IN THE HIGH COURT OF TANZANIA

DODOMA SUB - REGISTRY

AT DODOMA

LAND APPEAL NO. 49 OF 2022

(Arising from Mc. Land Application No. 17 of 2022 from District Land and Housing Tribunal for Singida at Singida)

RAYMOND FERDINAND NGOMAS.....APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE.....RESPONDENT

JUDGMENT

25th August, 2023

HASSAN, J:.

In the District Land and Housing Tribunal (DLHT), the Appellant herein sued the Respondent claiming to be a lawful owner of the disputed land located at Plot No. 496 Block "AA" Kibaoni area within Singida Municipality in Singida Region. The application was heard *ex parte* and decided in favour of the Appellant. This was on 24th of February, 2022.

Aggrieved by the said decision, the Respondent filed application No. 17 of 2022 to set aside an *ex parte* judgment. On 29th July, 2022 the District Land and Housing Tribunal set aside the *ex parte* judgement. The

Appellant herein being unsatisfied with the said decision of the DLHT lodged this appeal on the following grounds:

1. *That, Hon. Learned Chairperson erred in law and in fact in granting extension of time to the respondent and setting aside the ex parte judgment entered in favour of the appellant without the respondent counting each day of delay as required by law.*
2. *That, Hon. Learned Chairperson erred in law and in fact in holding that the respondent was not afforded right to be heard while such right was given but denied to utilize it.*
3. *That, the Hon. Learned Chairperson erred in law and in fact in holding that since the respondent was not issued with summons informing her on the judgement date that was a good ground for setting aside the ex parte judgement while the respondent was fully aware on the existence of Land Application No.94/2019 after has been served with several summonses to enter appearance and defend.*

On 16th May, 2023 the appeal was called on for hearing, parties prayed the appeal to be heard by way of written submission. Prayer was granted and parties complied with the schedule ordered by the court.

The Appellant on his written submission presented on the first ground of appeal that, it is the requirement of the law that when one apply for the extension of time, he/she must account for each day of delay. To support his point, he cited the case of **Francis B. Mndolwa v. Bank of Africa Tanzania Limited and Viettel Tanzania Limited, Civil Appeal No. 71 of 2021**. He added that, the respondent was served with the summons on 28/10/2019 but had never appeared in court, and no cogent reasons was furnished. To him, the chairman was wrong to set aside the *ex parte* judgment and granting the respondent the right to be heard while the same right was given in advance and the respondent had disregarded it. The appellant contended further that, the respondent was duty bound to prove that there were sufficient reasons for his delay to set aside the *ex parte* judgment, see **Francis** case (supra) quoting the case of **Lyamuya Construction Company Ltdv Board of Registered Trustees of Young Womens Christian Association of Tanzania,Civil Application No. 2 of 2010**. Therefore, the appellant

concluded on this point that the respondent has not adduced any sufficient cause as to his delay.

As to the second ground of appeal, the appellant argued that, all rights are subject to conditions, and there is no right which is absolute, thus, every person has a constitutional right to be heard but such right is subject to the other laws. He added that, once right is given but negligently or wilfully defaulted, then such person cannot claim to have been denied the right to be heard. He cited the case of **Johnson Amir Garuma v. The Attorney General and Others, Misc. Civil Cause No.11 of 2017** to cement his point of right to be heard.

Regarding to the third ground of appeal, the appellant stated that the respondent was duly informed about the matter through the summons which was issued to him. Thus, the allegation that service of summons was not proved by affidavit cannot hold water since the respondent himself admitted to have received the summons but because of lack of affidavit he defaulted to enter appearance. To him, the admission to have received summons bars the respondent from claiming the right which he had already slept over it. Owing to all that, the appellant prayed to this court to allow this appeal with costs by quashing and set aside the decision and proceedings of the District Land and Housing Tribunal for Singida.

In reply, as to the first ground of appeal the Respondent submitted that, the law which regulates applications for extension of time is section 14(1) of the Law of Limitation Act. To his opinion, the cited provision requires for the applicant to establish either a reasonable or sufficient cause; and what amounts to reasonable or sufficient cause differ from one case to another. According to the case of **V.I.P Engineering and Marketing Limited v. Citibank Tanzania Limited Consolidated, Civil References No. 6, 7 and 8 of 2006** at page 18, the Court of Appeal held that when the issue is illegality of the decision comes in, the requirement to account for each date of delays steps aside. He added that, the decision of the tribunal in Land Case No. 94 of 2019 is tented with illegality, because it did not observe the mandatory requirements of **Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations,2002** which provided that, the chairman shall, before making his judgement, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili. The respondent succumbed that, at page 6 of the ruling dated 7th February, 2022 the chairman found that there is no record that shows that assessors were required to give

their opinion in writing and also the records are silent on whether assessors' opinions were read over to the parties before judgment. He cited the case of **Edina Adam Kibona v Absolom Swebe (Shell), Civil Appeal No. 286 of 2017 at page 3 and 5** to support his point. To him, non-observing the law makes the decision illegal and once the decision is illegal, for ex-parte judgment, the remedy by the same court is to set aside and if it is an appeal the remedy is to nullify the same. The trial tribunal to him did not error to extend time in order to ascertain the issue if illegality and after ascertaining the issue did not error to set aside the same. He cemented his point by citing the case of **Principal Secretary, Ministry of Defence and National Services v. Devram Valambhia (1992) TLR 185**. He further stated that, all of the facts stated in affidavits which were confirmed by the tribunal makes the *ex parte* judgment illegal and the tribunal was right to extend time to ascertain the issue of illegality and after ascertaining illegality the tribunal was right to set aside the *ex parte* judgement. Therefore, the case cited by the appellant to him is distinguishable to the case at hand.

Dealing with the second ground of appeal, the respondent contended that he did not reject the right to be heard. She did not take party in the hearing because she was not served with a copy of application

and a notice to appear. She further submitted that, right to be heard starts with service of a notice or summons as per Regulation 6 (4) (b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G. N. No. 174/2003 which provide that, after service, a person who effected the service shall swear an affidavit in the prescribed form indicating the manner in which service has been effected. To the respondent's view, section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the laws of Tanzania, the word **"Shall"** means "**must be performed**". Therefore, in the Land Application No. 94 of 2019 there was no proof that the respondent has been properly served with the same.

Moreover, the respondent cited the case of **Oysterbay Properties Ltd v. Kinondoni Municipal Council, Civil Case No. 4 of 2011** at page 17, and the case of **T. M. Sanga v. Sadru G. Alibhai and 2 Others (1977) LRT. 51**, with a view to support his point of service, thus, there was uncertainty concerning service of summons, and that, uncertainty itself raised a sufficient reason for allowing an application to set aside *ex parte* judgment and decree thereof.

Regarding the third ground of appeal, the respondent submitted that it is true that she had admitted to have received a summons but she disputed to have not been served with documents of Land Case No. 94 of

2019. More so, she averred that, the appellant had also admitted at page 3 of the last paragraph that, notice of judgment was not served to the respondent. To him, the law is clear concerning a requirement to notify the party on the date of judgement as per Order XX Rule 1 of the Civil Procedure Code Cap.33. thus, because case proceeded with hearing *ex parte,* then law requires the other party to be notified on the date of judgment, but the other party in this case was not notified. To support this assertion, he cited the case of **Multichoice Tanzania Ltd v. Maxcom Africa Plc, Misc. Commercial Application No. 04 of 2020** at page 15 it addresses the situation of which the respondent was not notified for the date of judgment. He therefore prayed this court to hold that the respondent was entitled to be notified of the date of judgment.

Based on what was presented by the respondent, the appellant had waived his right of rejoinder, hence, no rejoinder submission was filed to the court before the date set for the same had lapsed.

I have heard the parties herein in their submissions and have also gone through the record of the District Land and Housing Tribunal in order to ascertain this dispute. Thus, based on the available facts, the main issue for determination of the court is whether this appeal has merits.

Starting with the first ground of appeal that, Hon. Learned Chairperson erred in law and in fact in granting extension of time to the respondent and setting aside the *ex parte* judgment entered in favour of the appellant without the respondent counting each day of delay as required by law. I am of the view that, extension of time is discretion of the court depending on the circumstances of the case. It is also a trite law that illegality can be a good ground for extension of time as it was stated in the case of **TANESCO vs. Mufongo Leonard Majura and 15 Others, Civil Application No. 230 of 2016** (unreported) where it was held that:

> "Notwithstanding *the fact that the Applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be impugned, suffices to move the Court to grant extension of time so that the alleged illegality can be addressed by the Court."*

See also the case of **Paul Joma vs. Diesel and Auto Electric Service Ltd. and Two Others, Civil Application No. 54 of 2007** (unreported). Furthermore, sufficient cause has not been defined, but

Nsekela JA, in the case of **Tanga Cement Company Limited v Jumanne Masangura and Amos A. Malwanda, Civil Application No. 06 of 2001**, once had this to say:

> *"What amounts to sufficient cause has not been defined, from decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly, such as illegality of the decision to be challenged."*

In the case at hand, it is on record that the chairman had granted the application for extension of time because there was illegality on the Land Application No. 94 of 2019, as per page 6 of the judgement of the trial tribunal in Misc. Application No. 216 of 2021, of which I quote it here-under:

> *"Also, on the 3rd ground of this application as submitted by the applicants advocate that the said exported judgement is tainted with illegalities, I find this ground to have merit as the applicant was not issued with notice of the judgement, there is no record that assessors were required to give their opinion in writing and also the records are silent on whether assessors*

opinion were read to the parties before judgement, especially to the respondent as the matter was heard ex parte."

To me, as long as the trial chairman had granted an extension of time for the reason of illegality, I see this ground of appeal lacks merit.

On the second ground of appeal that Hon. Learned Chairman erred in law and in fact in holding that the respondent was not afforded right to be heard while such right was given but she denied to utilize it. In this point, I will first make it known that it is a trite law that, among the reasons to set aside *ex parte* judgment is if the party was denied the right to be heard. It is obvious under Regulation 6 (4) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations,2002, G. N. No.174/2003, which provides that:

"After the service, a person who effected the service shall-

(b) swear an affidavit in the prescribed form indicating the manner in which the service has been effected."

Moreover, section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the laws of Tanzania, the word **"Shall"** means must be performed.

Therefore, it is on the record of the Land Application No. 94 of 2019 that, there was no proof of service of summons by the appellant to the respondent in the main case, of which it gave rise to the *ex parte* judgment. The procedure on issuance of summons in the trial tribunal is governed by Regulation 6 (4) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2002, G. N. No. 174 of 2003. Here, the law makes it clear that after service, a person who effected the service shall swear an affidavit in a prescribing form indicating the manner in which such service has been performed.

Dealing with this point, the court has taken pain to go through the proceedings of the trial tribunal in land application No. 94 of 2019, thus, upon perusal I found out that, there is no any copy of summons which was issued to the respondent. Obviously, it is well known that purpose of a summons is to inform the respondent that, there is a suit or application filed in the court against him or her and that he/she ought to attend. In the case at hand, this was not been done at the trial tribunal and there is no affidavit to prove the manner in which service of a summons was effected to the respondent.

In that context therefore, it is apparent that failure to effect service of summons is a sufficient reason for allowing an application to set aside

ex parte judgment and decree thereof. **[See the case of T. M Sanga v. Sadru G. Alibhai and 2 Others (1977) TLR. 51]**.

Regarding the third ground, that the Hon. Learned Chairman erred in law and in fact in holding that since the respondent was not issued with summons informing her on the judgement date that was a good ground for setting aside the *ex parte* judgment while the respondent was fully aware on the existence of Land Application No. 94 of 2019 after she has been served with several summonses to enter appearance and failed. On that, I have adequately covered this point while discussing the 1st and 2nd grounds, and thus, I need not to repeat the same.

In the upshot, as I have explained herein-above, this Court finds no merit in the appeal. Consequently, the appeal is hereby dismissed with costs.

It is so ordered.

DATED at **DODOMA** this 25th day of August, 2023.

S. H. HASSAN

JUDGE