

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 246 OF 2020

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No.26 of 2017)

EMMANUEL PELEKAMOYO APPELLANT

VERSUS

SHEDRACK JOHN SHISHA RESPONDENT

JUDGMENT

Date of Last order: 27.01.2021

Date of Judgment: 07.02.2022

A.Z.MGEYEKWA, J

This is the first appeal. The appellant is appealing against the decision of the District Land and Housing Tribunal for Kindondoni at Mwananyamala. Briefly, the facts which bred the instant appeal are quite straightforward. They roll back to the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No. 26 of 2017 arising from Application No. 359 of 2016. The appellant filed an application before the District Land and Housing Tribunal for Kinondoni at Mwananyamala requesting the

tribunal to set aside an *ex parte* judgment which was delivered on 21st December, 2016. The appellant's reasons for non-appearance before the tribunal was due to failure to locate the tribunal at the time he arrived at the tribunal the matter was already dismissed. The tribunal determined the application and decided that the appellant was aware that there was a matter before the tribunal but he deliberately seek evasion to obstruct justice. Therefore the application was dismissed.

Being aggrieved, the appellant has taken his battle to this Court, seeking to assail the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala. The appellant has coined seven grounds of appeal as follows:-

- 1. That the Honourable Chairperson erred in law and fact to dismiss the application for reason that the summons was affixed on the house which the appellant is staying yet the applicant did not appear while no any prove tendered to prove the allegation.*
- 2. That the Honourable Chairperson erred in law and facts for issuing a decision which disregard the interest of justice of the Appellant.*
- 3. That the Honourable Chairperson erred in law and facts to preside and determine the matter without involving assessors of the Tribunal.*

- 4. That the Honourable Chairperson erred in law and facts for failure to order the Assessors of the tribunal if any to give out their opinion before deciding the application.*
- 5. That the Honourable tribunal erred in law and facts to dismiss the application of the applicant without considering the evidence that the applicant received only one summons which was not accompanied with the document of land application.*
- 6. That the honourable tribunal erred in law and fact to put into consideration on an issue of acquiring ownership of suit property while was not related to the main application of the application at hand.*
- 7. That the Honourable Chairperson erred in law and fact to hold that the appellant failed to file appear before the tribunal on his own negligence.*

When the matter was called for hearing on 17th November, 2021, it was guided that the appeal be disposed of by way of written submissions whose filing was to conform to the court schedule. Whilst the appellant was to prefer his submission on or before 8th December, 2021, the respondent was scheduled to file his on or before 29th December, 2021. Rejoinder, if any, was to be filed on 12th January, 2022, whereas the appellant conformed to the filing schedule, nothing has been filed by the respondent until 27th January, 2022 when the matter was called for mention, Ms. Precious

Hassan, learned counsel for the respondent addressed the court that the appellant did not serve her with a copy of the written submission, thus, she prayed for extension of time to file her reply. Her prayer was granted.

In his submission in support of the appeal, the appellant briefly narrated the genesis of the matter which I am not going to reproduce in this appeal. The appellant started his onslaught by seeking to consolidate the third and fourth grounds of appeal argued them together and the remaining grounds to argue separately.

The appellant begun by tracing the genesis of the matter which I am not going to reproduce in this appeal. On the first ground, the appellant blamed the Chairman for dismissing the application for setting aside ex parte judgment for reason that the applicant was duly been served but yet the applicant did not show appearance. The appellant went on to argue that the counter affidavit does not show if the summons was affixed on the wall of the appellant's house thus, there was no any proof of the said affixation of summons to justify the decision of the Chairman. He lamented that the Chairman based his decision on assumption facts. Supporting his submission, he cited the cases of **Said S/O Salum v Republic**, Criminal

Appeal No. 499 of 2016 CAT at Dar es Salaam (unreported) and **Patrick Isango v Republic** (1967) HCD 442.

With respect to the second ground, the appellant contended that the Chairperson erred in law and facts for issuing the decision which disregard the interest of justice of the appellant. It was the appellant's submission that the Chairperson failed to consider the interest of justice as the court of laws are not bound by rules of procedures. He submitted that the Chairperson was required to observe substantive justice by allowing the appellant to defend and prove his case. Fortifying his position he cited the cases of **National Housing Corporation v Etienes Hotel**, Civil Application No.10 of 2005, Court of Appeal of Tanzania (unreported) and **D.T Dobie (Tanzania) Ltd v Phantom Modern Transport (1985) Ltd**, Civil Application No. 141 of 2001, CAT (unreported), the Court of Appeal of Tanzania held that:-

“ ...It has always been that rules of procedure are handmaids of justice and I take this to mean that they should facilitate rather than impede decision on substance issues.”

He continued to submit that the appellant prays for this court to set aside the *ex parte* judgment so that he may be afforded the right to be heard inter parties.

As to the third and fourth grounds, the appellant contended that the Chairperson entered into an error by determining the matter without involving the assessors of the Tribunal and failure to order the assessors to state their opinion before the Chairperson delivered his decision. To bolster his position he referred this court to section 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019]. The appellant contended that the District Land and Housing Tribunal proceedings were unlawful thus the Chairperson decision was invalid. Stressing, he submitted that the assessors are required to be involved and hearing the matter and give their opinion and the same must be availed in the presence of the parties to enable them to know the nature of the opinion and to know whether such opinion has been considered by the Chairman in his final verdict. Cementing his submission, the appellant cited the case of **Edina Adam Kinona v Absalom Swebe (SHELI)**, Civil Appeal No. 289 of 2017.

Arguing for the fifth ground, the appellant was brief and straight to the point, he insisted that the evidence on record proves that the summons was not accompanied with any copy of the application and the respondent did not dispute. Stressing, he submitted that the affixation of summons was not proved thus there was no any affixation of summons in the appellant's house.

He urged this court to set aside the ex parte judgment and allow parties to be heard inter parties.

On the seventh ground, the appellant contended that the Chairman erred in law and facts to hold that the appellant negligently failed to appear before the trial tribunal. He stated that in his affidavit he demonstrated sufficient reasons and evidence for his failure to appear and defend his case. He added that the appellant asserted that he served one summons but he did not know where the tribunal was located hence he delayed to show appearance at the tribunal and found that the case was dismissed.

On the strength of the above submission, the appellant beckoned upon this court to quash the District Land and Housing Tribunal decision.

In reply thereto, the respondent's Advocate started with a brief background of the matter which I am not going to reproduce in this appeal. On the first ground of appeal, Ms. Precious contended that Regulation 9 (a) (i) of the Land Dispute Courts (District and Housing Tribunal) Regulation, 2003 recognize the procedure of summons to be affected on the land and the situation was applied but on the hearing date the appellant did not show appearance. She claimed that it is untrue that the appellant was not aware

that there was a case at the court of law. She denied that the Chairman acted contrary to the law because the procedure of affixation of summons is clearly stated in the law she stringy argued that the cited cases are irrelevant and urged the same be expunged from the court record.

Arguing on the second ground, the learned counsel for the respondent contended that the appellant failed to adduce sufficient reasons as to why he did not appear before the tribunal to defend his case. She added that the appellant had no good reasons to move the tribunal to set aside the *exparte* judgment. It was her view that this is not a minor irregularity and to enforce the Chairman to look at substantive justice. To support her position she cited the case of **St. John University of Tanzania v Jeffery Industry Sini Limited & another**, Misc. Commercial Application No. 38 of 2020.

As to the third and fourth grounds, the learned counsel for the respondent was on his view that section 23 (2) and 24 of the Land Dispute Courts Act, Cap.216 elaborates that the Chairman is required to consider the opinion of the assessors before he pronounce his judgment, she submitted that this ground is baseless thus the same be disregarded.

Submitting on the fifth and six grounds, the learned counsel for the respondent submitted that Regulation 9 (a) (i) of the Land Disputes Courts

(The District and Housing Tribunal) Regulation of 2003 states the procedure of affixation of summons. She argued that the Chairman did not consider this requirement for the reason that the appellant in his affidavit stated that he arrived at the tribunal late and found that the matter was already been called but the appellant decided to leave the tribunal premises instead of asking the tribunal clerk as to why the matter proceeded *ex parte*.

With respect to the seventh ground, the learned counsel for the respondent submitted that the appellant received the said summons but he did not bother to make any follow-up. She strongly submitted that the appellant failed to prove her allegation as per sections 110 and 11 of the Evidence Act Cap.6 [R.E 2019]. It was her view that failure to prove her case renders all the appellant's allegations just hearsay that does not give the appellant legal legs to stand on.

As to the last ground, the learned counsel for the respondent submitted that the appellant in his submission urged this court to extend time to file his appeal against the decision of Kinondoni District Land and Housing Tribunal but the said prayer was already granted to him in Misc. Land Application No.79 of 2019. It was her view that raising the said prayer is a misusing

courts process since the tribunal cannot grant prayers that were already been granted.

In conclusion, the learned counsel for the respondent urged this court to expunge the appellant's submission and dismiss the appeal with costs.

After a careful perusal of the record of the case and the final submissions submitted by both parties. In determining the appeal, the central issue is *whether the appeal is meritorious*.

In my determination, I have opted to start with the third and fourth grounds of appeal that the trial tribunal erred in law and facts to preside and determine the matter without involving the assessors of the tribunal and order them to give their opinions.

In order to appreciate the essence of the appellant's concern, I think, I should demonstrate what transpired at the District Land and Housing Tribunal for Kinondoni at Mwananyamala. The record of the trial tribunal tells it all. It bears out that the hearing of the case commenced on 1st December, 2016, the Chairman recorded the Coram whereas one member or assessor Mr. Abdurrahman was recorded to attend the hearing while the law requires at least a Chairman to sit with no less than two assessors at the

commencement of the hearing of the case. On matters concerning the involvement of assessors in trials of land matters section 23 (1) of Land Disputes Courts Act, Cap. 216 [R.E 2019] provides that:-

“23.-(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.

Applying the above provision of the law, it is plain, in the instant case, that the requirements under section 23 (1) of Land Disputes Courts Act, Cap. 216 [R.E 2019] were not complied with. Since the trial began with Mr. Abdurrahman as assessor when PW1, PW2 testified, then in terms of the law applicable, the District Land and Housing Tribunal was bound to commence its hearing with at least two assessors.

Moreover, I have perused the District Land and Housing Tribunal for Kinondoni and noted that the assessors' opinions cited by the Chairman in his judgment were not read in the presence of the parties before the judgment was composed. It is a settled principle of law that at the conclusion of the hearing the Chairman of the District Land and Housing Tribunal should call upon the assessors to give their opinion in writing and read the same to the parties. This is in accordance with Regulation 19 (2) of the Land Disputes

Courts Act (District Land and Housing Tribunal) Regulations, 2002 G.N. 174/2003. Regulation 19 (2) states that:-

"Notwithstanding sub-regulation (1) the chairman shall, before making his judgment; require every assessor present at the conclusion of the hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."

The Court of Appeal of Tanzania in the case of **Tubone Mwambeta v Mbeya City Council**, Civil Appeal No 287 of 2017 (unreported), the Court of Appeal of Tanzania stated that:-

*"In view of the settled position of the law, where the trial has been conducted with the aid of the assessors,...they must actively and effectively participate in the proceedings so as to make meaningfully their role of giving their opinion before the judgment is composed...since regulation **19 (2) of the Regulations requires every assessor present at the trial at the conclusion of the hearing to give his opinion in writing, such opinion must be availed in the presence of the parties to enable them to know the nature of the opinion** and whether Page 4 of 6 or not such opinion has been considered by the Chairman in the final verdict." [Emphasis added].*

Under the circumstances, the judgment of the District Land and Housing Tribunal for Kinondoni at Mwananyamala is improper. It is evident that a fundamental irregularity was committed by the tribunal Chairman. The omission is an incurable defect and it renders the proceedings nullity. Thus, there is no proper judgment before this Court for it to entertain in appeal. Therefore, I shall not consider the remaining grounds of appeal as the same shall be an academic exercise after the findings I have made herein.

In the upshot, I quash the proceedings and set aside the judgment of the District Land and Housing Tribunal for Kinondoni in Land Application No.26 of 2017. I direct the appeal to be heard *denovo* before another Chairman and with a new set of assessors. Mindful of the long time the matter has taken in court, I direct the trial be expedited and be heard within four months from today. Each party shall bear its own costs.

Order accordingly.

Dated at Dar es Salaam this date 7th February, 2022.



A.Z.MGEYEKWA

JUDGE

07.02.2022

Judgment delivered on 7th February, 2022 in the presence of the appellant and Ms. Precious Ahmad Hassan, learned counsel for the respondent.



A.Z.MGEYEKWA

JUDGE

07.02.2022

Right of Appeal fully explained.