IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 11 OF 2020

(Arising from the ruling of the District Land and Housing Tribunal for Mara at Musoma (Hon. Kitungulu, E.- Chairman) dated 21st January, 2020 in Miscl. Land Application No. 478 of 2019 and Application No. 68 of 2018)

RAMADHAN NDANDAGE ..... APPELLANT

VERSUS

NDARO MASANGA ..... RESPONDENT

JUDGMENT

12th and 13th October, 2020

KISANYA, J.:

By way of Chamber Summons supported by an affidavit, the appellant, Ramadhan Ndandage, moved the District Land and Housing Tribunal for Mara at Musoma (the Tribunal) to grant the following orders:

1. A leave to file an application for extension to set aside the default judgment.
2. An order to set aside the *exparte* decree, default judgment and its order and restore Land Application No. 68 of 2018.

In its ruling dated 21st January, 2020, the Tribunal dismissed the appellant's application for want of merit. That ruling culminated into the present appeal filed by the appellant. His petition of appeal had three grounds of appeal. However, in the course of hearing this appeal, one ground was droped. The grounds argued before the Court were as follows:

1. *That, the trial Court (sic) erred in law for failure to consider that the Appellant had been served with summons and had never refused the services of summons as alleged by the respondent and the appellant was not aware of the proceeding relating to Land Application No. 68/2018.*
2. *That, the trial court (sic) erred in law to rely on the affidavit sworn on 11/09/2018 regarding the service of Summons issued by the trial tribunal on 24/07/2018 while the summons was not served to the appellant.*

At the hearing of this appeal, the appellant enjoyed the legal services of Mr. Daudi Mahemba while the respondent appeared in person, legally unrepresented.

As I was composing judgment after hearing the parties, I noticed that, the summons alleged to have been served to the appellant did not require him to file the written statement of defence and that, the default judgment was entered while the nature of claim was land dispute. In that regard and for the interest of justice, I recalled the parties to address me on whether the default judgment was properly entered against the appellant.

Submitting in support of the appeal, Mr. Mahemba restated that, the application before the Tribunal was for extension of time within which to file an application for the order to set aside the default judgment. He contended that, the appellant became aware of the default judgment upon receiving the application for execution. The learned counsel urged Court to consider the reasons advanced in the affidavit in support of the application that, the appellant was not served with summons in respect of Application No. 68 of 2018 which led to the default judgement. That said, he asked the Court to allow the appeal.

In relation to the issue raised by the Court, Mr. Mahemba argued that the trial tribunal erred to enter the default judgment against the appellant. His argument was based on the reason that, the appellant was not served to file his defence. The learned counsel urged further that, even if the appellant was served to file the defence, the respondent was required to prove his claim *exparte* under regulation 11(1)(c) of the Land Disputes (District Land and Housing Tribunal) Regulations, 2003 (hereinafter referred to as "the DLHT Regulations").

In response, the respondent contended that, the appellant was duly served to appear and defend Application No. 68 of 2018 but refused to receive the summons. He was of the view that, the appeal had no merit and urged the Court to dismiss it with costs. As regards the issue raised by the Court, the respondent contended that, the default judgment was entered in accordance with the law.

I have gone through the record, petition of appeal and the above submissions by the parties. The key issue that needs attention of this Court is whether or not the appeal is meritorious.

It is not disputed that a default judgement was entered against the appellant in respect of Land Application No. 68 of 2018 on the ground that, he was duly served. Default judgment is not provided for under the DLHT Regulations. Regulation 11(1)(c) thereto provides for exparte judgement only. However, pursuant to regulation 11(2) of the DLHT Regulations, an application to set aside the exparte judgement passed by the Tribunal is required to be lodged within is thirty (30) days from the date of impugned judgment. It is on records that, the impugned judgment in the case at hand

was passed on 16th January, 2019. Thus, the time within which to apply for an order to set aside the said judgment lapsed on 15th February, 2019.

The appellant did not file the application in time and hence the application filed before the Tribunal on 9th May, 2019. As stated herein, the appellant prayed for two orders namely; leave to apply for an order to set aside the default judgment; and an order to set aside the default judgment. In my opinion, the second prayer succeeds if the first prayer is granted.

In that regard, I prefer to start with the first prayer on extension of time to file the application for an order to set aside the default judgment. This prayer was made under section 14 of the Law of Limitation Act, Cap. 89, R.E. 2002 which empowers the trial court or tribunal to extend time where there is reasonable or sufficient cause. The power to grant the extension of time is vested in the court or tribunal competent to determine the application. An appellate court can only interfere with the discretionary powers of the trial court or tribunal if such power was not exercised judiciously.

It is trite law that, where illegality is raised as ground for extension of time, that ground is in itself a good, reasonable or sufficient cause. This position was stated by the Court of Appeal in **VIP Engineering and Marketing Limited vs Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) where it was held that:

> *"We have already accepted it as established law in this country that where the point of law at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes "sufficient reasons" ...for extending time"*

In the present case, the appellant deposed that, he was not served with summons to appear and defend the case which was decided in his absence. According to O. VIII, Rule 14 of the CPC, default judgment can only be

entered when the defendant failed to dile a written statement of defend. As stated herein, the DLHT Regulations do not provide for circumstances under which the Tribunal can enter the default judgment. Under regulation 11(1)(c) of the DLHT Regulations, the proper course where the respondent does not appear is to require the applicant to prove his claim *exparte* by oral evidence. In any case, the Tribunal must be satisfied that the respondent was duly served with the notice of hearing.

Therefore, since the appellant raised the ground of illegality that, he was not duly served, that was in itself a sufficient cause to extend the time to file the application to set aside the default judgment. It follows that, the Tribunal did not consider this ground.

I now move to consider the second prayer in respect of an order to set aside the default judgement. The DLHT Regulations do provide for matter related to default judgment. However, even if the said default judgment was made under the CPC, the appellant (the then applicant) was duty bound to prove that he was not duly served or prevented by any sufficient cause from appearing when the case was called on for hearing. This is provided for under O. IX rule 13(1) of the CPC. Similar requirement is provided for under regulation 11(1) (c) of the DLHT Regulations which deals with exparte judgment.

The fact that the appellant was not duly served is reflected in paragraphs 6, 7 and 8 of the affidavit in support of his application before the Tribunal. The respondent countered the said fact. He deposed that, the appellant was served but refused to receive the summons. The issue then is whether the appellant was dully served.

Service of summons to the defendant and other parties to the suit is regulated by the law. As far as application before the Tribunal is concerned, regulation 6 of the DLHT Regulations provides that, service may be effected on the part himself, his spouse, member of the household who is above 18 years, his advocate or a person authorized by him. The person serving the summons is then required to return to the Tribunal the original summons signed by the person served and state in the affidavit the manner in which the service was effected.

However, the Land Disputes Courts Act, Cap. 216, R.E. 2002 and the DLHT Regulation do not provide for how the person who refuses to accept the summons is considered to have been served. In that regard and pursuant to section 51(2) of the Land Disputes Courts Act, the applicable law is the CPC. The provisor to Order V, Rule 16 of the CPC guides as as follows:

> *"Provided that where the defendant, his agent or such other person refuses to sign the acknowledgement the serving officer* ***shall leave a copy thereof with him*** *and return the original to the court together with an affidavit stating that the person upon whom he served the summons* ***refused to sign the acknowledgement****, that* ***he left a copy of the summons with such person and the name and address of the person*** *(if any) by whom the person on whom the summons was served was identified." (Empasize supplied).*

In view of the above, a person refusing to receive the summons is considered to have been duly served if the court or tribunal process server meets the following condition;

(a) leave a copy of summons with the defendant;

(b) return the original to the court or tribunal;

(c) sign an affidavit stating:

  (i) that person served and refused to sign the acknowledgement;

(ii) that a copy of summons was left with the said person; and

(iii) the name and address of the person served.

The records at hand reveal that, when Application No. 68 of 2018 was called on for hearing on 19/10/2018, the Hon. Chairman was satisfied that, the appellant had been served but refused to receive summons. He went on to fix the hearing date on 16/01/2019. Indeed, there is an affidavit sworn on 11/9/2018 by the tribunal process server namely, Maiga Majani, Chairman of Mwikonda Hamlet before D.Z. Sondo, Magistrate of Rwasi Primary Court. The said Maiga Majani had with him a summons which invited the appellant to appear before the Tribunal on 19/10/2018 for metion/hearing. Upon examining further, the Court noted a previous affidavit sworn by the said Maiga Majani on 23/7/2018 before the same D.Z. Sondo in respect of summons which required the appellant to appear for hearing on 24/7/2018. However, the signature of the said Maiga Majani in both affidavits is on face of record different. This raises doubt on whether the service in both summons was effected by the same person.

Furthermore, in his affidavit sworn 11/09/2018, the said Maiga Majani deposed as follows on the service effected to the appellant:

"**KIAPO CHA MPELEKA WITO/KUITWA SHAURINI**"

1. *Mimi Maiga Majani Mkt Kitongoji ...nikiwa mpeleka wito/kuitwa shaurini, nathibitisha kwamba maombi Na..../utetezi/aombi madogo/wito/ notisi ...nimezipeleka kwa muhusika.*
2. *Wito hakukupokelewa katika mazingira yafuatayo:*
   Mlamikiwa ndg Ramadhani Ndandage amekataa kupokea wito akidai hana madai yoyote dhidi ya Ndaro Masanga tena mbele ya mke wake na mbele ya watoto wake.

SIGN

Saini ya mpeleka wito..."

It is clear that, the tribunal process server's affidavit is silent on whether a copy of the summons was left with the appellant after refusing to acknowledge the summons. Further, the address of the person (appellant) served was not stated in the affidavit. Having noted the said defects, I am of the opinion that, the appellant was not duly served in terms of Order V, Rule 16 of the CPC. In that regard, the default judgment and orders arising from the summons which not duly effected can be allowed to stand. Had the Tribunal satisfied itself on the proof of service, the default judgment could not have been entered.

Even if it is taken that the appellant was duly served, the matter before the Tribunal ought to have proceeded *exparte* by oral evidence as required under regulation 11(1)(c) of the DLHT Regulations which provides that:

> *11.-(1) On the day the application is fixed for hearing the Tribunal shall:-*
> *(a) N/A*
> *(b) N/A*
> *(c) where the respondent is absent and was duly served with the notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter exparte by oral evidence.*

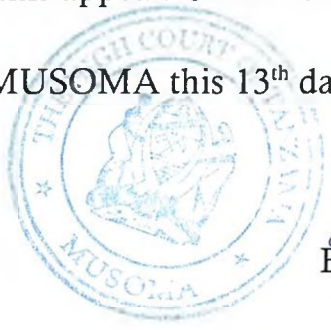
As noted herein, the summons alleged to have been served to the appellant was for mention or hearing of the case and not for filing the defence. Despite of fixing the hearing date, the Tribunal went on to enter the default judgment without requiring the respondent to prove his claims. With respect to the trial Tribunal, that was wrong and contrary to the law. The respondent was duty bound to prove his claims.

In view of the above, I am of the considered opinion that, this being a Court of justice, it has to entervene and rectify the above irregulariries in respect of proof of service and the manner in which the default judgement was entered.

Both irregularties vitiated the the proceedings before the Tribunal. As a result, the present appeal is competent before the Court because it arose from a nullity proceedings.

That said and done, I am inclined as hereby do, invoke the revisional powers vested in this Court by section 43(1)(b) of the LDCA to nullify the proceedings of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 68 of 2018, quash and set aside the default judgment and decree arising thereto. Furthermore, the proceedings, ruling and order in Misc. Application No. 478 of 2019 are hereby nullified, quashed and set aside because they arose from the nullity proceedings. Consequently, this appeal is struck out for being incompetent. I order retrial of Land Application No. 68 of 2018 before another Chairperson with competent jurisdiction to try the matter. In the circumstances, each party shall bear its own costs related to this appeal. Order accordingly.

Dated at MUSOMA this 13th day of October, 2020.



E. S. Kisanya
JUDGE

Court: Judgment delivered this 13th October, 2020 in the absence of the appellant and in the presence of the respondent in person. Bench Clerk, Ms Mariam present.

Right of appeal is well explained.

E. S. Kisanya
JUDGE
13/10/2020