IN THE HIGH COURT OF TANZANIA

MWANZA DISTICT REGISTRY

AT MWANZA

LAND APPEAL No. 14 OF 2020

(Originating from the decision of District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Application No. 69 of 2016)

BATAMANANGWA CORNELIUS POMONHI ---------- APPELLANT

VERSUS

MARTINE KULOBA ---------- RESPONDENT

JUDGMENT

13th October & 16th December, 2020

TIGANGA, J

This appeal fetches its origin from the decision of Land Dispute No. 23 of 2011 which was filed before Sumve Ward Tribunal. That dispute was heard and decided exparte against the appellant. Having been dissatisfied by that decision, the appellant decided to appeal to the District Land and Housing Tribunal for Mwanza. However, having realised that he was late to appeal, he filed before that appellate tribunal, Misc. Application No. 69 of 2016 for extension time to appeal out of time. That application was dismissed with costs for want of merits.

Following that decision, he decided to appeal to this court where he filed five grounds of appeal as follows;

1. That the tribunal grossly erred in law and in fact by relying on inapplicable provision of the law in dismissing the application for extension of time.
2. In the alternative to ground number 1 above, the Tribunal mis interpreted the provision of the law governing the service of summons of the District Land and Housing Tribunal.
3. The tribunal grossly erred in law and in facts in holding that the appellant was dully served with summons at the Ward Tribunal.
4. In the alternative to ground number 3 above, the tribunal grossly erred in law and in facts in holding that service of summons of the Sumve Ward Tribunal to the relative of the appellant was proper.
5. That the tribunal erred in facts and law in holding that the appellant failed to adduce sufficient cause for the delay and consequently for extension of time to file his appeal.

Having paraded these five grounds of appeal, the appellant asked for the following orders;-

i) The appeal be allowed and the ruling and order of the District Land and Housing Tribunal for Mwanza in Misc. Application No. 69 of 2016 dated 14/08/2017 be quashed and set aside.
ii) In the alternative to prayers number 1 above, the ruling and order of the District Land and Housing Tribunal for Mwanza at Mwanza in Misc. Application No. 69 of 2016 be revised and the appellant allowed to prefer his appeal out of time at District Land and

Housing Tribunal for Mwanza at Mwanza against the decision of Sumve Ward Tribunal in Dispute No. 23 of 2011.

iii) Costs of the appeal.

iv) Any other relief that this honourable Court deem fit to grant.

The appeal was filed after the applicant had secured an extension of time of 14 days.

At the hearing, the appellant was represented by Mr. Robert Mosi - Advocate, while the respondent appeared in person, unrepresented. Mr. Robert Mosi decided to consolidate the 1st and 2nd grounds of appeal and argue them together.

He submitted that the District Land and Housing Tribunal erred when it used regulation 6 of the GN No. 174 of 2003 and concluded that, the summons of the Ward Tribunal was properly and correctly served to a relative or any other person who was not a party to a case before the Ward Tribunal. The base of his argument is that the law referred to is regulating service of summons in the District Land and Housing Tribunal in its original jurisdiction. That was relied upon notwithstanding the facts that the matter in question originated from the Ward Tribunal and the law applicable was the Ward Tribunal Act [Cap 206 RE 2019], which directs

under section 12 how the summons should be served. According to him, the law directs the secretary of the tribunal to summon the parties against whom a case has been filed before the tribunal something which was not done in this case before the Ward Tribunal. Instead, the summons was served to another person who was not a party to the case before the Ward Tribunal.

He also argued the 3rd and 4th grounds of appeal together, for which he submitted that, the summons was not served to the appellant, and the evidence shows that the summons was served to one Lawrencia Patrick Pomoni who was not a party to the case. He submitted that since the appellant was not summoned, then the case was heard without hearing him, thereby denying him the right to be heard thus making the proceedings to be a nullity.

On the 5th ground of appeal which raises a complaint that the decision of the tribunal did not give reasons as to why it refused the application, in support of that ground of appeal he submitted that, the District Land and Housing Tribunal failed to consider the point of illegality as contained in the proceedings and judgment of the Ward Tribunal. Citing

those illegalities, he submitted that section 12 of the Ward Tribunals Act, requires the secretary to issue summons, but that was not done.

The other illegality is that the Ward Tribunal determined the dispute over the surveyed land and declared the respondent as the lawful owner which all is tantamount to the rectification of the Land Register, the power which under the section 99 (1) of Land Registration Act [Cap 334 RE 2019] is vested to the High Court.

He submitted further that, it is now the stand of the law that illegality has been held to be the reason or ground for extension of time. This is because, once it has been established that there is illegality, then the court needs to be content and allow application for extension of time so that the illegalities can be rectified by the superior court.

He cited the case of **Losindilo Zuberi vs Ally Hamis,** Civil Application No. 5 of 1999 in which the Court of Appeal of Tanzania, at page 2, paragraph 3 of the judgment, it held *inter alia* that whenever illegality has been pleaded, the court should not fold its hand, it must give the chance so that it can look into the alleged illegality.

He submitted further that even the District Land and Housing Tribunal, in its decision committed illegality by applying inapplicable law i.e Regulation 6 (3) of the District Land and Housing Tribunal Regulation, GN 174 of 2003, which is inapplicable in the proceedings before the Ward Tribunal or in the proceedings originating from the Ward Tribunal.

He submitted that on these grounds, the court be pleased to set aside the decision of the District Land and Housing Tribunal in Land Application No. 69 of 2016 dated 14/08/2017, the appellant be permitted to file his appeal before the District Land and Housing Tribunal against the decision of Sumve Ward Tribunal in Land Case No. 23 of 2011. He lastly asked for any other relief as this court may deem just to grant.

In reply, the respondent who fended for himself, unrepresented, submitted in opposition of the appeal that, what the counsel for the applicant has said are lies. In countering the argument by the appellant, he submitted on the ground that the summons was served to a non party, he said when the 1st summons was served, the appellant was not present at home. According to him, the same was served to Lawrencia who handed over the same to the appellant on his return, but the appellant said he

cannot be heard by persons who did not go to school and therefore refused to appear.

Further to that, he submitted that the appellant delayed for about two years, he featured after the respondent had filed an application for execution and the District Land and Housing Tribunal had issued a number of summonses some of which were refused. According to him, the application for extension of time was refused after the District Land and Housing Tribunal had considered all grounds for application and found that it generally lacked merits.

In rejoinder, it was insisted by the counsel for appellant that, the appellant was unjustifiably denied the right to be heard as he proved that he was not living in Sumve but in Dar es salaam. Therefore no summons was served to him.

Having summarised the contents of the records, the documents instituting the appeal, as well as the submission filed in support and in opposition of the application, I will discuss and resolve the grounds of appeal in the manner adopted by the appellant counsel in his argument in support of this appeal, by combining the 1st and 2nd grounds of appeal and

3rd and 4th together, and last discuss the 5th ground separately. Now, without unnecessarily repeating what the contents of the 1st and 2nd grounds, it can be gathered from the combined grounds that the main issue for determination in these two grounds is whether regulation 6 of the District Land and Housing Tribunal Regulations, GN. No. 174 of 2003, providing the manner of service of summon to the tribunal does not apply to the proceedings before the Ward Tribunal.

In resolving this issue, inferring from the nomenclature of the regulations themselves, it goes without saying that these regulations were meant to be used in the District Land and Housing Tribunal as opposed to the Ward Tribunal. That being the position of the law, it was not proper for the District Land and Housing Tribunal to use the said regulations in describing the manner of service of summons in cases filed to the Ward Tribunal. That alone makes the findings of District Land and Housing Tribunal to be tainted. This means, the Ward Tribunal Act, [Cap 206 R.E 2019] was to be used. However, this law does not provide the manner in which summons must be served to the parties with dispute before the ward tribunal, it has a lacunae on that aspect. Now how can the lacuna of this kind be filled?

Under section 65 of the Village Land Act [Cap 114 R.E 2019] and section 179 of the Land Act [Cap 113 R.E 2019] as well as section 51 (2) of the Land Disputes Court Act [Cap 216 R.E 2019], the Minister is empowered, where there is a *lacuna* in the law, that is the Land Disputes Courts Act, to make regulations prescribing the rules of evidence and procedures to be applied where there is any inadequacies in the law on how the matter of evidence and procedure in conducting matters before the tribunals should be administered.

To the best of my understanding, the regulation made by the Minister is that one regulating the procedure before the District Land and Housing Tribunal only; he has not made the ones to be used before the Ward Tribunal.

It is the practice in the circumstances like this, that where there is such a *lacuna*, then the court may use the procedure under the Ward Tribunals Act [Cap 206 R.E 2019] which under section 12 of the Ward Tribunals Act (supra) provides for the requirements to issue summons to the parties to the dispute before it.

However, no procedure has been provided on how the summons should be served. In the circumstances, it is allowed to take inspiration of the procedure used in other courts of relatively or the similar level. We have no a similar level of ordinary court to be equated with the Ward Tribunal, however, looking at the simplicity, user friendly and coverage of the rules applicable in the Primary Court, it can be correctly held that an inspiration can be taken from the procedure applicable in Primary Court, that is the Magistrates Court's (Civil Procedure in Primary Courts) Rules, G.Ns. Nos. 310 of 1964 and 119 of 1983. These rules provides for the procedure on how a summons should be served.

Rule 19 of the rules provides that;

> *(1) Subject to the provisions of sub rule (2), a summons or any other document required to be served under these rules shall be served on the defendant personally or, if he has an agent authorised to accept service, on such agent.*
>
> *(2) Where the court is satisfied that personal service cannot be effected or cannot be effected without undue delay and expense, it may direct that the summons or*

document be served either by post or by leaving it with an adult male member of the family of the defendant or with some adult male servant residing with him, or with his employer, or by affixing a copy of the summons or document on some conspicuous part of the last known residence of the defendant and another copy thereof on the court notice-board.

(3) *Service under sub rule (2) may be proved–*

(a) in the case of service by post, by evidence that a postal packet was received by the defendant, supported by a certificate of an officer of the court that the postal packet contained the summons;

(b) in any other case, by the affidavit or evidence on affirmation of the person who effected the service to the party himself, but where he is absent from his residence at the time when the service was effected on him at his residence and there is no likely hood of his being found at the residence within the reasonable time and he has no

agent empowered to accept service of the summons on his behalf, ***service may be effected to any adult member of the family who is of sound mind, whether male or female who is residing with him.*** *This excludes servant".* Emphasis added.

Looking at the provision, it provides similar with, regulation 6 of the District Land and Housing Tribunal Regulations GN 174 of 2003 and is in line with Order V, Rule 19 of the Civil Procedure Code [Cap 33 RE 2019]. This means that, this is the general principle on how service of summons should be done; it follows therefore that the proceedings before the Ward Tribunal should not be exception to this general rule of service of summons. That said, it is instructive to find that the District Land and Housing Tribunal though did not say expressly, but was justified to take inspiration on how the service of summons should be effected in cases where the defendant or respondent is not found at home during the service of summons.

That said and done, the use of that law did not in any way prejudice the appellant. What was important for the respondent was to prove that Lawrencia Patrick Pomoni was an adult family member residing with the

appellant in his house. Secondly, that the applicant was not at home when the service was done. Thirdly, that the process server found the said Lawrencia and served her. The law does not require proof that the adult person family members actually informed the person on behalf of whom the service was received of the service.

From the record, it has not been disputed that Lawrencia was an adult family members residing with the appellant. It has not only not been disputed that the appellant was absent at the time when the service was effected, but also confessed by the appellant through his counsel that he was in Dar Es Salaam when the service was effected. It is also proved that the service was served to Lawrencia Pomini, an adult family member who was residing in the house of the appellant. From these undisputed facts, it goes without saying that the service of summons to the appellant was properly done. That has resolved the 1st, 2nd, 3rd and 4th grounds of appeal.

Regarding the 5th ground that the tribunal erred in fact and law in holding that the appellant failed to adduce sufficient cause for the delay, and consequently for extension of time to file his appeal. In his argument, the counsel for the appellant submitted that, he had concrete reason for extension of time to grant, one of the reasons being illegality. He

submitted that the fact that summons was not effected to the appellant but to another person who was not a party, tainted the judgment and proceedings with illegality, as the law which is relevant that is the Ward Tribunals Act, (supra) requires the secretary of the tribunal to issue summons to the respondent which was not done.

Secondly that the Ward Tribunal adjudicated the dispute over the surveyed land and declared the appellant to be the lawful owner of the plot. He submitted that, that is tantamount to deregistration of the ownership of the appellant on Land Register, which is the power of the High Court under section 99 (1) of the Land Registration Act (supra). He submitted that once an illegality has been pleaded and proved, then it constitutes a valid ground for extension of time.

He submitted that, despite all these grounds, the District Land and Housing Tribunal refused the application for extension of time on the ground that, the appellant failed to account for the days delayed as one of the requirement for extension of time to issue.

The respondent submitted that, the ruling and the record show that the appellant did not conspicuously plead illegality as one of the ground

before the District Land and Housing Tribunal. The issue of illegality has been raised in this appeal, and that had the same been so considered the District Land and Housing Tribunal would have extended time for an appeal to be filed.

I have thoroughly perused the record, the reasons given to ask for extension of time before the District Land and Housing Tribunal was that the appellant was not aware of the existence of the case involving him as he was not served with summons in the proceedings before the Ward Tribunal, therefore he could not take action within time. Illegality was not one of the grounds for extension of time pleaded and relied upon in an application for extension of time before the District Land and Housing Tribunal. In law an issue which has not been raised at trial cannot be raised on appeal and decided without causing miscarriage of justice.

As the issue of illegality was not raised and argued in the application before the District Land and Housing Tribunal, it cannot be raised and entertained at this stage. Therefore this makes the ground of not being aware of the existence of the case to be the only ground for the application before the trial tribunal. That being the only reason the appellant was required to account for each and every day of delay which he failed to

account, without so accounting the application could not have succeeded. See **Ally Rashid vs Halima Kazaria & Another**, Civil Application No. 28 of 2017, **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 **Bariki Islael vs The Republic**, Criminal Application No. 4 of 2011 and **Sumry High Class Limited and Sumry Bus Service Limited Vs Mussa Shaibu Msangi**, Civil Application No. 403/01 of 2018. That said, and basing on the grounds of appeal, I find the appeal to have no merit.

However, on consideration of the fact that the matter was heard *exparte* before the trial Ward Tribunal, it was a legal requirement for a person against whom the *exparte* order was passed to first apply to set it aside before the tribunal which passed it. The person aggrieved by the exparte judgment passed against him, cannot appeal against an *exparte* judgment, he needs first to apply for an order to set aside an exparte decision passed against him. He can only appeal against that decision after he has been allowed to present his defence, get it recorded, and have the decision given based after considering his defence. He may also appeal

against the order of ruling which refuses his application to set the *exparte* order aside.

Having so realised, I invited the parties to address me on the competence of the application for extension of time to file an appeal before the District Land and Housing Tribunal. The appellant counsel was the first to address me as follows: - That section 20 of the Ward Tribunals Act [Cap 206 R.E 2019] read together with section 19 of the Land Disputes Courts Act [Cap 216 R.E 2019] provides that a person who has not been satisfied with the decision of the Ward Tribunal, should appeal to he District Land and Housing Tribunal. The law does not provide for the procedure in the circumstances in which the case before it was heard and determined *exparte*.

However, reading between lines, the provisions of the Ward Tribunals Act (supra), it is instructive to find that the rule of procedure and evidence applicable in the normal court do not bind the Ward Tribunals. They are encouraged to formulate their own procedure basing on the customs of the community in which they operate.

According to him, the course taken by the appellant to appeal to the District Land and Housing Tribunal based on the law that is section 20 of the Ward Tribunals Act [Cap 206 R.E 2019] read together with section 19 of the Land Disputes Courts Act [Cap 216 R.E 2019].

Responding to my call to address that court on the competence of the application which resulted into this appeal, the respondent being a lay person had nothing useful to contribute on the issue before the court. He just narrated the efficiency of the Ward Tribunal in resolving the dispute before it, I will therefore not reproduce what he actually said, but it suffices to say that, what he said did not relates with the issue at hand.

Now, having heard what the counsel has addressed me, it goes without saying that there is no procedure laid down by law on the right recourse where the person whose case was heard exparte before the Ward Tribunal. Having a lacuna on that area, an inspiration should be taken from other procedures including the one used in the Primary Court, which is a simpler court on the hierarchy of the ordinary court that is the Magistrates Court's (Civil Procedure in Primary Courts) Rules (supra). Under Rule 30 it provides that, where the case is decided *exparte* in the absence of the defendant, the court may set aside an *exparte* judgment upon an

application made by the defaulting party, and fix for the case to be heard in the presence and participation of the defendant. In the case of **MIC Tanzania Limited vs Kijitonyama Lutheran Church Choir,** Civil Application No. 109 of 2015 CAT where it was held inter alia that;

> *"in cases where a judgment has been passed exparte, the first option is to apply to set is aside before indulging to the appeal".*

That being the case, it is a must therefore that the appellant was supposed to apply for setting aside the *exparte* judgment so that his evidence can be received and recorded and the court decides the matter basing on the evidence of both sides before he decides to appeal. He may also appeal against the order refusing an application to set aside the exparte judgment, if the application to set aside is refused.

The philosophy being that a person who has not had his evidence recorded cannot appeal on the merits of the case, the reasons being that, he has no evidence on record to challenge the evidence given by his fellow, therefore the appellate court will has nothing to consider on his case on appeal. He needs to set aside an *exparte* judgment first, have his

J. C. TIGANGA

JUDGE

16/12/2020