APPEAL NO 46/2019 07/08/2019.

ANNEXTURE MM-02

Proper cause for one aggrieved by ex-parte decision is to apply to set it aside and not to appeal.

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT IRINGA

MISCELLANEOUS LAND CASE APPEAL NO. 25 OF 2012

(From the decision of the District Land and Housing Tribunal of Iringa at Iringa in Land Case Appeal No. 47 of 2012 and Original Ward Tribunal of Mlenge Ward in Application No. 20 of 2011)

KUYELA CHULUGU & ANOTHER ---------- APPELLANTS

VERSUS

MAUA MGATA ---------- RESPONDENT

22/09/2015 & 22/10/2015

JUDGMENT

KITWELO, J.

The appellants herein have knocked the doors of this Court seeking to challenge the Decision of the District Land and Housing Tribunal of Iringa delivered on 28th August, 2012 which in essence allowed the respondent's appeal and quashed the decisions of Mlenge Ward Tribunal, and Itunundu Ward Tribunal.

Before this honourable Court the appellants filed a three point Petition of Appeal namely;

1. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and in fact in deciding the appeal before him against the appellants despite the misjoinder of the parties.*
2. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and in fact in deciding that, the matter in dispute is res judicata without considering that the purported judgments of the Itunundu Ward Tribunal was mere letters and not judgments within the meaning of the law as a result he issued a wrong decision.*
3. *That, the Honourable Chairman of the District Land and Housing Tribunal erred in law and in fact in deciding that the ex parte decision of the Mlenge Ward Tribunal was done improperly.*

The genesis behind this appeal is two separate land disputes which were filed separately by the appellants against the respondent way back in 2011 before the Mlenge Ward Tribunal and Itunundu Ward Tribunal in Pawaga. In both land disputes the respondent did not enter appearance despite the fact that she was dully served. The Mlenge Ward Tribunal and Itunundu Ward Tribunal decided to proceed with the hearing of the disputes ex

parte and upon conclusion of the hearing in both two disputes the appellants won against the respondent.

Dissatisfied by the decisions of the Ward Tribunals the respondent preferred an appeal before the District Land and Housing Tribunal in Appeal No. 47 of 2012 which upon hearing the parties the Chairman of the District Land and Housing Tribunal delivered the judgment in favour of the respondent. Dissatisfied with the decision of the District Land and Housing Tribunal the appellants came before this Court for a redress.

At the hearing of this appeal the appellants appeared in person whereas the respondent was represented by Mr. Jackson Chaula, learned counsel instructed by M/S ABRA LAW ATTORNEYS. Upon the request of the appellants which request was not objected by Mr. Chaula, the appeal was disposed through written submissions which were dully filed as directed by the Court.

I have anxiously and painstakingly scrutinised the records of the Ward Tribunal as well as that of the District Land and Housing Tribunal and one issue stands out and that is none other than whether or not the instant appeal before this Court is competent.

I am aware that it is trite law that the proper and correct course for whoever is aggrieved by an *ex parte* decision of the court or tribunal is to apply for setting aside the *ex parte* decision and not to prefer an appeal.

This position has long been settled and clear and there is a plethora of legal authorities in this aspect. In the case of **Majid Abdurrahman V Anitha Nickson Mdete**, Land Appeal No. 5 of 2012, High Court of Tanzania at Iringa (unreported), the Court cited the case of **Swiss Port Tanzania Limited and Another V Michael Lugaiya**, Civil Appeal No. 119 of 2010 in which Hon. Juma J. (as he then was) while referring to the decision of **Government of Vietnam V Mohamed Enterprises (T) Ltd**, Civil Appeal No. 122 of 2005, Court of Appeal of Tanzania (unreported) and **CRDB Bank (1996) Ltd V Morogoro Farm and Transport Services (1985) Ltd**, Civil Appeal No. 61 of 2010 and stated that;

"I am clearly bound by the decisions of the Court of Appeal directing that parties aggrieved by ex parte decrees are required to apply to the same court that passed the ex parte decree to set it aside."

Similarly in another case of **Charlo Mligo V Victoria Kilasi**, Land Appeal No. 7 of 2013 High Court of Tanzania at Iringa (unreported), the Court having realised that the Land Disputes Courts Act Cap 216 RE 2002 and its Regulations are inadequate on matters related to appeal originating from an *ex parte* decision,

applied Section 51 of the Act as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2010 in particular Section 51(2) and Section 70(2) of the Civil Procedure Code, Cap 33 RE 2002 and stated that;

> *"From the foregoing position of the law it is obvious that the proper and correct course for the respondent to have taken was to apply to the trial Ward Tribunal for setting aside the ex parte decision. The appeal before the Njombe District Land and Housing Tribunal was premature."*

In the instant case this Court lacks jurisdiction to entertain the appeal much as the proceedings under scrutiny emanated from an appeal which was a nullity. I am of the considered opinion that the proceedings of the District Land and Housing Tribunal being a nullity in the circumstances of this case the appeal before me is incompetent.

Consequently, the proceeding and judgment of the District Land and Housing Tribunal are hereby quashed for being a nullity and the instant appeal is hereby struck out. However, since the defect in the proceedings have been raised by the Court *suo motu* no order as to costs.

It is so ordered.

P. F. KIHWELO

JUDGE

22/10/2015

Right of appeal is fully explained.

P. F. KIHWELO

JUDGE

22/10/2015