IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 309 OF 2023

(Arising from the Ruling in Misc. Land Application No.91 of 2023, L.R. Rugarabamu, Chairman)

JOSEPH LUSANI HELASITA SANGA ..... 1ST APPELLANT

REHEMA HAMZA CHEGEZA .....2ND APPELLANT

VERSUS

JACOB PETER MAKAYA ..... RESPONDENT

JUDGEMENT

Date of Last Order: *25/10/2023*

Date of Judgment: 14/11/2023

MWAIPOPO, J.

This Appeal traces its genesis from the Ruling of the District Land and Housing Tribunal for Temeke at Temeke **"The DLHT"** handed down on the 13th July 2023 in Misc. Land Application No.91 of 2023 (Hon. L. R. Rugarabamu, Chairman).

Briefly, the background of this appeal, as may be gleaned from the court records, is as narrated hereinbelow.

Jacob Peter Makaya, the Respondent herein, instituted Land Application No.5 of 2021 at the DLHT against John Lusani Helasita Sanga, Rehema Hamza Chegeza and Athumani Mdoe, the first two being the Appellants herein, requesting to be declared as the lawful owner of the property described as Plot No. 2012 with Title No. 164231 & Plot No. 2011 with Title No. 16232 Block C Saranga-

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es Salaam hereinafter " **the suit property".**

As a consequence, thereof, the DLHT issued summons through a court process server in compliance with Section 6(1)(2)(3) and (4) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003 GN 174/2003. The process server allegedly tried to serve on the Appellants but all his efforts were in vain hence he swore an affidavit to that effect and a new summons was issued. The process server then decided to enlist the assistance of the Kisota hamlet chairman but the latter stated that he neither knew them nor their place of abode. After the process server had failed to locate them, he swore another affidavit and, consequently, service was effected by affixing the summons to the suit property. This mode was also unsuccessful. Thereafter, service was effected through their postal address. As was the case previously, this also ended in vain. After all attempts of ordinary service had proved ineffectual, the DLHT ordered for substituted service through a local daily with wide circulation. The substituted service was effected by publication in the **"Mwananchi"** newspaper of May 6, 2021. This mode also did not bear fruits. Following non appearance of the Appellants after exhausting all the efforts to serve them, the DLHT directed that the matter proceed exparte by virtue of Regulation 11 (1)(c) of the Land Disputes Courts (The Land and Housing Tribunal) Regulations 2003, GN. 174/2003.

In view thereof, the Respondent had, nonetheless, to prove his case exparte This is a mandatory **requirement and there is a litany of authorities to that effect; See, for instance, the case of** Mbuyu Holdings Ltd Vs Jenipher Muti, Land Case No. 151 of 2006, HC (Unreported):

The mere absence of the defendant does not of itself justify presumption that the Plaintiff's case is true. The court has no jurisdiction to pass an

exparte decree without any evidence given by or on behalf of the Plaintiff.

The Respondent thus prayed and was granted leave to prove his case exparte. He testified and tendered various documents to prove that he is, indeed, the owner of the suit property which he inherited from his father. In its determination of the suit, the DLHT was guided by two issues namely; first, as between the parties in the suit, who is the lawful owner of the suit property and, two, what reliefs, if any, is the Respondent entitled to.

The DLHT, subsequently, entered an exparte judgment on February 8, 2022 declaring him the lawful owner of the suit property and awarded resultant costs whereas the Appellants, in the eyes of the law, were declared trespassers.

The Appellants allegedly only became aware of this matter in August 2022 when they went to Temeke Municipal Council to request for the annual land rent assessment. They found out that the suit property now bears the Respondent's name and that there was an exparte judgment entered against them. As by then they were hopelessly out of time, they, consequently, filed Land application No.301 of 2022 at the DLHT for extension of time to set aside the exparte judgment. The DLHT, upon hearing both parties, granted the application on October 4, 2022 and directed them to file it within 14 days. The Respondent, being aggrieved by that Ruling, filed Land Appeal No.240 of 2022 in this Court challenging the same. Hon. Mgeyekwa J, after hearing both parties, dismissed the application on December 12, 2022 for lack of merit. Following, the dismissal, the Respondents filed Misc. Land Application No.337 of 2022 at the DLHT to set aside the _exparte_ judgment issued on February 8, 2022 in Land Application No.5 of 2021. However, the application was struck out for the reason that the affidavit was defective.

The Appellants, thereafter, filed Land application No.91 of 2023 before the DLHT for extension of time to set aside the _exparte_ judgment. Hon. Chairman. R. Rugarabamu, heard both parties and on July 13, 2023 dismissed the application.

The Appellants, being aggrieved and thus seeking to impugn the said ruling, have knocked the doors of this court armed with four grounds of appeal namely:

(1) That the Hon. Chairman of the Tribunal erred in law and fact by failure to evaluate whether proper procedure and practice in relation to service of summons were adhered to by the Respondent.

(2) That the Hon. Chairman of the Tribunal erred in law and fact by dismissing the application for extension of time without considering the illegality of proceedings before delivering the exparte judgment against the appellants herein.

(3) That the Hon. Chairman erred in law and fact by holding that there were no reasons for the Tribunal to grant the application.

(4) That the Hon. Chairman erred in law and fact by reaching its decision without analyzing and considering the facts and evidence adduced by the appellants during the hearing.

On the date fixed for hearing, in appearance was Mr. Godlisten Lyimo, learned counsel for the Appellants while the Respondent enjoyed the legal services of Mr. Tumainiel Lyimo, learned counsel.

As is the norm, the privilege of addressing the court first was accorded to the Appellants, via their counsel, Mr. Godlisten. In his submissions in chief, Mr. Godlisten, with the leave of the court, argued ground No.1 and 2 separately and then ground no.3 & 4 conjointly as the two are so

interwoven that they cannot be separated.

Submitting on ground one, Mr. Godlisten argued that proper procedure and practice in relation to service of summons were not duly complied with. In elaboration, he stated that the application was _exparte_ on the ground that the Appellants were nowhere to be found while in actual fact no efforts were made to trace them. He faulted the DLHT for failure to comply with Order 16 Sub rule (1) of the CPC regarding substituted service in that other modes of service had not been preferred before substituted service was affected.

Furthermore, he stated that substituted service can be effected only when the court is satisfied that the defendant is avoiding summons. He argued that the process server stated nowhere in his various affidavits that the Appellants were avoiding service.

As for ground two, Mr. Godlisten submitted that the impugned judgement is tainted with a threefold illegality. Firstly, according to him, the proviso to Section 45 of the Land Disputes Courts Act Cap 216 of RE 2019 is to the effect that where a decision is reached, it cannot be revised or altered unless it has occasioned failure of justice and in this case failure of justice has, indeed, been occasioned. He amplified that the DLHT misdirected itself on the issue of ownership of the suit property in that it was a registered land, had a registered title as there is a certificate of title no. 164231 and certificate of title No 164232 (Block C. Sangara, Kisota, Kigamboni). He also stated that the Respondent has no certificate of title and what was tendered was only a sale agreement and that he was not even a party to that agreement. He contended that one party has a valid title and another an invalid title. To buttress his submissions, he cited Section 29 of the Land Disputes Courts Act Cap 216 RE 2019. He further submitted that under the law it is only the Commissioner for Lands who

has mandate to issue certificates of title and prove whether a particular certificate of title is valid or not. He thus wondered where does the DLHT derive authority to establish that one has trespassed a particular area. He cited the case of Athumani Mamiri Vs Hamza Amiri & another Civil Appeal No.8 of 2020 where the Court of Appeal stated that a Title deed is conclusive evidence of ownership. He is thus of the view that there is an illegality as a certificate of title is not issued by the DLHT but by the Commissioner for Lands only. He insisted that if there is any dispute between two parties, that one has a title while another doesn't have, the DLHT ought to have summoned the Commissioner for Lands to settle the dust.

The second limb of the illegality is with regard to the issue of summonses being served by an illegible person. Mr. Godlisten submitted that Regulation 6 of the Land Disputes Court (the District Land and Housing Tribunal) Regulations, 2003 GN 174, requires that service be effected by a process server. He stated that according to Rule 5 of the Court Brokers and Process Servers (Appointment, Renumeration and Disciplinary) Rules 2017 GN 363, the law is very clear. Rule 5(3)(c) states:

A person shall not be eligible for Appointment as a court broker or process server under these Rules if that person is a judge or Magistrate in office or is employed in any capacity as an executive or officer of the court.

Mr. Godlisten submitted that it was one Khalid Sudi Ali who effected these summonses and his photos have been attached to his affidavits. He stated that this person is a court clerk working with the Temeke DLHT and hence as an officer of the court he is not eligible to be a process server. He contended that, in these circumstances, whatever was done by him is of no legal effect.

With regard to the third limb of illegality, Mr. Godlisten submitted that according to Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of 2003, all assessors must give their opinions in writing and the same must be read over to the parties but this was not adhered to by the DLHT Chairman hence the same is not reflected in the relevant proceedings. Mr. Godlisten stated that this is a point of law and as such it may be raised at any time. To cement his view, he cited the case of Mohamed Ibrahim Vs Mohamed Ibrahim Adam Civil Appeal No.51 of 2021 (Unreported) CAT.

With regard to grounds number 3 & 4, Mr. Godlisten argued conjointly that the DLHT was not justified to grant the application. He amplified that the DLHT was misled by the Respondent regarding the fact as to when the appellants became aware of the suit as a result the DLHT wrongly came to the conclusion that the Appellants delayed to file their application. He thus requested this Court to invoke Section 45 of the court Disputes Courts Act Cap 216 RE 2019 and find it fit and just to quash all the proceedings in Misc. Land Application No.91 of 2023 and Land Application No.5 of 2021so that both parties can appear before the Temeke DLHT and this matter be heard on merit.

Upon taking the stage to argue the appeal, Mr. Tumainiel, learned counsel for the Respondent, in his rebuttal submissions, stated that ground one lacks merit. He stated that service procedures were not violated and was adamant that service of summons was duly effected in strict compliance with the law. Expounding the issue of substituted service, he stated that the same was preferred after the ordinary service had proved futile. He amplified that there is a certificate of title where there is a postal address which was used to effect service as the same had not been changed. Furthermore, he stated that the process server was one Abdul Sudi and not Ali Sudi. He also stated that the Appellants

failed to prove that the said person is an employee of the Temeke DLHT as they ought to have tendered his employment agreement.

With regard to ground two on illegality, Mr. Tumainiel explained that the suit property was bought in 1981 and by that time there was no Commissioner for Lands and that people were owning land under customary rights of occupancy and that the Commissioner for Lands only came into picture in 1999 vide the Land Act No. 5 of 1999. He insisted that in 1981 all Lands were unregistered Lands. He cited Section 2 of the Land Act No. 5 of 1999 which recognizes deemed rights of occupancy meaning that even a person without a certificate of title has a legal right to own land.

Mr. Tumainiel went on to submit that it is the Registrar of titles who confers ownership in respect of land and that the DLHT only determines the rights and interests of the parties.

Regarding the issue of assessors, Mr. Tumainiel submitted that in the judgment and proceedings of the Land Application no.5 of 2021, there was an opinion of the assessors hence the argument of illegality does not hold water.

With regard to the issue that there were no reasons for granting the application, Mr. Tumainiel stated that it is a general rule that to grant an extension of time, there must be sufficient reasons. He cited the case of Dorothy Kensolele vs Eileen Josephine Mshana & Another Land Application No. 607 of 2020 (HC- Unreported) and that of Samora Kipesha vs Beatrice Kilota Civil Land Appeal No.28 of 2020 (HC-Unreported) to cement his view. He stated that the decision was based on reasons and the same have been mentioned at page 7.

He lastly submitted that the Appellants have grossly misdirected themselves to appeal against the Ruling in Land Application No.91 of 2023 as the only remedy available to them was to apply for extension of time to set aside the exparte judgment in Land Application No.5 of 2021. He is of the view that the proper appeal should have been against appeal no. 327 of 2022 and not Land Application no.5 of 2021. He also stated that this document has been brought contrary to Order 39 rule 1of the CPC which requires that every appeal be brought by way of a Memorandum of Appeal and not a Petition of Appeal. He thus implored this Court to dismiss this appeal with costs.

In his rejoinder submissions, Mr. Godlisten basically reiterated his submissions in chief. He stated that the Appellants admitted in their reply that the Respondents were not served personally but other modes were used. He insisted that before preferring other modes, the Appellants ought to have informed the DLHT that personal service was ineffectual, which was not done.

Regarding the issue of the names of the process server who effected the summonses, he argued that the crux of the matter is whether or not the person who effected them was an officer of the court stationed at the Temeke DLHT. He further stated that his photo is in the court file hence this court should take judicial notice.

Responding to the issue of the Commissioner for Lands, Mr. Godlisten stated that it doesn't matter whether a person is the holder of a granted right of occupancy or deemed right of occupancy as it the Commissioner for Lands who allocates land in Tanzania. He was adamant that if the certificate mentioned above was fake, it was the Commissioner for Lands who was supposed to be summoned by the DLHT to clarify.

Regarding the issue of assessors, Mr. Godlisten was also adamant that the court records do not contain their opinions.

Regarding the issue of preferring an appeal, Mr. Godlisten was of the view that this is the right remedy as their application for extension of time to set aside the exparte judgment in Land Application No.91 of 2023 was dismissed by the DLHT.

Lastly, regarding the issue of filing **"A Memorandum of Appeal"** instead **of "A Petition of Appeal"** Mr. Godlisten conceded that the appropriate title should have been **"A Petition of Appeal"** but was quick to implore this Court to invoke the overriding principle under Section 3 of the CPC to cure this minor error.

Having heard the relatively lengthy submissions of the learned counsel for the parties herein in the light of the record of appeal before me, I am now called upon to determine whether this appeal is meritorious by considering the competing arguments made by the learned trained minds.

Starting with the contention in the first ground of appeal, I am in agreement with Mr. Tumainiel that all the requirements of the law regarding procedures of issuing summonses were duly complied with.

Mr. Godlisten has stated that substituted service was wrongly effected as in law the same can be effected only when the defendant avoids summons and there is no evidence that the Appellants avoided summonses. There is no gainsaying that, that is not correct as substituted service can also be affected if there is any other reason. Order V rule 16 (1) of the CPC is very clear on this:

> *"Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose*

of avoiding service or that, for any other reason the summons cannot be served in the ordinary way, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place ..."(Emphasis mine).

In this regard, my brother Malata, J rightly stated in the case of **Pathec Limited Vs Juma Lukinda Majegelo Civil Appeal No. 42 of 2022** (HC- Unreported):

"According to Order V rule 16(1), for substituted service to be effective, there are pre conditions to be met; the court must be satisfied that one, the defendant is keeping out of the way for the purpose of avoiding service and two for any other reason the summons cannot be served in the ordinary way..." (Emphasis mine).

I fully subscribe to his views and I find no cogent reasons to depart from his views. This is in line with the case of Bank of Africa Tanzania Ltd Vs Nakumatt Tanzania Ltd & 3 others Commercial case No. 151 of 2019 (HC-Unreported):

"It is not advisable, as a matter of practice, comity and rationality, to easily depart from a decision of a brother or sister judge unless one finds truly cogent reasons to do so".

I am of the settled view that the process server used all due and reasonable diligence to serve the appellants physically but he could not trace them. Consequently, substituted service as ordered by the DLHT was appropriate in the circumstances of this case since sufficient explanation had been given on the efforts made to serve them through the ordinary mode.

Furthermore, as per Order 5 rule 20(2) of the CPC, substituted service is as effectual as physical service:

> *"Service substituted by the order of the court shall be as effectual as if it had been made on the defendant ".*

Furthermore, alleging that one does not read newspapers will not exonerate him when it comes to substituted service.

This legal position is in tandem with the decision of the Supreme Court of India **in Suni Poddar and and vs Union Bank of India AIR 2008** SC 1006 which I have found to be highly persuasive:

It is a well settled position that once a summons is published in a newspaper having wide circulation, the respondent cannot be heard to complain that he was not aware of such publication and it is immaterial whether the respondent does subscribe or read the newspaper or otherwise.

From the records, the Respondents stated that they were not aware of the case despite the same having appeared in the newspaper mentioned above for the reason that they didn't see it. Guided by the above legal principle, I hold without any demur that this is a lame excuse. This court had the same view in **Lodrick Emmanuel Uronu v Dhoryum Sing Hanspaul & Sons Ltd and Another Misc. Civil Application No.95 of 2022** (HC- Unreported):

> *"The averment in paragraph 17 of the Applicant's affidavit is that he does not read newspapers. I find this to be a lame excuse".*

Regarding ground two on the issue of illegality, it was held in the celebrated case of **Lyamuya construction company Ltd v Board of Trustees of Young Women's Christian Association of Tanzania**

Civil Appeal No.2 of 2010 (CAT) that:

> *"Illegality must be apparent on the face of the record, not one that would be discovered by a long-drawn argument or process".*

In the instant appeal, it is my view that the issue of ownership of the suit property is not apparent on the face of the record. It can only be discovered by a long- drawn argument. Furthermore, as no certificate of title was tendered as an exhibit due to non appearance of the Appellants in the DLHT, this complicates matters even more as what was before the DLHT was the sale agreement only which was admitted as an exhibit.

With regard to the second limb of illegality, it was alleged by Mr. Godlisten that the process server who effected the said summonses was an employee of the Temeke DLHT hence an officer of the court and consequently not eligible to serve summons. Mr. Tumainiel, on the other hand, has flatly denied that allegation. I have noted that both parties have given different names and, in the circumstances, Mr. Godlisten has implored this Court to take judicial notice. With respect, I do not subscribe to his line of argument for the following reasons; one Section 59 (1) of the Evidence Act Cap 6 RE 2022 mentions scenarios underwhich a court can take judicial notice. It is crystal clear that the scenario in the instant appeal is not one of them. Two Mr. Godlisten who had made this allegation is the one who was duty bound to prove it on the balance of probabilities. In this regard, I wish to quote the decision of our Apex court in the case of Paskali Nina vs Andrea Karera Civil Appeal No.325 of 2020 (Unreported):

> *"It is necessary to reiterate the basic rule that he who alleges has the burden of proof as per Section 110 of the Evidence Act Cap 6 RE 2022 and the standard of proof in a civil case is on a preponderance of probabilities".*

As Mr. Godlisten has failed to substantiate his allegation, this Court has thrown the same into the dustbin of history.

That said, next for consideration is whether it was proper to use the title **"Memorandum of Appeal"** instead of **"Petition of Appeal"** I fully concur with Mr. Tumainiel that Order 39 rule 1 of the CPC requires that every appeal be brought by way of a Memorandum of Appeal. But what is in a name? To me, I do not see any difference whether one uses **"Petition of Appeal** or **"Memorandum of Appeal"** to me, they are just different names meaning one and the same thing intended to serve the same purpose. My search for possible support for the above opinion led me to the case of Basil **Masare vs Petro Michael 1996 TLR 226** (HC):

What substantive distinction can one make from the use of the words **"Petition"** and **"Memorandum"** when referring to grounds of appeal to a higher court? I must confess, I see no such distinction.

In the same vein, it was stated in **Thomas Kunongoleka vs Joseph Elias Land Appeal No.53 of 201**0 (Unreported- HC) that:

> *"The practice has been filing a memorandum of appeal for those appeals which come to this court by way of appeal from the decisions of the DLHT in their exercise of their original jurisdiction".*

That said, next for consideration is whether the Appellants were wrong to appeal as contended by Mr. Tumainiel who stated that the Appellants' only remedy was to make an application to set aside the exparte judgment in Land Application No. 5 of 2021. In my view, this argument has no legs to stand on as the Appellants were entitled to appeal. I am fortified in my view by the case of **Hadija Ally vs George Msingi Civil**

Appeal No. 83 of 2019 (CAT) (Unreported):

The Law applicable in appeals challenging decisions of the DLHT, is mainly the Land Disputes Courts Act (LDCA). In terms of the law, Section 38(1) of LDCA provides for the High Court to be the only forum to which an appeal from the DLHT is to be presented for determination.

Any party who is aggrieved by a decision or order of the District Land and Housing Tribunal. ..... may within sixty days after the date of the decision or order, appeal to the High Court.

I have found myself with no flicker of doubt in my mind that as the DLHT made its decision in Land Application No.91 of 2023 dismissing the Appellants' application, then the Appellants were legally entitled to appeal against that decision.

This finding takes me to the issue of assessors. Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations 2003 mandates every assessor present at the conclusion of hearing to give his opinion in writing. This is a mandatory requirement and if it is not adhered to, this will amount to a serious irregularity. There is a considerable body of case law on this; see, for instance, the case of **Ameir Mbarak & Another vs Edgar Kahwili Civil Appeal No.154 of 2015** (Unreported) CAT:

> *"It is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgement of the chairman in the judgement. In the circumstances, we are of the considered view that the assessors did not give any opinion for consideration in the preparation of the Tribunal's judgement and this was a serious irregularity".*

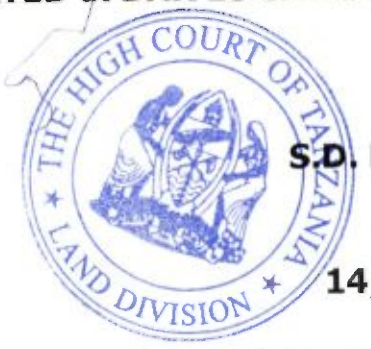
yamesomwa leo 21 Desemba 2021".

In this instant appeal, on December 21, 2021, the Chairman scheduled a date of Judgment after the assessors' opinion had been pronounced as required by Section 22(1) of the Land Disputes Courts Act Cap 216 RE 2019. My perusal of the proceedings clearly show that the trial Chairman strictly adhered to the requirements of the law.

For the foregoing reasons, I have no lurking presentment in holding that I have found no merit in the appeal and I, consequently, dismiss it in its entirety with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of November, 2023



S.D. MWAIPOPO

JUDGE

14/11/2023

The Judgement delivered this 14th day of November,2023 in the presence of Advocate Godlisten Lyimo for Appellants and Tumainiel Lyimo for the Respondent, is hereby certified as a true copy of the original.

S.D. MWAIPOPO

JUDGE

14/11/2023