

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

LAND APPEAL NO. 58 OF 2021

(Originating from the Misc. Application No. 37/2021 and Land Application No. 365 of 2017 of Dodoma District Land & Housing Tribunal)

HALMASHAURI YA KIJIKI CHA MPWAYUNGU APPELLANT

VERSUS

BURTON SIMON PAULO RESPONDENT

JUDGMENT

Date of Last Order: 21st November, 2022

Date of Judgment: 23rd March, 2023

KHALFAN, J.

Halmashauri ya Kijiki cha Mpwayungu, the Appellant, being aggrieved with the decision of the District Land and Housing Tribunal for Dodoma at Dodoma ("Dodoma DLHT") in Miscellaneous Application No. 37 of 2021 which originated from Land Application No. 365 of 2017 from the same Dodoma DLHT, appealed to this Court on the following grounds:

- 1. That, the trial District Land and Housing Tribunal erred in law and fact by finding that an ex parte judgment in Land Application No. 365 of 2017 was proper.*
- 2. That, the Trial District Land and Housing Tribunal erred in law and fact by deciding in favour of the Respondent by the reasons that the Appellant had no sufficient and good cause for delay to seek for setting*



aside the order while that matter was already decided by the same tribunal.

3. That, the trial District Land and Housing Tribunal erred in law and fact by disallowing the Appellant's application without considering the Appellant's submission and arguments during hearing of the same.

At the hearing of this appeal on 21st November 2022, the Appellant was represented by Mr. Raymond Mwachango, learned State Attorney, whereas the Respondent had the service of Mr. Cheapson Luponelo Kidumage and Godwill Benda, Learned Advocates.

During hearing, Mr. Raymond stated that in Land Application No. 365 of 2017, the Respondent herein was the Applicant and the same was heard *ex parte* against the Appellant. The decision of which ordered the eviction of the Appellant from the disputed land which the Appellant became aware of it after commencement of execution processes vide Misc. Application No. 147/2017 by Kibaigwa Auction Mart.

For that reason, the Appellant decided to lodge an application for extension of time to file an application to set aside *ex parte* judgment which was granted hence the application to set aside an *ex parte* Judgment was lodged but the same was not successful hence this appeal before this court.

Mr. Raymond argued that for the Court to proceed with an *ex parte* hearing, there must be consideration of the conditions provided under **Regulation 11(1) (c)** of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 ('herein referred as the Land Disputes Regulations') which provides that:

1. *On the day the application is fixed for hearing the Tribunal shall-*
 - (c) *Where the respondent is absent and was duly served with notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter ex parte by oral evidence.*

He pointed out that one of the conditions set in the above quoted provision of Regulation 11 is duly service of notice of hearing. He contended that to ensure duly service, the provision of **Regulation 6 (4)(b)** of the Land Disputes Regulations must be observed. The same provides the following:

4. *After the service, a person who effected the service shall-*
 - (b) *swear an affidavit in a prescribed form indicating the manner in which the service has been effected.*

For that case, Mr. Raymond, contended that regarding the matter at hand, there was no proof of service, thus he expected the Tribunal not

to proceed *ex parte* in the absence of such proof of service. He also insisted that there was no notice for hearing as required by the law.

Mr. Raymond contended further that since the disputed piece of land has a public interest, it is desirable for Tribunal to hear the matter inter parties to serve the interest of villagers who are more than 100 persons taking into consideration that the land in dispute is a market place. Thus, he prayed this Court to dismiss the decision of the Dodoma DLHT in Land Application No. 365 of 2017 and Misc. Application No. 37 of 2021 and order the matter to be heard inter parties.

Mr. Cheapson Luponelo Kidumage, Learned Advocate for Respondent in reply totally disagreed with the submission made by the learned State Attorney for the Appellant. He contended that the Appeal had no merit since the service was duly served to the Appellant except that the Appellant wilfully decided not to enter appearance before the Dodoma DLHT.

Mr. Kidumage contended further that the proof of duly services was attached with the Counter Affidavit as 'annexure BSP1' which is a summons issued to the Appellant signed by the Village Chairman, Gabriel Lucas Hoya and the same was accompanied by affidavit of the person who effected the services namely Peter K. Chugu, also the dispatch book

which shows that the notice of hearing was brought to the attention of the Appellant.

Mr. Kidumage went on to counter the second ground of appeal contending that the same was based on allegations which did not reveal material facts that would be relied on by the Court to make its findings. Thus, he pointed that the Dodoma DLHT was right not to grant the Applicant's application to set aside *ex parte* judgment for lack of sufficient reasons.

Mr. Kidumage, on the other hand, argued that despite the fact that the right to be heard is a constitutional right to any party in the proceedings, that right is subject to the laws and procedures. He stated that a party to proceedings must adhere to the **Regulation 11 (1) and (2)** of the Land Disputes Regulations; that in order for a party to enjoy that right, he must appear before the Tribunal when served with notice of hearing if he fails, then such right disappears. This means that in order to enjoy this right, the Appellant was supposed to appear before the Dodoma DLHT after being served with summons.

In rejoinder, Mr. Raymond, Learned State Attorney for the Appellant said the 'annexure BSP1' is silent whether the summons is for hearing or mention as it was stated on the Regulations 11 of the Land Disputes

Regulations. He also stated that the Affidavit for proof of service referred to by the learned Advocate for the Respondent is defective as it does not show to whom the said Peter K. Chugu swore the affidavit as required by Section 3 of the Notary Public and Commissioner for Oath, [Cap 12 R.E 2019].

Mr. Raymond further contended that, Peter K. Chugu as WEO is not a proper person to serve summons. He added that the said summons was served to a wrong person taking into consideration that the village of Mpwayungu (the Appellant) is within the Municipal which is a legal entity with its seal, so it was wrong for a summons to be served to the village council.

On the issue of the right to be heard, Mr. Raymond concurred with Mr. Kidumage saying the same is not absolute. He also compared the right to be heard with *ex parte* hearing that the same as well is not absolute as it requires to observe the conditions set by the law under **Regulation 11 of the Land Disputes Regulations**. For this end, Mr. Raymond prayed the appeal to be allowed and the decision of Dodoma DLHT be dismissed.

I have considered the rival submissions of both parties and I find the issue to be determined by this Court is whether the Appeal has merit. In order to answer this issue, I will start by determining whether the



summons was duly served to the Appellant to initiate *ex parte* judgment in Land Application No. 365 of 2017 before the Dodoma DLHT.

First of all, I would like to grasp the provision of **Regulation 11(1)(c)** of the Land Disputes Regulations cited above which gives the Tribunal power to determine the matter *ex parte* after the absence of Respondent provided, he/she was duly served with notice of hearing and has not furnished the Tribunal with good cause for his absence.

For that reason, I would like to illustrate what does constitute the term duly service. The provision of **Regulation 6** of the Land Disputes Regulations has provided for service of summons that summons shall be served by the process server and after service, a person who effected service is required to return to the Tribunal the original summons duly signed by the person served and shall swear affidavit indicating the manner in which the service has been effected.

Mr. Raymond has contended that the summons was not duly served to the Appellant. To determine this contention, I find impassively required to go through the Dodoma DLHT records in particular the affidavit sworn by the Appellant and the counter affidavit sworn by the Respondent as they carry evidence. The Appellant in his affidavit averred that the purported summons was not signed or stamped by the village chairman



of the Appellant as well as the emanating affidavit thereof was not signed or stamped by the Ward Executive Officer hence tainted with forgery which was strongly disputed by the Respondent through the counter affidavit.

With these rival contentions as the first appellate court, I find it necessary to peruse the purported summons and emanated affidavit which are 'annexure MP1' to the Appellant's affidavit and 'annexture BSP1' to the Respondent's Affidavit for re-evaluation.

It is a trite law that for the summons to be duly served as stated earlier, the process server is bound to return to the Tribunal the original summons duly signed by the person served and to swear an affidavit to indicate the manner in which service was effected. It is shown in the summons that the same was received by the Appellant through one Gabriel Lucas titled as the village chairman.

However, the affidavit sworn by the process server to state the manner how the summons was received stated that '*wito umepokelewa na wahusika*' and '*ujumbe umefika kwa mhusika amepokea*' literally, its meaning in its loose translation is that: 'the summons was received by the relevant persons' this raises question why the process server did not



mention the exact person who received it taking into consideration that the Appellant is a legal person so by itself cannot receive summons.

Moreover, as contended by Mr Raymond, the affidavit was sworn before the Ward Executive Officer who in terms of section 3(1) and 10(1) & (2) of the Notaries public and Commissioners for Oaths Act, [Cap 12 R.E 2019] he is neither a Commissioner for Oaths no Notary Public. This also raises doubt as to the validity of the purported affidavit. For that case I find the averments that the summons was not duly served has basis.

Therefore, I am of the firm opinion that the summons was not duly served. I am persuaded by the decision of this Court in the case of **Kaiza Katamba Mwalugaja vs Obby Sikuanguka Mwampaja and Another**, Civil Appeal No. 7 of 2022, High Court, Mbeya where the Court referred the holding of the case of **The Editor, Nipashe Newspaper and Another vs Martin Nishikongwa and Another**, Misc. Civil Application No. 23 of 2014 where by Kihwelo J. (as he then was) cited with approval a case of **Gahire David vs Uwayezu Immaculate**, Civil Appeal No. 0034 (HC Uganda) which held that:

'Clearly, a Court handling an application for setting aside a decree obtained ex parte is duty bound to investigate and make a finding as to whether summons was or was not duly served. It is not enough that there is an affidavit of service on record because such an affidavit could be false.'

On the other hand, I should enshrine the importance of right to be heard as one of the fundamental rights. The case of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited**; Civil Appeal No. 260 of 2018, CAT at Arusha, Kitusi JA had the following to say:

'It is settled law that Courts should encourage matters to be determined on merit, unless under exceptional circumstances, they cannot.'

To back up its opinion, the Court of Appeal to back up its opinion referred the case of **Independent Power Tanzania Limited vs Standard Chartered Bank (Hong Kong) Limited**, Civil Revision No. 1 of 2009 (unreported) in which the Court of Appeal, after discussing the right to be heard as a principle of natural justice, enshrined in our Constitution, the Court went on to say:

'Ex post facto hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudice apart from being a negation of timely and inexpensive justice, which we all strive for.'

I also find myself obligated to point out the principle that 'justice is better than speed' as it was stated in the case of **Mount Meru Flowers Tanzania Limited** (Supra). I find that this principle is indispensable and the Dodoma DLHT failed to observe it as a result it went on to determine



the matter *ex parte* to enhance timely disposal of the case without considering fair trial to render justice to both parties.

In the final analysis, I find this appeal meritorious and therefore allowed. The decision of the District Land and Housing Tribunal for Dodoma at Dodoma in Misc. Land application No. 37 of 2021 is set aside and the *ex parte* Judgment in the Land Application No. 365 of 2017 is quashed. Thus, I order the Land Application No. 365 of 2017 to be heard inter parties before another Chairman with competent jurisdiction. No order as to costs.

Dated at Dodoma this 23rd day of March, 2023.




F. R. KHALFAN
JUDGE