

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 642/17 OF 2022

**VICTORIA RWEIKIZA..... APPLICANT
VERSUS**

ALEX MSAMA MWITA.....1ST RESPONDENT

BENEDICTO R. IJUMBA.....2ND RESPONDENT

NOELA O. ISHEBABI.....3RD RESPONDENT

**(Application for an *Ex parte* order waiving service upon the second
respondent of the notice of appeal, copy of the letter requesting for
proceedings and all other subsequent documents
against the decision of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Msafiri, J.)

dated the 19th day of September, 2022

in

Land Revision No. 08 of 2022

RULING OF THE COURT

12th & 26th March, 2024

LEVIRA, J.A.:

This *ex parte* application is brought by way of a notice of motion preferred under Rules 84 (1) and 4 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by the affidavit of Pascal Livin Mshanga, advocate from Adare Advocates (formerly Auda and Company Advocates). The applicant herein is seeking for an order waiving service

on the second respondent of the following: **one**, notice of appeal which she filed in Court on 7th October, 2022 against the decision of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Revision No. 8 of 2022; **two**, a copy of the letter requesting for proceedings in the above Land Revision; and **three**, all other subsequent documents to be served upon the second respondent in pursuing the appellate process. The application is predicated on the ground that, the second respondent took no part in the proceedings in the High Court which culminated in the intended appeal and his whereabouts are unknown to the applicant.

At the hearing of the application, the applicant was represented by Mr. Audax Kahedanguza Vedasto, learned advocate, from Adare Advocates. Since this is an *ex parte* application, there was no representation from the respondents' side.

Initially, Mr. Vedasto submitted on the application requesting for waiver of a requirement to effect service on the second respondent of the above-mentioned court documents. He was certain that under Rule 84 (1) of the Rules, the Court can direct that service need not be effected on the second respondent due to the fact that he took no part in the proceedings in the High Court. However, he said, since there is no provision of the law which directs for an *ex parte* application for waiver

of the requirement to serve the said respondent with a copy of the letter to the Registrar, requesting for proceedings and other subsequent documents, then the Court should invoke its powers under Rule 4 (2) (a) and (b) of the Rules to grant the application in that regard. Relying on the supporting affidavit, he insisted that the whereabouts of the second respondent was not known since when the matter was before the High Court. That is why the matter proceeded *ex parte* against him, as stated at paragraphs 9 and 10 of the said affidavit.

In the alternative, Mr. Vedasto made a prayer to the Court to the effect that service of the documents under consideration be effected through publication in newspapers. In addition, he prayed for an order that the time within which to publish the notice be reckoned from the date of this order, bearing in mind that the law provides for specific time to effect service of court documents.

Having heard Mr. Vedasto and after perusal of the record of the application, the main issue for our determination is whether the application as a whole is tenable. In this issue, among others, we shall consider whether the second respondent seems to be directly affected by the intended appeal. We will start with the provisions under which this application is made.

Rule 84 (1) of the Rules provides:

"An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."

The power of the Court to waive service of a notice of appeal on a person who took no part in the proceedings in the High Court as per the above provision, is discretionary. Therefore, it needs to be exercised judiciously after taking into consideration circumstances of each case. The above provision sets a condition that, having lodged a notice of appeal, the intended appellant must serve copies of it on all persons who seem to him to be directly affected by the appeal. At the same time, it empowers the Court to waive service of a notice of appeal on a person who took no party in the proceedings in the High Court, but in our view, may be affected by the outcome of the appeal, like in the present matter.

It is on record that on 28th September 2016, the second respondent instituted Land Application No. 491 of 2016 at the District Land and Housing Tribunal for Kinondoni (the DLHT), against the applicant and the

third respondent. He claimed to be declared as a lawful owner of a piece of land known as Plot "J" Mbezi Beach Area within Kinondoni Municipality (the land in dispute). Eventually, the matter was determined by settlement where the second respondent was paid TZS. 50,000,000/= by the first respondent and he abandoned his claims over the land in dispute.

Vide Land Revision No. 08 of 2022, the applicant unsuccessfully challenged the decision of the DLHT as she claimed that, she was not a party to the settlement deed which dispossessed her property (the land in dispute). The applicant was aggrieved by the decision of the High Court on Revision delivered on 19th September, 2022. On 7th October, 2022, she lodged a notice of appeal against it subject of the present application. The reason why the applicant is moving the Court to exercise its power under Rule 84 (1) of the Rules, is because the second respondent's whereabouts are not known to the applicant. The learned counsel for the applicant substantiated this assertion in his submission by referring the Court to the supporting affidavit.

We thoroughly examined the supporting affidavit and observed that, to a large extent, the same explains about the sequence of events from the time Land Revision No. 8 of 2022 was instituted to its conclusion. Of

relevance to this application is the deponents' expression that, the matter was conducted *ex parte* against the second respondent after the efforts to procure his attendance proved futile. Regarding the current status, the deponent stated at paragraphs 10 and 11 as follows:

10. "That regarding the whereabouts of the 2nd Respondent now, nothing has changed. His whereabouts and or any other means to reach him are unknown to the applicant.

11. That I have discussed with the applicant about the whereabouts of the Respondent we have both failed to get a hint as to where he can be found. Hence, we have not served him with Notice of Appeal which was filed in this Court on 07/10/2022 and a letter requesting for proceedings which was filed in the High Court on 23/09/2022".

It is evident from the above paragraphs that, the deponent did not explain the efforts (if any) taken by the applicant to serve the second respondent. In our considered view, it was not sufficient for him to just explain that nothing has changed regarding the whereabouts of the second respondent, but in the application of this nature, the applicant ought to have given a thorough explanation about the measures taken to

procure his attendance and whether he/she will be affected by the outcome of the intended appeal. We say so because, failure to know the whereabouts of a party to a matter in itself cannot justify waiver of a requirement to service necessary documents for appeal purposes on that party, unless there is a proof of unsuccessful exhaustive measures to do so. Equally important is a consideration of whether waiver of service on a person who took no part in the High Court will cause injustice.

In the matter at hand, we have noted that, the second respondent surrendered his claims over the disputed land upon being paid as per the deed of settlement as intimated above. Therefore, we think, whatever outcome of the intended appeal will affect him. Yet, there is no even an attempt by the applicant to serve him through substituted service or publication has been made. The only attempt was to communicate with the then advocate who represented him in other applications in the High Court. We think, the applicant ought to have resorted to Rule 22 (1) of the Rules to ensure that service is effected on the second respondent.

Apart from that, much as we appreciate that under Rule 4 (2) (a) and (b) of the Rules we can give orders on matters not provided for by the Rules, we wish to state that having examined the nature of the second and third prayers in the notice of motion, we find that we are unable to

grant them. Our reasons are the following: **one**, we do not think that it will be appropriate for us to give an *ex parte* order waiving service of the letter to the Registrar requesting for necessary documents for appeal purposes at this stage. The essence of the letter to the Registrar, in terms of the proviso to Rule 90 (1) of the Rules, is to benefit the appellant in exclusion of time that may be spent in preparation of the requested documents. This is subject to time limitation of thirty (30) days from the date of the impugned decision.

The validity of certificate of delay issued under the above provision is mostly determined at the hearing of the appeal. This presupposes that all preliminary matters have already been attended to, including service of copies of the notice of appeal. Therefore, we do not find it appropriate at this stage, where even the notice of appeal has not yet been served on the second respondent, to give the order sought under the second prayer. More so, the intended appeal is not before us and the other parties are not present as the application is made *ex parte*. It cannot be over emphasized that, the aim of ensuring service of a copy of letter to the Registrar on the other party, apart from alerting him, is to examine the competence of the appeal before the Court. Granting of applicant's prayers number one and two which are guided by different provisions,

with different administration and purposes in the same application, in our view, is inappropriate.

Two, the third prayer is vague. We fail to comprehend how can the Court give an *ex parte* order waiving service on the second respondent of "unknown" subsequent documents. With respect, as we indicated above, we are unable to grant waiver of service on the respondent of uncertain subsequent documents.

For the interest of justice and as eventually prayed by Mr. Vedasto in the alternative, we are satisfied that, although the second respondent did not take part in the proceedings in the High Court, he may be affected in one way or the other by the outcome of the intended appeal. Therefore, we find that service of a copy of the notice of appeal on him, in terms of Rule 84 (1) of the Rules is mandatory. We are, as well, satisfied that the said notice of appeal was filed within time, it being filed on 7th October, 2022 while the impugned decision is of 19th September, 2022. Thus, since the applicant has not thoroughly utilized the avenue provided for under Rule 22 (1) of the Rules to serve the second respondent, we order, as per the procedure and practice of the High Court, service of the notice of appeal on him be effected through publication in Nipashe and Mwananchi

newspapers, both on the same day within fourteen (14) days of the date of this order.

The application is granted to the extent explained above and we make no order as to costs.

DATED at **DAR ES SALAAM** this 25th day of March, 2024.

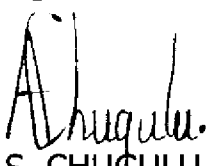
M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 26th day of March, 2024 in the presence of Mr. Joseph Rugambwa, learned counsel holding brief for Mr. Audax Kahedanguza Vedasto learned counsel for the applicant, is hereby certified as a true copy of the original.




A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL