

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND APPEAL NO.153 OF 2019**

*(Originating from Land Appl. No.651 of 2019 before the District Land and Housing  
Tribunal for Kinondoni District at Mwananyamala dated 3<sup>rd</sup> July 2019)*

**ANITHA SHONI FREDERICKSEN .....1<sup>ST</sup> APPELLANT**  
**MICHAEL FREDERICKSEN.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MARRY AKENA (SUING THROUGH HER  
ATTORNEY RITA AKENA)..... RESPONDENT**

**JUDGMENT ON APPEAL**

**S.M MAGHIMBI, J:**

The appellant, being aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni District at Mwananyamala ("The Tribunal") in Land Application No. 651 of 2018 ("The Application"), has lodged this appeal on the following grounds:

- i.) That the trial Tribunal erred in law and in fact in failing to examine and scrutinize the evidence that during all the time of the Land case and to date appellants are residing in United State of America thus they were not aware on existence land

application No.397 of 2015 which was filed by the respondent to the trial Tribunal.

- ii.) That the trial Tribunal erred in law and in fact in ignoring the provision of Section 7 of the Notaries Public and Commissioners for Oath Act Cap12 of the Revised Edition 2002.
- iii.) That the trial Tribunal erred in law and in fact in ignoring the fact that the appellants are residing in United States of America and the service made was substituted service through the publication of which the appellants were not aware with Application thereto.

It was the appellant's prayer that this appeal be allowed with costs. During the hearing of this appeal, the appellants enjoyed the service of Mr. Augustine Mathern Kusalika learned advocate, while the respondent was represented by Mr. John Seka, learned Advocate. On the 4<sup>th</sup> June, 2020 the court ordered the hearing of this appeal to proceed by way of written submissions.

During the application, the appellants had applied for extension of time and further for setting aside an ex-parte judgment that was entered against the appellants in Land Application No. 397 of 2015 ("The previous application"). The application was dismissed hence this appeal. Upon perusal of the grounds of appeal, I find that the first and third grounds of appeal are more or less challenging the validity of the alleged service of

the appellants in the application while they were residents of the USA. In his submissions Mr. Kusalika's argument was that the appellants were (and still are) residing in the United States of America. That during the hearing of the case in the Tribunal, the service made to them was the substituted service through the publication in national newspapers while the applicants were not in the country hence not having access to the said newspaper. He also had an argument that the appellants came to know the existence of the previous application through his brother who was residing the appellant's house, this was during the execution process when the respondent attached the house of the 1<sup>st</sup> appellant which is situated at Plot 157 Block B Kimbiji area Tememe Municipality.

Mr. Kusalika also pointed out that the appellants brought the application promptly and explained reasons for their delay. To support his arguments he cited the case of **Rutagatina C.L vs. Advocates Committee & Clavery and Mtindo Ngalapa, Civ.Appl.No. 21 of 2001 (unreported)**

In their reply, Mr. Seka submitted on the 1<sup>st</sup> and the 3<sup>rd</sup> grounds together. His submissions were mainly denying the appellant's allegations that they were actually in the United States of America when the Application was heard and determined. He argued that the trial Tribunal properly evaluated the evidence of the appellants and noticed that there was no single piece of evidence to prove that the appellants were in the United States of America. That even in this appeal, the appellants have not supplied any proof to demonstrate that they were truly out of Tanzania when the Application was being filed. To support his argument Mr. Seka cited the case of **Barelia Karangirangi Vs. Asterial Nyalambwa (Civ. Appeal**

**No.237 of 2015) [2019] TZCA 51:(01 April 2019)** where the court discussed the issue of burden of proof and stated at age 7 as follows

*"at this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove".*

Mr. Seka argued that the evidence to prove that the appellants were in the USA was glossily lacking and the appellants failed to discharge this burden. That in the absence of such evidence by way of passport showing exit from Tanzania and entry in the United States of America or travel tickets to show they travelled out of Tanzania at that time, or any other concrete evidence to demonstrate their absence, it is not possible for this court to fault the decision of the trial Tribunal.

On the 2<sup>nd</sup> ground of appeal, Mr. Kusalika submitted that according to the records of the Tribunal, the respondent herein did not contest the application in the counter affidavit filed in the Tribunal on the 10<sup>th</sup> October, 2018 and attested by their advocate John Seka, who appeared in the Tribunal contrary to Section 7 of the Notaries Public and Commissioners for Oath Act Cap 12 of the R.E 2002. That the said provision prohibits a Commissioner for Oath to exercise any of his powers as Commissioner for Oaths in any proceeding or matter in which he is an advocate to any of the parties on in which he is interested. He then argued that since Mr. Seka was advocating for the respondent, then he was barred from attesting the counter affidavit of the respondent which was filed on 10<sup>th</sup> October 2019.

In reply, Mr. Seka argued that this ground is untenable to this court on account that it is raised herein for the first time. That an appellate court

cannot entertain a matter on appeal on an issue that was not part of the issues in the trial court. He concluded that the procedure used by the appellant is an abuse of court process.

I will start determination of the 2<sup>nd</sup> ground of appeal on the procedural irregularities outlined. I am in agreement with Mr. Seka that this issue should have been raised at the tribunal and not at this appellate stage. It is trite law that any objection should be raised at the earliest possible opportunity and not at the appellate stage. This principle however exempts an objection on jurisdiction which can be raised at any stage. However, the issue raised by Mr. Kusalika is not on jurisdiction because even if for the sake of argument, we were to expunge the counter affidavit of the respondents or their advocate, he would still remain bound to prove his issue that he was not notified of the previous application. The ground should not therefore waste any of my time.

As for the first and third grounds of appeal, having gone through the records of this appeal and parties submission therein, the main issue for determination in this appeal is whether during trial, the appellants were duly served with the summons to appear. According to Mr. Kusalika, the appellants were at the time and till now residing in the USA hence service even by publication could not be affected to them. Mr. Seka's argument is that were served through publication and that they not bring any proof that they resided in the USA, this was also the holding of the tribunal in the application.

I have taken time to go through the records of the submissions as well as the submissions of Mr. Kusalika and indeed, there is no place that proof of

the residence of the appellants during trial was availed. The appellants could have used many documents to prove of their absence in the country, for instance they could produce passports with the relevant stamps they exited Tanzania at some point and returned at another point. They could have also shown some visa (where applicable) that they were out of the country when the previous application was on going. In the absence of such evidence, I am totally in agreement with the finding of the tribunal that the applicants did not show good cause for the orders sought therein. On those findings, I see no reasons to interfere with the decision of the tribunal. The appeal before me lacks merits and it is hereby dismissed with costs.

***Appeal dismissed.***

Dated at Dar es Salaam this 01<sup>st</sup> day of September, 2020



**S.M MAGHIMBI**

**JUDGE**