

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

LAND APPEAL NO 77 OF 2020

(Originating from Miscellaneous Land Application No. 226 of 2017)

CHARLES NDESI.....APPELLANT

Versus

JUMA MASAI WAMBURA RESPONDENT

JUDGMENT

20th April, & 26th May, 2021

Kahyoza, J.

Juma Masai Wambura sued **Charles Ndesi** before the District Land and Housing Tribunal for Tarime at Tarime (DLHT) for trespassing to his land and cutting 86 timber trees. **Juma Masai Wambura** won the case which was head *ex-parte*. Aggrieved, **Charles Ndesi** lodged an application seeking the DLHT to set aside its *ex-parte* judgment on the ground that he was not properly served. The DLHT found that **Charles Ndesi** was properly served and dismissed the application.

Aggrieved, **Charles Ndesi** appealed to this Court with three grounds of appeal, which culminate into the following issues: -

1. Did the DLHT the decide on the strange case?
2. Were the submissions of both parties considered?
3. Did the DLHT analyse properly the evaluation?

The parties to this appeal were unrepresented. They did not expound the grounds of appeal and reply to the memorandum of appeal save for the appellant who insisted that he was not properly served to appear before the DLHT to defend the claim. He also added that the damaged items were not properly valued.

I will commence with the first ground of appeal which raised the issue Whether the DLHT made the decision on the strange case. The appellant did provide explanation regards this ground of complaint. The appellant alleged that he was not served with summons or notice to appear and defend the claim. I examined the record of the DLHT and I found that the appellant appeared before the district Land and Housing Tribunal on 2/9/2016. After that appearance, the tribunal recorded that he was not properly served he ought to be served. After several adjournments, the tribunal directed the appellant to be served by publication.

The respondent complied with the order and served the appellant by publishing the notice in the Uhuru Newspaper of 8th February, 2017. On the 27th February, 2017, the tribunal ordered the matter to proceed *ex-parte*. It passed the *ex-parte* judgment on the 19th May, 2017.

I perused the record to find out if the appellant was physically served in vain. The DLHT's record shows that effort to serve the appellant proved futile as he was residing at Mwanza. The respondent contention is that he served the respondent by publication in the newspaper. The record revealed that the appellant did once appear before the tribunal on the 2/9/2016. This part of the record is false. Had the appellant appeared before the tribunal on the 2/9/2016, the tribunal would not have recorded

on the following date that the respondent is not properly served. The law clearly provides the modes of serving the respondent to an application instituted before the DLHT. The modes are found under rules 5 and 9 of the Land Disputes Courts (The Land and Housing Tribunal) Rules, GN. 174/2003 (the **Rules**) provide the mode. Rule 5(3) requires the service to be effected upon the party himself, his spouse, any member of the households above 18 years, his advocate or any other person authorised to receive the summons. In this case, this case the above rule was not applied. The appellant was not served in that manner as it is on record that he was not where to be found. The law further provides the mode of service if the respondent cannot be served in the mode provided under rule 5, he may be served as provided under rule 9 of the Rules.

Rule 9 provides that where it is not possible to effect personal service, service may be by affixing the notice on the conspicuous place on or as near as possible on the land in dispute, by registered mail and by publishing a copy in one or more newspaper locally circulating.

Reading the law one gets an impression that if personal service cannot be effected, all the above modes must be applied to effect service. The conjunction used implies that the modes specified under rule 9 must be applied. I will produce the provision of the law. Rule 9 states that-

9. Where the tribunal is satisfied that it is not possible to effect personal service of a summons or a notice of the date of hearing on parties it may order services to be affected by-

a) Affixing a copy of the summons or the notice of hearing in a conspicuous place:

(i) On or as near as may be to the land where possible; and

- (ii) Where the land is village land, at the office of the village council or other public place within the village; or*
- (iii) Where the land is general land, at the office of the local authority having jurisdiction in the area where the land is located; and*
- (iv) Registered mail;*
- (v) Publishing a copy in one or more newspapers locally circulating in the area.*

The Civil Procedure Code, Cap. 33 R.E. 2019 has provisions like the ones under consideration providing for substituted service. The provisions are applied in alternative and not collectively as suggested by rule 9 of the Rules. I borrow a leaf from the position under the Civil Procedure Code and ruled out that the modes of service under rule 9 apply in alternative. It is therefore proper for the DLHT to order service by any of the modes provided under rule 9 of the Rules.

The record bears evidence that the applicant did publish the summons in the Newspaper. I examined the publication. The publication is so minute to the extent that the same cannot attract attention. The respondent published the summons to comply with the order and not to notify the appellant that there was suit instituted against him before the tribunal. The law presumes that once a party to the suit or an application is served by publication that party is duly served. It does not matter whether the party served by publication received the notice or not. Like any other presumption, the presumption of service by publication is rebuttable.

I am alive of the fact there are not guidance on how the service by publication must be effect. The CPC does not make any reference to this mode of service. Service by publication is ordered by courts as any other mode of service the court considers to just. The Rules under consideration also do not guide how the service must be effected. The omission to guide this mode of service is not a warrant to entitle the plaintiff or the applicant to effect the service in the way he is pleased. It is logical and justice demands that the notice or the publication ought to be big enough to attract the attention. The publication should be at least a quarter page of the newspaper. In this case, it was so small that no one could have been invited to read it.

Unlike the tribunal, I am not able to construe that the appellant was properly served because the size was too small to attract the attention of the reader and there was no proof that the *Uhuru newspapers was locally circulating in the area*. The law required the party to publish the summons or the notice *in one or more newspapers locally circulating in the area*.

In the upshot, I find that the tribunal erred to disallow the application to set aside its *ex-parte* judgment on the ground that the appellant was not duly served. Consequently, I make the following orders-

1. the ruling of the District Land and Housing Tribunal is hereby set aside;
2. the *ex-parte* proceedings of the DLHT the District Land and Housing Tribunal in Land Application No. 40 of 2016 are hereby quashed, the judgment and decree arising thereto is set aside;
3. the District Land and Housing Tribunal for Tarime is ordered to re-hear Land Application No. 40 of 2016;

4. in the interest of justice, Land Application No. 40 of 2016 shall be heard by another chairperson and new set of assessors; and
5. Costs shall be costs in the due course.

It is ordered accordingly.

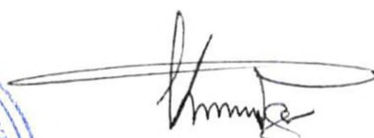


J. R. Kahyoza

JUDGE

26/5/2021

Court: Ruling delivered in the presence of the parties. B/C. Catherine present.



J. R. Kahyoza

JUDGE

26/5/2021