IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

MOROGORO SUB - REGISTRY

AT MOROGORO

LAND APPEAL NO. 18 OF 2022

HAROUN KHATIBU PANDE.....APPELLANT

VERSUS

1. **AHMED A. S. MWINGE.....1ST RESPONDENT**
2. **GANO A. MWINGE.....2ND RESPONDENT**
3. **MPELWA MWINGE .....3RD RESPONDENT**
4. **ALLY MWINGE.....4TH RESPONDENT**
5. **NEEMA MWINGE .....5TH RESPONDENT**

(Arising from Misc. Application No. 93 of 2017 originating from Land Case No. 67 of 2016 of Morogoro District Land and Housing Tribunal)

JUDGMENT

30/09/2022 & 11/05/2023

NDESAMBURO, J.:

The appellant, being aggrieved by the ruling of the Morogoro District Land and Housing Tribunal (Tribunal), has lodged this appeal against the whole ruling on the following grounds:

1. *The Chairman erred in law and fact to dismiss the application for an extension of time without considering that the appellant was not duly served with a summons.*
2. *That the Chairman erred in law and facts in failing to note that non service of summons to the appellant was a planned issue purported to infringe the appellant's right as the respondents met the appellant several times from the 7th of April 2016 while facing a Police case without informing him about the case at the land Tribunal.*
3. *That the Chairman erred in law and facts in making a decision denying the appellant's constitutional audience right.*
4. *The Chairman erred in law and facts in holding that the appellant showed no good reasons to convince the Tribunal to extend the time while the non-service of summons to him is a strong and sufficient reason.*

The respondents disputed all the grounds of appeal and prayed for the following orders:

i. That the appeal be dismissed with costs and the decision of the Tribunal be upheld.

ii. Any other order or reliefs this court may deem fit and just to grant.

The facts that led to this appeal may be stated in briefs as follows: on 16th June 2017, the appellant, when inspecting his building on plot No. 175 Block "A" Mlimakola, in Morogoro Municipality, found a note bearing an order of temporary injunction issued by the Tribunal for Morogoro. The order restrained him from entering the said plot or making any development thereon.

Upon inquiry from Tribunal, the appellant was informed that the respondents had filed a Land Case No. 67 of 2016, whereby an *ex parte* judgment was issued against him. Accordingly, he was advised to apply for an order to set aside the *ex parte* judgment. However, since he was time barred, he was advised to file an application for setting aside the *ex parte* judgment out of time.

The appellant, therefore, filed Misc. Application No. 93 of 2017. However, the same was dismissed for lack of sufficient cause for the delay, hence this appeal.

When the matter was called on for hearing, the appellant was unrepresented while the respondents enjoyed the service of Mr. Hamis A. Mbangwa, a learned advocate.

Arguing supporting the first ground of appeal, the appellant submitted that he was not served with the summons. He had no knowledge of the substituted service as he was at Mtwara caring for his sick brother. He could not tender the document to support his facts that he was in Mtwara as the papers were at the High Court, Dar es Salaam where his appeal was first determined and a retrial ordered in respect of Misc. Application No. 93 of 2017 was made.

Submitting on the second ground, the appellant said that on the 7th of April 2016, he met the respondents, but they did not serve him with a summons.

On ground three, the appellant only said that he was not given the right to be heard since the matter was heard and decided *ex parte*.

Regarding the fourth ground of appeal, the appellant acknowledged that summon by publication is proof of service.

However, he said that since he was in the village where newspapers are not circulated, he cannot be said to have been served with a summons. Therefore, that was sufficient cause for the Tribunal to consider and extend the time requested.

In reply, Mr. Mbangwa combined grounds one and two. He submitted that the summons was properly effected on the newspaper, and the application was dismissed for failure to show good and sufficient cause. He cited the case of **Samson Kishosha Gaba v Charles Kingongo Gaba [1990] TLR 133 HC** to demonstrate that in an application for leave to appeal out of time, the court has to consider the reason for the delay as well as the likelihood of the success of the intended appeal.

Submitting on grounds 3 and 4, the counsel averred that the appellant was given the right to be heard. However, he miserably failed to support his reasons. He failed to procure a bus ticket, hospital sheet, or an affidavit to prove his brother

was sick. He failed to tender the death certificate to prove the death of his brother, nor did he mention his name.

Citing section 3 of the Law of Limitation Act, the learned counsel averred that matters brought out of time must be dismissed. He, therefore, argued that the application before the DHLT was properly dismissed and called for the current appeal to be dismissed with costs.

In rejoinder, the appellant reiterated what he submitted in chief.

Having reviewed and considered both parties' submissions and perused the entire record of this appeal, the main issue to be determined is whether the appeal is merited. Therefore, I will simultaneously determine grounds one, two and four as they are intertwined and related.

Initially, this application originated from an application made by the appellant before the Tribunal asking it to extend the time within which he could apply to set aside the *ex parte* judgment entered against him in Land Case No. 67 of 2016. In law, the appellant was required to show sufficient reasons or

cause why he did not take the necessary steps within time, the Court of Appeal in the case of **Benedict Mumello v Bank of Tanzania (2006) E. A 227** held that an application for an extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause.

The crucial issue, therefore, is whether the grounds adduced by the appellant before the Tribunal amounted to "sufficient cause." What amounts to the sufficient cause was addressed in **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001:

> *"What amounts to sufficient cause has not been defined. From decided cases, several factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."*

Before the Tribunal, the appellant made two reasons for his delay: one, that he was unaware of the matter before the

Tribunal and two, that he was away caring for his sick brother and where newspapers were not circulated. In its ruling, the Tribunal refused to enlarge the time for insufficient cause. It went further and stated that the substituted service by publication in the newspaper was prima facie evidence for service and that the appellant failed to prove the sickness or death of his brother.

It is not disputed that the summon was effected by publication in the Mwananchi newspaper on 9th June 2016 and that summons by substituted service by publication is a sufficient notice: the Court of Appeal in **Amos Shani & Peter Kirua v Jumanne Juma**, Crim. Appeal No. 168 of 2013 held that once compliance with the order of substituted service by publication is achieved, the notified parties are presumed to have the notice of the pending matters in Court.

However, despite the publication in the newspaper, the appellant still contends that the summons was not duly served on him, which entails that he was unaware of the matter lodged against him. The appellant further argued that it was a

planned event aimed at infringing his right. In contrast, the respondents opposed and insisted that the summons was duly served through substituted service by publication in the Mwananchi newspaper.

Service of summons before the Tribunal is governed by Rules 8 and 9 of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003. Rule 8(2)(b) of the above GN No. 174 of 2003 provides that in the absence of the parties or any of them, the Tribunal is required to cause notice of the date of the hearing to be served on the absent party. Rule 9(a)(i)(ii)(iii)(b) and (c) GN No. 174 of 2003 further state that where the Tribunal is satisfied that it is not possible to effect personal service of a summons or notice of the date of the hearing, the Tribunal may order service to be effected by affixation, registered mail or publication in a newspaper.

In my observation, the above Rule entails that before the Tribunal issues an order for the service of summons through affixation or substituted service, the Tribunal must be satisfied

that the requirement set under its Rule 9 of GN No. 174 of 2003 is met, that is, it was impossible to effect personal service of a summons to the absent party.

In determining whether the appellant was effectively served, I had time to revisit the proceedings of the Application No. 67 of 2017. On 29th of April 2016, when the application was tabled before the Tribunal, there was an order to issue a summons to the respondent (now the appellant), and the matter was set for mention on the 16th of May 2016. However, no summons was issued as ordered by the tribunal to require the appellant to attend before the Tribunal on the set date.

The record shows that on the 16th of May 2016, a summons was issued, commanding the appellant to appear on the 30th of May 2016. That summons is attached with an affidavit of Edwin A. Sikwese, process server, deponed that the appellant was not found in the Kola area. A street chairperson of Kola B indorsed at the bottom of the summons stating that the appellant was not within his area and that he should be contacted through his phone number. The

chairperson indicated the telephone number of the appellant. (*"Huyu mtu hayupo huku Jaribu kumtafuta kwa namba ....."*).

On the 16th of May 2016, nothing was recorded, suggesting that the matter did not proceed. Nothing transpired until the 5th of July 2016 when the respondents (by then the applicants) informed the court that they had served the appellant through Mwananchi Newspaper dated 9th June 2016. The respondents/applicants never addressed the Tribunal on what transpired on the issued summons of 16th May 2016. Now a pertinent question is whether the Tribunal was justified in proceeding with the hearing based on the substituted service.

The answer is negative as there is no tangible evidence on record to prove that the Tribunal was satisfied that it was impossible to effect personal summons on the appellant.

Moreover, it is very awkward how the Tribunal moved; first of all, the respondents/applicants did not inform the Tribunal of any attempt to serve the appellant personally as established by Rule 9 of GN. No. 174 of 2003. Second, the respondents did not inform the Tribunal that they had failed to

serve the appellant/respondent through his spouse or any household member above 18 years. Third, efforts to trace the respondent/appellant via the phone number provided by the street Chairman bared no fruit. Fourthly, the order for the publication was not prayed for and granted by the Tribunal. Finally, the Tribunal did not go further to rule on the legality of the process that led to the substituted service by publication in the Mwananchi newspaper. Had it done so, it would have concluded that the appellant had forwarded sufficient cause.

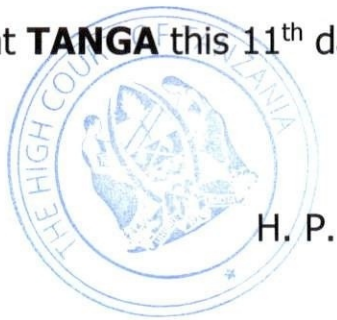
Therefore, the appellant was justified to claim that he was unaware of the matter lodged against him at the Tribunal as the procedure laid under Rule 9 of GN No. 174 of 2003 was not adhered to. Hence, the Tribunal was not justified in dismissing the appellant's application for the extension of time for lack of sufficient cause. All that said, I find the first, second and fourth grounds of appeal with merit.

In light of the above, it is a considered opinion of this court that the first, second and fourth grounds of appeal suffice to dispose

of this appeal. Therefore, I will not labour on the remained ground of appeal.

That said, the appeal is merited and allowed. I accordingly quash the decision and set aside the subsequent order of the Tribunal in Misc. Application No. 93 of 2017. The appellant is given 30 days to file an application for setting aside *ex parte* judgment regarding Land Case No. 67 of 2016. Costs to follow the event.

DATED at **TANGA** this 11th day of May 2023.



H. P. NDESAMBURO

JUDGE