

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 58 OF 2021

(Arising from Kahama District Land and Housing Tribunal in Land Application No. 50/2021)

JOACHIM M. NKWABI *(Administrator of the*
Estate of the late MHOJA NKWABI)**APPELLANT**

VERSUS

- 1. ADVIR COMPANY LIMITED**..... **1ST RESPONDENT**
2. DAUD MANASE..... **2ND RESPONDENT**
3. MOHAMED H. WARSAME..... **3RD RESPONDENT**
4. ALICE NZOMUKUNDA..... **4TH RESPONDENT**
5. MATHIAS BABABOSE..... **5TH RESPONDENT**
6. BANZO INVESTMENT..... **6TH RESPONDENT**

RULING

19TH AUGUST, 2022

A. MATUMA, J.

In the District Land and Housing Tribunal for Kahama at Kahama, the Appellant sued the respondents for Civil trespass in Land and declaration that he is the lawful owner of the suit land located at Shunu street within Kahama District in Shinyanga Region.

The 3rd respondent in his written statement of Defence raised preliminary objections to the effect that;

- i) *The suit was res-judicata as it was substantially and conclusively determined by the Ward Tribunal of Nyahanga Ward vide Land Dispute no. 11/2012 whereas the Appellant was adjudged a loser/judgment Debtor and he never appealed which led to a full execution of the decree against him in the District Land and Housing Tribunal for Shinyanga at Sinyanga vide Misc. Land Application no. 2/2014.*
- ii) *That the suit was time barred.*

The trial tribunal heard the parties in respect of the preliminary objections and at the end it dismissed the suit for it found the same to have been res judicata and been filed out of time.

The Appellant became aggrieved of the decision of the trial tribunal as herein above reflected hence this appeal. The Appellant has advanced two grounds of appeal namely;

- i) *That, the Hon. Trial chairman erred in law and facts by deciding that the suit is Res-Judicata.*
- ii) *That, the Hon. Trial chairman erred in law and facts by deciding that the Application is time barred.*

On 18/01/2022 when this appeal came for hearing, it transpired to the Court that the appellant did not effect service to the 4th, 5th and 6th Respondents. Mr. Simoni Kamkolwe learned advocate who appeared for the Appellant pressed the Court to proceed with the hearing in the absence of those respondents on the ground that they were nowhere to be seen.

Bearing in mind the principle that nobody should be condemned unheard and the fact that there was no affidavit of the Court process server to the effect that there was in deed any attempt to effect service to those respondents, I adjourned the hearing of this appeal and made the following order;

"I will adjourn this matter for the appellant to effect service to the rest of the Respondents. I order that failure to effect service to the rest of the respondents shall amount to failure to prosecute the appeal."

- *Hearing on 30/03/2022*
- *Service to the 4th, 5th and 6th respondents be effected without failure and this is the last adjournment."*

The matter undergone two further adjournments on 30/03/2022 and 22/06/2022 respectively as I was out of station for other official duties. The learned acting Deputy Registrar fixed it today for hearing.

Today the 4th, 5th and 6th respondents are as usual absent. I required the parties to address me on;

- i. Whether the Appellant effected service to the 4th, 5th and 6th respondents in accordance to the law.
- ii. If service has not been effected accordingly, why should this Court not dismiss this appeal for want of prosecution.

Mr. Simoni Kamkolwe learned advocate for the Appellant quickly responded that they effected service by Publication vide Uhuru Newspaper dated 25th March, 2022. He further submitted that they decided to make service by publication because of the surrounding

circumstances of this case whereas the whereabouts of the 4th, 5th and 6th Respondents is unknown for they do not have residents or offices in Kahama. That even at the trial tribunal they were nowhere to be seen.

He finally prayed that this appeal should not be dismissed for want of prosecution because the rights of the parties in its merits has yet been determined and thus the dismissal order will prejudice the Appellant.

The 1st and 2nd respondents were absent without any notice.

Mr. Kassim Gilla learned advocate for the 3rd respondent pressed for dismissal of this appeal for none prosecution sailing me through various rules of Order V of the Civil Procedure Code, Cap. 33 R.E 2019. He submitted that the appellant should have filed the affidavit of the court process server if at all service was ineffective by reason that such respondents were nowhere to be seen.

He stressed that in the absence of such affidavit, it is clear that the appellant defaulted the order of service which was issued by this Court and could not resort into substituted service by publication without satisfying the Court as to why the ordinary means of service was not possible.

After hearing the parties down here is my findings.

Service of summons to the parties in any suit is a legally governed process. This is in accordance to order V of the Civil Procedure Code supra. It is not a matter of personal wishes by either party on whether or not to effect service or through which manner the service should be effected.

Rule 7 or order V supra provides that service of summons shall be to each defendant in a case where there are more than one defendants, for the purpose of this case, to each of the respondents.

Rule 8 thereof provides that where practicable, service shall be done to the party in person or to his agent. Rule 11 thereof provides the circumstances under which summons may be served to an adult member of the family who resides with the said party to the suit.

Rule 12 thereof provides for the person served to acknowledge service by endorsing to the original summons and in case of refusal to acknowledge service, the service officer to swear an affidavit of such service and the refusal thereof. All these provisions implies the primary service should be physical service or in other words an ordinary service.

Rule 13 provides for the procedure to be followed when the party to be served cannot be found. Substituted service is accepted as one of the modes of service but the same must be by order of the court after having been satisfied that such mode in the circumstances of the matter before it was called for. That is provided for under rule 16 (2) of order V supra.

Therefore there should be on order of the Court for the party to effect service by way of substituted service through publication. It is not a matter of one's wishes and I cannot see the need to state the rationale behind.

In the instant matter, there is no any proof whatsoever that the Appellant dared or attempted anyhow to effect service to the 4th, 5th and 6th respondents in vain either physically or at their respective residences.

As the law requires and as rightly submitted by Mr. Kassim Gilla learned advocate, I expected that if those respondents are really nowhere to be found, the appellant would have filed the Court process server's affidavit for the purposes of obtaining the order of the court for substituted service by way of publication.

I therefore agree with Mr. Kassim Gila learned advocate that in the absence of the Affidavit of the process server, the appellants defaulted the order of this Court to have the 4th, 5th and 6th respondents effectively served.

The argument of the Appellant's advocate that they decided to make publication due to the nature of this matter as those respondents are nowhere to be seen does not hold water. Upon which evidence can we satisfy ourselves that they even tried to make on ordinary service in terms of the law supra! Why didn't they move the Court to order for substituted service by way of publication? Is it not a calculated move by the appellant that such respondents are condemned unheard? I find the appellant to have calculations of forcing the 4th, 5th and 6th respondent's adjudged unheard. Even during trial at the trial tribunal he deliberately defaulted the order of service and when he was asked why he didn't effect service to those respondents he merely stated that it was because he intended to withdraw the suit.

In the case of ***Paschal Leonard v. Iddi Kavuruzi, (DC) Civil Appeal no. 9 of 2020***, High Court at Kigoma, I had time to make some observations as far as service of summons is concerned.

In that case the matter was determined *exparte* against the Appellant by the District Court which relied on an affidavit sworn by one

Hassani Selemani on behalf of the village chairman. In the said affidavit it was deposed that the appellant had refused to acknowledge service.

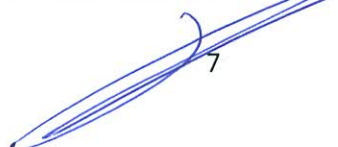
During execution of the decree, it is when the appellant rose up and objected such execution on the ground that he was not heard. The parties litigated on the same until when the appeal was lodged in the high Court. I was thus necessitated to determine whether Hassani Selemani was a qualified officer to effect service whose affidavit could be relied upon. I held at page 3 that and I quote;

*"Service of Court process as defined under rule 2 of the Court Brokers and process servers (Appointment, Remuneration, and Disiplinary) Rules, 2017 G.N. no. 363 of 2017 to be legal documents issued by the Court for service on interested parties, **is a dignified duty vested in the very selected and recruited persons** under G.N. no. 363 supra.*

Those are in law known as Court process servers who are appointed under rule 5 (2) of G.N. no. 363 supra. They are subjected to disiplinary measures under the G.N and have their own Code of Conduct under the same G.N"

I am aware that under rule 30 and 31 of the same G.N any other Public Officer may execute the duties of process servers or even Court Brokers but he must have been dully assigned for such duty in respect of the relevant case. And the assigning officer is either the Registrar of the High Court or the Resident Magistrate incharge of the relevant court.

In that respect, service of summons or any other legal document is not a duty to be disregarded or to be taken simple and nor can be given to any person for its execution.



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The person to effect service should be honest and conversant with the rules of service of the Court process as provided for under the Civil Procedure Code and any other written laws.

In the case of Paschal Leonard supra at page 5 I further held that under the clear implications of the law;

"Service of summons is not a duty to be neglected and taken for leisure. It is a dignified duty.....which entails integrity, honest, competence, high quality of service and confidentiality.....Parties to suits have no choice in the manner of effecting service to their opponents".

In the instant appeal so does during trial in the tribunal below, the appellant took it very simple. He did not effect services to the 4th, 5th and 6th respondents and still admires the matter to be determined in their absence.

Before this Court, he has gone an extra mile of choosing his own mode of service by making publications. There was no court order that service be effected by publication. The appellant ought thus to abide to the law governing service of summons or court processes.

Since the appellant defaulted service to the 4th, 5th and 6th respondents, I have no choice rather than agreeing with Mr. Kassim Gilla learned advocate that this appeal be dismissed for want of prosecution.

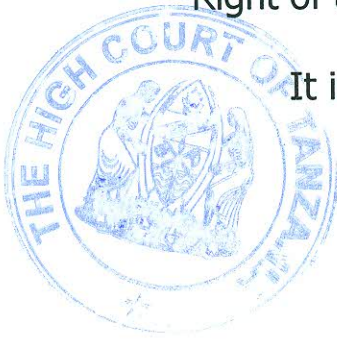
This is because failure to effect service to the respondent or respondents as the case may be, amounts to failure to prosecute the suit, appeal, application e.t.c as the case may. That was decided in the

case of ***Matias Luhana versus Mupizi Mpuzu, Misc. Land Appeal no. 2 of 2019***, High Court at Kigoma.

I accordingly dismiss this appeal for want of prosecution and the dismissal is with costs.

Right of appeal is explained.

It is so ordered.



A. MATUMA
JUDGE
19/08/2022