

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND REVISION NO. 01 OF 2022

*(Arising from Land Application No. 639 of 2021 at District Land and Housing Tribunal
of Mwanza at Mwanza)*

FRANCIS ALPHONCE NAMLILO-----APPLICANT

VERSUS

PENINA BENJAMIN WARIOBA-----RESPONDENT

RULING

Last Order date: 24/1/2022

Ruling Date: 27/1/2022

M. MNYUKWA, J.

This ruling is in respect of the Court's suo moto Revision triggered by the applicant's complaint which was administratively brought before the Judge in charge. The applicant's complaint letter dated 15/11/2021, mainly outlined to having been denied the right to be heard before the District Land and Housing Tribunal (Tribunal) which led to his eviction from the disputed premises following the ex-parte order delivered by the



Tribunal Chairman in Misc. Application No. 639 of 2021. Upon acting on the complaint letter resulted to this suo moto Revision.

When the matter came for hearing the applicant was represented by Mr. Godchile Chirare learned counsel while Mr. Steven Kitale learned advocate entered an appearance on behalf of the respondent and the matter was heard orally. However, before this court pronounced its Ruling that was scheduled on 21st January 2022, this court received a letter dated 19/01/2022 from the respondent's counsel requesting this court to expunge the record of the applicant's counsel submissions on the reason that the counsel has not renewed his practising certificate as appeared in the e-wakili system. To set records straight this Court decided to invite both counsels to address on the raised issue.

Mr. Kitale was the first to address the court, he submitted that section 39(1)(b) of the Advocate Act Cap 341 R.E 2019 requires every advocate to have in force a practising certificate, failure to do that the advocate will be an unqualified person. He added that section 38(2) of the Advocate Act, Cap 341 R.E 2019 provides that advocate's practising certificate will be in force until 31st December of that year and it will expire after 31st December, and on that basis, any advocate who practises after



31st December before renewing his certificate will be an unqualified person. He buttresses his position by citing the case of ***Edson Osward Mbogoro V Dr. Emmanuel John Nchimbi and The Attorney General***, Civil Appeal No. 140 of 2006 CAT (unreported) and submitted that on that Ruling the court ordered the records filed by an advocate who did not renew his practising certificate to be expunged. And also, on pages 12 and 13 of the said Ruling, the advocate's act was considered as illegal and anything done by the advocate had no legal validity.

Mr. Kitale went on to submit that, the applicant was expected to know the status of his advocate through e-wakili system and consequently, the applicant cannot benefit from his advocate's wrong and therefore he prays this court to deal with the records filed by the client and courts record only. He added that the applicant had a duty to know the status of his advocate and likewise the advocate had a duty to inform his client that his practising certificate has expired.

Replying, Mr. Godchile in the first place submitted by joining hands with Mr. Kitale argument regarding the guidance of advocates pertaining to practising certificate. However, he parted ways citing section 38(1) of the Advocates Act, Cap. 341 R.E 2019 and submitted that within the cited



section there is a grace period of one month from 31st December. He went on to distinguish the case of ***Edson Osward Mbogoro V Dr. Emmanuel John Nchimbi and The Attorney General*** (*supra*) from our case at hand, as in that case the grace period had expired and the advocate had practised for the whole year without a valid practising certificate. He went on to state that, in our present case, the complainant had lodged his complaint in the year 2021 and by that time his client had hired a practising advocate who was registered and by that time the system showed for how long that advocate has practised.

The counsel of the applicant further submitted that when the complaint was lodged, he had a valid practising certificate and there that was a technical problem that led to some hardship to the advocate to access the system and renew the practising certificate and the said problem was beyond his control. He added that since there is a grace period then he is still within time to represent his client. He added that the request of the respondent counsel has no leg to stand as he has to help his client to attain his rights. The counsel of the applicant finalized his submission by submitting payment receipts dated 21 January 2022 as



evidence to show that he had started renewing process and paid the Tanganyika Law Society (TLS) fees

In his rejoinder the respondent counsel submitted that, he has seen the payment receipt but in practice when payment is done to the TLS then the system shows if a person has paid or not. He went on to submit that the applicant's counsel has misinterpreted section 38(1) of the Advocate Act as the grace period claimed is not for practising but for renewal of practising certificate. He admitted on the existence of the technical problem but he averred that the same was resolved by the Judiciary by granting the five (5) days grace period up to 5th January 2022 and that TLS did not issue any notice on a technical problem. He added that applicant's counsel appeared before the Court on 19th January 2022 and by that time there was no technical problem. He finalised his submission by reiterating his prayer that applicant's counsel submissions be expunged from court record with costs.

From both counsels' submissions, it is undisputed that the applicant's counsel has not renewed his practising certificate for the year 2022 when he appeared before me on 19th and 21st January 2022. Now



my task is to determine the request of the respondent counsel to expunge the submission of the counsel of the applicant from Court records.

In the first place I agree with respondent's counsel that any advocate who practices without a practicing certificate is an unqualified person as per section 39(1) of the Advocates Act Cap 341 R.E 2019. In his submission, Mr. Godchile, the learned counsel of the applicant submitted that, the same Act has provided for a grace period of one month for an advocate to practise under section 38(1). However, this was disputed by Mr. Kitale who in his rejoinder submitted that the said provision has been misinterpreted by the applicant's counsel. I find it necessary to reproduce the queried provision as follows: -

38(1) every practising certificate shall, subject as hereinafter provided, take effect on the day on which it is issued by the Registrar:

Provided that, every practising certificate issued between the first day of January and the first day of February in any year to an advocate who held a valid practising certificate on the thirty-first day of December of the preceding year shall have effect for all-purpose from the first day of January in that year.

From this provision, the applicant's counsel claims that the proviso provides for a grace period for him to practice before he has renewed his practising certificate something that was opposed by the respondent



counsel. From the wording of the proviso to section 38 (1), I came to the conclusion that the proviso firstly does not contain words which expressly provides the grace period for an advocate to practise without a practising certificate. It is my considered view that the proviso talks about the practising certificate that has been renewed on any day between 1st January to 1st February to hold the same status as the practising certificate that has been renewed on the 1st day of January.

It is settled law that in construing any provision it is important to look at the intention of the legislature. It is doubtful if the legislature intended to give one month free for an unqualified person to practise freely meanwhile section 41 of the same Act prohibit the same. Let's assume that an advocate is given a one-month grace period to practice without a new practising certificate then what if the said advocate does not intend to renew his certificate for the rest of the year. Even the previous TAMS system and now e-wakili system reflect what I am saying here, that is why the system termed Mr. Godchile in the category of *HARUHUSIWI (hajahuisha leseni)* and there is no anywhere in the system that says he is still in the grace period.



Moreover, even though Mr. Godchile submitted to have evidence of his efforts and commencement of renewing his practising certificate as he blamed on the existence of the technical problem, he only submitted payment receipt for TLS fee that is evidenced to be done on 21st of January 2022. At the time of composing this Ruling. I decided to visit the e-wakili system and I find that the system now placed Mr. Godchile in the category of *ANARUHUSIWA (Amehuisha leseni ya uwakili)*, and I went further to see the history and finds he is active from 1st January of 2022.

Therefore, this means that for the advocate to enjoy this grace period of being valid from 1st of January, it has to be renewed as Mr. Godchile learned counsel has done. And this does not change the fact that on 19th and 21st January 2022 when he appeared before me, he had yet to renew his practising certificate and therefore, it is my considered view that he was not yet qualified to enjoy the said grace under the proviso of section 38(1) and hence applicant's advocate was an unqualified person by that time.

From that view, what is the position of submissions that were submitted by the learned counsel, Mr. Godchille who was an unqualified person by that time, bearing in mind the respondent's counsel prayer that



his submission be expunged from court's record. The acts of Mr. Godchile was indeed against the law and ethics guiding lawyers in this country. Also, given the circumstances that transpired where the system defaulted and could not work properly, I went through different correspondence issued and the same was resolved on the 06 January 2022 and the learned counsel stood a chance to renew his certificate before appearing for the applicant.

However, I disagree with the respondent's counsel that the applicant should not benefit from the advocate wrongdoings, reflecting the truth that the applicant hired his counsel from 2021 when his practising certificate was still effective and so punishing the applicant for the wrongs done by his advocate on failure to disclose that his practicing certificate has expired will be a miscarriage of justice to the applicant.

And so, I have decided to follow the footsteps of my learned brother, Hon. Judge Nangela in the case of ***Afriq Engineering and Construction Co. Ltd vs the Registered Trustee of the Diocese of Central Tanganyika, Commercial Cause NO. 4 of 2020 (HC) DSM (Unreported)*** where he maintained the oral submissions by an unqualified person and held that in the interest of justice the rights of an



innocent client need to be secured. Thus, the submission done by the applicant's counsel will not be expunged rather maintained for the aforesaid reasons. On that basis, I find the case cited by the advocate of the respondent, the case of **Edson Osward Mbogoro** (supra) is distinguishable with our present case as it is rightly submitted by the counsel of the applicant.

Now, coming to the determination of the complaint filed before this Court, the counsel of the applicant, M. Godchile Chirare was the first to address the Court on the basis of the complaint. He submitted that on 5th November 2021 his client received a call from the court process server called Silas informing him to appear before the Tribunal on 12:00 noon as there was a case against him. His client informed the process server that he is far away and requested the matter to be adjourned for some hours. That, his client appeared before the Tribunal around 16:00hrs in the evening and found the case was still continuing. That his client prayed to be afforded an opportunity to be heard but he was denied for the reason that the case has already started and the other party was submitting. That his client kept insisting for the matter to be adjourned without success.



He further submitted that, on 6th November 2021, his client was informed by the court process server on the Order of the Tribunal that requires him to vacate from the suit premises and that the said Order was delivered on 5th November 2021. He went on that, his client requested to be furnished with the said Order without success. The counsel continued that, on 6th November 2021 which was Saturday, is when his client was served with the document which consists of the main application together with a Miscellaneous Application and yet he was not given an Order delivered by Tribunal for his necessary step of appeal to the higher court.

The counsel of the applicant's went on that, on 10th November 2021 the applicant through his advocate wrote a letter to the Chairman of the Tribunal requesting to be furnished with the Tribunal' order in Misc. Application No. 639 of 2021 but he has not been served the same to date. The counsel finalised that, his client has been affected by the said Order as he was denied an opportunity to be heard.

Responding to the applicant's submission, Mr. Steven Kitale learned counsel of the respondent submitted that, the basis of this complaint is on Misc. Application No. 639 of 2021 in which there was ex-parte and inter-parties application. That, before the matter was heard, the



summons was served to the applicants and there was proof of service through an affidavit sworn by the process server that the other parties to the case were notified and responded. He therefore prayed this court to have a look at court records.

He went on that, after the Chairman of the Tribunal has satisfied that the parties were served and they choose not to appear before him, it resulted the Chairman of the Tribunal to proceed to hear the respondent exparte. The counsel of the respondent stated that the applicant appeared before the Tribunal on the same day and he found the case had already been heard and was informed that the case will be heard inter-parties on 8th November 2021.

He further submitted that, on 8th November 2021, neither the applicant nor his advocate who appeared before the Tribunal. Thus, they prayed the matter to be adjourned until 10th November 2021 for the hearing of Misc. Application No. 639 of 2021. At a material day, the applicant prayed for the Chairman to recuse from hearing the application and the matter was adjourned to 17th November 2021 where he filed a written statement of defence instead of a counter-affidavit.



The respondent counsel went on that, the Order issued by the Tribunal was against the 3rd respondent who resided in the suit premises and not the 1st and 2nd respondent who is the applicant and his spouse respectively. That since the 3rd respondent is the one who was evicted then the Order did not affect the 1st respondent who is the complainant in this Revision.

He finalized his submission asserting that the applicant was not denied a right to be heard as he attended the Tribunal on 19th, 24th November 2021 and 14th December 2021 where he prayed for an adjournment. And therefore, his right to be heard was there and service of summons was done by two different court process servers. Therefore, this complaint is premature before this Court.

In rejoinder, the applicant's counsel submitted that in Application No. 639 of 2021 the complainant was not served with the chamber summons and affidavit as he just received a call. He added that as far as the serving of summons is concerned, reasonability of time is very important. He insisted that the applicant was not served with the summons on a reasonable time. He further submitted that his client was informed by the Tribunal that the case will be heard on 8th November



2021 but the case was heard on 5th November 2021 and the Order was granted and executed on 6th November 2021. He maintained that, there was no realistic hearing on 8th November 2021. He went on to state that the hearing dates stated by the respondent counsel were the dates for hearing of the Main Application and not the Miscellaneous Application. He insisted that it was his client who was living in the disputed house and evicted from it. That marks the end of both submissions.

Now, in determining this Revision the court will venture its findings on the question of the fundamental principle of natural justice as to whether the applicant was given the right to be heard by the Tribunal.

From the applicant's submission he contended that his client's was denied right to be heard as he was not properly served since he was just informed to appear before the Tribunal by a phone call on the same hearing date of 5th November 2021. That although his client pleaded for the adjournment still the application was heard and an eviction Order was granted in his absence. The contention was vehemently denied by the respondent's counsel who averred that the applicant was properly served and responded to the information as he went to court lately. And that the



Chairman proceeded to hear the matter after he was satisfied that the applicant was served.

I was obligated to peruse the Tribunal records so as to satisfy myself whether the service of summons to the applicant was properly done. From the court records, it shows that the Chairman issued summons to the respondents (herein the applicant) on 3rd November 2021 and ordered the applicant and his fellows to be served with summons and matter to be heard on 5th November 2021. Whereas on 5th November 2021 Mr. Kitale informed the court that both respondents including the applicant in this Revision were served with summons by the court process server and that the 1st Respondent has communicated with the court broker and said he will find him on his own time and he will come to the court.

However, when I went further by looking to the summons served to the applicant, I managed to find a copy of the summons to the applicant without his signature to acknowledge receiving it. I also managed to see the affidavit sworn by Mr. Kyagunya Pius Mao (process server) stating to have served the document to the 1st respondent, the applicant telling him that he is required to appear before the Chairman Hon. Murirya on 5th November 2021 at 11:20 hrs. The affidavit further state that the applicant



responded that he will call him at his own time and collect the Tribunal document. And that the process server called and send a short message (SMS) to the applicant through mobile No. 0767463101 showing the time and date to appear. Now the question comes as to whether the affidavit sworn by the process server, was enough to show that summons was duly served to the applicant.

The Civil Procedure Code Cap. 33 R.E 2019 governs the service of summons. Specifically, the Code provides for the service of summons to be personally made as provided under Order V Rule 8 that:

"wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient"

Furthermore, the Civil procedure Code Cap 33 R.E 2019 requires acknowledgement of receiving summons as provided under Order V Rule 12 where it is provided that;

"where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on behalf, he shall require the person to whom the copy is so delivered or tendered to sign an acknowledgement of service endorsed on the original summons:

Provided that, where the defendant, his agent or such other persons refuses to sign the acknowledgement the serving officer shall leave a copy thereof 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 the acknowledgement, that he left a copy of the summons with such person and the name of the person (if any) by whom the person on whom the summons was served was identified.

From the submissions, the respondent's counsel submitted that there is an affidavit which shows that the applicant was notified and responded and therefore the Chairman of the Tribunal was satisfied that the service was duly done. As I pointed out earlier the sworn affidavit by the process server explained that he served the document through mobile phone by calling and texting the applicant who responded by saying he will call him at his own time.

To start with, it is clear that the provision of Order V Rule 8 of the Civil Procedure Code Cap 33 R.E 2019 was not complied with because the process server has sworn to have called the applicant through mobile phone only to inform him about the case. But there is no evidence to back up what he said to be true that the applicant agreed to have received the information. Even if that was a case, still that is not the modality of serving summons in accordance with the law. Moreover, there is no any acknowledgement by the applicant to receive the said summons as per the requirement of Order V Rule 12 of the Civil Procedure Code, Cap 33



R.E 2019. The acknowledgement of the summons is very important as it was highlighted in the case of **Wilfred Muganyizi Rwakatare V Hamis Sued Kagasheki and the Attorney General** Civil Appeal No, 107 of 2008 at Dar-es-salaam where the Court of Appeal struck out the Appeal on the reason that the Notice of Appeal was not served properly. It pointed out that;

"There is no indication by signature, rubber stamp or whatever, to prove that the first respondent ever received the Notice of Appeal. We are of the firm view that if the first respondent had been duly served with the Notice of appeal in person, or through his advocate, whoever received the Notice of appeal would have signed and such signature would appear to prove service just was the case with the attorney general"

From the record of the Tribunal, the respondent's counsel informed the tribunal that the applicant was served and he added that the first respondent (applicant herein) has communicated with the Process server and he replied he will find him in his own time. Surprisingly, the Chairman was satisfied with that information and decided to proceed with hearing the Application exparte without even confirming whether it was true that the respondents were properly served. Looking at the affidavit it is clear



that the applicant was never properly served as per the requirement of the law and therefore denied the right to be heard.

It is a settled principle that the right to be heard is very crucial in our justice system as it is also reflected in our Constitution under Article 13 (6)(a) Cap 2 [R.E 2019] and therefore a denial of the right to be heard in any proceedings would vitiate the entire proceeding, as it was held in the case of ***Mussa Chande Jape Vs Moza Mohammed Salim Civil Appeal No. 141 of 2018 Court of Appeal of Tanzania at Zanzibar.***

Also, in another case of ***Abbas Sherally and another V Abdul Fazalboy, Civil Application No. 133 of 2002 (unreported)*** the Court of Appeal held that;

"the right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice"

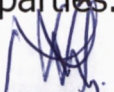
Therefore, on the aforesaid analysis, my mind is setteled that the applicant was not afforded the right to be heard by the Tribunal and therefore this renders all that transpired before it a nullity.



From this finding, I find the Misc. Application No. 639 of 2021 wanting for the irregularity committed by the Tribunal and therefore this Court quash and nullify the entire Proceeding, Ruling and Orders emanated from it. This file is remitted to the Tribunal for it to continue with the hearing of the pending application.

No order as to costs since the Revision has been initiated by the Court suo motu. It is so ordered.

Right of appeal explained to the parties.


M.MNYUKWA

JUDGE

27/1/2022



Ruling delivered on 27/01/2022 through Audio Teleconference where all parties were present online


M.MNYUKWA

JUDGE

27/1/2022