IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. LAND APPLICATION NO. 28 OF 2023

IBRAHIM RAJAB ..... APPLICANT

VERSUS

DOMINIC SAHALI ..... RESPONDENT

(*Arising from Land Appeal No. 24 of 2018 of The High Court of Tanzania at Tanga, as originating from Land Appeal No. 36 of 2017 of The District Land and Housing Tribunal for Korogwe and Originating from Land Case No. 2 of 2016 of Kang'ata Ward Tribunal in Handeni*)

RULING

07/12/2023 & 19/12/2023

NDESAMBURO, J.:

This ruling pertains to an application filed before this court, wherein the applicant seeks an order to set aside the *ex-parte* judgment rendered by this court on 25th April 2022 following a Land Appeal No. 24 of 2018 filed by the respondent herein. The application is made under Order IX Rule 13(1) of the Civil Procedure Code, Cap 33 R.E 2022, herein after Cap 33. The application is by chamber summons supported by an affidavit affirmed by the applicant. The respondent filed a counter affidavit

to recounter the application which was sworn by his learned counsel.

The genesis of the present application lies in the initial dispute over a 93-acre land, where Dominic Sahali, the current respondent, initially emerged a winner in Land Dispute No. 2 of 2016 against Ibrahim Rajabu and Nada Sahalo before the Kang'ata Ward Tribunal for Handeni. However, the applicant, Ibrahim Rajabu, and Nada Sahalo successfully appealed against that decision through Land Appeal No. 36 of 2017 before the District Land and Housing Tribunal of Korogwe (DLHT).

In response to the DLHT ruling, a subsequent Misc. Land Appeal No. 24 of 2022 was initiated before this court by the respondent. This led to a settlement between Dominic Sahali (the then appellant) and Nada Sahalo (the then 2nd Respondent). Consequently, the judgment and decree of the DLHT were quashed and set aside through an *ex-parte* judgment. Dissatisfied with this outcome, the applicant successfully sought an extension of time to set aside the *ex-parte* judgment in Misc. Land Application No. 75 of 2022 before this court.

The granted extension of time enabled the applicant to file the current application, wherein he seeks an order to set aside the aforementioned *ex-parte* judgment with associated costs.

In the affidavit, the applicant affirmed that he was not aware of the *ex-parte* judgment, as he had not been served with a summons. Furthermore, he asserted that the judgment was entered based on false statements made by the respondent in respect of effective service of summons to him. The applicant emphasized that the *ex-parte* judgment was passed illegally.

When the matter came for hearing, the applicant was represented by Graciana Assenga, a learned counsel while the respondent enjoyed the services of Mr. Switbert Rwegasira, also a learned counsel. The parties opted for written submissions as a method of disposing of this application.

In presenting his arguments, the applicant's counsel having adopted the applicant's affidavit, highlighted the grounds for contesting the *ex-parte* judgment, primarily emphasizing the non-service of summons to the applicant. The contention was that the service was ineffective, as it was directed to Nyasa Village

authority, whereas the applicant resides in Suwa Village. The applicant maintained that the affidavit supporting the service was based on incorrect information.

To bolster this submission, the learned counsel referenced the case of **Fanuel Mantiri Ng'unda v Herman Mantiri Ng'unda and 2 Others** (1995) TLR 155 to prove that the judgment and orders entered against the applicant emanated from defective facts and thus to him, they are equally defective. The applicant urged the court to set aside the *ex-parte* judgment and order the same to be heard inter-parties.

In response to the applicant's submissions, Mr. Rwegasira, the learned counsel for the respondent, adopted the counter affidavit to form part of the opposing submission. He then revisited the legal provision invoked by the applicant, specifically Order IX, Rule 9 of Cap 33. Mr. Rwegasira pointed out that, according to this provision, the court may set aside *ex parte* judgment however, the applicant must demonstrate that he was prevented by a sufficient cause from appearing when the suit was called for a hearing. To support his argument, he referred to the cases of **Shah v Mboga**

and Another (1967) EA 116 and **Haji Shamte and Another v Republic** (1987) TLR.70.

Mr. Rwegasira asserted that the applicant was duly served with all necessary notices and summons, contending that there was no breach of the principles of natural justice. He claimed that the applicant chose not to appear on the hearing date, but later on accepted a summons related to the execution of the judgment, served in the same manner as the one for the hearing. Moreover, he questioned the authenticity and purpose of the letters attached to the applicant's affidavit, suggesting doubts about their credibility.

While challenging the citation of the case of **Fanuel Mantiri** (supra) by the applicant, Mr. Rwegasira argued that the application before this court is for setting aside the *ex parte* judgment and not to examine whether or not the court judgment was false or not. He stressed that information in the affidavit regarding the status of the service of summons contained no false information and was as per the law. He concluded by asserting that the applicant failed to demonstrate sufficient cause preventing him from appearing when

the suit was called for a hearing, and therefore, he urged this court to dismiss the application with costs.

After careful consideration of the application and the submissions presented by both parties, fundamentally, the applicant challenges this court's order to proceed with an *ex-parte* hearing. The crux of the matter lies in the applicant's assertion that he was not adequately served as the summons served to him relied on inaccurate information. Consequently, the pivotal issue at hand centres on whether the applicant received proper notice to appear in court when his case was slated for a hearing, a prerequisite for this court to judiciously exercise its discretion.

It is not in dispute that the right to be heard as a basic principle of natural justice, embodies the issues of the right to adequate notification of the date, time and place of the hearing and detailed notification of the case against such individual whose rights are being determined by courts or administrative bodies. To amplify this principle the Court of Appeal of Tanzania in the case of **Luckson Rutafubibwa Kiiza** (*The Administrator of the estate of the late Angelina Bagenyi*) **v Erasmus Ruhungu** (*The*

administrator of the Estate of the late Gaudensia Rwakailima), Civil Appeal No. 375 of 2021, had this to say:

> "*It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard*".

This application is governed by **Order IX Rule 9** of Cap 33 which provides as follows:

> "*In any case in which a decree is passed ex-parte against the defendant, he may apply to the court by which the decree was passed for an order to set it aside and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the court shall make an order setting aside the decree as against him upon such terms as to cost payment into court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit*".

Per the above provision, the applicant bears the explicit responsibility of satisfying the condition that was prevented by a sufficient cause from making an appearance when his matter was called for a hearing before the application can be granted to him.

The reason put forth by the applicant is that the summons was served to a different village (Nyasa Village) from where he ordinarily resides in Suwa Village. The applicant has further presented letters from the village authority to support his argument (Annexure P-1), in his affidavit.

On the other hand, the respondent, in his submission, asserts that a summons was duly dispatched to the applicant through a court process server, which he purportedly refused to sign and acknowledge receipt. This is supported by the evidence presented in the affidavit of the process server, which indicates the applicant's refusal to accept service of the summons.

The point of contention between the two parties in this matter revolves around whether the summons for the hearing of Misc. Land Appeal No. 24 of 2018 was appropriately served on the applicant, leading the court to issue an *ex-parte* order for the hearing. To address this, it is prudent to examine the conditions stipulated by the law, specifically Cap 33 on service of summons. I am drawn to highlight Order V of Cap 33 and, in particular, emphasize on Rule 8 of the same Order, which provides that:

"Where it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service in which case service on such agent shall be sufficient".

Upon a thorough examination of the court records, it is evident that on 14th February, the court issued an order mandating the service of the respondent (the applicant herein) through the court process server, with a requirement for proof of service to be filed in court. The matter was fixed for mention on 25th February 2022. Subsequently, on 25th February 2022, it is documented that the appellant (the respondent herein) informed the court that the applicant was served through the court process server but the applicant refused to accept the service. An affidavit of service of summons sworn on 17th February 2022 by Fredy Ojuck Daniel, court process server, containing information that the defendant (applicant) refused to accept service, was filed with this court.

The aforementioned evidence indicates that the applicant was personally served by the court process server; however, he declined to accept the service. I am inclined to agree with the arguments presented by the learned counsel for the respondent,

asserting that the applicant was duly served with a summons but willfully refused service and chose not to attend the hearing in the appeal. This, in turn, resulted in the issuance of an *ex-parte* hearing and judgment against him.

The applicant's contention that the service was directed to the wrong address (Suwa Village) while he resides in Nyasa Village lacks merit, especially when the summons was served directly to him, and he chose not to accept it. Additionally, the process server, as indicated in the attached summons, affirmed that the applicant was personally known to him by the time of the service of the summons. This strongly proves that the summons was indeed properly served to the applicant. Regrettably, the applicant has failed to demonstrate to this court that he was prevented by any sufficient cause from attending the hearing as he was served but refused the service.

This court is very aware that the right to be heard encompasses the proper service of summons as underscored by this court in the case of **Tanalec Limited v Jackson Basu**, Labour Revision No.124 of 2018 which said:

"Suffice to say that it is common ground that service of summons is crucial on the procedure of hearing of cases as it informs a party his right to be heard and accords him the opportunity to be heard".

In the present application, I am convinced that the applicant was accorded an opportunity to be heard before the matter proceeded *ex parte* against him but willingly decided to forsake his right to be heard by refusing to accept the service of summons.

Based on the foregoing this application being devoid of merit is hereby accordingly dismissed with costs.

It is so ordered.

DATED at **TANGA** this 19th day of December 2023

H. P. NDESAMBURO

JUDGE