

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF BUKOBA)**

AT BUKOBA

LAND APPLICATION NO. 128 OF 2021

(Arising from the High Court of Tanzania (Bukoba Registry) in Land Case Appeal No. 61 of 2018)

BERNAD LUTTASHABA APPELLANT

VERSUS

CONSTANCIA KAMUGISHA RESPONDENT

RULING

Date of Judgment: 28.10.2022

A.Y. Mwenda J,

On 7th December, 2020, this court ordered Land Case Appeal No. 61 of 2018 to proceed ex-parte against the respondent for his failure to enter appearance before the court. The hearing commenced and consequently an ex-parte judgment was delivered on 19th February, 2021.

Aggrieved by the said judgment, the Applicant lodged the present application praying the court to set aside the same.

This application is brought under Order XXXIX, Rule 21 of the Civil Procedure Code, [CAP 33 R.E 2019]. It is also supported by an affidavit sworn by Bernad Luttashaba (the applicant).

At the hearing of this application the applicant was represented by Ms. Erieth Barnabas, learned advocate. The learned Advocate was holding brief for Mr.

Geofrey Kange, learned counsel, with instructions to proceed. On the other hand, the respondent appeared in person without legal representation.

At the hearing, Ms. Erieth Barnabas prayed the applicant's chamber summons and affidavit to be adopted to form part of her oral submissions. She submitted that the applicant is praying for re hearing of Land Case Appeal No. 61 of 2018 because the same was heard ex parte against him without being dully served with the summons and memorandum of appeal.

She said, the respondent (the then appellant) neither served him with a summons nor did she swear an affidavit to show that the applicant was nowhere to be found. She stated that following pronouncement of the ex parte judgment, the applicant was served with summons through Ward Executive Officer to appear before the District Land and Housing Tribunal for execution purposes. She submitted that they are wondering why the respondent failed to adopt the same modality of service during the hearing of Land Case Appeal No. 61 of 2018. The learned counsel further submitted that despite the respondent's knowledge that the applicant was, before the lower tribunal, represented by Galati Law Chamber (Advocates) she failed to serve the summons to him through the said law firm.

She thus prayed this application to be allowed by setting aside ex parte judgment and order re-hearing of Land Case Appeal No. 61 of 2018.

In reply to the submission by the learned counsel for the applicant, the respondent submitted that, this case historically begun in the year 2007 and

since then the applicant have been defaulting appearance. She said that there are proofs of services by publication on various newspapers. She concluded her submission by stating that this court should go through the records and if what the applicants alleges is true, then they should be allowed to appear for the re-hearing of Land Case Appeal No. 61 of 2018.

In rejoinder to the submission by the respondent, the learned counsel for the applicant said that, the respondent made submissions on matters filed in 2007. She said that is not proper because the present application is in respect of Land Appeal No. 61 of 2018. She concluded her submission by reiterating to her submissions in chief.

Having gone through submissions by both parties the issue for determination is whether there are sufficient reasons justifying setting aside the *ex parte* judgment.

From the applicant's submissions, it is clear that he alleges that there was no proper service in Land Appeal No. 61 of 2018. He alleges that, he was not aware that Land Case Appeal No. 61 of 2018 was filed in court as he was never served with the summons to appear. On top of that he submitted that there is no affidavit by the respondent proving that the applicant was nowhere to be found.

From the records it is clear that on 22nd October 2020 there was an order that summons be served upon the applicant. The matter was then fixed for mention on 7th December 2020. When the matter came for mention on 7th December 2020 the respondent informed the court that she served the summon to the

applicant through publication in Nipashe Newspaper dated 3rd October 2020. Following this information, the court ordered the hearing to proceed *ex parte* against the applicant (the then respondent) for his nonappearance.

I have gone through the records and failed to see where an order for publication of summons came from. By the previous order, the respondent was required to serve the applicant and if the applicant was nowhere to be found, she was expected to swear an affidavit to that effect. Thereafter the court would then issue an order for substituted service.

It is trite principle that uncertainty of service of summons is sufficient reason for allowing an application to set aside an *ex parte* judgment and decree. This position has been stated in the case of ***Lim Han Yung & Another vs Lucy Traseas Kristensen Misc. Land Application No. 762 of 2017 [2018]*** where the court, while citing the case of ***T.M Sanga vs Sadrudin G. Albai & 2 Others (1977) L.R.T n. 51*** held inter alia that;

"Uncertainty of service of summons is sufficient reason for allowing an application to set aside ex parte judgment and decree thereof"


In the present application, the records are clear that there was an order for summons to be served upon the applicant but it is unknown whether the said summons was duly served upon the applicant. What is seen in the records is

only a proof of service by the way of publication through Nipashe Newspaper. However, it also not clear where an order for the said publication came.

That being the case this court is of the view that there is uncertainty of service of summons thus the applicant has demonstrated sufficient reasons for allowing this application. This application is hereby allowed by setting aside *ex parte* judgment to pave the way for re-hearing of Land Case Appeal No. 61 of 2018. Each party shall bear its own costs.


It is so ordered.




A.Y. Mwenda
Judge
28.10.2022

Ruling delivered in chamber under the seal of this court in the presence of Ms. Constancia Kamugisha the respondent and in the presence of Mr. Gildon Mambo holding learned advocate holding brief of Mr. Geoffrey Kange learned counsel.




A.Y. Mwenda
Judge
28.10.2022