

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO.299 OF 2021

(Arising from the District Land and Housing Tribunal for Temeke at Temeke in
Misc. Land Application No. 79 of 2020)

KIBADA FAITH HEALTH CENTER APPELLANT

VERSUS

HATIBU SALUMU MWINYI RESPONDENT

JUDGMENT

Date of Last Order: 17.09.2021

Date of Judgment: 23.09.2021

A.Z.MGEYEKWA, J

The appellant, Jimmy Cornel has lodged this appeal against the Ruling of the District Land and Housing for Temeke in Misc. Land Application No.79 of 20220 dated 18th August, 2020. The material background facts to the dispute are not difficult to comprehend. They go thus: the respondent filed a suit at Temeke District Land and Housing Tribunal in Land Application No. 107 of

2019 seeking eviction orders against the appellant. The respondent claimed that he could not enter into the suit landed premises since the appellant hired security personnel to guard the said premises this he was deprived of collecting and benefiting rent or use of his own house. The respondent complained that the appellant was summoned to appear in court but failed to enter appearance despite several efforts by the respondent to ensure she is served with a summons to appear. The tribunal determined the matter exparte and decided in favour of the respondent.

Dissatisfied, the appellant lodged a Misc. Land Application No. 79 of 2020 at the District Land and Housing Tribunal at Temeke seeking to set aside the exparte orders of Application No. 107 of 2019. However, his efforts were futile. The District Land and Housing Tribunal for Temeke ruled out that the applicant's application for an extension of time is demerit after noting that the appellant had not stated any sufficient reasons for his delay. Therefore the application to file an appeal out of time was dismissed.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged an appeal containing four grounds of appeal as follows:-

- 1. That, the Honourable Chairman erred in law and fact for holding that the applicant became aware of the ex parte judgment on 31st January, 2020 hence creating a lapse of 2 months uncounted for in the computation of time.*
- 2. That the Honourable Chairman erred in law by ignoring the point of law that the decision was pronounced without the presence of the applicant which is a legal fatality.*
- 3. That the Honourable Chairman erred in law and facts by failure to acknowledge the applicant was in the United State during the commencements of the case.*
- 4. That the Honourable Chairman erred in law by refusing the prayer while the applicant was not served with any summons to appear in the main case before the tribunal.*

When the matter was called for hearing before this court on 7th March, 2022, the appellant enjoyed the legal service of Mr. Victor Kessy, learned counsel and the respondent had the legal service of Mr. Telecia Clement, learned counsel. Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court whereas, the appellant's Advocate filed his submission in chief on 25th March, 2022 and

the respondent's Advocate filed his reply on 8th April, 202. The appellant waived his right to file a rejoinder.

Mr. Melchzedek Joachim, learned counsel for the appellant started his onslaught by seeking to consolidate the second, third and fourth grounds of appeal and argue them together and opted to argue the first ground separately.

The counsel for the appellant began by tracing the genesis of the matter which I have already narrated when I was introducing the matter at hand. On his first ground, Melchzedek submitted that the appellant is aggrieved by the Chairman's decision who alleged that the appellant became aware of the *ex parte* judgment on 31st January, 2020, and took to two months to file the application to set aside the *ex parte* judgment. He valiantly contended that the Chairman failed to understand the circumstances of an *ex parte* decision. He went on to submit that in *ex parte* judgment usually the party who was not involved in the matter that was determined *ex parte* receives the information about the decision while the time to file necessary reliefs has already lapsed. He added that thereafter the party must go through obtaining copies of the decision and hire an Advocate to represent him. Thus, it was his view that these reasons are reasonable grounds for extension of time. Fortifying his submission

he cited the case of **Vodacom Tanzania Public Ltd Company v Commissioner General Tanzania Revenue Authority**, Civil Application No. 101/20 of 2021

The learned counsel for the appellant went on to submit that where the respondent found no reason to challenge the delay within the appellant was waiting to receive the said copies, however, respondents had qualms with the period from the days when certified copies of the exparte judgment were supplied to the applicant. Supporting his position he referred this court to the Vodacom Tanzania Public Ltd Company (supra) where Hon. Korosso, JA held that:-

"I am of the view that the said days are reasonable since they were preparing and filing the current application."

He forcefully argued that the Chairman ought to have known this situation was different since this was an exparte decision and the appellant was not aware of the decision.

Submitting on the 2nd, 3rd, and 4th grounds, Mr. Melchzedek contended that the Chairman easily accepted the narrative that the service was attempted to be served but the appellant was nowhere to be served. He added that at the time when the matter was in court the respondent was a

landlord to the applicant who was actively operating an office at his rented premises, the business on the rented premise had security services. He added that how difficult is it to inform the security to locate the business owner? He added that the tribunal ordered to affix the summons and through publication. Mr. Melchzedeck continued to submit that in Application No. 107 of 2019 before the Chairman ordered the matter to proceed *exparte* publication was effected but there was no affixation done in the premises before the prayers for publication were done. Supporting his submission he cited Order V Rule 13 of the Civil Procedure Code Cap.33 [R.E 2019].

Forcefully, Mr. Melchzedeck contended that it is not clear why the respondent failed to locate the tenant and why he failed to affix the summons to the immovable premises before ordering publication. The learned counsel for the appellant stringently argued that the Chairman grossly erred in law in ordering *exparte* hearing since there was no proof that the appellant herein refused service.

Stressing on the point of service of summons, Mr. Melchzedeck submitted that the law requires a sever of summons to use all due reasonable diligence to effect service which was not done by the respondent in this appeal. Thus, it was his view that the Chairman's decision was illegal for failure to notice

an error on the face of the record. To buttress his contention he cited the case of **TANESCO Co. Ltd v Mufungo Leonard Majura & 14 Others**, Misc. Land Application No. 224 of 2016 HC (unreported). He went on to submit that allowing this appeal will enable the appellant to challenge the *ex parte* decision hence the applicant will be brought close to recover her hospital equipment worth Tshs. 200,000,000/= that has been confiscated by the respondent for allegedly unpaid rent of less than 2,000,000/=. He insisted that the appellant has lost equipment of her hospital for a dispute of rent which she has proof of payment. He added that the disputed rents are alleged to be Tshs. 24,000,000/= and the seized equipment is in a tune of Tshs. 200,0000,000/=.

On the strength of the above submission, Mr. Melchzedek beckoned upon this court to all the appeal.

In reply, the learned counsel for the applicant started with a brief background of the facts which led to the instant appeal which I am not going to reproduce in this appeal. On the first ground, Ms. Theresia argued that this ground is baseless since the allegation that the appellant became aware that an *ex parte* judgment was delivered on 31st January, 2020 is a misstatement since the Chairman did not allege anything rather he reiterated

his ruling that the appellant stated in paragraph 9 of her affidavit. To support her submission, she referred this court to Misc. Land Application No. 79 of 2020.

Ms. Theresia distinguished the cited case of **Vodacom Tanzania Public Ltd Company** (supra) from the facts of the instant appeal. She submitted that there is nowhere in the appellant's affidavit throughout Misc. Application No. 79 of 2020 indicates that her lateness was due to preparing and filing her application. The respondent's Advocate valiantly argued that this is a new ground that cannot stand as a ground. She added that it is settled rule that failure to account for each day of delay makes any application of no merit. To bolster her submission she cited the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010.

The learned counsel for the respondent stated that since the appellant's Advocate argued the 2nd, 3rd, and 4th in tandem then she will also respond in the same manner. Ms. Theresia contended that the appellant claims that the affixation was not done, but it is unclear as to why the appellant keeps on disputing the service of affixation was not done but does not dispute that

the service by publication was done. She went on to submit that the argument that she did not see the summons by way of publication in the newspaper is that she was in United State. Ms. Theresia submitted that in all the judgments on record there is nowhere that the Chairpersons ruled out that affixation was not done. To support her submission she referred this court to page 2 of the Judgment in respect to Application No. 107 of 2019 Hon. Amina Rashid, Chairperson stated that " the tribunal ordered for service by publication and affixation and summoned the respondent for hearing on 30th September, 2019. She went on to submit that the order was adhered to and affixation was done and publication too.

Stressing on the point of summons by affixation, Ms. Theresia referred this court to page 4 of the Ruling by Honourable Chairman J.M. Bigambo in Misc. Land Application No. 79 of 2020 wrote that "local service done by the court could not reach her as this court made an attempt of the serving the applicant by the affixation of summons on the leased premises on 29th April, 2019 and publication via Mwananchi Newspaper dated 5th August, 2019'. It was her submission that the appellant's allegations that affixation was not done are fallacious and lack legal backing as in all cases the modes of service,

not affixation and publication were discussed and determined by the Hon. Chairpersons.

Ms. Theresia further submitted that the respondent did not avoid serving the appellant in order to join the case. He added that the avoidance to serve the tenant in the lease agreement suit would benefit the Landlord who was seeking to be paid his unpaid rent for almost a whole year. He added that all the actions taken by the respondent in collecting the unpaid rent would be unnecessary if only the appellant adhered to the terms of their lease agreement. The learned counsel for the respondent went on to submit that the fact that the appellant was out of the country was never proved as she was never tendered any evidence of air tickets, boarding passes, or a visa indicating her name.

The learned counsel for the respondent in allowing the appeal will cause injustice to the respondent as he was forced to lodge a suit against the appellant due to the appellant's failure to perform her part of the lease agreement and throughout the case, the respondent enjoyed the legal service of Advocates. She added that being dissatisfied with the decisions of the court does not make the decision unjust. But the endless institution of cases that have been determined to its finality and even executed is a waste

of court's time, a waste of money on both parties. To buttress her contention she cited the cases of **Juto Ally v Lucas Komba and another**, Civil Application No. 84 of 2017, Court of Appeal of Tanzania (unreported), and **Zaituni Kashinde Juma and Others v Ramadhani Juma** , Misc. Land Application No. 77 of 2021 HC.

The learned counsel for the respondent did not end there he argued that the appellant is no longer the legal owner of Plot No.27 Block 18 which is the root of the instant case. She added that the equipment was attached and sold during execution amounted only Tshs. 6,000,000/= thus the alleged amount of Tshs. 200,000,000/= which the appellant is claiming to be the value of the said equipment is unnecessarily exaggerated and does not reflect the truth. He added that if she did own such valuable equipment, she would never leave the premises unattended.

On the strength of the above submission, Ms. Theresia argued that the grounds of appeal do not suffice as reasonable grounds for this court to grant the appeal. She urged this court to dismiss the appeal with costs.

I have opted to combine the 2nd and 4th grounds because they are intertwined and the 1st and 3rd grounds will be argued separated as they appear.

On the 1st ground of appeal, the appellant's Advocate is complaining that in Misc. Application No. 79 of 2020, for extension of time to set aside the *exparte* judgment, the days when the appellant was preparing his appeal and hiring the learned counsel to assist her with her case were not considered by the Chairman. I have scrutinized the tribunal's records and noted that the matter at the tribunal was determined through written submissions. The appellant in his written submission raised several reasons for her delay to file an application for setting aside *exparte* judgment out of time. I have noted that the reason that the appellant was searching for Advocates to assist her in her case was not among the reasons raised to justify her delay to lodge the application to set aside the *exparte* judgment. I fully subscribe to the submission of Ms. Theresia that this is a new ground that is raised for the first time at the appellate court. In other words, the new ground was not raised at the District Land and Housing Tribunal in Misc. Land Application No. 79 of 2020.

It is worth noting that, it is not proper to raise a ground at a higher court based on facts that were not canvassed in the lower courts/ tribunals. It is settled position of law that issues not raised and canvassed by the appellate court or tribunal cannot be considered by the second appellate court. The

Court of Appeal of Tanzania in the case of **Farida & Another v Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) the Court of Appeal of Tanzania held that:-

" It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded, and not raised at the lower court."

Applying the above authority, it is clear that this court cannot determine the first ground on the bases that it is a new reason for an extension of time which was not brought to the attention of the tribunal in Misc. Land Application No. 79 of 2020.

With respect to the 2nd and 4th grounds which relate to the mode of service. The appellant's Advocate confidently argued that the summons was not affixed in the suit premises. Without wasting the precious time of the court, from the outset, I have to say that these grounds are demerits. I have scrutinized the trial tribunal's records and found that at District Land and Housing Tribunal for Temeke at Temeke in respect to Land Application No. 107 of 2019, there is a summons (standard Form No. 28) dated 29th April, 2019, whereas Hillary Matembo deponed that the summons was not delivered since the appellant was not at her home it was believed that she travelled to a place which was not disclosed.

Further, I have perused the proceedings dated 29th July, 2019 of the District Land and Housing Tribunal for Temeke at Temeke in respect to Land Application No. 107 of 2019, and noted that the Chairman issued an order, directing the respondent to re-service the appellant through substitution of service; publication and affixation, the matter was scheduled for hearing after two months.

The records show clearly that the summons was affixed to the appellant's premises. There is an affidavit of one Hillaly Matembo who deponed that *wito huu umebandikwa sehemu husika bila tatizo lolote*. To support his affidavit he attached a photo of the summons which was affixed on the wall and a piece of Newspaper dated 5th August, 2019 to prove that the appellant was served through publication to appear at the District Land and Housing Tribunal on 30th September, 2019. In my considered view, I find that the appellant was properly been served through ordinary service, substitution of service; affixation or publication or registered mail. In the matter at hand, the appellant was served through ordinary service and substitution of service both by affixation and publication. Therefore the argument of Mr. Melchezedek that affixation was not done is not true.

For the sake of clarity, the cited cases **TANESCO CO. Ltd** (supra), **Boney N. Katatumba** (supra) and **Prosper Baltazar Kileo** (supra) are irrelevant to the matter at hand. The issue for discussion was illegality, the court in **Boney's** case observed that illegality of the challenged decision was valid to the case under discussion. In the instant case, unlike the cited cases, the District land and Housing Tribunal in Misc. Application No. 79 of 2020 found that all modes of service were exhausted, therefore the appellant's ground cannot be a good ground of illegality for extension of time to file an application to set aside the exparte judgment. Therefore this ground is disregarded.

Moreover, I am in accord with the learned counsel for the respondent and Hon. Chairman that in Misc. Land Application No. 79 of 2020 throughout the tribunal's records there is no any documentary evidence tendered by the appellant to justify her allegations that at the time when the matter was lodged at the tribunal and she was summoned to appear at the tribunal, she was in the United State. It is a mere statement not supported by any cogent documentary evidence which in my view, the appellant's claims are unfounded.

As to the 3rd ground, I have read the tribunal's proceedings with respect to Misc. Land Application No. 109 of 2019 noted that the appellant was not notified that the matter was set for judgment on 3rd December, 2019. Instead, the Chairman issued an order of judgment date on 3rd December, 2019. However, as rightly stated by Hon. Chairman in his judgment that it is not a mandatory requirement to notify the party who is absent or in *ex parte* judgment on the date set for judgment. Regulations 19 (1) of the Land Disputes Courts and (the District Land and Housing Tribunal) Regulations of 2003 GN. 174. For ease of reference, I reproduce Regulation 19 (1) of the Land Disputes Courts and (the District Land and Housing Tribunal) Regulations of 2003 GN. 174 as hereunder:

*" The Tribunal may, after receiving evidence and submissions under regulation 14, **pronounce Judgment on the spot** or reserve the Judgment to be pronounced later." [Emphasis added].*

The aforesaid excerpt clearly shows that, it was not mandatory to notify the appellant the date of the Judgment. Therefore, it is my view that Order XX Rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] applies in a situation when there is a lacuna in the Land Disputes Courts Act Cap.216 [R.E 2019]. Section 51 (1) of the Land Disputes Act, Cap. 216 [R.E 2019]

allows the application of the Civil Procedure Code Cap.33 where there is a *lacuna* in the Regulations related to land matters. For ease of reference, I reproduce section 51 (2) of the Land Disputes Courts Act, Cap. 216 [R.E 2019] as hereunder:-

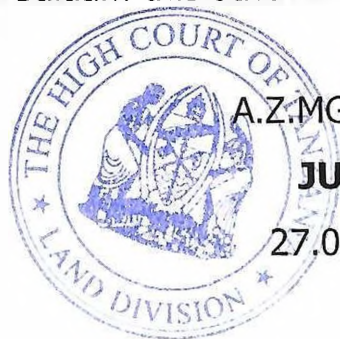
" 51. (2) The District Land and Housing Tribunals shall apply the Regulations made under section 56 and where there is inadequacy in those Regulations it shall apply the Civil Procedure Code."

Based on the above provision of law, the Civil Procedure Code Cap.33 [R.E 2019] is inapplicable in the matter at hand. Therefore the 3rd ground of appeal is disregarded.

For reasons canvassed above, I find the appeal before this court is devoid of merit. Thus, I proceed to dismiss the Land Appeal No. 299 of 2021 without costs.

Order accordingly.

Dated at Dar es Salaam this date 27th April, 2022.

A.Z.MGEYEKWA
JUDGE
27.04.2022

Judgment delivered on 27th April, 2022 in the presence of the appellant and
Eva Manga, learned counsel for the respondent.

