

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 20 OF 2023

(Appeal from the judgment and decree in Land Application No. 22 of 2022 before
District Land and Housing Tribunal for Mbulu at Dongobesh)

PETRO DELI.....APPELLANT

VERSUS

SEVESTIANA MARTIN (administratrix of the estate of the late

MARTIN TANGILO AMNAAY)RESPONDENT

JUDGMENT

31/5/2023 & 24/7/2023

BARTHY, J.

The above-named appellant was aggrieved with the decision of the District Land and Housing Tribunal for Mbulu (hereinafter referred to as the trial tribunal) in Land Application No. 22 of 2022, preferred the present appeal marshalling with five grounds as follows;

- 1. That the trial chairman erred in law and facts by entertaining and proceeds with the hearing and*

determination of the suit land without considering proper services of the summons to the appellant herein.

- 2. That the learned trial chairman erred in law and facts by failure to issue notice to the appellant herein of the date when the ex-parte judgment would be delivered so that the appellant would have been afforded an opportunity to timely take the reasonable step to enforce his rights.*
- 3. That the learned trial chairman and his gentlemen assessors of the trial tribunal grossly erred in law and fact by failing completely to examine and evaluate the evidence on record properly.*
- 4. That the learned trial chairman and his gentlemen assessors of the trial tribunal grossly erred in and fact in deciding in favor of the respondent while she failed to prove how late Martin Tangilo Amnaay acquired the suit land.*
- 5. That Hon. Chairman of the District Land Housing Tribunal grossly erred in law and facts in holding that the appellant*

absented himself in court when the case was fixed for hearing ex-parte

Briefly facts underlaying the instant matter are that, the respondent lodged Land Application No. 22 of 2022 before the the trial tribunal claiming against the appellant for trespass of land measuring about 1 acre situated at Bargish Antsi village in Mbulu District (the suit land).

It is on record that the matter proceeded ex-parte against the appellant and at the end the trial tribunal decided in favour of the respondent herein. The appellant was aggrieved with the decision of the trial tribunal hence, the instant appeal.

During the hearing, both parties appeared in person. The appeal was disposed of orally.

When they were called upon to expound his grounds of appeal, the appellant submitted generally that he was not served with summons as he was sick. He argued that and when he came to know about the case it was already heard ex-parte. The appellant faulted the trial tribunal determining the matter without affording him the right to be heard.

The respondent on his reply submission he stated the appellant was duly served with the summons, but he deliberately refused to enter appearance. She further contended that, the appellant was duly served with summon, hence his claim that was not not true.

On a brief rejoinder the appellant maintained his argument made in his submission in chief.

Having gone through the parties' rival submissions as well as the record of the trial tribunal, the issue for my determination is whether the appeal has merits.

The appellant on the first and second grounds of his appeal he faulted the trial tribunal for determining the matter ex-parte. Going by the record of the trial tribunal the matter was fixed for mention on 2/11/2022 and it was further ordered the appellant be served with summons.

It is also on record that, on 2/11/2022 the respondent informed the trial tribunal that the appellant had not been served she thus requested for another summons. The trial tribunal ordered the matter to come for mention on 16/11/2022.

I have keenly gone through the entire record, but I could not find any proof that the appellant was served although the record shows that he entered appearance.

The record reveals that on the subsequent date of 21/11/2022 the appellant was present, but on 30/11/2022 the appellant was absent with notice from one Victoria Safari. On that date the respondent pressed for the matter to proceed ex-parte the order which was granted on 14/12/2022.

The matter was fixed for ex-parte hearing on 19/1/2023, however the appellant was present. The record is silent as to whether the trial tribunal inquired about the appellant's previous non-appearance. Rather the respondent and her witnesses testified and the matter was fixed for judgment on 31/9/2023.

Looking in the totality of the matter before the trial tribunal, its order to proceed with the matter ex-parte against the appellant was not justified. In terms of Regulation 11 1(c) of the Land Disputes Courts) The District Land and Housing Tribunal Regulations) G.N. 174 of 2003 (the Regulations) prescribes the circumstance on which the trial tribunal could order the matter to proceed ex-parte against the appellant. As it reads;

Where the respondent is absent and was duly served with notice of hearing or was present when hearing or was present when 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.

It follows therefore that before the trial tribunal could order the matter to proceed ex-parte against the respondent now the appellant, it ought to have satisfied itself on the above requirements.

The fact that the appellant had once appeared before the tribunal indicates that he was notified on the existence of the case. However, on the fateful date he had sent notice for his absence. On 19/1/2023 when the matter was fixed for hearing the appellant was present, but he was not inquired into anything. The tribunal went ahead to hear and determine the matter ex-parte.

Therefore, I am of the settled mind that the trial tribunal was required to inquire about the appellant's previous non-appearance and make determination if it was not backed up with any good cause before deciding to proceed with hearing of the matter ex-parte.

This requirement is also provided for under Order IX Rule 4 of the Civil Procedure Code [CAP 33 R.E 2022], (the CPC) which reads;

Where the court has adjourned the hearing of the suit ex-parte and the defendant at or before such hearing, appears and assigns good cause for his previous non- appearance, he may, upon such terms as the court may direct as to cost or otherwise, be heard in answer to the suit as if he had appeared on the date fixed for his appearance.

Since the records of the trial tribunal are clear that the appellant was not availed with a chance to account on his non-appearance, then he was denied his right to be heard and the trial tribunal acted without important information.

The emphasis in affording a party the right to be heard was stated by this court in the case of **Daud John v. Israel John**, Land Appeal No. 44 of 2019, quoting the case of **Margwe Erro and 2 Others v. Moshi Bahaiuiu**, Civil Appeal No. III of 2011, the Court of Appeal held;

"The right of a party to be heard before adverse action 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.

It is on record that the appellant was absent on 30/11/2022 but, there was notice from Victoria Safari. Taking into the circumstance of the matter in totality the appellant was condemned unheard and therefore the decision of the trial tribunal cannot be allowed to stand.

Considering that the appellant had notified the trial tribunal about his absence. The trial tribunal did not determine if there was good cause. This court in the case of **Daud John v. Israel John** (supra) had considered that the test of good cause is to verify if the party is not trying to delay justice. It also considered that the party was not a habitual defaulter.

Consequently, I find this ground is meritorious and can dispose the entire appeal. proceed to quash and set aside the judgment and decree of

the trial tribunal. I order that the matter be remitted to the trial tribunal with and order retrial of the matter from 19/1/2023 and the case should proceed from where it ended. I also order the matter to be expediated as has been before the trial tribunal since in the year 2022. Also, with the circumstances of this case, each party to bear its own costs.

It is so ordered.

Dated at Babati this 24th July, 2023

A handwritten signature in black ink, appearing to read 'G. N. Barthy', written over a horizontal line.

G. N. BARTHY,

JUDGE