

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

MISC. LAND APPEAL NO. 209 OF 2021

*(Arising from Misc. Land Application No. 892/2020 and Misc. Land Application
No. 41 of 2014 before Kinondoni District Land and Housing
Tribunal at Mwananyamala)*

SAID MOHAMED MDETE 1ST APPELLANT

FATUMA MOHAMED MDETE 2ND APPELLANT

MWAJABU MOHAMED MDETE 3RD APPELLANT

VERSUS

ROMAN MASENGERESPONDENT

JUDGMENT

Date of Last Order: 05/04/2022

Date of Judgment: 28/04/2022

A. MSAFIRI, J

The brief background of this appeal is that the respondent Roman Masenge, filed an Application No. 41 of 2021 before the District Land and Housing Tribunal of Kinondoni at Mwananyamala. He was suing the now appellants for unlawful eviction from the house Plot No. 18 located at Manzese, Dar es Salaam. The respondent was a tenant in the said house (house in dispute) which was leased to him by the appellants' father one Mohamed Mdetete who is now deceased.

The matter before the trial Tribunal was heard ex-parte after the appellants failed to appear before the Tribunal despite the claims that they were summoned. After hearing, the trial Tribunal decided the matter ex-parte in favour of the respondent. Basing on the decision, the

respondent filed an application for execution through Application No. 581 of 2020 before the same District Tribunal.

The appellants were summoned to appear and defend an application for execution. They then filed an application for extension of time to set aside ex-parte judgment through Application No. 857 of 2020 claiming that they were unaware of the existence of ex-parte judgment as they were not summoned during the hearing of the matter. The application No. 857 of 2020 for extension of time to set aside ex-parte judgment was dismissed by the District Tribunal. The appellants were aggrieved and have lodged this appeal on two grounds namely;

- 1. That, the Hon. Tribunal erred in law and fact by dismissing an application for extension of time without considering several illegalities pertaining to the proceedings which lead into ex-parte judgment against the appellants herein.*
- 2. That, the Hon. Tribunal erred in law and fact by holding that there were no reasons for the Tribunal to grant the Application.*

The appellants prays for the ruling and decree of the District Tribunal to be quashed and set aside and this appeal be allowed. The hearing of the appeal was by way of written submissions.

Mr. Adili Simeon Kiiza, advocate represented the appellants. Briefly, he submitted that, there were illegalities pertaining to the proceedings which led into ex-parte judgment against the appellants. He said that one of the illegalities in the said proceedings is in the service of summons. That, the appellants had never been served with the summons to appear and defend in Misc. Land Application No. 41/2014 and therefore, they were condemned unheard. *Adili -*

Mr. Kiiza argued that the service of summons did not comply with the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003, G.N. No. 174 of 2003, which regulates the service of summons in land Tribunals.

That, the summons which were purported to have been issued by the trial Tribunal on 12th February 2014, requiring the appellants to appear before the Tribunal on 12th March 2014 vary with what are in the records in the Court file. The summons which are in Court file shows that they were issued by the Tribunal on 6th February 2014 and were issued only to two appellants i.e. Said Mohamed and Fatuma Mohamed while the appellants were three.

He stated further that, the said summonses were attested by one Roya. M. Makoloweka (Mjumbe wa Shina) who purported to have effected the service to the appellants. That the act of Roya Makoloweka of witnessing the affidavit sworn by himself was illegal and was contrary to the Oaths and Statutory Declaration Act, Cap 34 R.E 2019.

Mr. Kiiza also argued that, the trial Chairperson also considered the summons issued by publication through Mwananchi newspaper without warning herself on the requirements set out by the law of substituted service as per Order V Rule 20 (1) of Cap 33 R.E 2019. He pointed that the trial Chairperson erred in law by relying on the said publication service.

Mr. Kiiza also stated that, the application instituted by the respondent was incompetent as it did not disclose the date as to when it was filed before the Tribunal and there was no proof of payment for the filing free, and that this is contrary to Regulation 3(2) of G.N. No.174 of 2003. *Adde.*

On the 2nd ground of appeal, Mr. Kiiza submitted that, the trial Chairperson did not take time to read the proceedings which led to the ex-parte judgment, and that if he could have done so, he could have ruled otherwise. To cement his points, the counsel cited several authorities including the cited several authorities including the case of **Metro Petroleum Tanzania Limited & 3 others vs. United Bank of Africa**, Civil Appeal No. 147 of 2019.

The respondent was represented by advocate Mohamed Menyanga. He submitted in opposition of appeal that, through the submissions, the counsel for the appellants admitted that four summons were served to the appellants including service by publication.

He said that, the first summons was issued on 24th November, 2014 and was signed by the appellants, second summons was issued on 19th December, 2014, third summons was issued on 12th February 2014 and four summons was issued by publication on 8th April, 2015.

He argued that the service complied with Regulation 5(2) of the Land Disputes Courts (The District Land and Housing Tribunal), G.N. No. 174 of 2003. That, the service done by "Mjumbe wa Shina" was proper as he is a person qualified for service of summons. That, the service can be done not only by the Court Process Server but also by other person as what is required is just to inform the appellants and make them aware of the suit instituted.

Regarding to the reservice by mode of publication through newspaper, it was done as per the provisions of Order V Rule 20(1) of the Civil Procedure Code Cap 33 R.E 2019. He concluded that in his view, the *Actle*

trial Tribunal dealt with the issues of irregularities addressed before it and clearly resolved them. He prayed for the dismissal of the appeal with costs.

In rejoinder, the counsel for the appellants reiterated the submissions in chief and added that, the Court should disregard the counsel for the respondent's assertion that the trial Tribunal did not grant the application for extension of time for the reason that the appellants did not account for each day of delay from the date of ex-parte judgment. He argued that, there was no delay in instituting the application for extension of time, rather the trial Tribunal misdirected itself.

I have gone through the submissions in support of appeal and against the appeal, together with the Court records and I am of the view that the major issue for determination is whether the appeal at hand is meritorious. My determination will focus on the two grounds of appeal forwarded by the appellants.

The first ground of appeal is that the Honourable trial Tribunal erred by dismissing an application for extension of time without considering the illegalities on the proceedings which led into ex-parte judgment.

From the submissions in chief and rejoinder, I have gathered that the appellant is raising the issue that there was illegalities in the proceedings which led into ex-parte judgment.

The illegalities which have been raised by the counsel for the appellants, one is the issue of service of summons to the appellants in Land Application No. 41 of 2014. The appellants through their advocate are

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claiming that they were unaware of the fact that the respondent has instituted a suit against them i.e. Land Application No. 41 of 2014 before the District Tribunal. They asserted that they were never served and the summons which are in the Court's proceedings are tainted with illegalities.

I have to read the whole of the proceedings to satisfy myself on the illegalities claimed to be in the process of issuance of summons to the appellants. During the hearing of the proceedings before the District Tribunal which was filed by the now appellants in Misc. Application No. 857 of 2020, the applicant's counsel submitted before the District Tribunal that there were three sufficient reasons for the Tribunal to extend time for the applicants to file application for stay of execution.

The first reason adduced was that, when Application No. 41 of 2014 was instituted and proceeded in Court, the applicants were unaware of that proceedings until 12/9/2020 when they were informed by their daughter.

The counsel submitted that, the Application No. 41 of 2014 filed by the now respondent, did not show the date it was filed in the Tribunal. Furthermore, the summons alleged to be served to the appellants and signed by them were forged and that the person who served the summons was the one who also attested the affidavit for summons.

In the court records, I have seen the photocopies of summons which were purportedly served to the appellants. There is a summons dated 06/02/2014 summoning one of the appellants Fatuma Mohamed Mdetete to appear before the Tribunal on 12/03/2014. It is signed by Fatuma, and dated 12/2/2014. The same is the summons for Mwajabu Mohamed

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Mdete and Said Mohamed who all signed to receive the summons. The appellants through their advocate have submitted that, the summons relied upon by the trial Chairperson vary with the one in the Court file in the records. That the summons in the Court records were issued on 06/2/2014 and were issued to only two appellants.

However, I don't agree with these claims. At page three (3) of the Ruling of the District Tribunal in Misc. Application No. 857 of 2020, the Chairperson stated that the appellants received summons on 12/2/2014 and were summoned to appear before the Tribunal on 12/3/2014 and file their defence within 21 days.

This observation by the Hon. Chairperson, tally with the dates on the photocopies of the summons which are on the Court records. Therefore the claims by the appellants that the summonses vary are baseless and I hereby disregard them. Furthermore, the claims that the summonses were issued to only two appellants also have no truth in them because the records show that summonses were issued to the three appellants and all them signed them.

The appellants have also averred that the said summonses purported to be served to the appellants did not meet the requirement of Regulation 6(4) (b) of G.N. No. 174 of 2003. That, the person who served the summons, one Roya Mkoloweka, a ten cell leader (*Mjumbe wa shina*) attested the affidavit of summons as a commissioner for oath while he was a deponent in the said affidavit. That, *Mjumbe wa shina* was not supposed to attest in his own affidavit, and also, he is not qualified to attest the affidavits as he is not a commissioner for oath.

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I have read regulation 6 (4) of G.N. No. 174 o 2003. It provides that;

"6(4); After the service, a person who effected the service shall;

b) Swear an affidavit in prescribed form indicating the manner in which the service has been effected".

I have also looked at the summonses purportedly served to the appellants. It is true that the same were witnessed/attested by the deponent himself i.e. *Mjumbe wa shina*. In the circumstances, I have asked myself whether the purported error was fatal. It is my view that the error does not go to the root of the matter because the records show that the summons were received and signed by the appellants. I say so for the reason that, I believe the purpose of service is to inform the party about the pending matter before the Court/Tribunal and directing him to enter appearance and defend the matter.

It is my view that, although the appellants are denying to have received the summons, they have failed to prove that the purported signatures were forged and that they did not sign the same. I have noted that, during the hearing of the application for extension of time to set aside an ex-parte judgment, counsel for the appellants submitted before the Court that the summons alleged to be served to and signed by the appellants were forged. However, there is no evidence which were adduced before the Tribunal to prove those claims by the counsel for the appellants. Also, it seems that claim was abandoned as it was not raised during the hearing of this appeal. In absence of proof that the signatures in the summons were forged, it is my finding that the summons were served to the appellants and they signed them. *Alle*.

Up to this juncture, the Hon. Chairperson did not err when he found that the appellants were served hence they were aware of the pending matter before the Tribunal.

The appellants were served for the second time by the summons to appear on 24/10/2014. The summons shows that the appellants were not found as they have moved to unknown place. The third time the appellants were served by substituted service through Mwananchi Newspaper on 08th April, 2015. The appellants have argued that the service contravened Order V. Rule 20(1) of Civil Procedure Code (*supra*).

I again find no reason to differ with the findings of the trial Chairperson that the substituted service was issued after the prayer by the respondent's counsel. In addition, the substituted service was the last resort within the meaning of the rule of law, as it was found by the trial Tribunal that the appellants were initially served by the summons which they signed and failed to appear. Therefore, the Hon. trial Chairperson cannot be blamed by his decision to proceed with the matter *ex-parte* as he was satisfied from the returned summons that the appellants first received the summons and signed it, so they were aware of the pending case.

Furthermore, after the first service of summons, the Tribunal issued for the second summons which were endorsed by the same "*mjumbe wa shina*". Summons were returned that the appellants were not found as they have moved to unknown place. In the circumstances, I find that the service by publication was proper because, the District Tribunal was satisfied that the appellants were served twice, the first one where the Tribunal satisfied itself that the same were served to the appellants and *Alle.*

signed by them. The second time the appellants were untraceable. Therefore, I do not blame the Hon. Chairperson to issue an order of substituted service.

I find that the issue of defectiveness of the summons does not waive the fact that in the first place, the appellants were properly served.

From this, I find that the purported illegalities raised by the appellants were baseless and I agree with the decision of the Hon. Chairperson that, there was no apparent legal errors or illegalities which goes to the root of the matter.

The appellants have raised issue of illegalities involving service to appear during the hearing. It is true that generally it is a set principle of law that extension of time can be considered by the Court when the point at issue is one alleging illegality (see the case of **Principle Secretary, Ministry of Defence and National Service vs. Devram Valambhia** [1992] TLR 387.

However, there are circumstances upon which the Court of Appeal has drawn a line on when the point of illegality can be raised and be termed as a good and sufficient cause for extension of time.

The case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015 CAT at Arusha (unreported), the Court of Appeal set the rule that illegality is only accepted when it is apparent on the face of record such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.

As I have observed the submissions by parties and evidence on Court records, the illegalities claimed by the appellants are drawn arguments

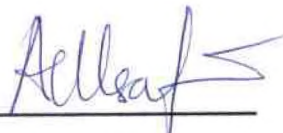
that the process of issuance of summons to the appellants were full of irregularities. However, as I have explained and analysed hereinabove, the irregularities have drawn a long process of arguments on whether the appellants were served or not. Going through the arguments, I have already found that there were no illegalities as claimed by appellants.

Therefore, I entirely agree with the findings of the District Tribunal which considered the raised illegalities and found them to have no basis. Basing on that, I find that the appeal lacks merit and I proceed to dismiss it, with costs.

It is so ordered. Right of appeal explained.

Dated at Dar es Salaam this 28th April, 2022.




A. MSAFIRI,
JUDGE