IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

MWANZA

MISCELLANEOUS LAND CASE APPEAL NO. 16 OF 2008

(From the Decision of the District Land and Housing Tribunal of Mwanza at Mwanza in Land Case Appeal No. 130 of 2006 and Original Ward Tribunal of Kagunga Ward)

CHENGE ROBERT ..... 1ST APPELLANT

MAKOYE MALABI ..... 2ND APPELLANT

VERSUS

PAULO M. KIHILA ..... RESPONDENTS

JUDGMENT

MWAMBEGELE, J.:

On 13.06.2007 the District Land and Housing Tribunal (henceforth the appellate Tribunal) heard *ex parte* an appeal from the Kagunga Ward Tribunal. The Appellant in that appeal was Paulo M. Kihila; the Respondent and Chenge Robert and Makoye Malabi; the Respondents herein, were respondents. After the *ex parte* hearing, the appellate Tribunal decided in favour of the

Respondent. Aggrieved, the Appellants, appealed to this court on three grounds of appeal, namely:

1. That the appellate tribunal erred in fact and law for denying the appellants their constitutional right of being heard when it proceeded to hear and determine the appeal in their absence;
2. That the appellate tribunal could not , have proceeded to hear and determine the appeal without evidence that the appellant had been served and declined to enter appearance; and
3. That the Chairperson of the appellate tribunal erred in fact and law for proceeding to hear and determine based on uncertified copies of the proceeding and without original record of the Kagunga Ward.

The appeal was argued before me on 29.10.2012. The Appellants were speaking through Mr. Butambala learned Advocate while the Respondent appeared in person and unrepresented. However, before the hearing, the Respondent who had filed an application for temporary injunction pending the hearing of the appeal, withdrew the application to pave way for the hearing of this appeal. The Respondent felt that the application would unnecessarily

delay the hearing of this appeal. The application for temporary injunction was according withdrawn at the request of the Respondent herein.

On the first ground of appeal Mr. Butambala, on behalf of the first Appellants argued that the appellate Tribunal denied the appellants right to be heard. He submitted that the application was filed in the Tribunal on 29.12.2006 and the summonses to the parties were accordingly issued so that the parties could appear on 17.01.2007. He submitted that these were the only issued to the parties until the hearing of the suit *ex parte*. The summonses have an endorsement to the effect that the appellants refused service. Mr. Butambala submitted that this was not proper service as it is the duty of the Court Process Sever to effect service. He concluded on this ground that the appellate Tribunal erred in law to proceed with the appeal without proper service.

On the second ground, Mr. Butambala adopted his arguments on the first ground. On the third ground, Mr. Butambala submitted that the appellate Tribunal erred in law in proceeding with the case without the original record of the Ward Tribunal. He submitted that this anomaly is apparent even in the

judgment of the appellate tribunal as it appears the judgment was written before the appellate Tribunal received the same.

On his part, the Respondent was very brief in his submission. He stated that the appellants were properly served. He asked who else could serve them while the Village Government is there so serve them. He concluded that the Hamlet Chairman was, in the circumstances, the right person to serve them.

Mr. Butambala had nothing in rejoinder. I think Mr. Butambala was right in not submitting anything in rejoinder as the Respondent had raised nothing new in rebuttal as to warrant further reply by Mr. Butambala, learned Counsel.

I have had an opportunity to argue in some of my judgments and rulings that service through government officers other that the Court Process Server is not proper service. Service of summons through the Village or Hamlet Chairman or through the Village Executive Officer or any officer of the Government is not proper service in the eyed of the law. 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 or any Government officer other than the Court

Process Server 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 of the Court Process Server 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 identification 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. This takes care of the first and second grounds of appeal.

As for the third ground of appeal, it is apparent on the court record that the appellate Tribunal decided the appeal without the original record of the War Tribunal. As Mr. Butambala rightly submitted, this is even apparent in the judgment of the appellate Tribunal. This was not. in the record before me, there is a photocopy of a document before the Ward Tribunal of Kagunga which shows what transpired in the trial tribunal. To say the least, it cannot be termed as proceedings of the Ward Tribunal. Neither can it be termed a judgment though it shows that the Respondent lost. The third ground of appeal also succeeds.

I think justice will prosper, as Mr. Butambala submitted, if this matter is heard *de novo* in the Ward Tribunal as the appellate Tribunal had nothing to base on its decision. In the premises I quash the proceedings of both lower tribunals and order that this matter be heard *de novo* in the Ward Tribunal.

In the end result, this appeal is allowed. It is allowed with costs. The matter should be heard afresh in the Ward Tribunal of Kagunga and proper record should be kept for its record and just in case they will be required on appeal in the District Land and Housing Tribunal and courts above it.

DATED at MWANZA this 2nd day of November, 2012

J. C. M. MWAMBEGELE

JUDGE