

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

A MBEYA

LAND APPEAL NO. 21 OF 2021

(From DLHT for Mbeya in Misc. Land Application no 193B of 2019

In original Application No. 193 of 2019)

Between

**JAMAL MOHAMED AHMED (as the Administrator of
the estate of the late Yasin Mohamed Ahmed).....APPELLANT**

VERSUS

**JENIPHER HATSON MWAZEMBE (as the Administratix of
the estates of the late Hatson Msongole Mwazembe)..... 1ST RESPONDENT
TUNDUMA TOWN COUNCIL2ND RESPONDENT**

JUDGMENT

Date of last order: 28/04/2022

Date of judgement: 19/05/2022

NGUNYALE J.

This appeal has its original in Misc. Land Application No. 193B of 2019 in which the appellant unsuccessfully sought extension of time within which to lodge an application to set aside *ex-parte* judgment.

Briefly, the 1st respondent in capacity as administratix sued the appellant also by virtual of being administrator and 2nd respondent over plot 223 Block 'A' located at Mwaka within Tunduma Township. Upon service of

summons, it was discovered that the appellant was residing in Dar es Salaam and another summons shown it was received by the legal department of Tunduma Town Council. Based on such information the Tribunal issued substituted service. The 2nd respondent filed her defence while the appellant did not appear or file the defence.

Upon full trial the Tribunal ordered the offer issued to the 2nd respondent to be cancelled and the land to be registered in the name of any person chosen by right heirs of late Hatson Msongole Mwazembe. The extracted decree show that the application was dismissed and the applicant was declared the lawful custodian of the suit property.

The appellant was awakened by the demolition of the suit premises by the 1st respondent probably in execution of the decree. It is when the appellant lodged the application for extension of time within which to file the application to set aside *ex-parte* judgment. The application was heard in full and eventually dismissed for was of merits. The appellant is aggrieved and has preferred 4 grounds of appeal namely;

- 1. That the learned honourable chairman erred both in law and facts when he ruled out that the applicant was served through tangazo la gazette la tarehe 199/11/2021 which contradicted with the record of the proceedings dated 19/11/2019.*
- 2. The learned honourable chairman misdirected himself when he believed that the applicant was the administrator of the estate of the late Yassin Mohamed Ahmed in absence of letter of administration.*

3. *The learned honourable chairman erred both in points of law and facts when he ruled that there was no need to hear the applicant in the circumstances of the case who had no interest in it without regard to the order of the main application*
4. *The learned honourable chairman failed to extend time on the issue of illegality which were on the Tribunal proceedings, judgment and decree.*

When the appeal was called on for hearing the appellant was represented by Simon Mwakolo learned advocate whereas the 1st respondent has the service of Alfred chapa learned advocate and Mr. Massawe learned advocate appeared for the 2nd respondent. The appeal was disposed through written submission but the 2nd respondent did not file her written submission.

I have considered the records of the Tribunal and rival submission of both parties. The issues for determination are;

- i. *Whether the appellant raised illegalities in the application under scrutiny and if yes.*
- ii. *Whether there was improper service of summons to the appellant.*

I wish to put it clear that, I have noted with appreciation the submission and cited cases. But for the reason to be apparent later, I will only refer to the arguments which are relevant in determining the issues before the Court. This is an appeal against refusal to grant extension of time.

I will start with the principle that Courts have a wide discretionary power of granting or denying an extension of time when sought. However, for

the said decision to stand the discretionary powers must be exercised judiciously, reasonably, and based on sound legal principles and not arbitrarily. It is also a settled principle that an appellate Court would not interfere with the discretionary powers of the lower Court/Tribunal in that aspect unless the discretion exercised is in contravention of the above stated principles and that the contravention resulted into miscarriage of justice. See the case of **Metro Petroleum Tanzania Limited & 3 Others versus United Bank of Africa**, Civil Appeal No. 147 of 2019, CAT at Dar es Salaam(Unreported).

In addressing the first issue of illegality Mr. Mwakolo submitted that the Tribunal failed to consider that there was illegality in the proceedings, judgment and decree. In reply Mr. Chapa submitted that there was no illegality on the face of record. I have considered submission for and against this ground together with cited cases for the reason to be disclosed latter I will not recite them here or there. Argument advanced in this Court by both parties were also advanced in the Tribunal.

The matter in the Tribunal subject of this appeal was application for extension of time to file the application to set aside *ex-parte* judgment. The issue of illegality complained of is on the main application that is Application No. 193 of 2019. Assuming to be true that there was illegality in the proceedings, judgment and decree in the said application still it

could not be corrected in the application to set aside *ex-parte* judgment. The Court of Appeal was confronted with an identical situation in the case of **Iron & Steel Limited v Martin Kumalija and 117 Others**, Civil Application No. 292/18 of 2020 (unreported) in which the applicant moved the Court to enlarge time within which to lodge an application for stay of execution. The ground relied upon was the illegality of the decision sought to be challenged. However, the applicant referred to the illegalities in the decision of the CMA, not in the High Court's which was sought to be challenged. The Court made the following observation;

'... an illegality of the impugned decision will not be used to extend time in the circumstances of this case, for, no room will be available to rectify it in the application for stay of execution intended to be filed. Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one in situations where, if the extension sought is granted, that illegality will be addressed.'

The same to the appeal at hand, even if the chairman had considered the issue of illegality and granted the application, still those issue could not have been resolved in the application to set aside *ex-parte* judgment. It is on that account the argument and authorities referred by both parties were not paraphrased in this judgment. Therefore, this ground is misconceived.

On the second issue, whether there was procedural irregularity to serve summons to the appellant. Mr. Mwakolo submitted that there was

contradiction as on 25/10/2020 it was disclosed to the Tribunal that the appellant was living in Kamsamba and on 19/11/2020 gave another version that whereabouts of the appellant was not known. He added that there is no sworn affidavit of the process server on how service was conducted. It was Mr. Mwakolo's submission that uncertainty in serving summons to the appellant infringed the rule of natural justice particularly right to be heard.

Responding to the above, Mr. Chapa replied that the appellant was served with summons through substituted service but failed to appear to defend the case. He added that proceedings at page 3 discloses the order for the appellant to be served through newspaper whereby the 1st respondent complied but the appellant did not. In deciding this issue, the chairman stated;

'Hata hivyo baada ya kupatiwa mwenendo wa baraza hili tumliona kuwa meta maombi aliitwa barazani. Baada ya kumtafuta mleta maaombi bila mafanikio witi kupitia Tangazo la gazetini ulitolewa na baraza hili tarehe 19/11/2019. Wito huu ulitangazwa kwenye gazeti na gazeti hilo lililetwa barazani kabla ya kuanza kusikilizwa kwa shauri.'

I have gone through the applicant's affidavit in support of the application for extension of time at the Tribunal and noted that the applicant instead of stating reasons for delaying to file the application for setting aside the aforesaid *ex-parte* judgment, narrated reasons for setting aside the *ex-*

parte judgment, a stage that was yet to be reached, as no such application has been filed. In fact, the applicant alleged to have no interest in the suit property in his affidavit. I agree with the chairman that enlarging time for the appellant would be without any useful purpose.

Having discussed above, I find no reason have been advanced to interfere with the Tribunal's discretion to refuse extension of time. In the event, I find no merit in the appeal and dismiss it with costs.

DATED at MBEYA this 19th of May, 2022.



D. P. Ngunyale
Judge
19/05/2022

Judgment delivered in presence of Saimon Mwakolo for appellant and Pendo Lukumay for the respondent.



D. P. Ngunyale
Judge
19/05/2022