IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND APPEAL NO. 20 OF 2019

(Originating from Miscellaneous Land Application No. 149 of 2019, Original Application No. 107 of 2017, in the District Land and Housing Tribunal for Moshi at Moshi)

NOVAT ONESMO MSEIYE .....APPELLANT

VERSUS

DEOGRATIUS CHRISTIAN MARANDU..... RESPONDENT

17TH SEPTEMBER, 2020 & 29TH SEPTEMBER, 2020

JUDGMENT

MKAPA, J:

Novat Onesmo Mseiye the appellant, aggrieved by the decision of the District Land and Housing Tribunal for Moshi at Moshi (trial tribunal) in **Misc. Application No. 149 of 2019** delivered on 19th September 2019 preferred the present appeal.

In a nutshell the facts leading up to this appeal are that, the respondent claimed against the appellant a piece of land measuring 0.5 acres located at Kwakalamu Village Kitirima Ward in Rombo District (suit land). The value of the suit land was estimated at ten million shillings (10,000,000/=). It is alleged that on 09/03/2003 the respondent was allocated by his parents Christian Peter Marandu (father) and Maria Tarimo (mother) respectively, a piece

of land measuring 1½ acres. After the death of his father, the family and clan members sub divide the suit land and allocated to the younger brother named Sigsimond, who in turn sold the same to one Novati Onesmo Mseiye (Appellant). In December 2016 the Respondent discovered that the appellant had trespassed into his land. Efforts by the Respondent to settle the dispute amicably proved futile whereby the respondent had to file **Land Application No. 107/2017** against the appellant in Moshi District Land and Housing Tribunal. The respondent appeared in person while the appellant never entered appearances despite being dully served with summons. The trial tribunal thereafter ordered for ex-parte hearing and ex-parte judgment was delivered against the appellant on 27th June 2018. Aggrieved, the appellant filed **Miscellaneous Land Application No. 7/2019** seeking for extension of time and the same was granted by the trial tribunal. Meanwhile, the appellant filed **Misc. Land Application No. 149//2019** seeking to set aside ex-parte judgment in Application **No. 107/2017** and the trial tribunal dismissed the application. Aggrieved by the decision the appellant preferred this appeal raising the following grounds;-

1. That, the Honourable Tribunal chairman erred in law and in fact in failing to consider that, the ex-parte judgment in

Application No. 107 of 2017 was reached without tendering the original proof of service of summons before the trial tribunal.

2. That, the Honourable tribunal chairman grossly error in law and in fact in relying its decision based on a mere copy of the summons purported to be issued to the Appellant as a proof of service.
3. That the Honourable Tribunal chairman erred in law and fact in failing to consider that, the purported copies of the issued summons in the ex-parte judgment relating to Application No.107 of 2017 were uncertain, vague and did not order the appellant herein to appear on the hearing date.
4. That the Honourable Tribunal chairman erred in law and fact in failing to consider the issue of illegality on the decision of the trial tribunal as pointed out by the appellant, whereby the respondent herein failed to sue the person who sold the suit land.
5. That the Honourable Tribunal chairman erred in law and facts in failing to address and consider other reasons regarding the application to set aside ex-parte judgment as stated by the appellant herein in his affidavit thus denied the appellant's right to be heard.

6. That the Honourable tribunal chairman erred in law and in fact in failing to take into consideration that, the ex-parte judgment in Application No. 107/2017 was reached without the appellant being informed about the date of delivery of the said ex-parte judgment.
7. That, the Honourable Tribunal Chairman erred in law and in fact in failing to consider that ex-parte judgment in Application No. 107 of 2017 was reached in favour of the respondent herein while the case was not proven on the balance of probability.
8. That, the Honourable trial tribunal chairman erred in law and in fact in delivering judgment in favour of the Respondent herein without assessors' opinion in writing contrary to mandatory requirement of Regulation 19 (2) of the Land Dispute Courts (the District Land and Housing Tribunal) Regulation, 2003.
9. That, the Honourable trial tribunal chairman erred in law and in fact in delivering the ex-parte judgment without addressing the issue regarding variance in the composition of assessors.

On the date this appeal was set for hearing parties consented the same to be heard by way of filling written submissions. The

appellant was represented by Mr. Tumaini Materu learned advocate while the respondent appeared in person, unrepresented.

Mr. Materu abandoned the 1st, 2nd, 8th and 9th ground of appeal and proceeded with the remained grounds.

Submitting in support of the appeal Mr. Materu submitted that copies of summons relied upon by the tribunal chairman in the ex-parte judgment of Application No. 107/2017 were uncertain, vague and did not order the appellant herein to appear on the date of hearing.

It was Mr. Materu's further argument that the sworn affidavit of the process server which had accompanied the summons dated 13/07/2017 was not attested by the Commissioner for oaths at the time when **Land Application No. 107 of 2017** was set for hearing before the trial tribunal chairman on 13/07/2017. Mr. Materu went on explaining that, the process server was attested by the Commissioner for oath on 17/07/2017 instead of 13/07/2017 when the matter was tabled before the trial Tribunal. It was Mr Materu's view that there was no proper service of summons. To support his argument he cited the case of **Mohamed Nasoro Vs Ally Mohamed** (1991) TLR 133 where the court held that "..... *as there was no proper service, the trial magistrate should have set aside the ex-parte judgment as of right"*

Mr. Materu argued further that, it is a requirement under Regulation 6 (4) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulation 2003 that, after the service a person who effected the service has to swear an affidavit in a prescribed form prescribing the manner in which the service has been effected.

It was Mr. Materu's contention in respect of the ground of appeal relating to language of the summons that, the trial tribunal's chairman failed to consider the fact that the summons dated 22nd June 2017 were written in English language thus the appellant was unable to understand.

Mr. Materu averred further that, the affidavit sworn by the process server had revealed the fact that, the appellant failed to sign the summons because he could not understood the contents of the same. Therefore **Land Application No.107 of 2017** was determined ex-parte while the appellant was unaware. It was Mr. Materu view's that the whole proceedings and subsequent ex-parte judgment were null and void, for contravening the fundamental principle of natural justice namely the appellant's right to be heard.

Mr. Materu further challenged the trial tribunal's chairman for failure to inform the appellant the date of delivery of ex-parte judgment which is contrary to the law.

It was Mr. Materu's view that, the trial tribunal's chairman ought to have set aside the ex-parte judgment due to contradictory evidence of the respondent and his witness regarding the actual size of the suit land in which the respondent testified the fact that the suit land measured one and a half acres while the witness mentioned two and a half acres.

Finally, he prayed for the appeal to be allowed with costs.

In reply the respondent submitted against the appeal the fact that the ex-parte judgment was entered due to laxity and gross negligence occasioned by the appellant. He went on explaining that the appellant had denied himself the right to be heard by rejecting the service of the summons for seven months.

The respondent went on submitting that it is on record of the trial tribunal proceedings, that the first summons was issued by the tribunal on 22nd June, 2017 and was rejected by the appellant on 5th July 2017 and the process server was sworn by the magistrate as per the prescribed form of the tribunal. It was the respondent's view that, summons dated 22nd June 2017 did order the appellant to appear before the tribunal on 13th July, 2017, although the ex-parte hearing was held on 15th February 2018 about seven month later.

On the issue of summons language, the respondent denied the same to be have been a barrier and it was the respondent's view that the argument was an afterthought as the law is settled to the effect that the language is either English or Kiswahili as provided for under section 32 of the Land Dispute Courts Act Cap 216.

Furthering his argument the respondent submitted that, the appellant denied himself the right to be heard as it is not a requirement for the appellant to be informed on the date of the judgment as the same is announced on the last date of the hearing.

The respondent finally prayed for the appeal to be dismissed with costs.

In his brief rejoinder the Appellant reiterated his submission in chief and maintained the fact that the ex parte judgment was null and void for occasioning miscarriage of justice on the party of the appellant.

Having considered both parties arguments for and against the appeal, the question for consideration is whether the appeal is meritorious.

To begin with I think it is opportune for me to point out the rationale behind the principle of natural justice. Essentially, natural justice requires that a person receive a fair and unbiased hearing

before a decision is made that will negatively affect him. The three basic requirements of natural justice that must be met in every case are, adequate notice, fair hearing and no bias. The case of **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma,** Civil Appeal No. 45 of 2000 is elaborative on the principle when the court observed the following:-

"In this country, natural justice is not merely a principle of common law; it has become a fundamental Constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law and stipulates in part;

> ***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kikamilifu.*** "

In **Civil Application No. 33 of 2002 - Abbas Sherally and Another V. Abdul Fazalboy,** the Court reiterated the same position that;

> *"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been*

reached had the party been heard, because the violation is considered to be a breach of natural justice."

Going through the judgment of the trial tribunal at page 2, the tribunal chairman conceded the fact that the appellant declined to receive the summons through the process server due to language barrier as stated hereunder;-

"I opted to go through the records of the file in Application No. 107 and saw an affidavit sworn by the process server clearly stating that the applicant (appellant herein) rejected the summons.

Let me quite (sic) the relevant part in the process server report;-

> *"Huyu bwana Novati Onesmo Mseiye amesema yeye hajui kilichoandikwa ndani ya samansi hivyo anaomba muandikie kiswahili kwani elimu yake ni darasa la saba. Ndio amekataa kusaini hii barua"*

The chairman of the tribunal went on elaborating the fact that, "the above quotation report is from the process server who is the village chairman named Francis P. Kimario. The above quotation is an affidavit because the village chairman took oath before Usseri Primary Court Magistrate."

My perusal of the records of the trial tribunal has revealed the fact that despite appellant's plea to be availed with a Swahili version of

the summons there is no record evidencing that the appellant was served with the same.

From the foregoing, it is plain clear the trial tribunal denied the appellant the right to be heard by declining to serve him with a substituted Swahili version of the Summons for him to understand its contents which could have enabled him to enter appearances before the trial tribunal. In the circumstances, I have no hesitation to come to the conclusion that the appeal has merit and this ground of appeal alone, suffices to dispose of the appeal. More so, I feel that it is not necessary to dwell on discussing the remaining grounds. Consequently, I allow the appeal by quashing the ex parte judgment of the trial tribunal and ordered the matter be remitted back to the trial tribunal to be heard on merit before another chairman.

Dated and delivered at Moshi this 29th September, 2020.

S. B. MKAPA

JUDGE

29/09/2020