

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 28 OF 2022

(Originating from Misc. Land Application No. 11 of 2022 and Land Appeal No. 29 of 2020 of the District Land and Housing Tribunal for Same at Same; emanating from Land Case No. 8 of 2020 of Kisima Ward Tribunal).

PERPETUA ALLY MMASA.....APPELLANT

VERSUS

NTEGHENJWA ELITWAZA.....RESPONDENT

JUDGMENT

13/10/2022 & 18/11/2022

SIMFUKWE, J.

The appellant herein successfully instituted a land dispute before Kisima Ward tribunal against the respondent herein. The respondent herein successfully appealed before the District Land and Housing Tribunal which proceeded ex parte and ordered the appellant herein to demolish her house built on the disputed land. The appellant's application to set aside the ex parte judgment was dismissed. Then, the appellant appealed before this court on three grounds which were preferred in Kiswahili:

1. Kwamba, baraza lilizielekeza Vibaya kisheria na kimantiki kwa kushindwa kuchambua vizuri na kwa kina na ama kutilia maanani ushahidi wa mrufani hivyo kufikia uamuzi huo.



2. Kwamba, baraza lilijielekeza vibaya kisheria na kimantiki kwa kuamini bila kujiridhisha kuwa mrufani alipata au hakupata wito wa kuhudhuria shauri.
3. Kwamba, baraza lilijielekeza vibaya kwa kushindwa kuona kuwa kiapo cha mpeleka wito kinatia mashaka kwa kukiuka matakwa ya kisheria.

Both parties were unrepresented. The appellant prayed to argue the appeal by way of written submissions. Her prayer was granted.

In her submission, the appellant narrated the background of the appeal to the effect that in Land Appeal No. 29/2021 at the District Land and Housing Tribunal, she was denied her constitutional right to be heard, hence failed to defend her case. As a result, ex parte judgment was issued upon her and that she became aware of the said appeal when she received a summons to show cause as to why execution order should not be made against her.

In support of the 1st ground of appeal, the appellant submitted that her testimony through her affidavit was never considered by the trial tribunal on the fact that the appellant did testify that at the very time when Land Appeal No. 29/2021 was before the appellate tribunal, she was pregnant. Thus, she was due to the demand of nature and body response unable to attend the tribunal sessions. That, despite being in such condition, no summons was served upon her. That, had the summons reached her, despite her condition she could have attended the tribunal sessions. Reference was made to the case of **John David Kashenkya v. The Attorney General, Civil Application No. 1 of 2012**, CAT, in which it was held that:



"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children which are yet in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and to whatever kind of work he is required to do."

The appellant cited another case of **Emmanuel R. Maira vs The District Executive Director, Bunda District Council, Civil Application No. 66 of 2010**, in which the Court of Appeal stated that:

"Health matters, in most cases, are not the choice of a human being; cannot be shelved nor can anyone be held to blame when they strike."

The appellant urged the wisdom of this court consider that pregnancy comes with a number of health changes due to body adjustments, hence the subject of such pregnancy may become ill, leading to become unable to perform herself in the expected level. Thus, even if the summons were proved to have been served to the appellant, she could still be in a critical condition to attend the sessions. That, since the summons did not reach her, it should not bind this court's wisdom to conclude that the appellant purposely withheld from attending her case.

The appellant stated further that, failure for the appellate tribunal to consider the said evidence and or testimony so adduced by the appellant while seeking to set aside Exparte judgment against her after knowing the existence of Land Appeal No. 29 of 2021, made the Honourable tribunal to misdirect itself as it did not trouble itself to decide whether the appellant was pregnant or otherwise. That, if it had bothered itself to inquire into the fact it could have given a suitable order to fit the



circumstance of the case and of the parties. She opined that justice was highly denied to the appellant.

On the 2nd and 3rd grounds of appeal, it was submitted that the appellate tribunal took no effort to ascertain on the proof of service of the issued summons and justification of the affidavit by the process server. That, the tribunal should have asked itself the following questions:

1. Was the summons issued served to the appellant (then applicant)?
2. The attestation to such affidavit was it lawfully made and by a lawful person?

That, none of the two issues were tested by the law and found justified by the appellate tribunal, rather it was found that from a mere statement by the Mwenyekiti wa Kitongoji cha Majevu one Mohamed S. Bakari who deponed to had served the appellant. The appellant noted that, the affidavit of service was affirmed by the same Chairperson who appeared to be the Commissioner for Oaths as he attested his own affidavit, while he is neither an Advocate nor Magistrate. It was pointed out that the said illegality slipped beneath the trusted wisdom of the appellate tribunal unnoticed, hence miscarriage of justice was made as the appellant was denied her constitutional right to be equally heard.

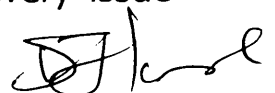
The appellant was of the view that it is to be considered and observed by the wisdom of this court that the affidavits made by the process server to prove service of summons the fact which was not true, was tempered by the respondent who cleared the name of the Attestator which at first appeared to be Mohamed S. Bakari and replace it with that of one Henerico Erasto Nkungu who is said to be an advocate. The said Henerico Erasto Nkungu was alleged to be unqualified as he had not renewed his

practicing licence. The appellant thought that the same was made so as to justify their falsehood and purported to mislead the appellate tribunal. Hence, the said affidavit was at last considered as proof of service of the issued summons, the fact which was not true. The appellant subscribed to the phrase **THE END JUSTIFIES THE MEANS**, and commented that no justice can ever be attained from falsehood as was done by the respondent who played foul to the adverse party and yet stand and submit on justification of such summons and its service and assure this court that justice was attained by the appellate tribunal to the parties.

The appellant went on to submit that despite faithful disclosure of the above fact to the appellate tribunal, it was not in its willing wisdom to take it into consideration though late, but rather the honourable tribunal chose to be misled and tricked by the respondent. Hence, justice was miscarried. In support of her argument, the appellant cited the case of **Nyamunini Ntarambigwa v. Simon Kikoti, Misc. Land Application No. 19 of 2021** at page 11 where it was stated that:

"It is from the fake, false and fraud documents which damage the reputation of the court once they go undetected as the opponent parties would not be positioned to know that the courts have been deceived. It is the reputation of the court that would be put into inquiry. The reputation and dignity of the court must therefore be protected."

The appellant urged that let the unwaived wisdom succumb itself to the upholding of justice and find fault in the pronounced ruling and orders thereto of the district tribunal on the fact that, it is a matter of practice and law that justice bodies are duty bound to ensure that every issue



raised by the parties to the dispute is addressed in the light of the law. That, none of that was done by the appellate tribunal even after being informed of the irregularities and fouls made by the respondent. That, since the appellant was set to be judged according to the law and yet it was commanded of her to be struck contrary to the law itself, justice should be upheld.

It was averred further that this court should further take note that the appellate tribunal upon the pronouncing of the order to proceed hearing the appeal Ex parte, did not notify by way of summons, the appellant that the case was to proceed ex parte. Nor did the appellate tribunal issue summons or notify the appellant (then respondent) of the date ex parte judgment was to be pronounced. That, had that been done by the appellate tribunal the appellant could have a chance to seek redress timely and hence, could save the costs incurred and time spent by the courts and the parties. The appellant was of the opinion that the said ex parte judgment was a nullity.

It further stated that the instant circumstance was once decided in the case of **Coast Millers Ltd and 2 Others v. Joyce Joseph, Civil Appeal No. 147 of 2004** (unreported) at page 6 and 6, the High Court sitting at Dar es Salaam decided that the ex parte judgment ordered by the Magistrate before and or without issuing summons to the defendants to notify of the same, affects the decision to the extent of making it NULLITY. It was opined that, that was the only remedy to Misc. Application No. 11 of 2022.

The appellant prayed this court to find it just:

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1. To nullify the ruling and order of the District Land and Housing Tribunal for Same basing on being reached out through irregularities;
2. Order that, the exparte Judgment entered in Land Appeal No. 29/2021 be set aside, and the appellant be heard;
3. To order costs for this appeal to be bared (sic) by the respondent;
4. Any other relief found just to be granted.

In her reply, the respondent submitted that the appellant being the respondent in Land Appeal No. 29/2020 at the District Land and Housing Tribunal refused to attend by refusing to receive and sign the summons that she was not concerned which caused her to fail to defend her case and her constitutional right. That, it was normal for the appellant to refuse to receive summons from the beginning.

On the 1st ground of appeal, it was replied that the clinic card adduced by the appellant before the District Land and Housing Tribunal has different names which show that the appellant deceived this court. In addition, the respondent submitted that being pregnant and conceiving is not sickness and the appellant did not adduce any report regarding her sickness according to her body change as claimed. That, the clinic card adduced before the trial tribunal was forgery as the names differ from Appellant's names which seems that the pregnant was Marry Hamis Said and the Appellant is Perpetua Ally Mmasa.

Replying to the 2nd and 3rd grounds of appeal, the respondent submitted that Mohamed S. Bakari is the chairperson of the hamlet of Majevu- Same and not an advocate/attestator. That, the matter of signing the place of

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the attestator/advocate/magistrate was just the slip of the pen. That, Henerico Erasto Nkungu had disqualified himself as an advocate.

It was concluded that the exparte judgment was fair as the appellant refused to sign the summons to appear and defend her right to be heard. The respondent prayed the decision of the District Tribunal to be upheld with costs.

In her rejoinder, the appellant submitted inter alia that Land Appeal No. 29/2021 was just a typing error as the case was to be cited as Land Appeal No. 29/2020.

On the issue of pregnancy, the appellant reiterated that she was pregnant when the case at the appellate tribunal was proceeding. She conceded that the names in the clinic card were different from the names Perpetua Ally Mmasa. She prayed this court to conclude that she was denied her constitutional right to be heard as no summons was issued to her from the commencement till the finality of the case.

I have keenly examined the records of the first appellate tribunal and considered the grounds of appeal and submissions of both parties. I will start determining the 2nd and 3rd grounds of appeal which concern service to the appellant. On these two grounds, the issue is *whether the appellant was served or not*. The appellant alleged that she was not served while the respondent stated that the appellant refused to be served. In his decision the learned Chairman of the district tribunal found out that the appellant had refused to be served and to appear before the tribunal.

This court is aware that on issues of credibility of witnesses the trial court is the best. However, in this case with respect, my perusal of the proceedings of Land Appeal No. 29/2020 found out that throughout the

proceedings it was never reported or recorded that the appellant herein had refused to be served and to appear. After an order of issuance of summons to the appellant, on 15/2/2021 the district tribunal ordered that the appeal should be heard *ex parte*. I wish to quote from page 3 of the typed proceedings of Land Appeal No. 29/2020 of the district tribunal dated 15/2/2021 for clarity, it reads:

"BARAZA

-Jalada la Kata limeletwa.

-Mrufaniwa hayupo tangu kesi hii ianze hajahudhuria.

AMRI

Rufaa itasikilizwa upande mmoja tarehe 11/3/2021.

Sgd. MHE. T. J. WAGINE

MWENYEKITI

15/2/2021."

Right to be heard (*Audi Alteram Partem rule*) being one of the cardinal principles of natural justice, I am of considered opinion that the district tribunal erred by not reflecting in its proceedings that the appellant herein had refused to be served. Presence of summons in the records alone cannot suffice to prove that the appellant had refused to be served. Unfortunately, the attached summonses are contested by the appellant who in addition stated that she was never summoned. The proceedings could have supported the report in the attached summonses.



In the case of **Sadiki Athumani v. R [1986] TLR 235** Hon. Samatta J (as he then was) quoted with approval the case of **S. L. Kapoor v. Jagmohan (1981 1 SCR)** at page 746 where it was held that:

*"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. **The non-observance of it is itself prejudice to any man and proof of prejudice independently is proof of denial of natural justice if necessary.**"*Emphasis added

At page 240 of the case of **SADIKI ATHUMANI** (supra) it was further held that:

*"The right is a very important one and **the denial of it is a grave error which vitiates proceedings in the district court. The error is in my judgment, incurable....**"*Emphasis added


Since the proceeding of Land Appeal No. 29/2020 is silent on the issue of service, I do not hesitate to conclude that the appellant herein was not served and hence denied right to be heard as alleged. That violated her Constitutional right as enshrined under **Article 13 (6) (a)** of the Constitution of the United Republic of Tanzania.


On the 1st ground of appeal which is to the effect that the district tribunal failed to properly evaluate and consider evidence of the appellant as a result reached into erroneous decision; the respondent objected the clinic card which was produced by the appellant before the district tribunal. On the basis of the fact that it was not indicated in the tribunal proceedings that the appellant herein had refused to be served, even in the absence of the said clinic card, I am of considered view that

the said proceedings do not support the ex parte hearing of Land Appeal No. 29/2020. The appellant was not even notified of the date of delivery of the ex parte judgment contrary to the law.

In the circumstances, I find that the three grounds of appeal have merit. I therefore reverse the ruling of the district tribunal in Misc. Land Application No. 11/2022 and nullify the ex parte proceedings, judgment and decree in Land Appeal No. 29/2020. The matter should be determined inter parties before another Chairman sitting with another set of assessors. Appeal allowed with costs.

Dated at Moshi this 18th day of November 2022


S.H. Simfukwe
Judge

The seal of the High Court of Tanzania is circular. It features a central emblem depicting a lion standing on a pedestal, surrounded by a wreath. The words "HIGH COURT" are inscribed in a semi-circle above the emblem, and "TANZANIA" is inscribed in a semi-circle below it. The entire seal is enclosed within a double-lined circular border.