

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARSHA
AT ARUSHA**

LAND APPEAL NO. 07 OF 2019

(C/F: Misc. Appl. No. 07 of 2018 from the District Land and Housing Tribunal of
Simanjiro, Original, Land Application No. 10 of 2017, in the District Land and
Housing Tribunal of Simanjiro)

NJINGU LESONGOYOAPPELLANT

VERSUS

NDIPOYA MANGEKI.....1ST RESPONDENT

KAAI MUSONIKI.....2ND RESPONDENT

NINA MUSONIKI.....3RD RESPONDENT

LESALIM MUSONIKI.....4TH RESPONDENT

JUDGMENT

19/04/2021 & 28/05/2021

MZUNA, J.:

NJINGU, the appellant herein, is dissatisfied with the decision of the District Land and Housing Tribunal of Simanjiro, to be referred hereinafter "the Tribunal" which dismissed his application to set aside the ex parte judgment in Application No. 10 of 2017.

NDIPOYA, KAAI, NINA and **LESALIM** referred herein after as the 1st, 2nd, 3rd and 4th respondents strongly opposed this appeal.

Briefly stated, initially, the 1st respondent vides Application No. 10 of 2017 brought a suit against the appellant together with the 2nd, 3rd & 4th respondents. In the said application the appellant who was suing as an administrator of the Estate of the Late Partopi Mangeki claimed among other reliefs for trespass and to be declared as the lawful owner of the suit land. The matter proceeded ex parte against the appellant and the 4th respondent. The tribunal declared the 1st respondent as the lawful owner of the land in dispute in an ex parte award.

The appellant was aggrieved. He filed an application to set aside an ex parte judgment for the reasons that he was not properly served and therefore filed an Application No. 07 of 2018. He was unsuccessful for the reasons that the Tribunal found that the appellant was properly served.

During hearing of this appeal, the appellant enjoyed legal services from Mr. J. Siay and Mr. Stephano James, the learned counsels, whereas the respondents were under the legal representation of Mr. Nicholous Ntasikoi Senteu, the learned counsel. With the leave of the court the appeal was disposed by way of written submissions and both parties filed their submissions which I shall consider them in the course of determining this appeal.

A total of four (4) grounds have been preferred. They bold down to one issue, that is, whether the appellant was properly served in Application No. 10 of 2017.

The appellant in his submission denies to have been served with summons three times as alleged by the respondent's counsel. He is of the view that even the affidavit of the process server which was relied upon by the trial Chairman is bad in law and defective

as it does not show before whom was the oath administered. It has no date and signature. That there is no order suggesting the alleged service by affixation as the proceedings are silent. The learned counsels submitted further that the ex parte order violated Regulation 11 (1) (c) of the Land Disputes Courts (the district Land and Housing Tribunal) Regulations, 2002, GN No. 174 of 27/6/2003 (herein after referred as Regulations) which requires that ex parte hearing can proceed only when the respondent defaulted to appear without showing good cause. That the said hearing contravenes Article 13 (6) (a) of the Constitution of the United Republic of Tanzania which insists on fair hearing. Above all, that the respondents will not be prejudiced thereby if the appeal is granted.

On the other hand, the respondents strongly support the Tribunal's findings. That the appellant was properly served which is well supported by Regulation 6 (4) (a) and (b) of the Regulations because proof of service of summons and a sworn affidavit in the prescribed form and how the service was effected had been clearly shown. That he failed to establish sufficient reasons.

Now the question is, was the appellant served? Is there sufficient cause for his/her non-appearance?

The record shows, on 28/08/2017 the 1st respondent's counsel prayed for ex parte hearing against the appellant and the 4th respondent. The application was granted and hearing proceeded ex parte on the same date. Given what transpired at the trial tribunal, I had also to look at the summons which were tendered. The first summons appears to have been issued on 19/05/2017, this summons exhibited that the matter was to come for hearing on 12th June 2017. Together with this summons there is an affidavit sworn

by one Vicky Mwanga, a tribunal clerk who stated that the summons was affixed at the appellant's door as he was nowhere to be seen. The affixation of the summons was done in the presence of a militiaman of the Sukuro Village together with the Village Executive Officer.

The second affidavit, was issued on 20/06/2017 and the same demonstrated that the matter was to come for hearing on 24/07/2017. Together with this summons there is an affidavit of one Omary Hashim Kita, the Village Executive Officer for reasons which are to follow I wish to quote part of the said affidavit;

"Mnamo tarehe 10/05/2017 nilimpa wito na akasaini mbele yangu pamoja na mashtaka ya kwanza (1) samansi ya pili nilimpelekea na karani wa mahakama tarehe 22/05/2017 tukamkosa tukambandikia mlango anamolshi. Samansi ya tatu tarehe 22/06/2017 tulimpelekea na amekataa kusaini na kusema hana kesi katika baraza hilo na aliemshtaki hamjui."

From the above transcript of the second affidavit this court asks itself a question as to whether the said summons was properly served to the appellant. Looking at the summons it portrays three different summons which were served to the appellant on different occasions, however the same are combined in one summons which was issued on 20/06/2017. As rightly submitted by the appellant's counsels, if at all the appellant was served on three different occasions it is expected that each summons would be independent and would be reflected by an affidavit describing the circumstances as to the acceptance of the said summons or denial and further to that the services of the said summons would also be reflected in the proceedings, that is not the case.

Looking at the records the trial chairman ordered for re service of the summons, the order which was made on 12/06/2017. Since then the record is silent as to how the summons were effected until 28/08/2017 when the applicant's / 1st respondent counsel prayed for an ex parte hearing against the appellant and the 4th respondent, which as I have intimated above, proceeded on the same date. More so, the summons which was issued on 20/06/2017 showed that the matter was to come for hearing on 24/07/2017 however looking at the proceedings of the trial Tribunal on the said date the records are incomplete and it appears that nothing transpired. There is therefore no proof of service.

It was held in the case of **T. M Sanga vs Sadrudin G. A Albhai and 2 Others** [1977] LRT n. 51 that:-

"Uncertainty of service of summons is sufficient reason for allowing an application to set aside an ex parte judgment and decree thereof."

I fully associate myself with the above holding of the High court which is in parlance with Regulation 11 (1) (c) of the Regulations which requires that ex parte hearing can proceed only when the respondent defaulted to appear without showing good cause. In the absence of proof of service of summons to the appellant, this court is of the view that the Tribunal findings that the appellant was properly served, with due respect is unsupported. It has no leg to stand on.

That said, the ex parte judgment is hereby set aside based on the reasons that the appellant was not dully served. The appellant has successfully demonstrated good cause for his/her non appearance on the date set for hearing. Above all ex parte hearing proceeded on the same date it was sought instead of another date of hearing. For the

interest of justice, it is hereby ordered that the order in Application No.07 of 2018 is hereby set aside. In similar vain, the ex parte judgment in Application No. 10 of 2017 is set aside. The latter application should be heard *denovo* inter parties expeditiously. It should be before another Chairman.

This appeal is allowed with no order for costs.




M. G. MZUNA,
JUDGE.
28/05/2021