

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CIVIL APPEAL NO. 8 OF 2023

(FROM THE DEFAULT JUDGMENT AND DECREE OF THE LAND TRIBUNAL
AT GAMBA

(HON. RM MOH'D SUBEIT) DELIVERED ON 31st JANUARY, 2023)

BETWEEN

MOHAMED RASHID JUMA APPELLANT

V.

MWBWANA IBRAHIM MADENI 1st RESPONDENT

NATASHA ZACHIE MASHALA 2nd RESPONDENT

JUDGMENT

Dated: 16th August, 2023

S. HASSAN (J)

The Appellant mentioned herein is dissatisfied by the Default Judgment and Decree of Hon Mohamed Subeit (RM), Chairperson of the Land Tribunal, in Civil Case No. 39 of 2022, in the Land Tribunal for Zanzibar at Gamba, dated 31st January, 2023 appeal to this Court against the whole of the said Default Judgment and Decree made thereto for the following grounds of appeal

1. That, the learned Trial Chairman of the Land Tribunal erred in law and in fact to deny the appellant Right to be heard.

2. That, the learned Trial Chairman of the Land Tribunal erred in law and in fact by pronouncing Default Judgment on the date fixed for filling Written Statement of Defence.

The brief background of the matter as shown in the Petition filed on the 19th January, 2022 by the 1st Petitioner and on 22nd January, 2022 by the 2nd Petitioner is that the respondents herein instituted a civil case no. 39 of the 2022 (herein 1st and 2nd respondents) claiming that the Appellant herein has trespassed in the Plot No. 280 situated at Kiwengwa in the Northern District of Unguja admeasuring 5, 393.89 square meters.

The records of the trial court shows that, on the 4th January, 2023 the trial Magistrate gave the following orders:

1. Filling of WSD on 31/1/2023
2. Hearing on 7/02/2023
3. Both Parties to appear.

On the 31/1/2023 when the matter was fixed for filling of WSD the records of the trial court shows that the respondent (appellant herein) and his advocate were absent hence the court issued a Default Judgment **under Order VIII Rule 10 of the Civil Procedure Decree Cap, 8 of the Laws of Zanzibar**. The respondent is aggrieved by the default judgment hence this appeal.

During the hearing of this appeal, the appellant was represented by learned Advocate Mr. Itael Kimario while both respondents were under the service of learned Advocates Mr Ali Rashid and Miss Maimuna

Mr Kimario kicked start this appeal by submitting on the 1st ground of appeal that the right to heard is a Constitutional right enshrined under *Article 13 (6) (a)* of the Constitution of the United Republic of Tanzania, 1977 and *section 12 (6)* of the Constitution of Zanzibar, 1984. Mr Kimario also made reference to *section 31* of the *Land Tribunal Act No. 7 of 1994* read together with *section 38* of the Act which was not

observed by the trial court magistrate. Under *section 31 of the Act No. 7/1994*, Mr Kimario stated that, the respondent is given 14 days to file WSD if failed to do so, the Tribunal within 7 days has to determine whether to extend another 7 days of filing WSD or not. He further submitted that, if the respondent is granted addition 7 days to file WSD and failed to do so, the Tribunal may issue a default judgment. Furthermore Mr. Kimario submitted that, under the provision of *section 38 of the Act No 7/1994* the Tribunal is required to issue ex parte judgment and not a default judgment. He submitted that the Tribunal erred in using civil procedure decree to issue a default judgment while the Act No. 7/94 is very exhaustive on the procedure to be taken if a party fails to submit WSD. To support his submission on the right to be heard, Mr Kimario made reference to the cases:

1. ***Thobias Nungu v. Deus Kyabana in Misc Land Application No. 85 of 2021***
2. ***Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Service Limited, Civil Appeal No. 257 of 2018***

With respect to 2nd ground of appeal, Mr Kimario made reference to page 2 of the trial court proceedings and stated that, the orders of the court were to file WSD on 31/1/23 and submitted that on that material date, they filed WSD as ordered by the court at around 14:15pm. He went on to cite the case of ***Albeilla International Limited v. National Bank of Commerce Ltd (1st respondent), DR. Fauz Twaib (2nd respondent) and Amour Rashid (3rd respondent)***

At the end of his submission on both grounds of appeal, Mr Kimario prayed this court to see merit on this appeal and to allow it and to set aside the default judgment given on 31/1/23.

On the other side, Miss Maimuna learned Advocate for the respondents opposed this appeal as premature and stated that the appellant was required to ask the trial court to set aside its default judgment. Miss Maimuna also made reference to page 2 of the trial proceedings and stated that the advocate and his client failed to appear in court and that the respondent was given 27 days from 4/1/2023 to 31/1/2023 to file WSD but failed to do so. Miss Maimuna cited a case of ***Sunil Zaverchand Choha and Hemali***

Sunil Chohan v. David Wilfrem Mwakitwange (as legal personal representative of Pauline Daud Mwakitwange and Diana Mwakitwange (as legal personal representative of Pauline Daudi Mwakitwange) in Land Case No. 135 of 2021 Land Division at Dar es Salaam to support her submission on respecting the orders of the court. Miss Maimuna supported the default judgment and stated that the trial magistrate was correct to issue it under Order VIII Rule 10 of the CPD CAP, 8 of the Laws of Zanzibar, and that the right to appellant to be heard was not infringed by the trial court because the appellant was given the right to heard but failed to appear in court. she prayed for this court to dismiss the appeal and upheld the trial court default judgment.

Advocate Ali Rashid also made his submission in support of what has been submitted by Miss Maimuna and went on the state that, the records of the trial tribunal shows that on the 27/1/23 both parties were present in court and all heard the orders of the court on filing of WSD but the appellant failed to file his WSD. To support his submission on failure to submit WDS he cited the case of ***Joe R.M Rugarabamu v. TTB LTD, [1990] TLR.*** Mr Rashid further submitted that the trial court had no legal basis to issue ex parte judgment hence *Order VIII Rule 10 of CPD, Cap 8* was appropriate. On the issue of setting aside the default judgment he submitted that, the appellant was required to use *section 129 of CPD, Cap 8* for no appearance and to set aside default judgment, in the end he prayed this appeal to be dismissed for lack of merits.

On his brief rejoinder, Mr. Kimario submitted that, this appeal is not premature as claimed by the advocates for the respondents and that since the default judgment was given under *Order VIII Rule 10 of CPD Cap 8*, the only remedy available to the appellant is to lodge appeal to the High Court as per *Order XLVII Rule (1) (b)* of the CPD, he maintained his position that the WSD was filed on 31/1/2023 together with Counter Affidavit. With respect to the issue raised by respondents on using *section 129 of CPD*, Mr Kimario submitted that, that section is only applicable when there is no specific provision governing certain matters but in the current matter the Land Tribunal

Act has provision and it has no lacuna hence he maintained his prayers of this court to find merit in this appeal.

Having gone through the submissions of both parties, this being the first appellant court, this court has a duty to step into the subordinate court shoes by going through the evidence adduced in order to reach a just decision and arrive to its own independent conclusion as held in the case of Hassan **Mfaume v. R (1981) TLR 167**, where the Court of Appeal held the following:

" A judge on the first appeal should reappraise the evidence because an appeal is in effect a rehearing of the case"

Moreover, in **Union of India V. K.V. Lakshman and others AIR 2016 SC 3139**, the Supreme Court of India held that:

" The jurisdiction of the first appellate court while hearing the first appeal is very wide like that of the trial court and it is open to the appellant to attack all findings of facts or/ and of law in first appeal. It is the duty of the first appellate court to appreciate the entire evidence and may come to conclusion different from that of the trial court"

Guided by the above principles relating to the duty of the first appellant court, I have considered the grounds of appeal, the evidence on record, the submissions made herein on behalf of the parties and the authorities cited. Having gone through the file case of the trial tribunal, I have discovered that, this court does not need to embark much on the academic exercise to determine whether the appellant was given a right to be heard or not, because to me that is not the main issue of this appeal. The main issue in this appeal which needs to be determined by this court is:

Whether the trial Chairman of the Land Tribunal was correct to issue a default judgment by using Order VIII

Rule 10 of the Civil Procedure Decree (Rules) Cap 8, for failure of respondent to file Written Statement of Defence (WSD) or Not?

The records of the trial court as highlighted above in the brief back ground of the matter shows that, on the 31/1/2023 the respondent (appellant herein) was Ordered to file his Written Statement of Defence (WSD) and failed to do so hence prompted the Hon Chairman of the Land Tribunal to issue a default judgment.

To determine the issue of this appeal, and since this is the land dispute, I will first start by addressing the issue of **default judgment** under *Land Tribunal Act No. 7 of 1994* as provided under *section 31* of the Act which reads as follows:

'31 (1) If a party to the dispute fails to attend or participate in either a pre- trial conference, a trial hearing, or any other meeting called to discuss the matter in question, the Chairman, Deputy Chairman or Magistrate may serve written notice on all parties of a proposed default order. This notice shall include a statement of ground for such an order.

(2) if after 14 days no answer has been received, the Chairman shall determine within seven days whether the respondent shall be given an additional seven days to reply from the time the respondent has not been made to the accusation. If no satisfactory response is received by the end of the additional 7 days period, the member of the panel may then issue a default judgment.

(3) within 7 days after the service of a proposed default order the party against whom it has been issued may file a written notice requesting that the proposed default order be vacated and shall state the reasons for such request".

The **ex parte judgment**, on the other side, is provided under the provision of section 38 of the Act which reads as follows:

'38 (1) When a respondent does not file a statement of defence within the required time or fails to appear when the case is set for trial, after a seven day wait following

the last notice issued under section 31 (2), present evidence in support of his claim, if the panel find the evidence support the petition filed, shall enter a judgment against the respondent.

(2) if an ex parte judgment has been entered the respondent shall within 7 days apply to the Chairman or Deputy Chairman or Magistrate to hear petition inter parties and shall state the reasons for such application.

Under the above cited provisions of the Land Tribunal Act, the difference between the default judgment and ex parte judgment is made crystal clear. When a party fails to attend or participate in either a pre trial conference, a trial hearing, or any other meeting called to discuss the matter in question the remedy is to give a default judgment after following the procedure of giving notice to the party in default.

On the other hand, the ***ex parte judgment*** is given when a party fails to file a statement of defence within the required time or fails to appear when the case is set for trial to present evidence in support of his claim after a seven day wait following the last notice issued under *section 31 (2)*

For avoidance of doubt this court will also look at *Order VIII Rule 10* which the trial Chairman of the Land Tribunal used to issue the default judgment the Order reads as follows:

"10. Where any party who has been ordered to present a written statement or other pleadings fails present the same within the time fixed by the court, the court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit."

The above Order is not made mandatory to the court to issue a default judgment when a party fails to file WSD at the time fixed by the court. The Order has given discretion to the court either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit.

In construing the provision of *Order VIII Rule 10 of CPD Cap 8*, the doctrine of harmonious construction is required to be applied. The effect would be that under such Rule, the court in its discretion would have power to allow the defendant to file WSD even after the time fixed has expired. Hence it is the view of this court that for justice to prevail, the trial Chairman of the Land Tribunal was not under mandatory obligation to issue default judgment under *Rule 10 of Order VIII*.

Also this court agrees that, the remedy against *Order VIII Rule 10* is to appeal to the High Court as provided under *Order XLV11 Rule 1(b)* as submitted by Mr Kimario.

Similar scenario for respondent failure to file WSD happened in the ***Civil Appeal No. 60 of 2017 in the case of Amour Khamis Mohamed and Mohamed Masoud Khamis v. Asha Abeid Suba and 10 others*** where *Hon Judge ISSA A.A.* stated the following:

" This Court is of the view that the procedure laid down in the CPD is addition which should be used when the Act itself is silent or has not laid down a procedure to be followed. But if the procedure has been laid down in the Land Tribunal Act, those procedure takes prevalence over those laid down procedure in the CPD. For instance, the case before Land Tribunal is initiated by a petition while in CPD is initiated by the plaint. The case in the Land Tribunal is presided with assessors and chairman, and the decision is taken by the majority, a procedure which is not available in CPD. Therefore, the learned magistrate erred in this respect in using Order VIII Rule 10 of CPD when there is a particular provision in the Land Tribunal Act, namely section 38 which is applicable in that matter."

In this appeal, the argument from Mr Kimario is that the Chairman of the Land Tribunal erred by applying *Rule VIII Order (10) of the CPD* instead of applying *section*

31 or 38 of the Land Tribunal Act No. 7 of 1994. On the other side, the Respondents Advocates Ms Maimuna and Mr Ali Rashid opposed this appeal and supported the trial Magistrate default judgment and made argument that the appellant was required to set aside the default judgment at the Land Tribunal and not to appeal at the High Court. In his rejoinder the advocate for the appellant submitted that the only remedy for default judgment given under *Order VIII Rule (10)* of CPD is to appeal to the High Court under *Order XLVII Rule (1) (b)*.

This court is of the view that, the argument from respondents that the appellant should have set aside the default judgment at the trial court has no merit because if the trial Chairman of the Land Tribunal issued an *ex parte* judgment under *section 38 (1) of the Act No. 7 of 1994*, the argument from the respondents advocates would be valid, but this court agrees with the appellant advocate that since the default judgment was given under *Order VIII Rule (10)* of CPD Cap 8, the only remedy available is to appeal to this court under *Order XLVII Rule (1) (b)*


In the trial court, even if the respondent (appellant) failed to file his WSD within time fixed by the court, the Chairman of Land Tribunal was required to issue ***ex parte judgment*** in accordance with *section 38(1)* of the *Land Tribunal Act No. 7 of 1994* and not to issue a ***default judgment*** under *Order VIII Rule 10*.

In the end, this court is persuaded by the decision made by ***Hon Issa, A.A*** in the Civil ***Appeal No.60 of 2017*** where similar incident occurred as stated herein above, and the respondent was given two weeks to file his WSD and the file was returned back to Land Tribunal to continue with the hearing.

This court also found the learned Trial Chairman of the Land Tribunal erred in deciding the case by issuing a ***default judgment*** under *Order VIII Rule (10)* of CPD Cap 8, when the procedure for failure of respondent to file written statement of defence is clearly provided under *section 38 (1)* of the *Land Tribunal Act No. 7 of 1994*.

Consequently, this appeal has merits and therefore, the proceedings and default judgment is hereby quashed and set aside. The appellant is given two weeks from the

date of this Judgment to file his WSD before the Land Tribunal and the file is returned back to the Land Tribunal to continue with the hearing of the case.


S. HASSAN (J)
16/8/23

It is so ordered.

Dated: **16th August, 2023.**

Court:

Right of appeal is explained.