IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 20 OF 2022

(Originated from Misc. Land Application No. 154 of 2021 former Land Case No. 28 of 2019 of the District Land and Housing Tribunal for Rukwa at Sumbwanga)

KALUMENDO NCHEMBA ..... APPELLANT

VERSUS

KAWILA VILLAGE COUNCIL ..... RESPONDENT

JUDGMENT

28th February & 08th April, 2024

MRISHA, J.

This is an appeal against the decision of District Land and Housing Tribunal of Rukwa at Sumbawanga (the trial tribunal) dismissed for want of merit in Misc. Land Application No. 154 of 2021, the application preferred by the herein applicant seeking an order to set aside ex-parte Judgment of the decision of the trial tribunal in Land Case No. 38 of 2019 which proceeded ex-parte. The appellant implored me to consider the four grounds of appeal contained in his memorandum of appeal and allow his appeal with costs.

Having being aggrieved by the above decision of the trial tribunal, the appellant henceforth filed the instant appeal with the following grounds: -

1. *The Honorable Chairperson erred in law and facts in dismissing the applicant's application for setting aside the dismissal judgment dated on 06/07/2022 in Application No. 154/2021 out of time while the applicant adduced sufficient reasons of his delay to file the said application. A copy of judgment is annexed hereto.*
2. *The trial tribunal erred in law and fact by not considering that there was no formal proof of service of summons to me.*
3. *That, the trial tribunal erred in fact by not considering that the summons was not published in circulating newspapers.*
4. *The trial tribunal erred in law and fact by not considering that the court process server did not swear on issuance of summons to me appellant.*

The hearing of the present appeal was heard by way of written submissions subject to the scheduled order of the court which was well complied with by the parties. As for legal representation, the appellant enjoyed the service of Mr. James Lubus, learned advocate whilst the respondent enjoyed the service of Mr. Deogratius Phailod Sanga, learned advocate. In his submission the appellant's counsel merged grounds two,

three and four of appeal and dealt with together; he termed those three mentioned grounds of appeal as related to each other.

In his preamble, the learned counsel for the appellant reminded this court that the Right to appeal is a constitutional right and that to prohibit a person's right to appeal is like to prohibit the right to be heard which infringes the principle of natural justice.

Commencing with the second, third and fourth grounds of appeal, Mr. Lubusi started his submission in chief by referring to page 2 of the impugned judgment in respect of Misc. Land Application No. 154 and argued that in serving summons there are procedures which must be complied with.

He submitted that once a summons is issued to the party, **one**, it is the duty of court process server to serve the summons; the reason behind is to avoid litigants to become enemies. **Two**, the court process server needs to prepare an affidavit and publish the same into a well circulated newspapers; one for Kiswahili and one for English. It was his argument that the procedure of serving summons was not complied with. He was of

the view that the trial Chairperson should have ordered the last adjournment for compliance.

To buttress his proposition, the learned counsel cited the cases of **Polycem Tanzania Limited v Jumanne Samnachilindi & 5 other,** Labour Revision No. 495 of 2019 and **Nyamguruma Enterprises Co. Ltd v Given Elias Sinyangwe,** Misc. Labour Revision No. 5 of 2022 (both unreported) in which the court emphasized that the matter was wrongly preceded ex-parte without sufficient proof of service. Thus, he prayed to this court to allow appeal and order hearing to proceed inter parties.

Again, he submitted that granting of application does not affect the rights of parties, whereas, if the right is of respondent it will remain to be respondent's right and if the right is rested to the appellant, it will continue to be the appellant's right, that is after been heard inter parte. He cemented that it is better that the parties be allowed to be heard inter parte than ex-parte.

In reply, the learned counsel for the respondent submitted that it is a trite law that for the ex-parte judgment to be set aside, the applicant must satisfy the court with two conditions; **one**, the summons was not dully

served and in alternative, **two**, he was prevented by a sufficient cause from appearance. He rightly cited case of **Lekam Investment Co. Ltd v The Registered Trustees of AL-Juma Mosque & 4 Others**, Civil Revision No. 27 of 2019 (unreported) in which the court emphasized that for an ex-parte judgment to be set aside, the applicant must satisfy the court that the summons was not dully served to him, or that he was prevented by sufficient cause from entering appearance.

He added by submitting that in the case at hand the appellant was duly and properly served with a summons in respect of Land Case No 28 of 2019; the summons was served twice by the respondent to the appellant via the Village Chairman of his locality, but denied to accept service. Indeed, he further argued that the trial tribunal took another step by ordering a substituted service against the appellant vide publication in the newspaper; he stressed that that proof was in the trial tribunal original file. Thus, he argued that the summons was dully served as per **Lekam Investment Co Ltd case** (supra), where the court held that:

> *"Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally"*

It was the argument of the learned counsel for the respondent that from the above position of the law, it is apparent that failure to enter appearance which consequently led the matter to proceed ex-parte was purely caused by the appellant and it is not true that he was not been served with summons or being prevented by any reasonable cause as alleged; hence, the appellant slept on his own right.

In regard to the modes of serving summons, Mr. Sanga maintained that the appellant was duly served with summons three times and the learned counsel went further to distinguish the two cases cited by the appellant's counsel i.e. **Polycem Tanzania Ltd** (supra) and **Nyanguruma Enterprises Co. Ltd** (supra) by submitting that in both cases summons were served by hand, but in absence of proof of service which is different to circumstance of the present case where summons was properly served and proofjl of service was brought back to the tribunal.

As if that was not enough, Mr Deogratius Sanga submitted that the appellant was being afforded a constitutional right of being heard, but he himself slept over and he also failed to establish any probable cause which prevented his appearance. In addition to that, the appellant pleaded that

he was prevented from entering appearance because of sickness, but failed to prove such facts.

The learned counsel further submitted that a ground of sickness may be used to warrant the tribunal to grant an application to set aside ex-parte judgment/decree or grant extension of time, but that is subject to proof. To cement his proposition, Mr. Sanga cited the case of **Mgabo Yusuph v Chamruho Yusuph,** Civil Appeal No. 22 of 2019 HCT (unreported), where the court held that:

> *"...sickness or illness becomes a ground for extension of time only when proved that indeed it is the sickness that caused the delay. Just mentioning it does not do."*

In applying the above principle to the present case, Mr. Deogratius Sanga argued that since the appellant failed to prove allegation that he was sick; that ground cannot be regarded by the tribunal or this court to allow this appeal.

In winding up his submission, Mr. Sanga submitted that despite having duty to prove two strict grounds enshrined in the case of **Lekam Investment Co. Ltd** (supra), the appellant failed to prove his allegations,

that summons was not dully served to him or that he was prevented from entering appearance because of his sickness. Based on the foregoing submissions, the respondent's counsel implored the court to dismiss the appeal for want of merits and uphold the decision of the trial tribunal in its entirely with costs.

Having gone through the above submissions together with the authorities referred thereto, the entire records of the trial tribunal and impugned judgment, I find it appropriate to find out whether the present appeal has merits.

Pursuant to Order IX, Rule 9 of the Civil Procedure Code, [Cap 33 R.E.2019] (the CPC) the remedy available to the defendant in a suit determined ex parte, is to apply to the court which passed the said order that he had sufficient reasons for his non-appearance and pray for the said order to be set aside. For easy of reference, Order IX, Rule 9 of the CPC provides that:

> *"In any case in which a decree is passed ex parte against a 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 on for hearing, *the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it think fit, and shall appoint a day for proceeding with the suit." [Emphasize is mine]*

The above provision sets a guiding principle on the procedure of setting aside an ex parte judgment and decree. I am aware that Order IX, Rule 13 of the CPC, was amended by GN No. 381 of 2019 by deleting the phrase "*the summons was not duly served or that*" appearing between the words "*that*" and "*he*" from the renumbered sub rule 1 of rule 9.

In my view, court shall consider only one condition that is when the defendant intends to set aside the ex parte judgment or decree on the ground that he was prevented by a sufficient cause from appearing before the court.

Back to the present appeal, the learned counsel for the appellant has strongly maintained his position that summons was not duly served and it

was not served by a process server, thus there was no proof of service. I find desirable to examine the records closely in this regard.

The learned chairperson was categorical that the appellant (applicant) was unable to attend to the tribunal because he was sick. Hence, she was of the view that ground has no merits. The records of Land Case No. 28 of 2019 reveal that the summons was served to the appellant twice, but he denied to receive it and he was never attending before the tribunal. Nor did he file his written statement of defence. Hence, it was the counsel's view that his claim that he was sick, is an afterthought.

From my examination of the records, the summons which is purported to have been issued through Land Case No 28 of 2019 was not attached to the present appeal. Despite the parties to the case mentioning it in their pleadings, none of them attached/annexed it with their pleadings. I would have expected the respondent to annex a newspaper used to publish the said summons, but that was not done by him. In my view, it will be difficult for this court to conclude, under such circumstances, that the summons was properly served to the appellant.

However, Order IX, Rule 9 of the CPC guides the court to consider if the party, like the appellant, was prevented by a sufficient cause from appearance especially when dealing with the application for setting aside ex parte judgment or decree. To my understand, if summons was not duly served to the party to the case, and that party was unable to appear in court, then it suffices to say that such person was prevented from attending in court.

Moreover, the ground of sickness may be used to warrant the court or tribunal in granting order of setting aside the ex parte judgment. Hence, I agree with Mr. Sanga that sickness or illness becomes a ground which may warrant the court to set aside ex parte judgment or decree only when it is proved that indeed it is the sickness which prevented the party from attending before the court.

That apart, it appears from the records that the appellant presented before a trial tribunal a letter from the Regional Commissioner's Office, Health Department, Sumbawanga, with Reference **No. GHS/R.40/13 VOL XIV/556** but not dated, with the following substance:

"TO WHOM IT MAY CONCERN

CONCERN MR. KALUMENDO NCHEMBA AGE 40 YEARS OLD

Above named Patient Mr. Kaluendo Nchemba Age 40 years old attended at Sumbawanga Regional Referral hospital with history of Painfully Lower Extremities for approximately 2 months ago and was admitted on 14/6/2019 with Diagnosis of "Rheumatoid Arthritis" with file number 40-36/2020 investigation was done and some Drugs given. And several times he was attended and treated up to 27 November 2020 now he's Improvement well.

(Sdg)
Medical Officer I/C
Sumbawanga Refferral Hospital"

Consequently, the trial tribunal denied the ground of sickness by declaring that claiming sickness is an afterthought because the appellant deliberately refused to attend to the tribunal and denied to file his defence. I have read the said letter and noticed that it does not state the seriousness of the appellant as a sick person. The document does not state that the appellant stayed in hospital which issued it for any number of days. In actual sense, what the letter states is simply the fact that the appellant was admitted on 14/6/2019 and diagnosed with Rheumatoid Arthritis, he was examined, given drugs and was on several times attended and treated up to 27th November, 2020.

From the above information, the trial tribunal could have scanned any sufficient reasons which prevented the appellant from attending before the tribunal, had there been any; since no sufficient reasons were provided the tribunal was constrained to find that the appellant failed to provide some good cause for his none appearance. Because of that this court cannot therefore interfere with the decision of the trial tribunal.

In view of the above discussion, I finally find no merit in the present appeal as it is obvious that the appellant failed to show some good cause for the ex parte judgment to be set aside. The appeal is thus hereby dismissed with costs.

It is so ordered.

A.A. MRISHA
JUDGE
08.04.2024

DATED at **SUMBAWANGA** on this 8th day of April, 2024.

A.A. MRISHA
JUDGE
08.04.2024