IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPLICATION NO. 563/17 OF 2019

RWEYEMAMU CONSTANTINE ..... 1ST APPLICANT

LUHUMBUKA MPUNGATI.....2ND APPLICANT

SEFU SELEMANI .....3RD APPLICANT

VERSUS

UWAMATEDA GROUP .....1ST RESPONDENT
MSOLOPA INVESTMENTS CO. LTD .....2ND RESPONDENT

(Application for leave to appeal against the judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam

(De Mello, J.)

Dated the 5th day of March, 2019
in
MBC. Land Appeal No. 140 of 2017

RULING OF THE COURT

22nd February, 2022 & 11th March

KENTE, J.A.:

This application originates from the *ex-parte* judgment and decree delivered by the Temeke District Land and Housing Tribunal on 27th February, 2015. The said judgment was in respect of Land Application No. 35 of 2012 concerning a dispute over a piece of land measuring fifty acres located at Yaleyale Puna Village within the District of Temeke in Dar es Salaam Region. Whereas before the District Land and Housing Tribunal, (hereinafter the DLHT) the first respondent, UWAMATEDA Group was the applicant, the present applicants namely Rweyemamu Constantine,

Luhumbuka Mpungati and Sefu Selemani were respectively, the third, fourth and seventh respondents. Other respondents who however, are not parties to the present application were, Halmashauri ya Mtaa wa Potea Pemba Mnazi, Ally Salum, Iliasa Hassan and Hamadi Mfaume. The second respondent Msolopa Investment Company Limited who is also a Court Broker is impleaded in this application as a necessary party.

Before the DLHT, the dispute between the parties was determined in favour of the present first respondent who was declared the lawful owner of forty-two acres of land out of the contested fifty acres. Accordingly, while the then first respondent namely, Halmashauri ya Mtaa wa Potea Pemba Mnazi was ordered to hand over the said forty-two acres of land to the first respondent, the present applicants, were ordered to vacate the disputed piece of land and pull-down all structures which they had erected there.

When the applicants became aware of the existence of the *exparte* judgment and decree against them, they were deeply aggrieved. Accordingly, they applied in vain to set aside the said judgment and decree. Still aggrieved, they appealed to the High Court (Land Division) to challenge the decision of the DLHT, but all to no avail. Valorous and

undaunted by the setbacks of their previous attempts, pursuant to section 5 (1) (b) (c) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] now R.E. 2019 (henceforth the AJA), the applicants applied to the same court seeking leave to appeal to this Court but again, without success.

In the notice of motion now before us which was filed by Mr. Evarist Sekaboyi learned advocate for the applicants and resisted by Mr. Francis Nkoka also learned advocate on behalf of the respondent, by way of a second bite, under section Rule 45 (b) of the Tanzania Court of Appeal Rules, 2009 as amended, (hereinafter, the Rules), the applicants are seeking leave to appeal to this Court. Their ultimate intention is to challenge the decision of the High Court (De Mello, J.) in Miscellaneous Land Appeal No. 140 of 2017 refusing to set aside the *ex-parte* judgment and decree of the DLHT. The notice of motion contains three substantial grounds upon which the application for leave to appeal is predicated. The said grounds are structured as follows:

i) Whether the High Court and the trial Tribunal were proper (sic) to hold that the applicants were properly served through the local Government leader who endorsed receipt on their behalf.

ii) Whether the High Court and the Tribunal were proper (sic) to hold that the applicants refused summons without proof of the same.

iii) Whether the High Court and the trial Tribunal were proper (sic) to hold that the substituted service by the respondents through Uhuru Newspaper dated 10/10/2013 was proper even though the procedures were not followed.

Moreover, in support of the application, is an affidavit sworn by Mr. Evarist Sekaboyi listing various factual matters on which the application is based. The most fundamental question arising out of the operative part of the said affidavit is, whether the applicants were duly served with a notice to appear before the DLHT and defend themselves against the suit lodged by the first respondent. If the answer is in the negative, following on heels is the pertinent question as to whether, the omission to serve them constitutes a serious point of law deserving consideration by the Court of Appeal.

At the hearing of this application, the applicants were represented by Mr. Augustine Rutakolezibwa learned Advocate, while Mr. Francis Nkoka also learned Advocate represented the first respondent. The second respondent company was represented by Mr. Ibrahim Msolopa its

Managing Director. Except for the second respondent, both the applicants' and the first respondent's counsel filed their respective written submissions in compliance with Rules 106 (1) and 106 (7) of the Court of Appeal Rules 2009 as amended, (the Rules).

Submitting in support of the application, Mr. Rutakolezibwa maintained that, the applicants were not served with any notice to appear before the DLHT and that the chairman of the said Tribunal made rather an impetuous decision when he ordered for substituted service by publication in the newspaper without proof that ordinary service on the applicants had proved ineffectual. As a result, the learned counsel contended, the applicants were denied their fundamental right to be heard before the DLHT could proceed to make an adverse decision against them. In other words, Mr. Rutakolezibwa submitted that, since it was not established that ordinary service had proven unsuccessful or that the applicants were avoiding service, the trial DLHT acted on a wrong principle of law in proceeding *ex-parte* on the assumption that, either the applicants were duly served or that the omission to serve them would not occasion any injustice or illegality while it was clear that the mandatory provisions of Order V. rule 16 of the Civil Procedure Code (Cap 33 R.E. 2019) were not complied with. For purposes of clarity, the above cited provision directs the

officer serving a summons upon the defendant to require the said defendant or his agent or other person acting on his behalf, to sign an acknowledgement of service endorsed on the original summons.

Submitting on behalf of the first respondent, Mr. Nkoka had an uphill task trying to lead evidence from the bar to show that the applicants were duly served with a notice to appear before the DLHT. In an attempt to get over the difficulty inherent in his client's case, he took great pain to contend that, the applicants were served by a court process-server who left the summonses at the office of one Asha Juma a Ward Executive Officer with instructions that she would serve the applicants. When we probed him about the accuracy of his factual assertions, Mr. Nkoka changed tack saying that, it was not clear whether the applicants were duly served or not. It was when we asked him as to why did the DLHT order for substituted service if the applicants were duly served that the learned counsel was somewhat set adrift. At the end, probably thinking that he had the sagacity to surmise, all the learned counsel could say, but without any degree of certitude, was that, after being physically served, the applicants failed or neglected to enter appearance before the DLHT and that, that is when an order for substituted service by publication in the Uhuru Newspaper was made.

Mr. Ibrahim Msolopa, for his part, being a layperson and, his company being a mere necessary party to this application, had nothing to say in support or opposition of the application. He left everything in the discretion of the Court to decide whichever way it deemed fit and just.

Now, it should be understood that, in an application for leave to appeal, what is required of the court hearing such an application, is to determine whether or not the decision sought to be challenged on appeal raises any legal point deserving consideration by the Court of Appeal. That is what is cardinal in any application of the present nature. (See **National Bank of Commerce v. Maisha Musa Uledi** (Life Business Centre) [2020] 1 TLR 524).

The fundamental question that arises from the rival arguments maintained by the applicants' and the first respondent's counsel is whether, having not been served with a notice to appear before the DLHT and resist the first respondent's claim, the applicants' right to be heard was not violated in this case. Given the undisputed facts and the circumstances obtaining in the instant case, most probably, the answer to the above-posed question will give rise to the corollary question on another important point of law. That is, whether in a civil case, a court can order for

substituted service without proof that all attempts of ordinary service have been abortive.

In our opinion, the two issues posed hereinabove are very crucial as to deserve consideration by the Court of Appeal. To put it simply, it is clear now that the applicants' complaints were not without legal basis. In the result, we find merit in the present application and we grant it. Pursuant to section 5 (1) (c) of the AJA, the applicants are granted leave to appeal to the Court of Appeal.

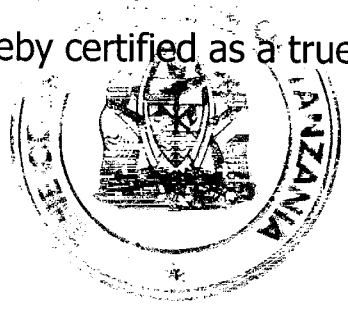
DATED at **DAR ES SALAAM** this 9th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Ruling delivered this 11th day of March, 2022 in the presence of Mr. Augustine Rutakolezibwa, counsel for the appellants and Mr. Ronald Mongi, (Principal officer of 1st Respondent and absence of 2nd Respondent is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL