

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

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**PC. CIVIL APPEAL NO. 02 OF 2021**

*(Arising from Civil Appeal No. 01 of 2021 of Makete District Court and Originating from Civil Case No. 01 of 2021 of Matamba Primary Court)*

**AJUWA NGAJILO ..... APPELLANT**

**VERSUS**

**TITO CHAVALA ..... RESPONDENT**

**JUDGEMENT**

Date of last order: 22/02/2022

Date of Judgement: 25/07/2022

**MLYAMBINA, J.**

The Appellant filed the instant appeal in this Court seeking to challenge the decision of Makete District Court (hence forth the First Appellate Court) made in *Civil Appeal No. 01 of 2021* dated 29<sup>th</sup> July, 2021. After hearing of the appeal, the First Appellate Court overruled the decision of Matamba Primary Court (hereinafter the Trial Court) on the ground that the Trial Court was incompetent to deal with the application of extension of time to file the application for setting aside the ex-parte judgement. Being aggrieved by the said decision, the Appellant filed his petition of appeal with four grounds of appeal namely:

1. *That, the Honourable Appellate Court erred both in law and facts when it allowed an appeal holding that the application for extension of time to set aside ex-parte judgement was improperly before the Primary Court.*
2. *That, the Honourable Appellate District Court erred in law and facts when it held that the summons was properly served to the Appellant while there was no proof of service to let the case to proceed ex-parte.*
3. *That, the Honourable Appellate Court erred in law and facts when it overruled the decision of the Trial Court on the findings of the objection proceedings while there was ample evidence to prove that the attached property was matrimonial home and other non-attachable properties, and*
4. *That the Honourable Appellate Court erred in law and facts by ignoring that the Appellant was exhausting available remedies in Trial Court as decided by District Court in Revision No. 1 of 2021*

This appeal was argued by way of written submission by the parties' consent.

The Appellant was represented by Mr. Abinel M. Zephania, learned Advocate while the Respondent proceeded in person. Before going to the merit of the case, the background of the matter is that; the Respondent herein filed the case before Matamba Primary Court which was heard in the Appellant absentia. During execution of the said decision, the Appellant unsuccessfully filed the application before the first Appellate Court for revision of the trial Court ex-parte decision. The First Appellate Court dismissed the said application on ground that it was filed prematurely because the Appellant did not exhaust all available remedy within the Trial Court.

Thereafter, the Appellant successfully filed the application for extension of time to file his application to set aside the ex-parte decision. The Trial Court reversed its decision and ordered some of the attached properties to be removed from the list of the attached properties. The Respondent was aggrieved. He successfully appealed to the First Appellate Court. The Court overruled the Trial Court decision. The Appellant being aggrieved by the decision, he lodged this appeal.

To start with the first ground, the Appellant contended that the Appellate Court erred both in law and facts when it allowed an appeal holding that the application for extension of time to set aside ex-parte judgement was improperly before the Primary Court. The Appellant submitted that the Primary Court has power to extend time to hear an application. He supported her submission with *section 3(4) of the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules G. N. No. 311 of 1964. Also, section 30 (1) and (2) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, 310 of 1964.*

On the other hand, the Respondent objected the first ground. He averred that, if the Court will allow the Applicant with extension of time to file an application to set aside the ex-parte judgement which was executed almost three months before, it will lead to injustice to the Respondent. *Rule 3 (4) of the Magistrates' Courts (Limitation of the Proceedings under Customary law),* provide that:

### 3.- Extension of period of limitation

*(4) the Court may, in its discretion, admit any proceedings after the expiration of the period of limitation if it is satisfied that the person bringing*

*such proceedings was unable, for sufficient cause, to bring the proceedings earlier.*

As for the second ground of appeal, the Appellant argued that the Appellate District Court erred in law and facts when it held that the summons was properly served to the Appellant while there was no proof of service to let the case to proceed *Ex-parte*. The Respondent averred that the summons was served several times but the Appellant was hiding by pretending to be on travel. The Village Executive Officer tried his best to reach him to the extend of calling him but in vain. On other side, the Appellant denied to be served with the summons.

I had time to go through the record and noted that there is no dispute that the Court has issued more than one summons to be served to the Appellant. The issue is; *whether the summons was properly served and if there is any proof to that effect. Rule 19 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 310 of 1964 provides: 19.- service*

*(1) subject to the provision of subrule (2), a summons or any other document required to be served under these rules shall be served on the defendant*

*personally or, if he has an agent authorized to accept service, on such agent.*

*(2) where the Court is satisfied that person service can not be affected without undue delay and expense, it may direct that the summons or document be served either by post or by leaving it with an adult male member of the family of the defendant or with some adult male servant residing with him, or with his employer, or by affixing a copy of a summons or document on some conspicuous part of the last known resident of the defendant and another copy thereof on the Court notice-board,*

*(3) service under subrule (2) may be proved-*

*(a) in the case of service by post, by evidence that a postal packet was received by the defendant, supported by a certificate of an officer of the Court that the postal packet contained the summons;*

*(b) in any other case, by the affidavit or evidence on affirmation of the person who affected the service.*

From the record, the summons which was issued by the Court to be served to the Appellant was returned to Court without being signed by him. There is only the statement written in the summons by the Village Executive Officer which shows that the Appellant was not available. Therefore, the summons was not properly served. Even if it could have been served, the Village Executive Officer as it applies to the Ten Cell Leader was not a proper Officer of the Court to save the same, as it was held in the case of **Mohamed Nassoro v. Ally Mohamed** [1991] TLR 133. According to *Order 5 Rule 16 of the Civil Procedure Code (supra)*, it is only the proper Officer of the Court who has to effect service of summons. And if the party refuses to accept service, the process server has to leave a copy of the summons with him and return the original to the Court together with an affidavit stating that the person upon whom he served the summons refused to sign to acknowledge service.

As per *Rule 6 (1) of the Court Brokers and Process Servers (Appointment Remuneration and Disciplinary) Rules, GN No. 363 of 2017*, any person who intends to be registered as a Court broker or process server must apply in writing to the secretary of the Court Brokers and Process Servers Appointment, and Disciplinary Committee

through the Resident Magistrate in Charge of a region in which he wishes to practise as a Court broker or process server.

*Under Rule 5 (1) of GN No. 363 of 2017 (supra)* the Committee has to be satisfied that a person applying to be a process server:-(a) is a citizen and resident of Tanzania who has attained the age of majority; (b) is director of a company incorporated in Tanzania or partner of an entity which is registered and licensed under the General Auctioneers Act; (c) has at least attained Ordinary Level of Secondary Education or its equivalent and is fluent in both Kiswahili and English; (d) is a holder of a certificate prescribed under *rule 6 (2) (e)*; (e) is conversant with the rules of execution as provided for under the Civil Procedure Code and any other written laws; (f) is of good repute and of high integrity; (g) is of good financial standing; (h) has adequate facilities for the safe storage of goods; (i) has paid a non-refundable application fee of two hundred and fifty thousand shillings; and (j) has appeared for an interview before the committee and passed at a grade which the committee may determine.

The Village Executive Officer is not mentioned anywhere to be the Process Server of normal Courts of law. The only law that recognizes the

Village Executive Officer as a Process Server is *the Land Disputes Courts Regulations of 2003, GN. No. 174 of 2003* which defines a Process Server to mean; *any person authorized by the Tribunal to effect service of documents of the Tribunal and includes a Ward Executive Officer, a Mtaa Chairman or Kitongoji Chairman, Village Chairman and Village Executive Officer so authorised.*

It follows, therefore that the Court could have not opted to hear the case ex-parte. This ground has merit.

Furthermore, the Appellant argued that the Appellate Court erred in law and facts when overruled the decision of Trial Court on the findings of the objection proceedings while there was ample evidence to prove that the attached property was matrimonial home and other non-attachable properties. The Appellant submitted that the application for objection is within the ambit of the Trial Court as per *Rule 69 of the of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN 310 of 1964*. Thus, the Trial Court was proper to find that the property attached was non attachable.

From the record, the property which the Appellant prayed to be removed from the list of the property attached for execution is a matrimonial house in which he is living with his family. *Section 112 of*

*the Evidence Act [Cap 6 R. E. 2019]* require whoever wants the Court to rule on his favour has to prove the existence of the facts he alleges. Taking into consideration that the matter before the trial Court was not on right of the parties but objection to attach the house which he claimed to be the matrimonial home, the First Appellate Court was not right to interfere with the decision of the Trial Court in which no any right of the parties was infringed.

Coming to the fourth ground, the Appellant argued that the Appellate Court erred in law and facts by ignoring that the Appellant was exhausting available remedies in trial Court as decided by District Court in *Revision No. 1 of 2021*. It is well established principle that a party has to exhaust all remedies available at the Trial Court before he makes a move to the Appellate Court. This was also insisted in the case of **Pangea Minerals Limited v. Petrofuel (T) Limited and 2 Others**, Civil Appeal No. 96 of 2015 (unreported). It is evidenced from the record, the Appellant applied for extension of time so that he can make an application to set aside the Ex-parte Judgement. Also, the objection to the nonattachable properties which was attached. He exhausted all remedies before the Trial Court.

In the light of what have been stated hereinabove, the Court is of the findings that the appeal by the Appellant has merit. The First Appellate Court erred in law and facts by nullifying the Trial Court decision. Consequently, the appeal is hereby allowed with costs. It is so ordered.

 **Y. J. MLYAMBINA**  
**JUDGE**  
**25/07/2022**

Judgement pronounced and dated 25<sup>th</sup> day of July, 2022 through Video Conferencing in the presence of Counsel Abniel Zephania for the Appellant and in the absence of the Respondent. The Appellant's Counsel was stationed at the High Court of Tanzania Iringa District Registry's premises. Right of Appeal fully explained.

 **Y. J. MLYAMBINA**  
**JUDGE**  
**25/07/2022**