

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**Misc. LAND APPLICATION No. 87 OF 2021**

*(Arising from the High Court (Musoma District Registry) in Land Appeal Case No. 35 of 2021; Originating from the District Land and Housing Tribunal for Mara at Musoma in Misc. Land Application No. 458 of 2019 & Land Application No. 110 of 2016)*

**ABDI OMARI ..... APPLICANT**

***Versus***

**MASINDA NG'ARITA ..... RESPONDENT**

**RULING**

24.06.2022 & 27.06.2022

**Mtulya, J.:**

This court on the 10<sup>th</sup> day of May 2021 had received and listed in its **Land Appeal Case Register** an appeal recorded as **Land Appeal Case No. 35 of 2021** (the appeal). The appeal was scheduled in chambers for necessary orders on the 20<sup>th</sup> day of May 2021. On this day, both parties were absent, and this court issued three (3) orders:

- 1. Parties to appear for orders on the 11<sup>th</sup> August 2021, at 09:30 A.M;*
- 2. Parties to be notified; and*
- 3. Call for original record.*

On 18<sup>th</sup> August 2021, Mr. Masinda Ng'arita (the respondent) was present in person whereas Mr. Abdi Omari (the applicant) was

absent. The record is silent on what transpired to the applicant, but the same record is plain that the second and third orders on notification through summons and calling for record were complied without any reservations and proof of the same placed in the record of appeal. The applicant had received summons through his learned counsel Mr. Daud Mahemba, two (2) months before the scheduled date of necessary orders, 6<sup>th</sup> June 2021. However, on 11<sup>th</sup> November 2021, no any necessary orders were pronounced to the respondent. The record shows that it was the respondent who rose and started complaining on previous proceedings in lower tribunals and this court. In appreciation of his complaint, I will briefly display the record:

*I won the case three times. This matter was instituted sometimes back. They appealed to the High Court where the matter was struck out. After one year, they instituted a fresh case.*

After registration of the materials, the respondent declined to pray for *ex-parte* hearing order or substantiate his five (5) reasons of appeal or prayed for the appeal to be allowed. However, in closing his complaints, the respondent prayed his grounds of appeal to be considered by this court. It is from this submission, this court set a judgment date, 14<sup>th</sup> August 2021, and accordingly pronounced the judgment in favour of the respondent in absence

of the applicant. The judgment aggrieved the applicant hence rushed to this court again and filed the present application in **Misc. Land Application No. 87 of 2021** (the Application) complaining on proof of service and prayed for set aside of the *ex-parte* judgment to cherish the right to be heard.

According to the applicant, as is displayed in the tenth (10<sup>th</sup>) paragraph of his affidavit, he was not served summons to appear for hearing before this court. In his ninth (9<sup>th</sup>) paragraph of his affidavit, the applicant complained that he had never instructed learned counsel Mr. Mahemba to proceed with any appeal in this court, but in **Land Application No. 110 of 2016** (the application) before the **District Land and Housing Tribunal for Mara at Musoma** (the tribunal).

When the parties were called in this court on 1<sup>st</sup> June 2022 for the Application hearing, the respondent prayed to argue the Application by way of written submissions, and the prayer received a positive reply followed by a scheduling order. The parties complied with the scheduling order that completed on 24<sup>th</sup> June 2022, and today the Application was scheduled for a Ruling

The materials which were registered by the parties in brief depict that the applicant is still maintaining his earlier position in the affidavit that he was not served and that the record of appeal

does not show any thing if it proceeded or decided *ex-parte*. Finally, the applicant prayed his affidavit be adopted to be part of his submissions and this court to set aside the *ex-parte* judgment to cherish the right to be heard. On his part the respondent resisted the applicant's prayer contending that the applicant had deliberately declined to appear in this court on hearing date, 11<sup>th</sup> August 2021 hence the appeal proceeded *ex-parte* against him and was decided in his favour.

According to the respondent, the applicant has always been creating delays and play tactics to abuse court process and defeat justice. In his opinion, it was the learned counsel Mr. Mahemba who was served, but both Mr. Mahemba and the applicant declined appearance on the hearing date. Finally, the respondent submitted that an issue for determination before this court is: *whether the applicant or his learned counsel was well aware of the appeal and hearing date.*

It is fortunate that the respondent identified the relevant issue in respect to the present application, and I shall reply the same in affirmative. My holding is obvious that: *both the applicant and his learned counsel were well aware of the existence of both the appeal and hearing date.* The record of the appeal shows that Mr. Mahemba was representing the applicant in **Land Application No. 110 of 2016** which was before the tribunal and again drafted and

filed the appeal in this court. It is unfortunate the record of the Appeal does not show Mr. Mahemba was only instructed for drafting the appeal. Similarly, Mr. Mahemba signed summons of this court on 6<sup>th</sup> June 2021 to appear for necessary orders on 11<sup>th</sup> August 2021. However, neither Mr. Mahemba nor the applicant who had registered any materials in the Application to depict this fact. From the record it is obvious that Mr. Mahemba and his client were fully aware of the appeal and hearing date. At any standard, Mr. Mahemba or his client, the applicant cannot be said to have sufficient reasons in support of the present application.

However, as I indicated above in this Ruling, on 11<sup>th</sup> August 2021, when the appeal was scheduled for necessary orders, no any necessary orders were pronounced, including *ex parte* hearing order. In the same way, no any record showing the respondent prayed for an *ex-parte* hearing and whether or not the order was granted. The record is also silent on *ex-parte* hearing date. It was the complaints registered by the respondent which had moved this court on the same day to consider the grounds of appeal and decided in favour of the respondent. It is obvious that the procedures regulating *ex-parte* hearing order and *ex-parte* hearing proceedings were at fault.

This court is a court of law, procedures and justice. It always cherish the right to be heard and fairness in decisions making. It

cannot justifiably close its eyes when there is obvious breach of procedures in *ex-parte* hearing of appeals or applications. This court will always cherish proper adherence of the laws and procedures without any reservations (see: **Ibrahim Wambura Wanchoke v. Daniel Paschal Kiusi**, Misc. Land Appeal Case No. 17 of 2022; **Hassan Rashidi Kingazi & Another v. Halmashauri ya Kijiji Cha Viti**, Land Case Appeal No. 12 of 2021; **Joseph Siagi Singwe v. Boniphace Marwa Wang'anyi**, Misc. Land Appeal Case No. 111 of 2021; **Mengi Machele Mumwi v. Simion Jakob**, Land Appeal Case No. 102 of 2021; and **Samo Kitengera v. Sospiter Mwenge Marwa & Another**, Land Appeal Case No. 119 of 2021).

This court has borrowed a leaf from the practice of the Court of Appeal (the Court) in appreciating proper application of laws and procedures as indicated in the decision of **Diamond Trust Bank Tanzania Ltd v. Idrisa Shehe Mohamed**, Civil Appeal No. 262 of 2017). The wording of the Court on fair procedure and right to be heard is spotted in the precedent of **Mbeya-Rukwa Auto Parts & Transport v. Jestine George Mwakyoma** [2003] TLR 251, in the following passage:

*It is a cardinal principle of natural justice that a person should not be condemned unheard, but fair procedure demands that both sides should be heard. It is not a fair and judicious exercise of*

*powers, where a party is denied a hearing before its rights are taken away.*

Following the above cited passage of the Court and considering the practice of this court in the precedents of **Thobias Nungu v. Deus Kyabana**, Misc. Land Application No. 85 of 2021 and **Ibrahim Wambura Wanchoke v. Daniel Paschal Kiusi** (supra), and being aware of the right to be heard as enacted in article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002], and cherished by our superior courts in our judicial hierarchy, the Court and this court in various precedents, including **Oysterbay Villas Limited v. Kinondoni Municipal Council & Another**, Civil Appeal No. 110 of 219 and **Katherina Makole v. Onjack Sospiter**, Land Appeal Case No. 79 of 2021, I have decided to follow the course and favour the right to be heard.

In the end, I have decided to set aside the *ex-parte* judgment of this court delivered on 14<sup>th</sup> September 2021 and proceedings of 11<sup>th</sup> August 2022 in favour of the proper record of the court and right to be heard. I do so without any order as to costs for the obvious reason that the appeal is right back for hearing *inter-partes*.

However, before I pen down, I am quietly aware that it is a technical error which had produced set aside order of this court to

prefer the right to be heard on the part of the applicant. I would like to take this opportunity to remind Mr. Mahemba to assess himself in handling cases filed in this court. He may place himself in a list of hoax advocates and may be asked to reply charges of professional misconduct in appropriate forums of Bar Association of Tanganyika or this court. This is a court of law and procedure with touches on appropriate procedures aimed at speedy justice to the parties in civil suits as reflected in section 3(A) & (B) of the **Civil Procedure Act** [Cap. 33 R.E. 2019] (the Code). After the insertion of the section in the Code, it is expected that all learned minds who are drafting documents and appearing for the parties in this court to cherish the section and section 66 of **the Advocates Act** [Cap. 341 R.E. 2019] (the Advocates Act).



Ordered accordingly.

F. H. Mtulya

**Judge**

27.06.2022

This Ruling was delivered in chambers under the seal of this court in the presence of the respondent, Mr. Masinda Ng'arita and in the absence of the applicant, Mr. Abdi Omari.

F. H. Mtulya

**Judge**

27.06.2022