

**IN THE HIGH OF THE UNITED REPUBLIC OF TANZANIA
(SUMBAWANGA DISTRICT REGISTRY)**

AT SUMBAWANGA

LAND APPEAL No. 24 OF 2021

(Originating from the Application No. 41 of 2017 and No. 122 of 2020 of the District
Land and Housing Tribunal for Rukwa at Sumbawanga)

VICENT NYAMI.....APPELLANT

VERSUS

FREDINAND NZYUNGU.....RESPONDENT

JUDGMENT

22/08/2023 & 13/10/2023

MWENEMPAZI, J.:

The appellant herein is aggrieved by the decision of the District Land and Housing tribunal for Rukwa at Sumbawanga (trial tribunal) as the respondent was declared the rightful owner of a disputed land in which the appellant claims to be the owner of the same.

The story behind this misunderstanding began in the year 2002 when the late Justino Lusambo invited the appellant to till on his land while retaining its ownership and the agreement was that the appellant should only cultivate temporary crops. However, the appellant did the contrary, and in the year 2006, the late Justino Lusambo decided to

reclaim his land from the appellant, but the latter refused to grant the possession of the suit land back to Justino Lusambo, and so he filed a suit at the Kisungamile Village Council where he was declared the winner and the appellant being aggrieved filed an appeal to the Ward Tribunal where the tables were overturned and he was declared the rightful owner. Then, the late Justino Lusambo appealed to the District Land and Housing Tribunal for Rukwa at Sumbawanga, where it was decided that the suit should be tried *de novo* at the Ward Tribunal, but the tribunal did not comply with the said order.

In 2015, Justino Lusambo passed away, and then the respondent herein was appointed the administrator of the estate of the late Justino Lusambo. The respondent then filed an application numbered 41 of 2017 at the trial tribunal, requesting for vacant possession of the deceased's suit land. Despite the appellant being duly served he did not appear at the trial tribunal, and so the suit was heard ex-parte and the respondent herein was declared the rightful owner of the disputed land.

Aggrieved by this decision, the appellant preferred his appeal to this court, whereas his petition of appeal consisted of nine grounds of appeal which are as reconstructed hereunder;

1. *That, the trial tribunal erred in Law by giving Judgment in the above case without considering that no appeal case was filed in such tribunal by the respondent.*
2. *That, the trial tribunal erred in law and fact by not considering that the respondent was the judgment debtor in the land case of Matai Ward Tribunal dated 12/03/2015 and that the respondent did not appeal, a copy of the judgment of Matai Ward tribunal dated 12/03/2015 is attached as annexure 'A' to form part of this petition of appeal.*
3. *That, the trial tribunal erred in law and fact by giving Ruling in Misc. Application No. 122/2020 without considering that the appellant was the Decree Holder in the Ward Tribunal of Matai dated 12/03/2015.*
4. *That, the trial tribunal erred in law and fact by giving Ruling without basing that the Application for Execution was null and void from the beginning since it did not contain any judgment or ruling, the copy of the said application is attached herein as annexure 'B' to form part of this petition of appeal.*

5. *That, the trial tribunal erred in law and fact by not considering that no Misc. Application No. 41/2017 which was filed/heard at the trial tribunal.*
6. *That, the trial tribunal erred in law and fact by not considering that the appellant is the rightful owner in the disputed land and have developed the same for more than sixty (60) years.*
7. *That, the trial tribunal erred in law and fact by giving Ruling/Judgment in favour of the respondent without giving vivid/strong reasons.*
8. *That, the trial tribunal erred in law and fact by noting that the appellant denied/rejected to sign summons without considering that who sent the summons to the appellant was not known since the process server belongs to Kisungamile Village while the appellant belongs to Kateka 'B' village. That, the process server returned the summons without showing the date fo his denial to sign, a copy of that summons is attached herein as annexure 'C' to form part of this petition of appeal.*
9. *That, the trial tribunal erred in law and fact since application for execution did not show the location of the land in dispute including its size/acres also the tribunal and its ruling did not show the*

location of the disputed land and its size, copies of ruling and the order thereto are attached herein as annexure 'D' to form part of this petition of appeal.

As per the grounds of appeal, the appellant prays for this Court to allow this appeal with costs and struck out all proceedings, ruling and orders of the trial tribunal.

Generally, in reply to the grounds of appeal as filed, the respondent denied all that has been filed by the appellant, and thereto he has put the appellant in strict proof of every paragraph that he has filed in his petition.

As the matter was scheduled for hearing both parties had no legal representation, and therefore they appeared for themselves. It was the view of this court that, in order for justice to prevail, as laypersons as they are, they should battle out their differences by way of written submissions. Both parties agreed to this court's suggestion and adhered to the schedule as fixed by this court.

As a procedure, the appellant submitted first that he will only argue for the 8th ground of appeal alone, but before he wishes to draw the attention of this Court on the issue of point of law, that it is trite of

the law that the issue of point of law ought to have been addressed and determined it on merit even if it was not raised and determined at the trial tribunal has lacked locus stand to file this Application as an individual and not as an administrator of the estate of the late Justino Lusambo, that without being appointed as an administrator it is not possible to be able to sue or be sued on behalf of the deceased.

The appellant then referred me to the case of **Malietha Gabo vs Adam Mtengu, Civil Appeal No. 485 of 2022**, CAT at Kigoma at page 9 where it was provided that;

"It was irregular for the respondent to initiate a case against the appellant in her own capacity instead of pursuing action against her as the administratrix of the late Gabo Mtengu. We are fortified in that regard because the only person who can act as a representative of the deceased, is the grantee of the letters of administration."

In addition to his submission, the appellant again cited another case of **Lujuna Shubi Ballonzi Senior vs Registered Trutees of Chama cha Mapinduzi (1996) TLR 203** (HC) where it was stated that;

"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his rights or interests have been breached or interfered with."

He did not end there, he referred further by citing the case of **Omary Yusuph (Legal Representative of the late Yusuph Haji) vs Albert Munuo, Civil Appeal No. 12 of 2018**, where it was also held that;

"That apart from the anomaly in question as well adversely impacts on the present appeal because Omary Yusuph who is appearing as legal representative of the deceased took over from the late Halima Omary who had no locus standi to institute a case on behalf of her deceased husband. Apparently, it is unfortunate that the anomaly missed the eye of both District Land and Housing Tribunal and the High Court or else it could have been addressed timely this appeal was perused."

It was his submission that, the legal impact for failure to comply with it, is fatal and makes the proceedings and judgment of the trial tribunal a nullity.

Coming to the eighth ground of appeal, the appellant submitted that the summons was not served effectively to him and hence non-appearance during the hearing at the trial tribunal and that made the said suit be tried ex-parte against him in which it led to the breach of principle of right to be heard because of ineffective service of the summons as there was no proof of affidavit that the appellant had refused to sign the summons.

He added further that, there were other ways of servicing the summons to the appellant but the respondent failed to use the other ways in which it entails his intentions of denying the appellant the right to be heard.

In winding up, the appellant submitted that basing on his submission above and the plethora of relevant authorities pinned in, he prays for this appeal to be allowed with cost.

In replying the submission made by the appellant, the respondent as layman as he is, he chose to reply to the nine grounds of appeal as filed by the appellant as his submission to this appeal.

Nevertheless, there was no any rejoinder made by the appellant and that left ample time for this court to go through the entire records in disposing of this appeal.

When one goes through the records before me, it would be noticed that the only determinant issue here is ***whether this appeal competent before this court.***

I wish to state that this being the first appeal, this court is entitled to re-evaluate the evidence on record and draw its own inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses - See also **D.R. Pandya vs Republic** [1957] E.A 336 and **Juma Kilimo vs Republic**, Criminal Appeal No. 70 of 2012 (unreported).

In re-evaluating the evidence of the trial court, it is in my perusal that indeed the respondent's application was heard ex-parte and it was after the efforts of getting the appellant to appear before it failed. This fact has been stated by the trial learned chairperson in her judgment on the 1st page and I quote, that;

"....the respondent (appellant herein) had not filed a written statement of defence as he was dully served and refused the

service, consequently the matter proceeded ex-parte against him."

Having not being heard before the trial court, it is trite law that the proper and correct course for whoever aggrieved by the decision of the court or tribunal that passed ex-parte decision against him, is to apply for setting aside the ex-parte decision and not to prefer an appeal. See the cases of **Jaffari Sanya Jussa & Ismail Sanya Jussa vs Salehe Sadia Osman**, Civil Appeal No. 54 of 1997 CAT (unreported) and **Kuyela Chugulu & Another vs Maua Mgata**, Land Appeal No. 25/2012 (unreported) High Court Iringa.

In similar vein, I unable to proceed to determine either the grounds of appeal as filed by the appellant or the submission he made before this court, for this appeal is incompetent before this court as the correct avenue for the appellant was to apply for an application for setting aside the ex-parte judgment and decree thereto at the trial tribunal, submitting sufficient reasons as to why he denied service of the summons as seen in the records of the trial tribunal where there is an affidavit by the process server who was known as **JERADI SWETU**, the Village Chairman of Kisungamile village confirming the appellant's denial of the service.

That being the case, I therefore proceed to dismiss this appeal. I urge the appellant to consider using the proper avenue as the law requires. Costs are to follow the event.

It is so ordered.

Dated and delivered at **Sumbawanga** this 13th day of October, 2023.


T. M. MWENEMPAZI
JUDGE

Judgment delivered in Court in the presence of parties as appearing in the coram.




T. M. MWENEMPAZI
JUDGE
13/10/2023