

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA  
MISC. LAND CASE APPLICATION NO. 16 OF 2008**

**JONAS DANIEL .....APPELLANT  
VERSUS  
VENANCE MICHAEL S/O CHARLES.....RESPONDENT**

(From the District land and Housing Tribunal in land Case Application No. 57 of 2005)

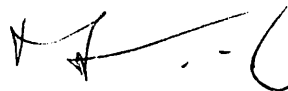
**RULING**

19.08.2010 & 21.10.2010

**NYANGARIKA, J.**

On 22.8.2005 the respondent filed an application against the applicant before District Land and Housing Tribunal for Mwana at Mwanza as land Application No. 157 of 2005 seeking for the following reliefs:

- (i) A declaration that the respondent is the lawful owner of plot No. 5 B1 "B" Bwiru; and a house thereon
- (ii) Respondent be ordered to demolish the portion of his building on Plot No. 5
- (iii) Costs
- (iv) Other reliefs



The record show that on **1.10.2005** the applicant was served with a summons/Notice which reads:

*"To: Jonas Daniel.*

*Take notice that the above matter is coming for mention/hearing on **22<sup>nd</sup> day of September, 2005** before the Hon. A.M. Kapinga, chairman of the Tribunal. You are hereby commanded to appear at 8.30 am. When the case will be mentioned at CCM Mkoa Building 4<sup>th</sup> Floor Room 95.*

*Given under my hand and the seal of this Tribunal this 9<sup>th</sup> of September, 2005".*

*Sgd:*

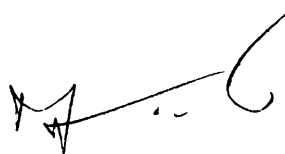
*Chairman*

The Coram on the typed record show also that on 26.10.2005, the applicant appeared in the Tribunal and the following orders were given:-

**Order:** (i) Mention on 07/11/2005

(ii) WSD to be filed on or before 7.11.2005.

Sgd.



A: Kapinga  
Chairperson  
22/9/2005

In other words, the applicant was supposed to file his WSD within a period of 12 clear days (ie from 26.10.2005 – 7.11.2005).

The handwritten record of the Tribunal show that on 7.11.2005 when the matter was called for mention, the hand written proceedings were recorded as follows:

7.11.2005

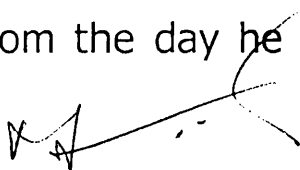
A. Kapinga.....

For Applicant.....

For Respondent.....

**Mr. Outa – Advocate:** Holding brief for Mr. Kahangwa – Advocate who is for the applicant. We haven't received the respondent's reply. We pray for exparte judgment.

**Tribunal:** The respondent didn't filed WSD in time to date, it is about 38 days from the day he received summons on



1.10.2005. No reasons have been raised for such misconduct.

**Order:** - Exparte Judgment on 28/11/2005.

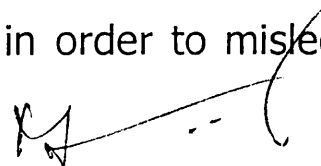
Sgd.

A. Kapinga – Chairperson

7/11/2005

Therefore on 7/11/2005 when the Tribunal called the matter for mention and made an order for exparte judgment but the record is silent on the appearance of the parties despite showing the appearance of Mr. Outa – Advocate, who is recorded as praying for an exparte judgment. Let us pose here, for a moment and I will come over this order later on in this ruling. Suffice to say that efforts by the applicant to set-aside the exparte judgment, to apply for an extention of time to file WSD on 22.9.2005, the date which by then has already passed proved futile.

A close scrutiny of the said summon/notice discloses that although it was signed by Tribunal on 9.9.2005 so that the applicant can appear on 22.9.2005, it has deliberately not prior served in time as required in order to misled the

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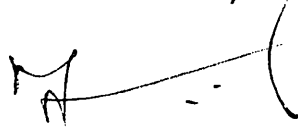
applicant. Instead the summon/notice was served on 1.10.2005 when the date of appearing before the Tribunal for mention had already passed. It is obviously from the foregoing that the process server intended or aimed to served the applicant with an expired summon/notice.

Further, the summon/notice, were not for filing the WSD but for appearance before Tribunal on 22.9.2005, a date which has already passed.

Moreover, it may be argued further that when the applicant appeared in the Tribunal on 26.10.2005, he was unjustified and deliberately ordered to file his WSD within 12 days (ie 26.10.2005 – 7.11.2005) instead of the 21 statutory days as required by the Law.

In my view, it can also be well argued in the same vein that on 7.11.2005 when the Exparte order was made for delivery of the exparte judgment, that was a date the matter was fixed for mention and not for hearing.

Upon looking on the way the summons were served and how the exparte judgment was obtained, one can

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conclusively at the face of record say that the proceeding were tainted with fraud or that the suit was conducted under the table and behind the door.

Therefore, it may be said that on the face of records there are some elements of fraud on records which needs the attention of this court as fraud vitiates every thing (see the ***case of Othman Kamle matata versus Gray Titus Matata [1981] TLR 23 at Page 28***). This court cannot close its eyes on an illegality apparently on the Tribunal face of record which is before it.

In this application, the applicant is seeking leave to appeal out of time under the provision of ***section 14(1) of the Law of Limitation Act (Cap. 89 RE 2002)***.

Both parties were unrepresented during the hearing of the application.

The main objection raised is that the application does not show the decision on which the appeal is sought.

A handwritten signature in black ink, appearing to be 'K. A. -t', is located in the lower right quadrant of the page.

In respond the applicant informed this court that he intends to appeal against the exparte judgment. He said that although he didn't apply to be supplied with a copy of the exparte judgment for appeal purposes, he now intends to appeal out of time to this court as he is ignorance on the content of the exparte judgment. Further he said that he was sick and did not know the procedure to assert his right throughout the trial before the Tribunal.

I entirely agree with the decision of the Tribunal for reasons given in dismissing the various applications filed before it in, challenging the exparte orders, Exparte judgment and for filing WSD out of time. But currently the record of the Tribunal is before me and I am disturbed on the mode the Summon/Notice were purportedly served to the applicant on 1.10.2005 for his appearance in the Tribunal.

This court, (Mkwawa, J.) in the ***case of Ramadhani Nyoni versus M/S Haule & Co. Advocates [1996] TLR 71(HC)*** held, interalia, that "in case where a layman, unaware of the process of machinery of justice, tries to get relief before the court, procedure rules should not be used

to defeat justice and the irregularities in an Affidavit are curable in terms of **section 95 of CPC.**

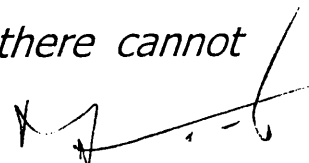
I am also aware that ignorance of procedure is also a sufficient reason as held in the case of ***Mbogo versus Shah [1968] EA 93.***

But in the instant application there are no reasons which convincingly explain away the delay to institute an appeal within the prescribed period. I therefore dismiss the application for lack of sufficient reasons on delay.

But the matter does not end here. I will explain.

In the case of ***Transport Equipment Ltd versus D.P. Valambia [1995] TLR 161 (CA)*** it was held, ***Interalia***, that

*"The appellate jurisdiction and the revisional jurisdiction of this court are, in most cases mutually exclusive. If there is a right of appeal then that has to be pursued and, except for sufficient reasons amounting to exceptional circumstances, there cannot*





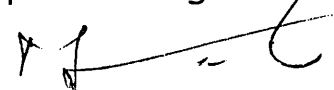
*be resort to the revisional jurisdiction of this court. The fact that a person through his own fault has forfeited that right cannot in our view be automatic right of appeal, then he can use the revision jurisdiction after he has sought leave but has been refused. However, the court may, suo moto, embark on revision whether or not the right of appeal exists or whether or not it has been exercised in the first instance”*

In the same vein, this court, even if no appeal or revision has been initiated by either of the parties, and the record is before it where it appear upon examination of the record that there is concealing of very important information which has resulted into material flaws resulting into injustice, this court may if it thinks fit invoke its powers of revision suo moto. (see ***Mwanahawa Muya versus Mwanaidi maro [1992] TLR 78(CA)*** at page 82.

The powers of this court of supervision and revision can be exercised suo moto as provided for under ***section 43 of the Land Disputes Courts Act (Cap. 216 RE 2002)***.

It is obviously from the record of the Tribunal that the applicant appeared before the Tribunal on 26.10.2005 when the matter was fixed for mention. On 7/11/2005 he was absent when matter proceeded exparte. Although the applicant was not present on 7.11.2005, and disabled himself from participating in the proceeding which were consequently exparte, he was entitled as of his right to be told when the exparte judgment is going to be delivered, so that if he so wished, could have attended to take it as certain consequences that may follow (see ***Cosmas Constructions Co. Ltd versus Arrow Garments Ltd [1992] 127(CA)***).

The record show that the respondent was suing for declatory orders but no evidence was adduced by him before an Exparte Judgment was entered. There were only pleadings but pleadings are not evidence and cannot be the basis of the decision except where they amount to admissions. The respondent did not prove the case. Therefore I am of the view that the irregularity before the Tribunal went to the root of the entire proceedings. In



effect, there was no trial all. (see ***Rashid Nkungu versus Ally Mohamed [1984] TLR 46(HC)***).

Worse still, on 7.11.2005 when the Tribunal was moved by the respondent counsel to make an order of delivery an exparte judgment the matter was only fixed for mention and not for hearing.

In order for the Tribunal to be moved to enter an exparte judgment, the suit must in the first place be fixed for hearing and not for mention.

I must also say that the respondent did not prove his case as required.

Reverting to the earlier issue of service of summons, the summons purported to have been served to the applicant were not only tainted with fraud but there was uncertainty of service.;

In the case of ***T.M. Sanga versus Shadrudin Ali Bhai & Others [1977] CRT 51*** it was held, interalia, that uncertainty of service of summons is sufficient reason for

allowing an application to set aside an ex parte judgment and decree thereof.

As already noted, the summons/notice purported to have been served to the applicant on 1.10.2005 when the date for mention on 22.9.2005 has already passed, clearly manifest some elements of fraud.

In summary, the record of the Tribunal reveals that there is no proof of service as fraud vitiates every thing.

In the result and in exercise of my powers under **section 43** of the **Land disputes courts Act (Cap. 216 RE 2003)**, I nullify the entire proceedings of the Tribunal, quash and set aside the ex parte judgment and other subsequent orders issued thereof.

The Land case shall commence de-novo before another different chairperson sitting with different set of competent assessors in accordance with the law.

For avoidance of doubt, the applicant shall be properly and correctly served with summons by the Tribunal and

given a statutory period of filing his defence. Each party shall bear its own costs in this matter as the tribunal is part to blame for the mistakes.

Order accordingly.



*H.M. Nyangarika*

JUDGE

At Mwanza

21<sup>st</sup> October, 2010

**Date** : 21<sup>TH</sup> October, 2010  
**Coram** : Hon. Nyangarika, J.  
**Applicant:** Present in person  
**Respondent:** Present in person  
**B/C** : Rose.

### **ORDER**

Ruling delivered today in the presence of the applicant and respondent in person.

Right, produce and time of appeal full explained.

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*K.M. Nyangarika*

JUDGE

**At Mwanza**

**21<sup>st</sup> October, 2010**