IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB-REGISTRY
[AT MOROGORO]

MISC. LAND APPEAL NO. 26661 OF 2023
(Arising from Misc. Land Application No. 88 of 2022 of the District Land and Housing Tribunal of Kilombero/Malinyi at Ifakara)

DR. SHAFII MSECHU..... APPELLANT

VERSUS

EPHRAIM JOSEPH..... RESPONDENT

JUDGEMENT

23/03/2024 & 03/04/2024

KINYAKA, J.:

In Misc. Land Application No. 88 of 2022 before the District Land and Housing Tribunal for Kilombero/Malinyi at Ifakara, hereinafter, "the Tribunal", the appellant applied for the indulgence of the Tribunal to grant an order for extension of time that would allow the appellant to prefer, before the Tribunal, an application to set aside *ex parte* judgement of the Tribunal dated 13th June 2019 (though erroneously dated 29th April 2019 in the judgement and decree of the Tribunal) in Land Application No. 81 of 2017. In Land Application No. 81 of 2017, the appellant was sued together with Loishiye S. Kimbele, the 2nd respondent therein who is neither a party to the present appeal nor the Misc. Land Application No. 88 of 2022.

The appellant's application for extension of time was predicated on his unawareness of the proceedings in Land Application No. 81 of 2017 culminating to the Tribunal's *ex parte* hearing order dated 3rd May 2019 and subsequently, an *ex parte* judgement delivered on 13th June 2019. According to the appellant, he became aware of the decision of the Tribunal upon his advocate's perusal of the Tribunal's file in Land Application No. 81 of 2017. The appellant decided to peruse the Tribunal's file after he was informed of the existence of the decision of Tribunal against him upon the arrest of his farm caretaker by the police for trespass of the disputed land, immediately after the respondent's execution of the decree of the Tribunal in Land Application No. 81 of 2017.

At the Tribunal, the respondent conceded that the Land Application No. 81 of 2017 was heard *ex parte*, but after the appellant was duly served with summons by publication effected in the Mwananchi Newspaper dated 7th May 2018.

Upon hearing both sides, the Tribunal dismissed the appellant's application for his inordinate delay of three years from 29th April 2019 (though the correct date is 13th June 2019), the date of *ex parte* judgement of the Tribunal to 17th June 2022, when the appellant filed Misc. Land Application

No. 88 of 2022, despite being duly served with summons by publication. The Tribunal dismissed the application on the basis that the execution had already been carried out, and that there should be an end to litigation. Aggrieved, the appellant preferred an appeal against the decision of the Tribunal on two grounds, namely:

1. That the trial tribunal erred in fact and law to hold that the appellant failed to provide sufficient reasons for his delay; and
2. That the trial tribunal erred in fact and law to hold that the delay of the appellant was inordinate delay.

At the hearing of the appeal, both parties were represented by learned advocates. While the appellant enjoyed the services of Mr. Switbert Rwegasira, learned advocate, the respondent enjoyed the services of Mr. Bageni Elijah, learned Advocate. The appeal was canvassed in writing. Both parties complied with the schedule set for filing their respective submissions. Mr. Rwegasira, learned advocate for the appellant argued the two grounds of appeal together. He referred to the decision of the Court of Appeal in the case of **Lyamuya Construction Company Limited v. The Board of Registered Trustees of Youngwomen's Christian Association of Tanzania, Civil Application No. 2 of 2010**, which set out the conditions

to be considered by the court in granting extension of time which include, the applicant's accounting for all the period of delay; the delay should not be inordinate; the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and if there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

Mr. Rwegasira contended that the appellant advanced reasons for delay which include his being unaware of the existence of Land Application No. 81 of 2017. He contended further that the appellant was diligent and had accounted for the period of delay from 26th May 2022 when he became aware of the dispute to 17th June 2022 when he filed the application for extension of time, upon his Counsel's realization of the existence of the *ex parte* judgment against the appellant in Land Application No. 81 of 2017. He contended that the Counsel became aware after he perused the records of the respective file *vide* the counsel's *vide* his letter dated 13th June 2022.

Regarding illegality, Mr. Rwegasira submitted that the respondent did not take necessary steps to serve summons upon the appellant and did not comply with Order V Rule 16 of the Civil Procedure Code, Cap. 33 R.E. 2019,

hereinafter, "the CPC 2019". He contended that the appellant was available and never kept away for the purposes of avoiding service that would lead to service by publication. He cited the case of **Kaiza Katamba Mwalugaja v. Obby Sikuanguka Mwampaja & Another (Civil Appeal No. 7 of 2022) 2022 TZHC 13554 (6 September 2022)** on page 10 where it was held that for the trial judge or magistrate to be satisfied that the defendant is keeping out of the way for the purpose of avoiding service, the trial court must be addressed of all attempts made to serve the defendant, it must be made aware of the record of attempted personal service by process server, there must be material proof and explanation that the defendant avoided or refused to accept the service, and the court's findings must well feature in the records of proceedings.

He submitted that the procedure for service of summons was not complied with by the respondent as required under Regulation 6(3) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003, hereinafter, "the Regulations", and Order V Rule 10 of the CPC 2019 which require service of summons in cases involving immovable property to be made to any agent of the defendant in charge of the property in case service cannot be made to the defendant in person. He contended

that service could be made to Sadiki Singahela, the one who was in charge of the disputed land who was then arrested by the police on 26th May 2017. He argued, the court's resort to substituted service was issued without complying with the requirement of the law and in violation of the principles of natural justice on the right to be heard. He contended that the respondent failed to establish how, when, where and why the ordinary service of summons failed, and that no affidavit was sworn by the court process server to prove why he failed to effect service to the appellant. He submitted that the only affidavit sworn in the suit was in respect of Loishiye S. Kimbele, the second respondent but not the appellant. He contended that the appellant was not notified of the date that the *ex parte* judgement was scheduled contrary to the decision in **Cosmas Construction Company Ltd v. Arrow Garments Ltd,** and **Chausiku Athumani v. Atuganile Mwaitege, Civil Appeal No. 122 of 2007**. He concluded by arguing that the violations constitute to illegality relying on the decision of the Court of Appeal in the case of **Tanzania Breweries Ltd v. Edson Dhobe & 19 Others, Misc. Application No. 96 of 2000** (unreported). He prayed for the appeal to be allowed with costs.

Opposing the appeal, the respondent submitted that the appellant did not dispute that service was effected upon him by publication in Mwananchi Newspaper. He contended that substituted service in terms of Order V Rule 20(2) of the Civil Procedure Code is as effective as made on the defendant personally referring to the decision of the High Court in the case of **Lekam Investment Co. Ltd v. The Registered Trustees of Al-Juma Mosque and 4 Others, Civil Revision No. 27 of 2019** which held that it is a well settled position that once summons is published in a newspaper having wide circulation, the respondent cannot be heard to complain that he was not aware of such publication and it is immaterial whether the respondent does subscribe or read the newspaper or otherwise.

Regarding the appellant's argument that there was no proof of failure of service by ordinary means, Mr. Elijah contended that not only the argument was neither posed in the affidavit nor argued during hearing, but also the publication was resorted after ordinary means of service had failed. He argued further that although it was not disclosed in the affidavit, if the appellant's caretaker was present in the disputed land since the inception of the dispute, it means that he was aware of what was going on the disputed

land and so was the appellant. He argued that the complaint on illegality was an afterthought as service was properly effected.

He contended that the appellant's delay was inordinate and he failed to account for each day of delay of 1,153 days. He added that the appellant's claim that he became aware of the decision of the Tribunal after his caretaker was arrested on 26th May 2022 was untrue. That notwithstanding, Mr. Elijah argued, the appellant failed to explain the delay of 21 days from 26th May 2022 up to 17th June 2022 when he lodged the application for extension of time. He prayed for dismissal of the appeal with costs.

In rejoinder, Mr. Rwegasira submitted that one cannot interpret or rely on Order V Rule 16(2) of the CPC 2019 and disregard the generality of the whole Rule. He contended that the Tribunal should have been satisfied that the appellant was avoiding service before issuing an order for substituted service. He argued that the substituted service was ineffectual reiterating the case of **Kaiza Katamba Mwalugaja** (supra) and Regulation 6(3) of the Regulations. He argued that the case of **Lekam Investment Co. Ltd** (supra) is distinguishable and cannot apply in the present case where there were procedural irregularities resulting in the substituted service.

He submitted that the appellant's complaint was taken before the Tribunal in paragraph 5 of the affidavit that the Tribunal relied on the process server words and issued substituted service while there was no proof that service by ordinary means was not fruitful. He argued that the order of substituted service was made without adhering to the requirements of the law and in violation of the principles of natural justice reiterating the decision in **Tanzania Breweries Ltd** (supra).

He reiterated that the appellant was diligent and had accounted for each day of delay from when he became aware of the *ex parte* judgement. He argued that there was no negligence, or sloppiness on part of the appellant in preferring the application for extension of time. He reiterated his prayer for the appeal to be allowed with costs.

At this juncture, my duty is to assess and make a finding as to whether the Tribunal erred in fact and law to dismiss the appellant's Misc. Land Application No. 88 of 2022 for lack of merit. In determining the present appeal, I have not only read the proceedings in Misc. Land Application No. 88 of 2022 which is the subject of the present appeal, but also the proceedings in Land Application No. 81 of 2017. This was necessary to ascertain whether there were such procedural illegalities complained of.

At the preliminary, I wish to address the respondent's contention that there were matters raised by appellant at the stage of appeal which were not raised in his affidavit and proceedings in Misc. Land Application No. 88 of 2022. These include that service should have been effected to the appellant's caretaker, one Sadick Singahela, and that there were no proof of service by ordinary means. I have noted that paragraphs 2, 10 and 11 of the affidavit in support of the application at the Tribunal demonstrate the appellant's pleadings in that respects. I find the respondent's arguments a misconception.

I agree with the holding of the Tribunal that the appellant's delay of three years from 13th June 2019 when the *ex parte* judgement of the Tribunal was delivered, to 17th June 2022 when the appellant filed Misc. Land Application No. 88 of 2022, was inordinate. However, the appellant contended that the delay was occasioned by him being unaware of the proceedings in Land Application No. 81 of 2017. The fact that the appellant never participated in the proceedings in Land Application No. 88 of 2017 was never disputed by the respondent. What the respondent contended is that the appellant was aware of the proceedings as he was duly served by publication in Mwananchi newspaper of 7th May 2018.

I should state at the onset that the appellant managed to explain the delay of 21 days from 26th May 2022 when he was informed of the arrest of his caretaker, to 17th June 2022 when he filed Misc. Land Application No. 88 of 2022. A close look on paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 of the affidavit demonstrate the steps taken by the appellant upon being informed of the existence of the land dispute and the decision of the Tribunal. I find the appellant to have acted diligently within 21 days to conduct perusal and file Misc. Application No. 88 of 2022.

I now turn to determine the appellant's claim that he was unaware of the proceedings in Land Application No. 81 of 2021, in the existence of publication of summons in Mwananchi Newspaper made on 7th May 2018. The contested aspect led me to carefully scrutinize the proceedings in Land Application No. 81 of 2017 to satisfy myself of the circumstances leading to the order of publication made by the Tribunal on 30th April 2018.

The record of the Tribunal in Land Application No. 81 of 2017 reveal that the case was called for the first time on 10th November 2017 for mention in the presence of the respondent and in absence of the appellant and Loishiye S. Kimbele. On 19th January 2018, the suit was called for mention and both parties were absent. On 30th April 2018, the then respondent's Counsel

prayed for substituted service on the reasons that the appellant was not traceable and Loishiye was avoiding service. The Tribunal granted the prayer for publication. The record of the Tribunal does not indicate if the Tribunal received any proof that the appellant could not be found and Loishiye was avoiding service as contended by the then Counsel for the respondents.

Thereafter, the suit was scheduled for mention on 10th August 2018 and 7th September 2018 in the presence of the respondent, and on 26th November 2018 and 15th February 2019 in absence of both parties. The matter was then called for mention on 3rd May 2019 when the respondent's Counsel applied for *ex parte* hearing, arguing that the appellant and Loishiye neither appeared nor filed their defence. The Tribunal granted the order and scheduled hearing of the suit *ex parte* on 8th May 2019. The proceedings does not reveal that summons were issued to the appellant and Loishiye notifying them of date set for hearing of the suit *ex parte*.

The *ex parte* hearing of the suit was duly conducted on 11th June 2019 by hearing only one witness from the prosecution, the respondent herein. On the same day, the prosecution case was closed. Opinions of members and judgement were scheduled to be read on 13th June 2019, two days later. The opinions of members and the judgement were accordingly read on 13th

June 2019 the date when the opinion of members were read. The proceedings does not reveal that the Tribunal issued to the appellant and Loishiye, summons to appear 13th June 2019 when the suit was scheduled for judgement.

I find the Tribunal to have abrogated several mandatory procedural requirements, culminating to the appellant's denial of his right to participate in the proceedings in Land Application No. 81 of 2022. First and foremost is the Tribunal's issuance of an order for publication without being satisfied that the preconditions for issuance of such an order were complied with by the respondent.

My reading of the record reveal that there were no summons issued to the appellant notifying him of the suit that would require him to enter appearance or file his defence. Further, there was no proof of the court process server that the appellant could not be found as alleged by the then Counsel for the respondent. The only summons found in the record was that issued to Loishiye.

The only affidavit of the court process server found on record was that of Said R. Sange attached to the summons issued to Loishiye contending that *'nilipeleka wito wa kuitwa shaurini kwa Loishiye S. Kimbele sijampata'*

meaning that he went to serve the summons but Loishiye was not found. The affidavit was not dated by the deponent. It did not specify where exactly he sent the summons that he could not find the said Loishiye. On blatant breach of the procedural requirement, what was contended in the affidavit of the court process server was contrary to the submission of the then counsel for the respondent that it was the appellant who was not found and that Loishiye avoided service.

I am aware that the summons that were issued to both the appellant and Loishiye and the affidavits of the court process server were in respect of the application for execution of the *ex parte* decree No. 115 of 2021. On that basis, the same cannot cure the procedural mishaps committed by the Tribunal in its failure to notify the appellant of the existence of Land Application No. 81 of 2017.

I agree with Mr. Rwegasira that in the circumstance of the dispute relating to immovable property, even if the appellant was not found, which was not the case, the respondent ought to have served summons upon Sadick Singahela who was in charge of the respondent's land property which was in dispute. This is in accordance with the then Order V Rule 14 of the Civil

Procedure Code, Cap. 33 R.E. 2002, herein after "the CPC R.E. 2002" which was applicable at the time of pendency of Land Application No. 81 of 2017. Again, even by assuming that the appellant was not found, the Tribunal should not have invoked its power to issue an order for publication in the circumstance where the respondent pleaded in paragraph 6(A) IV of his application that the appellant was developing the disputed land. In my settled opinion, the Tribunal could have ordered the respondent to serve the appellant on the dispute land or at the local government offices where the disputed land was located considering the appellant was still in possession of the same. That notwithstanding, the proceedings does not reveal any effort exerted by the respondent in serving summons upon the appellant prior to the issuance of an order for publication.

In essence, the law provides for the procedure of effecting service of summons to cover instances where the defendant is not found. Regulation 9 of the Regulations applicable to the dispute provide:

> *'Where the Tribunal is satisfied that it is not possible to effect personal service of a summons or a notice of the date of hearing on parties it may order services to be effected by-*
>
> *(a) Affixing a copy of the summons or the notice of hearing in a conspicuous place:*

(i) on or a near as may be to the land where possible; and

(ii) where the land is village land, at the office of the village council or other public place within the village; or

(iii) where the land is general land, at the office of the local authority having jurisdiction in the area where the land is located; and

(b) registered mail;

(c) publishing a copy in one or more newspapers locally circulating in the area.'

It is clear that the requirements in sub-paragraphs (a), (b) and (c) of Rule 9 above are cumulative and not independent. The paragraphs of Rule 9 use the word 'and' not 'or' which means that the conditions must be complied with in the manner they are arranged. One cannot resort to publication of summons before complying with affixation of copy of a summons in a conspicuous place to the land, or send summons to the village council or local authority office.

Regulation 9 of the Regulations clearly provides for publication as a last resort. In the present matter, the Tribunal resorted to publication without being satisfied with the respondent's compliance with the prerequisite

procedures of service summons upon the appellant and Loishiye, contrary to law.

In my considered position, had the Tribunal been impartial, it would not have issued an order for publication in the circumstances. As such, the Tribunal committed fatal procedural irregularities in ordering publication without issuance of summons to the appellant and for its noncompliance with the conditions precedent to the issuance of an order of publication.

I also agree with Mr. Rwegasira that the Tribunal had a duty to notify the appellant as to when the *ex parte* judgement was scheduled to be delivered. In **Cosmas Construction Company Ltd v. Arrow Garments Ltd** (1992) TLR 127, due to the applicant's refusal to accept service and failure to appear throughout the proceedings, the matter proceed *ex parte* against her and the *ex parte* judgement was delivered in her absence without being notified of the same. The respondent's Counsel argued that the High Court had no obligation to notify the applicant of the date when judgment was going to be delivered as the matter was heard *ex parte*. The Court of Appeal held:-

> *"With respect, that view cannot be correct. A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte, but that is the farthest extent he suffers. Although the matter is therefore*

considered without any input by him he is entitled to know the final outcome. He has to be told when the judgment is delivered so that he may, if he wishes, attend to take it as certain consequences may follow. In the present matter the applicant was not present and there is no proof that he was served with a copy of the Notice of Judgment dated 7th October 1991."

The circumstance of the above case is similar to the present matter. The record of the Tribunal does not reveal that the appellant and Loishiye were notified of the date of *ex parte* judgement intended to be delivered on 13th June 2019. The Tribunal committed illegality for its failure to notify the appellant and Loishiye of the date when the *ex parte* judgement was scheduled to be delivered.

I should point out that it was erroneous for Mr. Rwegasira to cite Rule 16 of Order V of the Civil Procedure Code, Cap. 33 R.E. 2019 relating to substituted service which was yet to be enacted at the time of pendency of the Application No. 81 of 2017. The proper rule should have been Rule 20 of Order V of the CPC R.E 2002, whose provisions are similar to those of Rule 16 of Order V of the Civil Procedure Code, Cap. 33 R.E. 2019.

Mr. Elijah, learned Counsel for the respondent heavily relied on the provisions of Order V Rule 20(2) of the CPC R.E. 2002 to argue that the publication in the Mwananchi Newspaper was effectual as if the appellant

and Loishiye were served with summons personally. I do not agree with him on that observation. The reason for my disinclination is that the publication was not preceded by a proof that the respondent or Loishiye kept out of the way for the purpose of avoiding service or service could not be effected in the ordinary way. Order V Rule 20 provides:-

> *20 (1) Where the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that, for any other reason, the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court thinks fit.*
>
> *(2) Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.*
>
> *(3) N/A*

Applying the above provision to the present case, I hold that there was no summons that was issued to appellant leave alone the affidavit of the court process server to prove the counsel for the respondent's allegation that he was nowhere to be found. Further, Order V Rule 20(1) of the CPC R.E. 2002

require in cases where the defendant avoids summons, a copy of the summons should be affixed in some conspicuous place in the court-house and conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain or in such manner as the court thinks fit. My interpretation of the last words 'or in such manner as the court thinks fit' include publication. Again, like Regulation 9 of the Regulations, publication seems to be the last resort.

I therefore find that Oder V Rule 20(2) is inapplicable in the circumstance of the present matter where ordinary summons were not issued to the appellant at all prior to its publication. It follows that the case of **Lekam Investment Co. Ltd** (supra) cited the respondent is distinguishable from the circumstances and illegalities committed by the Tribunal in Land Application No. 81 of 2017. From my above observations, I agree with the appellant that there were procedural illegalities committed by the Tribunal which occasioned the denial of the right to be heard to the appellant.

As illegality constitute a good ground for extension of time as held in the cases of **Lyamuya Construction Company Limited** (supra) and **Tanzania Breweries Ltd** (supra), I hold that the appellant demonstrated sufficient cause warranting an order for extension of time.

Consequently, the appeal is allowed. The appellant is given thirty (30) days reckoned from today to file his application to set aside *ex parte* judgement before the Tribunal. I make no order as to costs.

It is so ordered.

DATED at MOROGORO this 03rd day of April 2024.

H. A. KINYAKA

JUDGE

03/04/2024

Court:

Judgment delivered by F.Y Mbelwa, Deputy Registrar, in open court, this 3rd April, 2024 in the presence of Appellant through Advocate and in the absence of the Respondent.

F.Y MBELWA

Deputy Registrar

3/4/2024

Right of Appeal is fully explained.

SGD: F.Y MBELWA

Deputy Registrar

3/4/2024