fact when it reached its decision without according the appellant the right to be heard."*

I have carefully considered the wording of this ground; I subscribe with the contention by Mr. Shio that this ground aim to contest on why the trial tribunal proceeded hearing *ex-parte* against the appellant which resulted to *ex-parte* judgment. Nonetheless, I am settled the other remained grounds aimed to challenge the said judgment on merit. Therefore, this means, the appellant has intended to challenge why the

case was heard *ex-parte* at the same time appealing on the merit of the said *ex-parte* judgment.

Now, the next point to be considered is whether appeal containing two distinct grounds, one aiming for setting aside and other aiming appeal on merit offended the law stated above.

As observed above in the case of **Dangote Industries Ltd Tanzania** (supra) after interpreting the above provisions quoted, was of the view the appellants cannot challenge both orders in respect to why the trial court proceeded *ex-parte* and the merit of the findings in the *ex-parte* judgment, and the court clearly pointed out that one cannot challenge the merit of the findings before dealing with an application to set aside the *ex-parte* judgment first.

The counsel for the appellant in her argument referred page 11 and 12 of the above case, the court said holding was against the decision of the High Court and allowed the appeal to be heard without ordering going at the trial tribunal to set aside. In my view, I think the learned counsel misapprehended the facts in the said matters. As said above, the court in **Dangote Industries Ltd Tanzania** (supra) referred its earlier cases and

propounded the principle above, but its facts were different with this matter in hand, this was revealed at page 11 when the court had this to say;

> *"In this case, we have observed from the record and the parties are not in dispute that, neither of the grounds of appeal raised in the first appellate court sought to challenge the order by the trial court to proceed ex-parte. Obviously therefore, the principle in the two decisions under discussion was inapplicable and the first appellate court was legally wrong in dismissing the appeal for being premature."*

In the circumstances, I am settled the above facts differs with this case at hand wherein grounds of appeal raised challenge both the order by the trial court to proceed *ex-parte* and appeal on merit of the alleged *ex-parte* judgment.

Therefore, since the counsel for the appellant in this matter neither declared to abandon the said ground number four nor did not amend appellant's memorandum of appeal, her deposition that this court has to deal with other grounds and decide without touching this ground existing is

inevitable, this is because even if she will not argue it, so long is in place the opponent may argued it, which is obvious in this matter, and hence this court has to decide which is contrary to the authorities stated above.

Thus, and upon dealing with the fourth ground the route is apparent, and this is because in the said ground, the appellant claimed that they were denied right to be heard, this means they need to establish sufficient cause why they did not appear at the trial tribunal, which as observed above is done by the court with jurisdiction to set aside an *ex parte* judgment which is exclusively conferred to the trial court, and thus it cannot be addressed by way of an appeal. In the wording of the court in **Jaffari Sanya & Another vs. Saleh Sadiq Osman** (supra) the court had this to say;

> *"On the basis of the above provision and authorities, 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 that entered the judgment".*

Therefore, in view of the above, in the light of this glaring flaw in mixing the above grounds, the same cannot even rescued by principle of overriding objective, commonly known as the oxygen principle for the circumstances stated above (See **Yakobo Magoiga Gichere vs Peninah Yusuph,** Civil Appeal No. 55 of 2017).

On the basis of the reasons stated above, I find that the objection raised is meritorious and consequently is hereby sustained. In the event, I hereby strike it out this appeal with costs.

It is so ordered.

**DATED** at **MOSHI** this 14th day of March, 2024.

THE HIGH COURT OF TANZANIA

**A. P. KILIMI**

**JUDGE**

**Court: -** Ruling delivered today on 14th day of March, 2024 in the presence of Mr. Philemon Shio for the respondent and Ms. Ednah Mndeme for the appellants absent.

**Sgd: A. P. KILIMI**
**JUDGE**
**14/03/2024**