

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS LAND CASE APPEAL NO. 11 OF 2020

(Arising from the decision of the District Land and Housing Tribunal for Mtwara at Mtwara in Misc. Land Application No.155 of 2020 and originating from Mcholi II Ward Tribunal in Land Application No.80 of 2019)

SOFINA MBEDO.....APPELLANT

VERSUS

KAZUMARI MADEVU.....RESPONDENT

JUDGMENT

2 Aug. & 9 Nov., 2021

DYANSOBERA, J.:

The appellant, Sofina Mbedo, is challenging the decision of the District Land and Housing Tribunal for Mtwara in Misc. Application No. 155 of 2020 in which her application for extension of time in which to appeal out of time was dismissed.

Briefly, the facts of the case for purposes of this appeal are that on 08/03/2018 the respondent filed Land Application No.80 of 2018 against the appellant before Mcholi II Ward Tribunal. The respondent claimed the

appellant had trespassed into his land (i.e. the suit land). After the hearing of the parties and their witnesses, the trial tribunal decided in favour of the respondent. It however, ordered the respondent to pay a compensation of Tshs.150, 000/= to the appellant for unexhausted improvements appellant had made before she gave vacant possession for the respondent. Aggrieved, the appellant filed Miscellaneous Application No.155 of 2020 before the District Land and Housing Tribunal for Mtwara at Mtwara seeking an extension of time to file her appeal out of the prescribed time against the decision of the trial Tribunal. After a full trial, the District Land and Housing Tribunal for Mtwara dismissed the appellant's application for extension of time on the ground that she had failed to advance sufficient cause for her delay.

Dissatisfied with the ruling of the District Land and Housing Tribunal the appellant has come to this court and filed a petition of appeal containing five grounds of complaints:-

1. That the trial Tribunal grossly erred in law and in fact by failure to consider that the appellant was denied her right to be heard.
2. That the trial Tribunal grossly erred in law and in fact by holding that the appellant received summons to appear for hearing without sufficient evidence to prove the same.

3. That the trial Tribunal grossly erred in law and in fact by transferring the burden of proof of service of summons to the appellant herein, since it was the respondent's duty to prove that the summons was dully served to the appellant herein.
4. That the trial Tribunal grossly erred in law and in fact by relying on the respondent's annexure (payment receipt) in land case no 80 of 2018, in which it's decision has been nullified in Land Appeal No.29/2018 High Court, and the payment made thereto was refunded, and the current case is land case No.80/2019 in which the appellant was denied her right to be heard.
5. That, the Honourable Trial Chairman of the Tribunal erred in law and in fact by failure to consider, analyze and weigh the appellant's evidence.

During the hearing of this appeal both the appellant as well as the respondent appeared in person and unrepresented. At the first instance, the appellant submitted that she filed five grounds of appeal. She went further and argued that the respondent, Juma Mohamed destroyed her crops and she stated into her ground of appeal.

On the part of the respondent, she submitted that the Ward Tribunal was right as well as the District Land and Housing Tribunal. He insisted that Rajab Zuberi wanted to grab his farm. In addition, the respondent submitted that the appellant is just acting for her child one Rajab Zuberi who sued him

at Mkunya. He stressed that he went with the copies of judgment of the District Land and Housing Tribunal and the Ward Tribunal but the appellant came to this court.

In the rejoinder, the appellant submitted that the respondent is lying due to the fact that served the suit land for 21 years. Apart from that, the appellant argued that Rajab has not appealed. She further argued that the Village or Ward chairman knows this.

Having considered the records of both Tribunals, the grounds of appeal and the submissions of the parties, I am of the settled view that grounds 4 and 5 have been brought out of context. There is no dispute that at the District Land and Housing Tribunal for Mtwara at Mtwara the appellant filed the Miscellaneous Application No.155 of 2020 seeking an extension of time for which she could file her appeal out of the prescribed time. Her application was dismissed for her failure to advance sufficient cause(s) as required by the law for her inordinate delay. The District Land and Housing Tribunal did not hear the suit on merit rather, it heard and determined the appellant's application for extension of time. The complaints that the trial Tribunal grossly erred in fact and in law in relying on the respondent's annexure (payment receipt) in Land Case No. 80 of 2018 and that the Honourable Tribunal Chairman erred in law and in fact by failure to consider, analyse and weigh the appellant's evidence, are, to say the least, misconceived. The 4th and 5th grounds of appeal are dismissed.

With regard to the 2nd and 3rd grounds of appeal on the burden of proof, since it was the appellant who was asserting that she did not receive the summons and was not aware of the suit before the Ward Tribunal, she

bore the burden of proving the truth of what she was asserting. As the record of the District Land and Housing Tribunal depicts, the appellant failed to discharge that burden.

As far as the 1st ground of appeal is concerned, it is trite that a person's right to be heard is fundamental and the law of the land prohibits the condemnation of any person without his being given opportunity of being heard.

In the case under consideration, the record of the Ward Tribunal shows that the appellant was present at the time of hearing of the suit against her. It is on record that on 8th March, 2018, the appellant appeared before the Tribunal and testified in her defence.

It is only when the matter was set for delivery of the judgment that the appellant defaulted appearance. Was she denied the right of being heard? I think not. The record of the Ward Tribunal is clear that the appellant was served three times but defaulted appearance.

Besides, it is trite that if a party who, having duly served, absents himself, at the hearing is deemed to have waived his right to be heard in the matter and is precluded from complaining that they were denied of their right of being heard.

The Court of Appeal in the case of **Pantaleo Lyakurwa v. Leokadia Lyakurwa**, Civil Application No. 54 of 1998 had this to say:-

'The law of this country prohibits the condemnation of a person without his being given an opportunity to be heard. If, however, the person is given such an opportunity and does not make use of it, he cannot be heard to complain that he was condemned unheard. -the *audi alteram*

partem rule does not take away the power of the decision –maker to hear the matter ex-parte when a party duly notified of the hearing elects not to take a part in it or without good cause absents himself, or where because of the urgency of the matter an interim order must immediately be made. -A party who, having been duly notified of the hearing, absents himself at the hearing is deemed to have waived his right to be heard in the matter'.

In the instant matter since it was amply proved that the appellant was duly served but defaulted appearance without any justified cause. She is to blame.

Consequently, for the above reasons, this appeal fails and is dismissed with costs.

It is so ordered.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge

9.11.2021

This judgment is delivered under my hand and the seal of this Court this 9th day of November, 2021 in the presence of the appellant and respondent both have appeared in person and unrepresented.

Rights of appeal to the Court of Appeal explained.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge