

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

**LAND APPEAL NO. 179 OF 2021**

*(Arising from District Land and Housing Tribunal for Kinondoni at Mwananyamala in Misc. Land Application No. 868 of 2020 and from Exparte Judgment and Decree of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 583 of 2019)*

**DEVOTHA DAVID MKWAWA**

**t/a FIRST SUPERMARKETS ..... APPELLANT**

**VERSUS**

**CLASSIC MALLS LIMITED ..... RESPONDENT**

**JUDGMENT**

*Date of last Order: 01.09.2022*

*Date of Judgment: 19.09.2022*

**A.Z.MGEYEKWA, J**

The appellant has lodged this appeal against the Ruling of the District Land and Housing of Kinondoni in Misc. Land Application No.868 of 2020

dated 26<sup>th</sup> July, 2018. The material background facts of the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the applicant lodged an application for an extension of time to file an application for setting aside an *exparte* judgment and decree in Land Application No. 583 of 2019. The applicant in his affidavit claimed that the parties entered into an agreement of leasing the suit premises for supermarket business and the applicant deposited Tshs. 45,000,000/= into the bank account of JADECAM REAL ESTATE Ltd. The applicant among other things raised a ground of illegality.

The respondent opposed the application. The District Land and Housing Tribunal decided the matter and ended up dismissing the application with costs.

Believing the decision of the District Land and Housing Tribunal for Kinondoni was not correct, the appellant lodged an appeal containing four grounds of appeal as follows:-

- 1. That, the trial Chairperson erred in law and fact by holding that the appellant had failed to adduce sufficient cause to enable the tribunal*

- to extend the time to apply for an order to set aside ex parte judgment and decree in Land Applications No. 583 of 2019 dated 4<sup>th</sup> June, 2020.*
2. *That the Chairperson erred in law and fact by holding that the exhibit P1 was properly admitted into the list of evidence even though the legality of the evidence itself is questionable due to the following reasons;*
    - A. *The signing dates of the lease agreement have been tempered with the appellant, they signed the agreement on 26<sup>th</sup> July, 2019 while the respondent illegally changed the date to 1<sup>st</sup> January, 2019*
    - B. *The lease agreement was admitted into the list of evidence without being paid for and duly stamped with Stamp Duty.*
  3. *That the Chairman erred in law and fact by completely ignoring the fact that the summons which led to the ex parte was served by the process server who had an interest in the matter.*
  4. *That the Chairman erred in law and fact by completely ignoring the fact that the summons to attend the ex parte judgment in Application No. 583 of 2019 is purported to have been served by Mohamed Salum who stated that he could not find the respondent.*

When the matter was called for hearing before this court on 28<sup>th</sup> July, 2022, the appellant enlisted the legal service of Mr. Charles Lugaila, counsel and the respondent had the legal service of Mr. Mayenga, counsel. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant's Advocate filed his submission in chief on 10<sup>th</sup> August, 2022. The respondent's Advocate filed his reply on 1<sup>st</sup> September, 2022 and the appellant's Advocate filed a rejoinder on 8<sup>th</sup> September, 2022.

The appellant's counsel began by tracing the genesis of the matter which I am not going to reproduce in this appeal. Mr. Lugaila, learned counsel for the appellant opted to combine all grounds of appeal and argue them together. He argued that the appellant raised a ground of illegality and he adduced sufficient to move this tribunal to grant the applicant's application. He submitted that the Court of Appeal of Tanzania in a number of cases stated that where there is an allegation of illegality the same is a sufficient reason to extend time. To buttress his submission he cited the **Amour Habib Salim v Hussein Bafagi**, Civil Application No. 52 of 2008.

The learned counsel went on to submit that the applicant did not only allege illegality but he proved the existence of illegality which makes the whole proceedings in Land Appeal No. 583 of 2009 null and void. He submitted that the said illegality is related to admission of the evidence; lease agreement. He argued that the said lease was admitted while the same was not duly paid and it was not stamped according to section 47 (1) Stamp Duty Act, Cap. 189 which bars the admission of any instrument that is chargeable under the Act as a piece of evidence unless it is paid and stamped.

Mr. Lugaila asserted that it is undeniable fact that the tribunal acknowledged that the lease agreement which is the instrument that gave the parties the right and locus to sue had been wrongfully admitted as exhibit P1. He added that the appellant in his submission cited the case of **Mamo Agreconsult & AB Tanzania Branch b Margreth Gama**, Civil Appeal No. 86 of 2001. He added that the Chairman concluded by stating that the lease agreement was legally and proper because the appellant was the one who was required to pay for stamp duty.

He went on to argue that the summons was purported to have been served to the appellant by the process server while the same was untrue.

He argued that it is not true that the appellant was summoned to appear in court by Mohamed Sulum, the process server as stated in his affidavit that they went to the appellant's office and were informed that the appellant was not available. He added that the appellant had already been evicted from the office by the respondent on 27<sup>th</sup> November, 2019. He went on to submit that the second summons was issued on 6<sup>th</sup> January, 2020 via a person known as Frank Mapunda from Kische Auction Mart who returned the summons and swore an affidavit that he met the appellant but he refused to accept the summons and the tribunal published the summons and later the matter proceeded ex parte against the appellant.

He further claimed that Frank Mapunda was involved in the illegal eviction of the appellant's goods from the suit premises. He insisted that the appellant had no knowledge of the tribunal proceedings in Land Application No. 583 of 2019 until late September, 2020 and immediately he directed his counsel and make a follow-up on 30<sup>th</sup> September, 2020 and 19<sup>th</sup> October, 2020 he requested copies of the tribunal's pleadings. He insisted that illegality was a sufficient ground for extension of time. Supporting his submission he cited the case of **Omary Shaban Nyambu v Dodoma Water & Sewerage Authority**, Civil Application No. 146 of 2016.

In conclusion, the learned counsel for the appellant beckoned upon this court to allow the appeal with costs.

In reply, on the first ground of appeal, the learned counsel for the appellant contended that the respondent before hearing the application on merit on 25<sup>th</sup> February, 2022 raised two points of preliminary objection. He argued that the appeal is time-barred and the present appeal is a total abuse of the court process for being improperly lodged.

Mr. Mayenga argued that when the appeal was called for hearing of the preliminary objection and after deliberation between the parties and the Court, the respondent was convinced to withdraw the objections after the appellant's counsel put it clear that he was not challenging the *ex parte* judgment whose decision was rendered way back on 4<sup>th</sup> June, 2020. He added that the appellant on his first ground touched on the merit of the *ex parte* judgment thus the objection is still valid. To support his submission he cited the case of **Mwananchi Communication Ltd & 2 others v Joshua J. Kajula & 2 Others**, Civil Appeal No. 12604 of 2016.

The learned counsel for the respondent valiantly argued that it is trite law that a remedy of an appeal is provided by the status and no law allows riding two horses at the same time. He claimed that the law does not

permit to challenge a ruling refusing extension of time to set aside the *ex parte* judgment and at the same time allows to appeal against the findings of the *ex parte* judgment in one appeal. He added that there are two different recourse which bring different results in its determination. He insisted that it is total confusion of this Court to decide on the refusal of the application for extension of time and at the same time decide on the findings of the *ex parte* judgment. Supporting his submission he cited the case of **Dangote Industries Tanzania Ltd v Warehouses (T) Ltd**, Civil Appeal No. 13 of 2021.

The learned counsel went on to submit that whether the issue of the lease agreement is proper or improperly admitted touches the merits of the *ex parte* judgment. He added that the present appeal is concerning the refusal of time and not the merit of the *ex parte* judgment thus, the appellant's argument on the admission of evidence as illegality is a lack of focus. He added the Court of Appeal has on several occasions held that illegality must be apparent on the face of the record. To fortify his submission he cited the case **Ngao Godwin Losers v Julius Mwarabu**, Civil Application No. 10 of 2015.



Mr. Mayenge continued to argue that the first ground raised by the appellant is a new ground that was not part of the grounds raised in the application for extension of time. To support his submission he referred this court to the applicant's affidavit and the cases of **Alexander M. Masolwa v Doris Mwansasu**, Civil Application No. 99/01 of 2019, and **Kinanga Tumainiel v Frank Pieper & another**, Civil Appeal No. 139 of 2008.

Mr. Mayenga did not end there, he contended that the rest of the grounds are related to illegality in the process of service of summons. He asserted that the summons had nothing to do with the eviction. He added that the argument if the second summons were served to the persons who participated in the illegal eviction, the same was not featured in the earlier preferred application. He claimed that there is no any reason to depart from the tribunal *ex parte* judgment findings which demonstrated how the summons was served to the appellant. He insisted that the appellant's statements are from the bar. Supporting his submission he cited the case of **MIC Tanzania Ltd v CXC Africa Ltd**, Civil Application No. 171/01 of 2019.

The counsel for the respondent contended that the appellant in his affidavit did not account for the days of delay thus, it was his view that the delay was inordinate as the appellant was aware of the tribunal proceedings. He submitted that the application was verified on 16<sup>th</sup> October, 2020 but the same was filed on 19<sup>th</sup> September, 2020. He stressed that each day of delay ought to be counted precisely to enable the Court to exercise its noble discretion. To fortify his submission he cited the case of **Nega Builders Ltd v DPI Simba Ltd**, Civil Application No. 319/ 16 of 2020.

On the strength of the above submission, he urged this court to dismiss the appeal with costs.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief and rejoined further by addressing, the issue of illegality; Mr. Lugaila claimed that the applicant in his affidavit pleaded the ground of illegality. To buttress his contention he referred this court to paragraph 14 of the applicant's affidavit. He also stressed that the alleged illegality presides in evicting process. Ending, the counsel for the appellant cemented that the ground of illegality constitutes a good cause for an extension of time. He urged this Court to grant the appeal to enable the

applicant to file an application to set aside the *ex parte* judgment in Land Application No. 583 of 2019.

After a careful perusal of the submission made for the appeal by the appellant and the respondent and after having gone through the court records, I have come to the following firm conclusions. In determining this appeal the main issue calling for determination is ***whether the appeal is meritorious***. I have opted to combine the second, third and fourth grounds since they are intertwined. Except for the first ground which will be argued separately.

On the first ground, the appellant's counsel is faulting the Chairman for failure to find that the appellant adduced sufficient reasons to move the tribunal to extend the time to set aside the *ex parte* judgment. I have perused the Judgment of District Land and Housing Tribunal and noted that the Chairman in the whole of his judgment explained in detail the reasons stated by the appellant in his affidavit regarding the issuance of summons and the ground of illegality. The issue of challenging *ex parte* judgment was not raised as a ground of illegality. As rightly pointed out by the counsel for the respondent the first ground touches on *ex parte* Judgment. As pinpointed by the counsel for the respondent, the record is clear that before Hon. Arufani, J, the appellant claimed that he is not

challenging the *ex parte* Judgment. However, in the instant appeal, the counsel for the appellant submitted in length on *ex parte* Judgment.

I fully subscribe to the submission made by Mr. Mayenga that the appellant the ground of chickening the ground of *ex parte* Judgment is not featured in the appellant's (original applicant) affidavit dated 16<sup>th</sup> October, 2020. This is a new ground that was raised for the first time before the appellate court. The ground on *ex parte* Judgment was not listed as a ground of illegality. It is not proper to raise a ground of appeal in a higher court based on facts that were not canvassed in the lower courts. It is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. The Court of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

*" It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."*

Applying the above authority in the instant appeal, it is clear that the appellant's counsel submission is an afterthought and the same cannot

be regarded at the appellate court. Therefore, these three grounds of appeal are demerit

Regarding the second, third, and fourth grounds, He claimed that the signing date of the lease agreement was tempered and lacks stamp duty. As alluded in the first ground, the records of the District Land and Housing Tribunal show that the appellant was summoned to appear at the tribunal in Land Application No. 583 of 2019. The records show that the Tribunal issued two summons; the first summons was issued by the tribunal through the process server one Mohamud Salum from Kabango General Business. The second summons was delivered through the tribunal process sever one Frank Mapunda from Kaishe Auction on 6<sup>th</sup> January, 2020, who returned the summons, and on his affidavit he deponed that the appellant refused to sign the summons. Thereafter, the Tribunal summoned the appellant by way of substitution of service, and the same was published in Mwananchi Newspaper dated 24<sup>th</sup> January, 2020. However, the appellant did not show appearance, thus, the tribunal proceeded *ex parte* against the appellant. Therefore, the service of process to occur at the tribunal was properly done and the appellant was well informed that there was a pending case at the Tribunal but he opted not to appear at the tribunal to defend himself.

Thereafter, the tribunal decided to summon the appellant through substitution of service; the summons was advertised in Mwananchi Newspaper dated 24<sup>th</sup> January, 2020 but the appellant opted not to show appearance at the tribunal. As the result, the tribunal proceeded with a hearing ex parte against the appellant. The record reveals that Khamis Haule, the Chairman of the Government Street in his affidavit stated that the summons was served to the appellant. Therefore, the act of Khamis Haule issuing another affidavit while he already confirmed that the summons was issued to the appellant is not correct.

Regarding the rounds of illegalities, the appellant is faulting the Chairman to consider the exhibit P1 as evidence while the illegality of evidence itself is questionable. In my considered view, the complaint that the lease agreement lacks stamp duty or is tainted with illegality in the admission of the key evidence is not on the face of the record, the same needs to be discovered by a long drawn argument. See the cases of **Lyamuya Construction Company Limited and Citibank (Tanzania) Limited v. T.C.C.L. & Others**, Civil Application No. 97 of 2003 (unreported) and **Principal Secretary, Ministry of Defence and National Service v Devram Valambhia** [1992] TLR 185 at page 89. In

the case of **Lyamuya Construction Company Limited** (supra), the Court of Appeal of Tanzania held that:-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Vaiambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted an extension of time if he applies for one. **The Court there emphasized that such point of law must be that of sufficient importance** and, I would add that **it must also be apparent on the face of the record, such as the question of jurisdiction**; not one that would be discovered by a long drawn argument or process."* [Emphasis added].

Applying the above authority in the matter at hand, it is clear that illegality is a good ground for extension of time but such point of law must be of sufficient importance and apparent on the face of the record, such as the question of jurisdiction. In my considered view, the purported grounds did meet the requisite threshold for consideration as the basis for the enlargement of time.

That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere with the findings of the District Land and Housing Tribunal for Kinondoni. Therefore, I proceed to dismiss this appeal with costs.

Order accordingly.

Dated at Dar es Salaam this date 19<sup>th</sup> September, 2022.



  
A.Z.MGEYEKWA

**JUDGE**

19.09.2022

Judgment delivered on 19<sup>th</sup> September, 2022 via video conferencing whereas both counsels were remotely present.



  
A.Z.MGEYEKWA

**JUDGE**

19.09.2022

Right to appeal fully explained.