IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 05 OF 2022

(Arising from the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in Land Application No. 519 of 2020 delivered by Hon. C.P Kamugisha on 26th November 2021)

JESSE FRANK KIWELU.....1ST APPELLANT

BELINDA IMANI ULOMI.....2ND APPELLANT

VERSUS

GRAYSON KAJUNA.....RESPONDENT

Date of Last Order: 24/02/2022

Date of Ruling: 16/03/2022

RULING

MKAPA J:

At the District Land and Housing Tribunal of Kinondoni at Mwananyamala (the tribunal) the respondent herein (the applicant in **Land Application No. 519 of 2020**) sued the appellants (the respondents in **Land Application No. 519 of 2020**) together with Mzee Milambo for obstructing the respondent from developing his land (suit land) measured four acres. The suit land is situated at Kihonzile, Mabwepande ward (previously Bunju ward) at Kinondoni District, Dar Es Salaam Region. The respondents therein were served as evidenced by proof of service. At the hearing the 2nd appellant herein and Mzee Milambo did not enter appearance and the tribunal ordered hearing to proceed ex-parte against them in which ex-parte judgment was delivered and decree granted in favour of the respondent herein.

Aggrieved by and dissatisfied with the tribunal's findings the appellants have preferred the instant appeal. When this appeal came up for hearing a preliminary point of objection was raised by the respondent on its maintainability on the ground that the same was prematurely lodged before this court. Parties consented and this court ordered for the preliminary objection to be disposed of by way of filing written submissions. The appellants were represented by Mr. Methuselah B. Mafwele, learned advocate while the respondent had the services of Mr. Goodchance R. Lyimo also learned advocate.

Submitting in support of the preliminary objection Mr. Lyimo contended that, the instant appeal had been lodged prematurely thus unmaintainable before this court. He added that the 2nd appellant being aggrieved by an ex-parte order /decree granted against her should have first exhausted all remedies available including setting aside the said ex-parte decree instead of challenging it by way of appeal.

Supporting his contention he relied on the provisions of **Regulation 11 (2) of GN 174/ 2003** and the decision in the cases of **Daniel Sebastian Vs. Sebastian Daniel Odetarik, Land Appeal No. 3 of 2019, Yara Tanzania Limited Vs. DB Shapriya & Co. Ltd, Civil Appeal No. 245 of 2018, CAT** (Unreported), **Daud John Vs. Israeli John, Land Appeal No. 44 of 2019, HCT Arusha** (Unreported) and the case of **Jaffara Sanya Jussa & Anor Vs. Saleh Sadiq Osman, Civil Case No. 22 of 1996, CAT** (Unreported). He submitted further that, since judgment against the 2nd appellant was entered ex-parte, there was no evidence to the effect that she had exhausted the available remedies including setting aside the said ex-parte judgment. It was Mr.

Lyimo's view that, the instant appeal is premature thus unmaintainable. Finally he prayed for the appeal to be struck out with costs.

Opposing the preliminary objection Mr. Methusela counsel for the appellants submitted that the 2nd appellant had no intention to fault an order to proceed ex-parte rather she intended to challenge the correctness of the findings on the award in the ex-parte judgment. It was Mr. Methusela's view that the 2nd appellant is not barred from appealing direct to this court. In support of his argument he made reference to the case of **Jaffari Sanya Jussa** (supra) in which the court stated;

> *"This rule of setting aside ex-parte decree will only benefit a defendant. But there are two more possible scenarios in an ex-parte decree: One, a defendant might not want to set aside an ex-parte decree but might wish to contest the findings or the award.... In such a case the remedy would appear to appeal".*

Furthering his argument he referred this court to section 70 (2) of the Civil Procedure Code, Cap 33 [R.E 2019] which provides that an appeal may lie from an original decree passed ex-parte. It was Mr. Methusela's view that in the instant matter the 2nd appellant had the right to challenge the original decree granted ex-parte against her. He supported his assertion by citing the case of **The Registered Trustees of Pentecostal Church in Tanzania Vs. Magreth Mukama (A minor, by her next friend, Edward Mukama), Civil Appeal No. 45 of 2015, HCT at Mwanza (Unreported)**. He distinguished the provisions of **Regulation 11 (2) of GN No. 174/2003** from the present appeal as the 2nd appellant herein intends to challenge the findings on the award granted ex-parte. He prayed for

this court to allow the appeal as the 1st appellant has not objected therefore the remedy is for this court to order amendment in order to expunge the name of the 2nd appellant. He finally prayed for the preliminary objection to be dismissed with costs.

Re- joining his submission Mr. Lyimo generally reiterated what he had earlier submitted in submission in chief. He further submitted that, section 70 (2) of the CPC Cap 33, is inapplicable as it relates to matters emanated from the District Court and Resident Magistrate Court, while the present appeal originated from the District Land and Housing Tribunal which is governed by section 51 (2) of the District Land and Housing Tribunal Act, Cap 216 [R.E 2019]

I have given due consideration to the submissions made by the counsel for the respondent and the response advanced by the counsel for the appellants and the question that arises is whether the preliminary objection is maintainable.

The counsel for respondent has objected the appeal to the effect that the same has been lodged prematurely hence unmaintainable as it emanated from an ex-parte decree. That; the appellants (specifically the 2nd appellant) ought to have exhausted the available remedies before the tribunal such as setting aside the judgment and decree, instead of appealing direct to this court. On the other hand the appellants' counsel contended that the 2nd appellant intended to challenge the findings on the award in the ex-parte decree on its merit and not challenging tribunals order to proceed ex-parte for it to be set aside.

Since the counsel for the respondent has prayed for the striking out of the appeal under Regulation 11 (2) of GN No. 174/2003, I find it prudent that the relevant provisions namely Regulation 11 (1) and (2) respectively are reproduced. Regulation 11 (1) provides as follows;

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 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

Sub Regulation (2) thereof states;

(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 order set aside, and the tribunal may set aside its orders if it thinks fit so to do and in case of refusal appeal to the High Court.

From the import of the provisions of regulations 11 (2) it is plain clear that, where the respondent intends to challenge the order to proceed ex-parte the respondent first, has to show good cause for his non-

appearance. Upon satisfaction the tribunal may set aside the ex-parte decision and allow the matter to be heard inter-parties.

The rationale behind being, the tribunal being the same body which previously had made an ex-parte order has to be satisfied with the reasons for non-appearance. Impliedly, in the event of the respondent challenging 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 finding before dealing with an application to set aside ex-parte judgment first.

What I gathered from the memorandum of appeal as averred by the counsel for the appellants, the appellants do not intent to challenge tribunal's order to proceed ex-parte instead they are faulting the merit of the findings in the ex- parte judgment and decree.

The Court of Appeal in **Dangote Industries Limited Tanzania Vs. Warnercom (T) Limited Civil Appeal No.13 of 2021** had an occasion to consider whether ex-parte judgment can be appealed against without first attempting to set it aside in a scenario where the appellant is not faulting the decision of the trial court to proceed ex-parte, rather challenges the correctness of the decision itself, and the Court had this to say;

".....the requirement that, an aggrieved party should not appeal before attempting first to set aside an ex-parte judgment does not apply when the appellant is not interested in challenging the order to proceed ex-parte."

The above scenario fits squarely in the case at hand as the appellants are faulting the merit on the evidence adduced before the trial tribunal

without touching on the competence of the order to proceed ex-parte before the tribunal. As averred by the Counsel for the 2nd appellant, the 2nd appellant does not intend to challenge tribunal's order to proceed ex-parte for it to be set aside rather, she is challenging the correctness (merit) of the findings of the decree against her. This is evidenced by the 1st ground of appeal in which the appellants are challenging tribunal's decision for failure to analyse and consider the evidence of SU3, an officer from the Ministry of Land and Human Settlement who testified to the effect that, the land in dispute is the property of the Ministry comprised of 20,000 plots project. A reading from the said ground of appeal there can be no doubt that this ground of appeal and the other three (which I need not reproduce them here) touch on the root of the case and evidence tendered before the tribunal hence the appellants are challenging the merit of the findings of the award not the tribunal's order to proceed ex-parte which in my view it is not for this court to narrow down the scope of Regulation 11 (2) by implying that the legislature intended that such an appeal would be conditional upon there being an attempt to set the ex-parte judgment aside.

The counsel for the respondent had relied upon the provisions of Regulation 11 (2) of GN 174/2003 and various court decisions including that of **Daniel Sebastian Vs. Sebastian Daniel Oderika** and **Daud John Vs. Israel John** (*supra*) which in my view are distinguishable from the facts of the present appeal in which the defendants in the said cases were challenging the order to proceed ex-parte alone. [See page 3; last paragraph of the judgment in **Daniel Sebastian Vs. Sebastian Daniel Odetariki** "*.....the appellant was not properly*

summoned/served at the hearing in the Ward tribunal]" [See also page 5; last paragraph **Daud John Vs Israel John** (*supra*) "*.....the reasons for his failure to enter appearance on 15/5/2019 when the case was set for defence hearing are stated in paragraph 5 of the affidavit.]"*

For the reasons discussed above, I am of the settled view that this appeal is properly before this court as the appellants are challenging the merit of the findings in the ex-parte judgment of the District Land and Housing Tribunal of Kinondoni at Mwananyamala in **Land Application No. 519 of 2020** without touching on the competence of the order to proceed ex-parte before the tribunal. Consequently, the preliminary objection is overruled.

It is so ordered.

Dated and Delivered at Dar Es Salaam this 16th day of March, 2022.

S.B MKAPA

JUDGE

16/03/2022