

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND APPEAL NO. 438 OF 2023**

*(Originating from the Judgment and Decree of Ilala District Land and Housing  
Tribunal in Land Application No. 37 of 2023 (Hon. S.H. Wambili)*

**ALOYCE P. LYIMO..... APPELLANT**

**VERSUS**

**REGINA REGINALD CHONJO..... 1<sup>ST</sup> RESPONDENT**

**HIDAYA SUDI MUSHI..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

*Date of last Order: 04/3/2024*

*Date of Ruling: 21/3/2024*

**A. MSAFIRI, J.**

Before the District Land and Housing Tribunal of Ilala District (herein the Tribunal), the 1<sup>st</sup> respondent Regina Reginald Chonjo instituted an Application No. 37 of 2023. The 1<sup>st</sup> respondent claimed to be the owner of the house on Plot No. 65, Block 2, located at Gerezani, Dar es Salaam. She claimed that Hidaya Said Mushi (now the 2<sup>nd</sup> respondent) and Aloyce Lyimo (now the appellant) has trespassed into the said house and occupied it without any lease agreement or rent payment. The 1<sup>st</sup> respondent prayed for declaration that the respondents (in the

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application) were the trespassers and the eviction order be issued against the said trespassers.

After hearing which was *exparte* against the now appellant, the Tribunal entered judgment in favour of the 1<sup>st</sup> respondent. The appellant has now appealed against the said judgment by advancing three (3) grounds of appeal which are;

- 1. That the trial Chairman erred at law by making an exparte order in Land Application No. 37 of 2023 hence denying the Appellant's right to be heard.*
- 2. That the trial Chairman erred at law and fact by ignoring and/or neglecting the reasons adduced by the Appellant for the non-appearance of his advocate.*
- 3. That the trial Chairman erroneously ordered the Application to be heard Exparte against the Appellant while his advocate has never been absent for two consecutive dates without good cause.*

The appellant prays that the proceedings starting from 15/9/2023 when the Tribunal made *exparte* order and its resultant judgment and decree be quashed and set aside with costs.

The appeal was heard orally and the appellant was represented by Mr. Herry Kauki, learned advocate while the respondents were represented by Mr. Jerome Msemwa, learned advocate. I have considered their worthy

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submissions before the court and I will analyze them as I determine the grounds of appeal.

I have read the three grounds of appeal and it is clear that they all revolve around the illegality of the ex parte order which was entered by the trial Tribunal against the appellant who was then the 2<sup>nd</sup> respondent. The main complaint of the appellant which is the base of his appeal is that the Tribunal erred when it entered ex parte order against him hence denying him the right to be heard. That the Tribunal order was against Regulation 13(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (herein the Regulations). Since all three grounds are on the same issue, then I will consolidate and determine them jointly.

Before determination of the grounds of appeal, I will first tackle the preliminary objection which was raised by Mr Msemwa about the competency of this appeal before the court. Starting his reply submission, Mr Msemwa stated that the appellant was supposed to file an application before the trial Tribunal to set aside the ex parte judgment and it is only after denial by the Tribunal when the appellant could have filed the appeal before this court. He said that there is no record to show that there was

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any attempt to set aside the ex parte judgment before filing the current appeal. He pray that the appeal be struck out with costs.

In reply of the objection, Mr Kauki submitted that the same was a misconception because Regulation 13(4) of the Regulations provides that when the applicant is being represented by the advocate and wants to set aside an ex parte order, he can do so by appeal to the High Court and not by application before the Tribunal. He said further that the appeal is proper before the court as the appellant was represented during the trial before the Tribunal.

For purpose of clarity I shall reproduce the whole of Regulation 13 of the Regulations as follows:-

*13(1) The parties to the proceedings may during the hearing of proceedings be represented by an advocate or any other representative.*

*(2) Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate.*

*(3) Where a party's advocate is absent for the reason of attending the proceedings in the High Court or Court of Appeal, the Tribunal shall not believe any other evidence as a proof for being in the superior courts other than by producing summons to the advocate and cause list from such courts.*

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*(4) The Tribunal shall not have powers to set aside its own order made under sub-regulation (2) and any other aggrieved party may appeal to the High Court (Land Division).*

From the above provisions, it is settled procedure that where a party is represented by an advocate in the Tribunal and wants to set aside the exparte orders made against him by the same tribunal, then a party cannot move the Tribunal to set aside its own order. The remedy a party has is to appeal against that order to this court.

Since the appellant was represented by an advocate during the proceedings at the trial, and an exparte judgment was entered against him, then he has correctly appealed to this court. I find the objection by Mr. Msemwa to be misconceived and I overrule the same.

In determination of the grounds of appeal, Mr Kauki submitted on the grounds of appeal that the appellant was denied his right to be heard. That the right to be heard is constitutional as it is enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania. He submitted further that on 15/9/2023, the matter was set for hearing before the trial Chairperson and the appellant was present in court but his advocate has not arrived. That the appellant informed the Tribunal that he had unsuccessfully tried to communicate with his advocate. That the appellant prayed for the Tribunal to adjourn the matter on the reason that *Allo.*




he was a layman and could not proceed with the hearing as he had no knowledge of the legal matters. That despite this being a valid reason, the trial Chairperson rejected it.

Mr Kauki submitted further that the appellant had a right to be represented as provided under Regulation 13(1) of the Regulations. That the Tribunal ignored the reasons for non-appearance of the advocate and therefore denied the appellant the right of representation.

The counsel argued that the exparte judgment was entered erroneously contrary to Regulation 13 (2) of the Regulations. That it is on record that the advocate for the appellant has not failed to appear in court for two consecutive period but the Tribunal proceed to enter exparte judgment against the appellant.

To bolster his points, the counsel cited the case of **Projestus Rweyemamu Petro vs. Helios Tower TZ Ltd & 2 others**, Land Appeal No. 72 of 2020, HC Bukoba at page 16 and the case of **David Mushi vs. Abdallah Msham Kitwanga**, Civil Appeal No. 286 of 2016, CAT at DSM, where the importance of the right to be heard was emphasized.

He prayed that the appeal be allowed and the exparte judgment be set aside with costs. 

Mr Msemwa vehemently contested the appeal and submitted that the appellant had six advocates but only one Mr Ndunguru had disengaged from representing the appellant. That there is no record to show the whereabouts of the appellant's advocates. That the appellant was given a chance to proceed with his case but he refused as it is shown at page 3 of the judgment. The counsel said that there is no any reasonable ground which was advanced by the appellant to explain the failure of his advocate to appear in court and that the cited cases are distinguishable because the appellant has no clean hands. That at page 6-7 of the judgment it is shown that the appellant is using the house in dispute.

He prayed for the dismissal of the appeal with costs.


In rejoinder, Mr Kauki reiterated his submission in chief. He added that there is no record to show that the appellant was represented by six advocates and that it is not shown that the said advocated have ever appeared in Tribunal at the same time. That the appellant did not refuse to proceed with the hearing but prayed for an adjournment following the absence of his advocate. He reiterated his prayers.

I have read the records of the proceedings of the matter at the Tribunal. They show that on 06/9/2023, the matter was set for hearing. The applicant was represented by Mr Msemwa who was present in court. Both

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respondents were present in person. Mr Msemwa informed the court that they were ready to proceed. However the 2<sup>nd</sup> respondent (who is now the appellant), informed the court that he is unable to proceed as his advocate Mr Ndunguru is bereaved and has travelled to Songea for funeral. Mr Msemwa for the applicant admitted that the advocate Mr Ndunguru was bereaved. But he argued that the 2<sup>nd</sup> respondent has many advocates and any of the rest could have appeared in court to proceed with hearing. The 2<sup>nd</sup> respondent replied that his advocate is Mr Ndunguru. The Tribunal adjourned the hearing and stated that it was true that the advocate of the 2<sup>nd</sup> respondent is bereaved. The Tribunal stated thus;

***" kusikiliza 15/9/2023 saa 3.00 asubuhi ili kumpatia nafasi mdaiwa Na.2 wakili wake kuja kwenye kesi kwa kuwa ni kweli leo amefiwa"***

On 15/9/2023, the matter was called for hearing. Advocate Msemwa was present representing the applicant. The respondents were all present in person. The 2<sup>nd</sup> respondent (current appellant) informed the Tribunal that he was not ready to proceed with the hearing as his advocate was absent. He said that he did not know what has happened to his advocate but he prayed to wait for him so as to proceed with the hearing. 



The Tribunal was of the view that the 2<sup>nd</sup> respondent has not advanced any sufficient reasons for the absence of his advocate. That since the 2<sup>nd</sup> respondent was not ready to proceed with the hearing then the hearing shall proceed on the applicant and the 1<sup>st</sup> respondent only. Regulation 13(2) of the Regulations provides thus;

*13(2) **Where a party's advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate. (emphasis mine).***

In the present matter the major question is was the appellant's advocate absent in court for two consecutive dates? The answer according to the above narration from the record of proceedings of the Tribunal is that yes the advocate was absent in court for two consecutive dates i.e. he was absent on 06/9/2023 and on 15/9/2023.

However, his absence of 06/9/2023 was on good cause as he was bereaved and has travelled for funeral. This was confirmed by Advocate Msemwa himself and even the Tribunal agreed on that reason and adjourned the hearing on that date. It is true that the advocate absence

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on 15/9/2023 was without good cause as even the appellant himself did not explain the where about of his advocate. There was no any reason which the appellant gave to explain the absence of his advocate.

However since the first time of the advocate's absence was on good cause, then this was the first time the advocate has appeared without giving good cause of his absence. Therefore considering the provisions of Regulation 13(2) of the Regulations, the advocate of the 2<sup>nd</sup> respondent was absent in court without good cause for one time only. It is my finding that the Tribunal order of proceeding exparte against the 2<sup>nd</sup> respondent was in contravention of Regulation 13(2) of the Regulations.

Mr Msemwa has argued that the appellant had representation of six advocates during the proceedings hence any of the said advocates could have appeared in absence of Mr Ndunguru. However, the proceedings does not support Mr Msemwa's claims. The records does not show that the appellant was being represented by six advocates. It is shown that on 28/02/2023, the 2<sup>nd</sup> respondent was represented by one Mr Kitwika, advocate. Again Mr Kitwika appeared for the 2<sup>nd</sup> respondent on 17/4/2023. On 20/7/2023, one Mr Bakari Ndeke advocate appeared for the 2<sup>nd</sup> respondent. The appearance of the said

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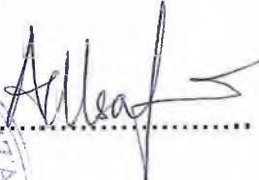
advocates beside Mr Ndunguru does not show that the 2<sup>nd</sup> respondent/ appellant has engaged six attorneys. Besides, the 2<sup>nd</sup> respondent/appellant has stated before the Tribunal that his advocate was Mr Ndunguru.

As already found, the trial Tribunal contravened the provisions of Regulation 13 (2) and by doing that the appellant was denied the right to be heard. For that sole reason, I find the appeal to have merit on all grounds of appeal.

I hereby set aside the exparte order entered against the appellant by the Tribunal on 15/9/2023, quash the proceedings from the date of 15/9/2023 and its resultant judgment and decree and order retrial of Application No. 37 of 2023 interpartes starting after the proceedings and order of the Tribunal of 06/9/2023.

Appeal is allowed with costs.

It is so ordered.

  
**A. MSAFIRI**  
**JUDGE**  
**21/3/2024**

