

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

LAND CASE APPEAL NO. 21 OF 2023

(Arising from the decision of the District Land and Housing Tribunal of Moshi District at Moshi dated 15th March 2023 in Land Application No. 215 of 2022 and originating from Application no. 117 of 2014 of District Land and Housing Tribunal of Moshi District at Moshi)

ERNEST KITILA.....APPELANT

Versus

JOYCE BARTHALOME MASAO.....RESPONDENT

JUDGMENT

26th July & 24th August, 2023

A.P.KILIMI, J.:

Nine years ago, the respondent hereinabove, initiated the matter when she filed application no.117 of 2014 at the District Land and Housing Tribunal of Moshi at Moshi, therein she claimed to be declared the lawful owner of the suit land situated at Mvuleni Village within Moshi Rural District. The appellant being the defendant therein, the effort of respondent to serve him was in vain. Hence the matter proceeded *ex-parte* against him. Consequently, on 10th February, 2015 the Tribunal decreed that the appellant to give vacant possession of the suit land, to pay disturbance allowance to the tune of Tshs.1,000,000/= and costs of the case.

Upon the above decision came to his knowledge, the appellant on 14th November, 2022 filed an application at the same tribunal vide application no. 215 of praying for an order for extension of time to enable him, to file an application for setting aside an *ex-parte* judgment above entered against him. Therein, the appellant raised the point of illegality to be granted the application to the effect that, he was not served with summons to appear, and also, he failed to file the application to set aside *ex-parte* judgment because neither he was present at pronouncement of the said judgment nor aware of the same before the tribunal.

The Tribunal reasoned that the raised illegality by the appellant is not apparant on the face of record and proceeded to dismiss his application for extension of time, the appellant aggrieved by that decision, has knocked the door of this court by way of appeal basing on three grounds of appeal as follows:-

1. That, the Honorable Chairman erred in law and fact for failure to consider the improperly service of summons to appear on hearing date and on the date fixed for *ex-parte* judgment constitute sufficient cause for delay.
2. That. the Honorable Chairman erred in law and fact for failure to consider the issue of illegality raised by the Appellant which was on face of record.
3. That, the Honorable Chairman erred in law and fact for failure to holding and finding that the Appellant was not aware of the *ex-parte* judgment, as he was not

served with summons to appear on hearing dates and on the date fixed for *ex-parte* judgment, thus constitute sufficient cause for extension of time.

At the hearing of this appeal, Mr. Oscar Mushi learned counsel appeared representing the appellant and Mr. Gabriel Shayo learned counsel appeared for the respondent. In their oral submission to me, Mr. Mushi submitted in respect to the first ground that, the appellant failed to file application to set aside *ex-parte* judgment in time because he was not served with the summons to appear before the trial tribunal on the date fixed for hearing, thus he was not aware of proceeding of the application no. 117 of 2014.

Mr. Mushi to supported his assertion, further referred Regulation 11(3) of Land Dispute Regulation 2003 which allows the tribunal to determine the matter *ex-parte* by oral evidence, and when is duly served with hearing date, since the said provision is mandatory, the counsel asserts that the trial tribunal was required to make finding on whether summons was properly served, therefore, absence of proof of summons vitiated proceeding for appellant being unheard.

In respect to ground number two, Mr. Mushi submitted that, since the appellant was not aware, so he was condemned unheard which is contrary to the principle of natural justice, which is illegality which goes to

the root of the case, hence constitute sufficient cause for this court to extent time for sentencing aside the *ex-parte* judgment. To bolster his assertions, the counsel invited me to have a look in the cases of **V.I.P Engineering and Marketing Ltd & 2 Others vs. Citibank Tanzania Ltd** consolidate Civil Reference No. 6, 7 and 8 of 2006 CAT at Dar-es-Salaam (unreported) and **Principal Secretary, Ministry of Defence vs. D. P. Valambia** (1993) TLR 185.

Arguing for ground number three, the counsel for appellant, avers that, the said *ex-parte* judgment was delivered in favour of respondent on 28th day of February 2015, however the appellant was not informed about the date of delivery of the *ex-parte* judgment, therefore the appellant was not aware, he insisted that, the law requires the other party to be notified on the date of *ex-parte* judgment. To buttress this position he has referred the case of **Cosmas Construction Co. Ltd vs. Arrow Garments Ltd** [1992] TLR 127. And **Abutwalib Musa Msuya & 2 Others vs. Capital Breweries Ltd & 2 Others**, Civil Revision No. 2 of 2012 CAT at Dodoma.

Mr. Mushi concluded that, the appellant failed to take any legal action because he was unaware, he became aware on 9/11/2022 when he was served with application for Execution No. 133 of 2022 filed before trial

tribunal, on the same date appellant consulted with his counsel were Misc. Land Application number 215 of 2022 was filed at the tribunal, which was an application for extension of time to set aside *ex-parte* judgment, was filed at trial tribunal on 10th day of November 2022, therefore he took immediate action after being aware of said *ex-parte* judgment.

In reply to the above claims, Mr. Shayo for the respondent, in respect to the first ground contended that the summons to appear was served to the applicant by one Omari Mhuru process server, the appellant was known that he shifted to another place, but sometimes came and check his house, the second time was issued, but he was also not seen, but the village chairman put it in the notice board office of Village Chairman and Ward Executive Officer. Also, he added that the said process server filed at the tribunal sworn an affidavit after above effort to serve the appellant.

Mr. Shayo further contended that, after the *ex-parte* judgment, the appellant application to set it aside was heard and found out of time because under Land Dispute Court Regulation, G.N 174 of 2003 Regulation 11(2) direct any *ex-parte* judgment delivered, application to set aside need to be filed within 30 days from the date order. Also, the counsel said, it is almost 8 years and the appellant has not shown any good cause to that

effect, therefore his application of the law he cited is immaterial because he was given right to appear but he failed to appear negligently.

In respect, to the second ground of appeal, Mr. Shayo conceded that, it is true he was unheard, but he was the one escaped summons, despite the same was fixed out of his house and notice board of public office, therefore by so doing, he was aware of the case. Therefore, since he has failed to account for every day of delay, the case law cited does not support his application.

In brief rejoinder, Mr. Mushi told this court that the counsel for respondent has conceded that appellant never seen, because he was not staying at that area, therefore, he was not resident at the area. Further, he conceded that it is true is eight years passed, but he insisted his client was never served with the case existed in the said tribunal.

I have dispassionately considered the submissions of the parties in support and opposition to the application along with the authorities cited and the grounds which I am invited to address.

For convenient purpose, I choose to start with ground number two of appeal, in this ground the appellant is alleging for illegality conducted, and

that is, he was condemned unheard, because he was not aware and the case was heard *ex-parte*. Therefore, from this ground, he is asking this court extend time for him to file application to set aside *ex-parte* judgment.

Before, I proceed I find convenient to have guidance of law in this matter, since it the discretion of the court in deciding whether or not to extend time, but this must be exercised judicially and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice. (See **Abdulrahman Mohamed Ally vs Tata Africa Holdings T. Limited** Civil Application 166/16 of 2021 CAT at Dar-es-Salaam. (Tanzlii).

It is a trite law in order illegality to ground extension of time must be apparently on the face of record. However, the time will be extended on the ground of illegality so as to rectify that illegality in the intended application, In the case of **Principal Secretary, Ministry of Defence vs. D.P. Valambia** (supra) the court observed that "

"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right"

Now, the point for consideration is whether the above allegation by the appellant meet the above test.

At the trial tribunal, the applicant (herein appellant) affidavit which is evidence according to the law, has deposed in paragraph 5 and 6 as follows;

"5. That, there is an illegality to the effect that during the hearing of the application no. 117 of 2014 the Applicant have never been served with a summons to appear or any copy of the document with regards to that matter.

6. That, I didn't file an application for setting aside an ex-parte judgment from the fact that I was neither present during the pronouncement of the ex-parte judgment nor aware of any application before this Honorable Tribunal."

Before considering above, I am mindful that, it is settled that a Court hearing an application like this should restrain from considering substantive issues that are to be dealt with in the main application sought, this is so in order to avoid making decisions on the substantive issue before

the main application sought is heard. See the case of **Regional Manager-TANROADS Lindi vs. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (Unreported).

I have considered these averments by the appellant above, in my view it alleges that, he was not given an opportunity to be heard, if this claim is true, no how he could have known the existence of the case, if at all he was not aware of the case because he was not served.

With respect to both counsels, the counsel for respondent have attempted to deliberate on how the services was prompted done to the appellant, while the opponent counsel for appellant attempted to show how he was not dully served. In my view all their submissions are from the bar, therefore are not evidence. The fact that, there are above two paragraphs in appellant affidavit filed at the tribunal, to my opinion is enough to trigger illegality apparent on the face of record, which is the failure to comply with the right to be heard, contrary to the principle of natural justice.

I concede with the learned chairman of the tribunal when he observed that, the illegality alleged need inner ascertaining of facts to the appellant to see whether was served or not, but as said above, according to

the nature of this matter, with respect what the chairman states are substantive issues, and thus this court at this stage should refrain considering them. See **Regional Manager- TANROADS Lindi vs. D.B Shapriya and Company Limited** (supra).

Therefore, being allegation of illegality at this stage of application for extension of time, in my opinion I think it is suitable and prudent to grant the extension of time, so that this alleged illegality be heard substantively, hence, the court having heard both parties will decide on merit. In the case of **Abdulrahman Mohamed Ally vs. Tata Africa Holdings T. Limited** (supra), the court of appeal observed at page 9 that;

"Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one in situations where, if the extension sought is granted, that illegality will be addressed."

[Emphasis added]

See also Principal Secretary, Ministry of Defence vs. Devram Valambhia [1992] T.L.R. 182 at page 189)

Extending further the court in **Abdulrahman Mohamed Ally** (supra) at page 8 proceeded to develop broader approach for purpose of doing justice, but this broader approach depends on the circumstances of the individual case;

*"In determining whether sufficient reason for extension of time exists, the court seized of the matter should take into account not only the considerations relevant to the applicant's inability or failure to take the essential procedural step in time, but also any other considerations that might impel a court of justice to excuse a procedural lapse and incline to a hearing on the merits. **Such other considerations will depend on the circumstances of the individual cases** and include, but are not limited to, such matters as: the promptitude with which the remedial application is brought, whether there was manifest **breach of the rules of natural justice** in the decision sought to be challenged on the merits, and the prejudice that may be occasioned to either party by the grant or refusal of the application for extension of time. **This broad approach is preferable as a judicial discretion is a tool, or device in the hands of a court for doing justice or, in the converse, avoiding injustice.**"*

[Emphasis added]

According to the circumstances of this matter, I have considered the refusal to grant extension of time to the appellant versus granting it, in my view granting it will not prejudice the respondent, but as said above the said illegality will be addressed, hence justice in such respect will be attained for all. It is thus my finding; the appellant has raised a matter of legal point for the consideration when extension is granted.

In the circumstances, I find this second ground of appeal have merit. Furthermore, I find this ground of appeal is sufficient to dispose of this appeal and find no need to consider and determine the remaining grounds of appeal, because the first and third ground entails on whether the appellant was served or not served which need to be dealt at next stage.

On the whole, I find merit in this appeal and consequently allow it. The decision of the District Land and Housing tribunal of Moshi in Application No. 215 of 2022 is hereby set aside and quashed. The appellant hereinabove is thus granted extension of time for 21 days within which to file application for setting aside *ex-parte* judgment of the decision of the tribunal no. 117 of 2014 dated 10th February 2015.

It is so ordered.

DATED at MOSHI this day of 24th August, 2023.



A. P. KILIMI
JUDGE
24/8/2023

Court: - Judgment delivered today on 24th day of August, 2023 in the presence of Mr. Oscar Mushi advocate for appellant, while Mr. Gabriel Shayo for Respondent absent. Appellant also present.

Sgd: A. P. KILIMI
JUDGE
23/8/2023