IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

MWANZA

MISCELLANEOUS LAND CASE APPEAL NO. 12 OF 2008

(From the Decision of the District Land and Housing Tribunal of Mwanza District at Mwanza in Land Case Appeal No. 64 of 2007 and Original Ward Tribunal of Bwisya Ward in Application No. 2 of 2007)

MKOROTO MTAKA .... APPELLANT

VERSUS

MABULA MATUTA .... 1ST RESPONDENTS

SILAS MALANDARA .... 2ND RESPONDENTS

JUDGMENT

MWAMBEGELE, J.:

This is an appeal from the decision of the District Land and Housing Tribunal of Mwanza at Mwanza (A. Kapinga, Chairperson) on a Judgment and decree dated 14.09.2007 in Land Appeal No. 64 of 2007. The appeal stemmed from the decision of the Ward Tribunal of Bwisya in Ukerewe District in Case No. 2 of 2007 in which Mkoroto Mtaka; the Appellant had sued Mabula Matuta; first

appellant and Silas Malandara; second Appellant together with one Maelo Machumba (who did not appeal) for trespass into the disputed plot of land. The Appellant claims that he was allocated the disputed plot of land in 1974 during the Villagisation Programme launched by the by Government of the United Republic of Tanzania. He allegedly built two grass thatched houses on the disputed plot and used to live there with his family and buried his son in there. In 1987 he was convicted of a crime and sentenced to serve a term of seven years in jail. As his health was not well when he was released from jail in 1994, he went to attend traditional medical treatment to a traditional practitioner at Mkolani. He went to the disputed plot in 20006. The two houses were not there. Instead, there were several poles belonging to the second Respondent. He (the second Respondent) was building a church on the disputed plot. The Ward Tribunal decided in his favour. He was not aware that the Respondents had appealed. He learnt of the appeal when following up his decree only to be told that there was an appeal against him in the District Land and Housing Tribunal which proceeded *ex parte* and judgment delivered against him. That is why he preferred this appeal.

The First Respondent submitted that he did not encroach into the appellant's land. That, he bought the land in 1999 from one Masinde Murunde, who the Village government had assertedly confirmed the land belonged to him. He further submitted that the matter proceeded *ex parte* in the appellate Tribunal as the Appellant was being served through the Hamlet Chairman but he never entered any appearance.

The Second Respondent claimed that he bought a big parcel of land from one Sadiki Mabruki in the presence of the Hamlet Chairman who was also chairman of the Local Government. That in 2003 the Village Government came to survey and allocated the land to him. He however had forgotten the date on which he bought the land from Sadiki Mabruki. He went on to submit that the appeal proceeded *ex parte* in the appellate Tribunal as the Appellant failed to appear after several services through the Village Executive Officer. That they once published in the Msanii Africa Newspaper after the order of the appellate Tribunal but the Appellant did not appear as well.

I will argue the first ground of appeal only as I think it sufficiently disposes of this appeal. Let me start with the service of summons through the Village or

Hamlet Chairman or through the Village Executive Officer. It is the duty of the Court, through the Court Process Sever, to serve the parties to any suit. The practice of delegating his (the Court Process Server's) duties to the Village or Hamlet Chairman or Village Executive Officer has been working well in some instances but the same amounts to abrogation of the duties of the Process Server. To say the least, this kind of delegation amounts to abrogation of duties and is not recognised at law. The reason why we insist that the process server should not delegate his duties was explained by my brother Utamwa, J. in Land Appeal No 33 of 2008 Mwanza (still pending in court) between ***Bahati Muyenjwa*** and ***Nyawaye Masanga*** in an order dated 2.6.2011. his Lordship stated:

> *"... the VEO can assist in the identiflcation of the parties to the process server who has to effect the service of summons himself. This is for the sake of avoiding misinformation to the court because the VEO has no ... duty to discharge in the legal service process"*

It is apparent therefore that it is incumbent upon the Court Process Server to effect the service of summons to litigants on his own and by himself; he should

not delegate to any person or authority this noble task which is very relevant for the administration of justice. The Court Process Server can seek assistance from the Village Executive Officer, Hamlet Chairman, Village Chairman, Village Executive Officer or any other person to identify the litigants after which he should effect the service himself according to the laid down rules and procedure.

In the instant case, the Respondents have claimed that they used to serve the Appellant through the Hamlet Chairman, Village Chairman and Village Executive Officer. As already alluded to hereinabove, this kind of service is not recognised at law. And to pursue this point a little bit further, my perusal of the court record has not substantiated this allegation. The Second Respondent has not proved this allegation. It is a cardinal principle of evidence that he who asserts must prove [see Section 110 (1) of the Evidence Act, Cap 6]. In the absence of any proof to this effect, I hesitate to agree with the second Respondent on this assertion. Moreover, the proceedings in the appellate Tribunal show that this matter came up for the first time on 18.04.2007 during which only the second Respondent herein appeared and the appellate Tribunal ordered that "substituted service to be effected on the readable newspaper".

Whatever this means, the matter was adjourned to 18.05.2007. On 18.05.2007, again, only the second Respondent appeared. The Tribunal ordered *ex parte* hearing to proceed on 13.06.2007. There is no record to show that substituted service was effected in compliance with the order of 18.04.2007. On 13.06.2007, once again, only the second Respondent appeared. The hearing did not proceed as, it appears, the second Respondent was not prepared. 19.07.2007 was therefore fixed so as to give the second Respondent "time to prepare himself". On 19.07.2007, the appeal proceeded for hearing; *ex parte*. It was only the second Respondent who argued the appeal. The judgment was reserved to 07.09.2007.

The judgment of the appellate Tribunal was delivered on 14. 09.2007 in the presence of the second appellant only. The second Respondent's appeal was allowed. On the ground that the Appellant herein was barred from bringing the suit after the time of limitation, the second Respondent herein was declared a lawful owner of the disputed plot. The judgment of the appellate Tribunal referred to both Respondents herein as appellants. But, as the first Respondent did not prosecute his appeal, the appellate Tribunal made a

finding in respect of the second Respondent only. Nothing was done in respect of the first appellant.

I must state at this stage that the procedure adopted by the appellate Tribunal is oddly strange - It left justice crying. I shall demonstrate. On the very first day the appeal came up, under normal circumstances, for mention, the appellate Tribunal ordered for "substituted service to be effected on the readable newspaper". Nothing is on record to show the reasons why substituted service was ordered. As the word indicates such service would be resorted to only when normal modes of service have proved futile. On the second day the appeal came for mention, the appellate Tribunal ordered for *ex parte* hearing to proceed on 13.06.2007. The *ex parte* hearing proceeded on 19.06.2007 as on the day previously fixed for hearing, the second Respondent was not ready to proceed. The appellate Tribunal did not record to show that the Appellant was served through substituted service as previously ordered. The appeal was heard *ex parte* anyway during which only the second Respondent prosecuted it. The judgment made a finding in respect of the second Respondent only. Nothing was mentioned as to the fate of the first Respondent.

I have painstakingly belaboured to narrate the background of this appeal and what transpired in the appellate Tribunal before and on the day of *ex parrte* hearing and the ultimate judgment because, in my view, it is against this background on which this appeal stands or falls. I must state from the outset that I am perturbed by the speed to dispense justice demonstrated by the Honourable Chairman in this matter. The speed demonstrated is quite superb which, if done soberly, is worth emulating. However, I am aware of an old maxim that goes justice delayed is justice denied. I am equally aware of a rarely used saying that goes justice hurried is justice buried. The latter saying, quite unfortunately, is evidenced by the proceedings of the appellate Tribunal in this matter. In my judgment, the Honourable Chairman hurriedly administered justice to the detriment of the Appellant thereby abrogating its role of an umpire and in the process justice was left crying. What transpired, on the face of it, leaves a lot to be desired.

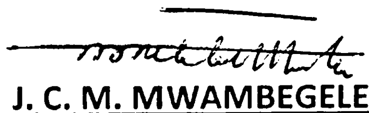
The appellate Tribunal, in my considered opinion, ought to have dismissed the first Respondent's appeal for want of prosecution. It was incorrect at law to proceed with the second Respondent's appeal without deciding on the fate of

the first Respondent's appeal. In my considered opinion, the judgment of the appellate Tribunal ought to have been very clear on this. If it were not for the confusion instigated by the appellate Tribunal, the Appellant could not have been made first Respondent a party to this appeal as his case would have ended in the appellate Tribunal in which he did not prosecute his appeal.

Having so found it seems to me that justice will triumph if the appellate Tribunal rehears the appeal on merits. The proceedings of the appellate Tribunal are quashed; its judgment is set aside. This matter should be remitted to the District Land and Housing Tribunal of Mwanza to be heard afresh on merits before another chairperson.

I will not consider the rest of the grounds, as doing so will be but an academic endeavour of which I do not want to indulge into at this moment. This appeal is allowed to that extent. It is allowed with costs.

DATED at MWANZA this 29th day of October, 2012



J. C. M. MWAMBEGELE

JUDGE