

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

**MISC.LAND APPEAL No. 215 OF 2020**

(Arising from the decision of the District Land and Housing Tribunal for Kinondoni in Land Application No. 146 of 2013, Originating from Land Application No.42 of 2011)

**JANETH JOSEPH KILEO.....1<sup>ST</sup> APPELLANT  
MELKIZEDEK FANUEL KILEO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**MERCY JOACHIM MSOFE.....RESPONDENT**

**JUDGMENT**

*11.05.2022 & 30.05.2022*

**MASOUD, J.**

The appellants being aggrieved by the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (herein after **the trial Tribunal**), delivered on 15/04/2016, decided to appeal before this court on the following reasons;

1. That the Hon. Trial Tribunal grossly erred in law and in fact in holding that failure to properly serve the appellant with summons for orders does not constitute a good cause and sufficient reasons for extension of time leading to set aside the ex parte judgment, which condemned the appellant unheard against the principle of natural justice.

2. That the Hon. Trial Tribunal glossily erred in law and in fact for having properly found that the complained judgment was procured ex parte without availing the parties an opportunity to be heard against the principle of natural justices, but failed to hold that an illegality of the decision being challenged constitute a good cause and sufficient reason for extension of time leading to set aside the ex parte judgment.
3. That the Hon. Trial Tribunal glossily erred in law and in fact in admitting and relying on the sale agreement which was not paid stamp duty as required by the law.
4. That the Hon. Trial Tribunal glossily erred in law and in fact for having properly found that the estimated value of the suit land is Tsh. 1,200,000/= only, but failed to hold that, it has not vested with pecuniary jurisdiction to try a land dispute involving a value at 1,200,000/=

On the reasons stated above, it is the appellant's prayer that, the decision of the trial Tribunal and all subsequent orders made there to be set aside, appeal be allowed in its entirety with costs and that court be pleased to grant any other orders it may deem fit and just to grant.

During the hearing of this appeal, while the appellants appeared in person and un represented, the respondent, despite of being served through publication on the Mwananchi Newspaper dated on 2/2/2022, did not enter appearance. Therefore, this matter proceeded ex parte against her.

By the order of the court entered on 22/03/2022, this appeal proceeded by way of filing written submission, the appellants adhered to the submission schedule.

Submitting in support of the 1<sup>st</sup> ground, the 1<sup>st</sup> and 2<sup>nd</sup> appellants said that, sometimes in 2011 the respondent filed a case before the trial Tribunal, that is Misc. Land Application No.42 of 2011 which proceeded ex parte against the Appellants. That this is contrary to the provisions of law, particularly **Regulation 7 (1)(a) of the Land Disputes (District Land and Housing Tribunal Regulations, G.N No. 174 of 2003,** which requires the opponent to be dully served with summons in order to file his respective written statement of defense within 21 days from the date of service.

When submitting on the 2<sup>nd</sup> ground, they submitted that, it is undisputed fact that the Misc. Land Application No. 42 of 2011 proceeded ex parte against the appellants, therefore, that the appellants were condemned unheard and that is against the principles of natural justice. To support

his argument, he referred to the cases of **Yahaya Selemani Mralya vs Stephano Sijia and Others, Civ. Appeal No. 316 of 2017 CAT** where the court at the last paragraph of page 9 of the typed ruling held as follows;

*"Affording parties an opportunity to be heard is an enshrined right under Article 13(6)(a) of the constitution, the breach of which undermines the entire decision"*

Also, in the case in the Case of **Principle Secretary, Ministry of Defense and Natural Service vs Devram Valambhia [1992] TLR No.185** the Court of Appeal had this to say;

*"We think that as here the point of law is illegality or otherwise of the decision being challenged that is sufficient importance to constitute sufficient reason within the meaning to Rule 8 of the Rules for extending time. To hold otherwise would amount to permitting a decision which in law might not exist to stand."*

The appellants submitted further that, the court to take cognizance of the Constitution principle under **Article 107 A (2)(e) of the Constitution of the United Republic of Tanzania, 1977** as amended from time to

time, which requires court of law in dispensing justice to give substantive justice over procedural technicalities.

On the 3<sup>rd</sup> ground of appeal, they submitted that, it is undisputed fact that the trial Tribunal declared the respondent the lawful owner of the disputed property relying on the sale agreement which was admitted before the trial Tribunal as exhibit P1 without having dully paid stamp duty as required by the law. He referred me to the provision of **Section 46(1) of the Stamp Duty Act, 1972**, which provides that no instrument chargeable with duty shall be admitted in evidence unless the instrument is duty stamped.

Submitting on the 4<sup>th</sup> ground of appeal the appellants submitted that, the trial Tribunal tried the matter before it while it was not vested with the jurisdiction to try the same. That the sale agreement revealed that the disputed land is valued at 1,200,000/= as the total amount used to purchase it. They continued to submit that at page 2 of the typed judgment the chairman said that;

*"The Applicant who is now the Respondent who testified as PW1, told the Tribunal that she purchased the suit property in 2003 from one Mzee Madenge for Tsh.1,200,000/= only"*

That according to the provision of Section 15 of the Land Disputes Courts Act, Cap 216 R.E 2019 the pecuniary jurisdiction of the Ward Tribunal in all proceedings of a civil nature relating to land shall be limited to the disputed land or property valued at Three million shillings. They added further that the dispute at hand concerned a land which valued at 1,200,000/= only, therefore that it was required to be adjudicated by the Ward Tribunal and not the trial Tribunal. That the pecuniary jurisdiction of the trial Tribunal is from three million shillings up to three hundred million shillings for the recovery of possession of immovable property, Section 33(2) of the Land Dispute Courts Act (Supra).

The issue for consideration is whether the appeal at hand is meritorious.

Starting with the 1<sup>st</sup> ground, the appellants submitted that the case filed by the Respondent that is, the Misc. Land Application No. 42 of 2011 proceeded ex parte against them due to the reason that they were not aware of its existence as the respondent never troubled to serve them the summons to appear and defend their case.

I have perused the record of this appeal, particularly the Misc. Land Application No.42 of 2011 it reveals that summons was served to the appellants through affixation to the structure erected by the appellants on the disputed land, also the trial Tribunal on 25/07/2011 ordered the

respondents herein to serve summons to the appellants herein by way of publication on the reason that the affixation of summons was done/affixed to the property where no one resides in it. The records of the Misc. Land Application No. 42 of 2011 further show that on the 28/02/2012 and 29/02/2012 the respondents appeared in the trial Tribunal. On the 28/02/2012 the matter was adjourned, but on the 29/02/2012 the matter was scheduled for continuation of ex parte hearing, though the Respondents attended the court, they never applied for setting aside the ex parte hearing so the trial Tribunal proceeded to hear the matter ex parte against them although they were present on that particular date, after hearing the testimony of PW2 the Applicant closed her case, the Tribunal ordered for the date to deliver the judgment.

As already said above, the Appellants herein were present, therefore, aware of the date when judgment was supposed to be delivered but they never troubled to file application to set aside ex parte hearing. Henceforth, not true that they were not served, and not true that they were not aware of the existence of the Misc. Application No. 42 of 2011 because they even attended the trial Tribunal session two times. Thus, the first ground of appeal has no substance.

As regards to the 2<sup>nd</sup> ground, I am not going to labor much time on this ground since it has been covered by the 1<sup>st</sup> ground. As I said earlier, the appellants were aware of the existence of the Misc. Land Appl. No. 42 of 2011, they had a chance of setting aside the ex parte hearing so that they could be accorded the chance to be heard on the matter, but due to their negligence, lost the chance. I therefore, hold that this grounds also, has no merit.

With regard to the 3<sup>rd</sup> ground the appellants attacked the admission of the sale agreement (Exhibit P.1) as it had no stamp duty. It is true that the sale agreement was not stamped before admitted as an exhibit in court which is an error as correctly argued by the Appellants. See the case of **Zakaria Bura vs Theresia Mari John Mbiu (1995) TLR 211 at page 216** his Lordship Hon. Nyalali CJ (as he then was) held that:

*"Failure to indicate payment of the stamp duty according to stamp duty act by law renders the sale agreement in admissible as evidence in court, "*

Following this inconsistency, the I hereby expunge the sale agreement (Exhibit P.1) from court record for want of stamp duty payment.

However, the law is settled that the absence of stamp duty does not vitiate



the sale if there are other evidence as was decided in the case of **Juma vs. Habibu [1975] IEA**. The question therefore is whether there is other evidence to verify the presence of sale agreement to which its answer is in affirmative. The testimonies by PW1 and PW2 support the same as per above analysis. Henceforth, this ground of appeal has no merit as well.

As regards to the last ground, the Appellants said that the trial Tribunal tried the matter before it, while knowing that it never had jurisdiction to try the same. That the dispute at hand concerned a land valued at 1,200,000/= only, therefore it was required to be adjudicated by the Ward Tribunal and not the trial Tribunal.

My thorough perusal of the records of this appeal reveals the contrary. Paragraph 4 of the amended Application discloses that the estimated value of the suit property is Tsh. 15,000,000/= and not 1,200,000/= as submitted by the appellants. The trial Tribunal was a proper place to file the matter. See **Section 33 (2) of the Land Dispute Courts Act** (Supra). Exhibit P.1 was tendered before the trial Tribunal to show how the Applicant came into possession of the disputed property, thereby proving her ownership over it against the appellants herein. It was never

aimed at proving and/ or showing the value of the disputed property. Thus, even the 4<sup>th</sup> ground of appeal has no merit.

I also, discovered that, the impugned ex parte judgment desired to be set aside, has already been executed thus, the appellants herein filed the Misc. Land Application No.146 of 2013 as an afterthought, with the aim of delaying the respondent herein peaceful enjoyment of their property.

In the case of **Commissioner General vs Yamasida Enterprises Ltd in the Tax Revenue Tribunal** at Dar es Salaam in Custom & Exercise Tax Appeal No.27 of 2012, where the Tribunal quoted with approval the case of **Gulam Hussein F. Gullam Hussein t/a Hussein Services Station & Another vs Capital Cargo Services (2012) KLR** in this case at page 4 it was held that:

*"Once the proceeds are realized to the decree holder then the court stops there. It cannot follow to successful decree holder, as execution is complete at that stage."*

In the results and having found that all grounds of appeal lack merit, it goes without saying that this appeal is bound to fail. Consequently, I hereby dismiss it with costs, and uphold the decision of the trial Tribunal.

It is so ordered.

Dated at Dar es Salaam this 30<sup>th</sup> day of 2022.

  
**B.S. MASOUD.**

**JUDGE.**

**30/05/2022**

