

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA
LAND REVIEW NO. 1 OF 2020

(C/F Misc. Land Application No. 49 of 2019; Originating from Misc. Land Appeal No. 18 of 2018)

FABIOLA GILYO.....APPLICANT

VERSUS

PETER MICHAEL.....RESPONDENT

RULING

18/05/2021 & 13/08/2021

GWAE, J

In this court, the respondent filed an application for certificate on points of law vide Misc. Land Application No. 49 of 2020. The court heard and determined the respondent's application ex-parte due to reason that the applicant defaulted appearance despite the fact that he was served. This court **(Gwae, J)** granted the respondent's application by certifying one point of law notably; "Whether the learned Judge erred in law and fact in holding that the adverse possession was not applicable while the applicant has been occupying the suit for more than 20 years".

Subsequently to the issuance of certificate by the court enabling the respondent to appeal to the Court of Appeal of Tanzania against the decision of this court **(Mzuna, J)** dated 28th May 2020, the applicant filed this application for review

under provisions of Order XLII Rule 1 (1) (a) (b), 3, 4 (2) section 68 (e), 95 and 96 of the Civil Procedure Code Cap 33, R. E, 2002 (CPC). In his memorandum of review, the applicant's grounds for the sought review are;

1. That, there is apparent error on the face of the record by ruling that the applicant was served with summons while she was not served and denied her right to be heard
2. That, the court made an error apparent on the face of the record by certifying that there is a point of law worthy for consideration by the Court of Appeal while the respondent's leave to appeal to the Court of Appeal on the same Land Appeal via Misc. Land Application No. 48 of 2019 was dismissed for want of good cause
3. That, the court made an error apparent on the face of the record by certifying that there is a point of law worthy for consideration by the Court of Appeal while the respondent has not demonstrated any point That, the court made an error apparent on the face of the record by certifying that there is a point of law worthy for consideration by the Court of Appeal
4. That, the court made an error apparent on the face of the record by certifying that there is a point of law worthy for consideration by the Court of Appeal while the respondent has not filed any or has no valid Notice of the Court of Appeal

5. That, the court made an error apparent on the face of the record by proceeding ex-parte with hearing of Misc. Land Application No. 49 of 2019 while the applicant was not duly heard with the summons to appear and defend
6. That, the court made an error apparent on the face of the record by entertaining Misc. Land Application No.49 of 2019

Having demonstrated grounds for the review, the applicant prays for the following orders;

- a. That, this court be pleased to quash down and set aside the ruling and order delivered on the 8th May 2020 by this court in Misc. Application No. 49 of 2019
- b. That, the Applicant be accorded her right to be heard in Misc. Land Application No. 49 of 2019
- c. An order awarding, the applicant costs of these proceedings
- d. Any other reliefs that this court deems fit to grant

The respondent's reply to the applicant's memorandum of review is to the effect that, the applicant was duly served with summons and that he acknowledged service by endorsing the seal and signature adding that the available recourse for the applicant was to file an application to set aside ex-parte order as the applicant's present intention contained in her affidavit is to establish as why she

did not appear on the date fixed for hearing. The respondent also stated that there is a valid notice of appeal.

Besides the respondent's reply, there is also a notice of preliminary objection on point of law accompanying the said reply. The respondent's objection is to the effect that;

"That, the application is unmaintainable in law for being filed prematurely for the application was heard ex-parte"

Supporting his preliminary objection, the respondent's counsel (**Mr. Kimaay-esq**) argued that, the law under Order IX Rule 9 of the CPC requires a party aggrieved by an exparte decree or order to file an application for setting aside such decree or order unless there is material error in its substance which requires an application to be confining on the material error and illegality instead of reasons that caused non-appearance. He then urged this court to make a reference to the case of **Pangea Minerals Ltd vs. Petrofuel (T) Limited and 2 others**, Civil Appeal No. 96 of 2015 where the Court of Appeal dealt with an issue where an exparte order should be set aside or appealed.

Resisting the respondent's objection, the applicant's advocate argued that the preliminary objection raised by the respondent is unmaintainable due to reason that it is not based on a pure point of law and therefore it does not meet the required standard. Embracing his arguments, the applicant's counsel cited a

chain of judicial authorities, notably; **Mukisa Biscuit Manufacturing Company Ltd vs. West End Distributors Limited** (1996) EA 696, **OTTU Union and another v. Hon. Idd Simba minister of Industries and Trade** (2002) TLR 88, **Musa Nang'wandwa v. Chief Japhet Wanzagi and 8 others** (2006) and 2 other precedents. He further added that this application for review is maintainable by virtue of Order XLII Rule 1 of CPC upon discovery of new and important matter or evidence which was not available when the order was passed.

In his rejoinder, the respondent's counsel reiterated his submission in chief however he added that if this kind of application will be allowed it will open pandora box as it will defeat the purpose of the law which requires an ex-parte order to be set aside by a party who was not present when the matter was heard exparte.

Considering the applicant's grounds for review and reliefs sought as depicted herein above, it clearly seems to me that the applicant is trying to establish that, that he was not served with summons and that the respondent has not filed the requisite notice of appeal against the decision of this court vide Misc. Land Appeal No. 18 of 2018 and that this court (Gwae, J) wrongly certified point of law that was not demonstrated by the respondent as required by the law. That being the case, I am persuaded that the available recourse for the applicant was to apply for setting aside exparte order rather than applying for review since she

was not heard due to her non-appearance and this is more evidenced by her prayer (b) that, she be accorded right to be heard.

Though the decision of the Court of Appeal in **Pangea Minerals Ltd vs. Petrofuel (T) Limited and 2 others**, Civil Appeal No. 96 of 2015 (unreported) was based on, whether the ex-parte order is appealable or subject to filing of an application to set aside exparte order, yet in my view, it is impliedly applicable since the applicant's grounds for the sought review pertain with reasons for her non-appearance or whether the applicant was aware or not during hearing of the respondent's Misc. Land Application No. 49 of 2019. I am also of the view that, a point of law is reflected in the applicant's grounds for review and reliefs sought contained in the applicant's memorandum of review which speak on themselves without ascertainment of facts or evidence.

I have further asked myself, if there is any apparent error in the order to justify this court and found none. I am holding for an obvious reason that, issue of filing on non-filing of notice of appeal by the respondent or whether the applicant was served or not do not constitute errors apparent on the face of the ex-parte order. More so, the issue whether the respondent demonstrated points of law to be certified or not is not material error. Worse still it is clear in the record that the respondent demonstrated five points of law as reflected in the court's ruling vide Misc. Land Application No.49 of 2019 as opposed to the applicant's assertions.

Basing in the above discussions, I find the applicant's application for review is unmaintainable. The respondent's preliminary objection is therefore sustained. The applicant's application is hereby struck out with costs.

It is ordered accordingly




M. R. GWAE
JUDGE
13/8/2020