IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

LAND REVISION NO 6 OF 2021

(Arising from Land Application No. 189 of 2017)

TELEZA W/O MARO ..... 1ST APPLICANT

MNYORU W/O MARO ..... 2ND APPLICANT

VERSUS

KITANG'ITA NYABUNYA SIMAMA ..... 1ST RESPONDENT

TONTE WAMBURA TONTE ..... 2ND RESPONDENT

KOGANI MARO SOSERA ..... 3RD RESPONDENT

JUDGMENT

1st & 30th March 2022

F.H. MAHIMBALI, J.:

The applicants who are the wives and beneficiaries of the estate of the late Maro Sosera are challenging the decision of Musoma District Land and Housing Tribunal in Land Application No.189 of 2017. In the said application filed at the DLHT, the third respondent Kogani Maro Sosera sued the first and second respondents that they should not trespass into the said land in dispute, that the applicant is the lawful

owner of the disputed land, that the respondents to pay the general damages of 40,000/=, costs of the application. As the respondents in that suit defaulted appearance to the trial tribunal, judgment on default was entered against them on 28th February, 2018. By an order of this Court dated 8th July, 2021 (Kisanya, J), it extended time for filing of the Revision out of time within 45 days.

The basis of this revision is two folds. First, that the applicants who are the beneficiaries of the estate of the late Maro Sosera were not made parties of the said Land case at the DLHT and that the matter proceeded exparte. Secondly, is on illegality that the judgment of the trial tribunal is marred by two illegalities: there was no proof of the case after the exparte order and secondly that the tribunal assessors did not read their opinions as per law.

As per this background facts of the case, the applicants have preferred this revision application under section 43 (1)(b) of the LDCA and Order XXI, Rule 54 (c), Section79 (1) and 95 of the CPC, Cap 33 R.E 2019, that this Honourable to examine the correctness, propriety and legality of the decision of the DLHT in Land Application No. 189 of 2017. The same is supported by the joint affidavit of the applicants.

During the hearing of the application, the applicants were represented by Mr. Edson Philipo learned advocate whereas all the respondents appeared in person.

In his submission in support of the application, Mr. Edson Philipo submitted that, the genesis of this application is Land Application No 189 of 2017 at DLHT – Musoma. The application is supported by the affidavit of the applicants in which he prayed that the said affidavit be adopted to form part of this application. He added that the applicants are wives of the late Maro Sosera. The 1st and 2nd respondents were administrators of the estate of the late Maro Sosera who then distributed the same amongst others to the applicants. The third respondent filed a suit against 1st and 2nd respondents alleging that they are trespassers to the said land which in essence was not their land but of the applicants. Thus, the 1st and 2nd respondents were not proper parties to the suit but the applicants. *Secondary,* he argued that the said judgment as per reg. 11 (1) c of the LDCA, there ought to have been proof of the case before the said judgment was issued. He referred this Court to the provisions of Order VIII, rule 14 (2) of the CPC that default judgment must be proved. In this case, there has not been no proof as per law.

Thirdly, there are no assessors' opinion in the court file. He thus prayed that all the proceedings in Application no 189 of 2017 be quashed and its judgment set aside for being procedurally nullity and irregular.

In their replies, the first and second respondents who appeared to be administrators of the estate of the late Maro Sosera they had nothing to submit saying that their joint affidavit dully filed be adopted by the Court and the same is their submission. In the said joint counter affidavit, in essence they concur with the application that the application is meritorious.

The third respondent in his reply to the submission by the applicants and the 1st and 2nd Respondents, submitted that his counter affidavit be adopted as well to form part of his submission. He added that it is true that he filed that Land case No.189 of 2017 on 13/11/2017. The purported distribution of the said estate was done on 1/01/2018. So, by the time he instituted this suit, these 1st and 2nd respondents were still administrations of the said estate. Therefore, they were properly sued. The said letter dated 30/11/2017 in which they are making reference, he argued that in fact that letter had not abandoned the said case as there was a post date to come back to the DLHT. That

means, the case was still intact. As the settlement had failed, it meant that the case was still existing. Their subsequent default appearance was their own choice and it must have consequences.

The fact that they did not attend it was not by mistake but by intent. The trial tribunal's record is clear on attendance. He was of the considered view that the said suit was properly adjudicated.

In his rejoinder submission, Mr. Edson Philipo learned advocate reiterated his submission in chief that the default judgment was wrongly entered in the circumstance of this case where there is no proof of service and that there is an illegality.

Having heard the submissions from both sides, it is for this Court now to determine whether the application is meritorious as argued.

According to regulation no. 11(1) of GN No. 174 of 2003 as made under section 56 of the LDCA, provides that where the respondent is absent on the day fixed for hearing and that the respondent was dully served with the notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his

absence, the Tribunal **shall proceed to hear and determine the matter *ex-parte* by oral evidence** [emphasis mine].

The trial Tribunal's records establish that on the date of the order (28/2/2018), the respondents were absent as it was in the previous sessions. For clarity, I let the record speak by itself:

28/02/2018

Chairman: Kaare J. T

T/ASS: Mr. Babere / Mr. Matiko

Apllicant: Present

Respondent: All Absent

T/K: Pude

Applicant: The case is coming for hearing. The respondents were s erved and are absent. I pray to be heard.

Tribunal: Since the respondents were served and did not file their WSD, I enter judgment in default.

Kaare, J.T

Chairman

28/2/2018

Was this order justified?

However, consequences of failure to present a written statement of Defense is provided under order VIII, rule 1 (1) and (2) of CPC. The court can either pronounce judgment or order exparte proof. (See **Joe Rugarabamu vs Tanzania Tea Blenders** (1990) T.L.R. 24).

Pursuant to Regulation 11 (1) of GN 174 of 2003, the DLHT and as a matter of best practice ought to have heard the evidence of the claimants. Upon hearing the evidence of the case, exparte judgment as per law would follow.

As per that none compliance of the law, the order of the DLHT entering judgment in default was unjustified.

On illegality, since it is undisputed as per 3rd respondent's submission that during the pendency of the case, the distribution of the said deceased's estates was done that the applicants are now amongst the beneficiaries of the said estate, then the execution of the DLHT's decree will be at legal challenge. On that, wisdom dictates that the matter should be relooked.

That said, pursuant to section 43 (1) b of the LDCA, the decision and orders of the trial DLHT are quashed and set aside. In its place, I

order retrial of the matter before another chairperson and new set of assessors. Each party to bear its own costs.

It is so ordered

DATED at MUSOMA this 30th day of March, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered 30th day of March, 2022 in the presence of first applicant, third respondent and Mr. Gidion Mugoa, RMA.

Right to appeal is explained.

F. H. Mahimbali

JUDGE

30/3/2022