

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 240 OF 2022

*(Originating from the decision of Misc. Land Application No. 301 of 2022
before the District Land and Housing Tribunal for Temeke at Temeke
delivered on 4th October, 2022)*

JACOB PETER MAKAYA APPELLANT

VERSUS

JOSEPH LUSANI HELASITA SANGA 1ST RESPONDENT

REHEMA HAMZA CHEGEZA 2ND RESPONDENT

ATHUMANI HASSANI MDOE 3RD RESPONDENT

JUDGMENT

Date of last Order: 05.12.2022

Date of Judgment: 12.12.2022

A.Z.MGEYEKWA, J

The appellant has lodged this appeal against the Ruling of the District Land and Housing of Temeke in Misc. Land Application No.301 of 2022 dated 4th October, 2022. The material background facts of the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly.

They go thus: the appellant lodged Land Application No. 05 of 2021 at the District Land and Housing Tribunal the matter proceeded *ex parte* against the respondents.

Dissatisfied, the appellant lodged a Misc. Land Application at the District Land and Housing Tribunal for Temeke for an extension of time to file an application to set aside the *ex parte* order. The respondents were granted leave to file an application to set aside the *ex parte* Judgment in Land Application No. 05 of 2021.

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

1. *That the trial Tribunal erred in law by reaching its decision without analyzing and considering the evidence(s) adduced by the appellant during the hearing.*
2. *That the trial Tribunal erred in law by reaching its decision without meritoriously looking at the Tribunal's records to ascertain if service summons(s) was done by Tribunal and appellant against the respondents for hearing *ex parte* and even judgment.*
3. *That the trial Tribunal erred in law by reaching its decision on the ground not defined/mentioned by the respondents' Joint Affidavit filed*

and adopted by the honourable Tribunal during the hearing. Thus, the Tribunal at its own motion gave reason for the decision in favor of the Respondents.

- 4. That the trial Tribunal erred in law by reaching its decision in favor of the respondents without encountering reason(s) for each delayed day.*
- 5. That the trial Tribunal erred in law by reaching its decision in favor of the respondents without considering the respondents' admission for the delay stated in the respondents'" Joint affidavit.*
- 6. In all the circumstances of the case, the findings and decision of the Honourable Chairman are insupportable in Law or on the basis of the grounds adduced.*

When the matter was called for hearing before this court on 16th November, 2022, the appellant enlisted the legal service of Mr. Tumainieli Lyimo, counsel and the respondent had the legal service of Mariam Shirima, 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 23rd November, 2022. The respondent's Advocate filed his reply on 30th November, 2022 and the appellant's Advocate filed a rejoinder on 5th December, 2022.

The appellant's counsel began by tracing the genesis of the matter which I am not going to reproduce in this appeal. Submitting on the first ground of appeal, Mr. Lyimo, submitted in length. He stated that the respondents in their affidavit clearly defined the ground for extension being service for the summon to file defense. To support his submission, he referred this Court to certified copies of the respondents' affidavit. He went on to submit that contrary to the decision dated 4th October, 2022, the tribunal stated that the respondents were not saved with the summons for hearing and the change of working place made it difficult for them to be properly been saved with the summons via postal address. Mr. Lyimo went on to submit that summons for filing defence is different from a summons for hearing. He faulted the Tribunal for using the summons for hearing as a ground for the grant of extension of time.

The learned counsel for the appellant continued to argue that the Tribunal proved that the respondents were properly been saved with a summons for defence and judgment contrary to the respondents' arguments. The learned counsel contended that the certificate of title is the only identification of ownership of land, thus, the address included on the certificate of title is the title holder's address namely, Joseph Lusani Helasita Sanga and Rehema Hamza Chegeza. He added that the said

address was used in the title to facilitate communication between the title holder and the Ministry of Land, Housing, and Human Settlement Development. To support his argumentation he referred this Court to the certified copies of the notice from the said Ministry.

Mr. Lyimo went on to argue that the respondents failed to provide evidence of the change of address and to prove that the said address is the employer's address and not a personal address or prove that the working place was not the same. Fortifying his submission he cited section 110 (1) and (2) of the Evidence Act, Cap.6 [R.E 2019]. Mr. Lyimo insisted that for the respondents to be granted an extension of time, they had to adduce sufficient reasons. To buttress his contention he cited the cases of **Dorothy Kansolele v Eileen Josephine Petit Mshana and Peter Louis Petit**, Misc. Land Case Application No. 607 of 2020, **Samora Kipasha v Betarice Kilosa**, Land Appeal No. 28 of 2020, and **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No.2 of 2010 (unreported). He argued that the respondents in their affidavit failed to adduce sufficient reasons for the delay of nine months from the date served with a summons for Judgment on 02.11.2021 and 04.11.2021 and more than nine months from the date when they were

saved with a summons for hearing on 04.11.2021 and the day when they were saved with the notice by the Ministry of Land, Housing and Human Settlement Development on 11.05.2021.

The learned counsel for the appellant submitted on the respondents did not prove the rent assessments since they failed to produce any documents.

Submitting on the second ground, the counsel claimed that the tribunal did not peruse the records to ascertain the correctness of the proceedings including the service of summons done against the respondents. It was his view that the summons was properly been done. He argued that the Chairman's decision is not supported by law and has not adduced the basis of the grounds.

In conclusion, the learned counsel for the appellant beckoned upon this Court to allow the appeal and nullify the decision of the District Land and Housing Tribunal.

In reply, Mr. Mlingo, counsel for the respondents also submitted in length and this Court will not reproduce the facts of the case. On the first ground, the learned counsel submitted that what was before the tribunal was an application for setting aside the *ex parte* Judgment. The counsel argued

that the respondents were not aware of the pendency of land Application No. 5 of 2021 and were not summoned to appear on the date of pronouncement of the Judgment. Mr. Mlingo went on to argue that the respondents become aware in August, 2022 when they requested for land rent assessment and they filed an application for extension of time to file an application to set aside the *ex parte* Judgment, having observed that the respondents were not served with a notice of the date of hearing and summons to appear on the date of delivering of the Judgment.

On the second and third grounds, the learned counsel for the respondents contended that the appellant's counsel submission is contradictory and misconceived. He argued that the grounds and what the counsel for the appellant has submitted in his written submission are two different issues. He argued that the appellant's counsel submission does not support the grounds of appeal. The counsel for the respondents submitted that the respondents' affidavit specifically paragraphs 5, 6, 7, 8, 9, 10, and 11 stated the reasons for their delay. he stated that the respondents are public servants and were transferred to Dodoma thus there are no longer stationed in Dar es Salaam. And there is no any change of address because they were not aware that there was a pending case against them and were not served with a summons to file their defence.

As to the fourth ground, the counsel for the respondents insisted that the respondents were not aware of the pendency of Land Application No. 5 of 2021 at the District Land and Housing Tribunal for Temeke until when they requested land rent assessments and found that their properties have changed names from their names to the appellant. He added that the respondents after noting that there was a pending case and the same was determined *ex parte* against them, decided to file an application to set aside the *ex parte* Judgment. The counsel distinguished the case of **Kansolete** (supra), **Samora Kipesha** (supra), and **Lyamuya Construction Company** (supra) cited by Mr. Lyimo that the same are distinguishable and are of no assistance in the circumstances of the case at hand.

On the fifth ground, the counsel submitted that there is no any single paragraph in their affidavit that shows that the respondents have admitted any delay.

On the last ground, Mr. Mlinga submitted in length that the Chairman had discretionary power to grant an extension of time upon showing good and sufficient cause. To support his submission he cited the cases of **Tanzania Revenue Authority v Yusuph Juma**, Civil Application No. 2 of

2014, **Badru Issa Badru v Omary Kilendu & Hashimu Rungwe t/a Rungwe Ltd**, Civil Application No. 164 of 2016, **Ngoni Matengo Co-operative Marketing Union Ltd v AlmMohamed Othman (1959) EA 577** and **Registered Trustees of Glory of Christ Church v Josca Bais Baltazar**, Civil Application No. 185 of 2013.

In conclusion, Mr. Mlinga contended that the respondents filed an application to set aside the exparte judgment on 13th October, 2022 and the same is pending before the tribunal. He urged this Court to dismiss the appeal for being demerit with costs.

In his rejoinder, the counsel for the appellant reiterated his submission in chief. He contended that the respondents' counsel is trying to mislead this Court since the respondents avoided service. He stressed that the respondents have failed to account for sufficient reasons and account for each day of delay.

I have opted to combine the second, third, fourth, and fifth grounds since they are intertwined. Except for the first and sixth ground which will be argued separately. On the first, the appellant's counsel is faulting the Chairman for failure to analyze and consider the evidence of the appellant adduced during the hearing. The records reveal clearly that the Chairman

in his Judgment specifically on pages 2, 3, 4, and 5 analysed the submission made by both parties, therefore, this ground is demerit.

On the second, third, fourth and fifth grounds which relate to the accounting for the days of delay. The appellant's counsel contended that the Chairman reached its decision on the ground not defined by the respondent. He added that the Chairman did not consider the fact that the respondent did not account for the days of delay and that he decided in favour of the respondent without considering the respondent's admission.

In the matter at hand, the respondents in their affidavit specifically on paragraphs 7 and 8 denied the fact that the process sever tried to affect service on them. The respondents also valiantly contended that there is no time in memorial they were served and were aware of the pendency of the matter at the Tribunal. Further, the respondents stated that they were not served with any summons to appear or to file a written statement of defence. Therefore, I differ with Mr. Lyimo submission that the respondents admitted that they were properly been saved with a summons for defence and judgment at the Tribunal. To the contrary the respondents maintained their position that they were not aware that there was a pending case at the District Land and Housing Tribunal

It is a trite law that in order for this Court to grant the application for an extension of time to set aside an *ex parte* Judgment, one must be established that there are sufficient reasons for the court to exercise its discretionary power to extend time. This is the position of the law as reiterated in the case of **Osward Masatu Mwizarubi v Tanzania Fish processing Ltd**, Civil Application No. 13 of 2010. The Court of Appeal of Tanzania held that:-

"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion."

The Chairman in his decision further stated that it is the requirement of the law to notify the other party before proceeding *ex parte*. As long as the respondents were not aware that hearing proceeded *ex parte* against them.

Based on the findings of the District Land and Housing Tribunal for Temeke and the above-cited authorities, I do not see any reason to differ with the Chairman's decision since he exercised his discretionary power to grant the application after noting that the procedure to summon the respondents were adhered to but they were not given notice of hearing

the case. I am satisfied that the respondents were not in a position to account for the days of delay and I fully subscribe to the findings made by the District Land and Tribunal that the respondents advanced sufficient reasons to warrant the Tribunal to extend time sought by the respondents.

For the sake of clarity, I have read the cases of **Dorothy Kansaele** (supra) **Samora Kipesha** (supra) are distinguishable from the case at hand whereas the respondents were not tasked to account for the days of delay, the days when they were served with the summon cannot be accounted for since they were not served with the date of hearing, therefore, they were not aware on the judgment date.

On the last ground, this ground is unfounded because the Chairman in his decision analysed the testimonies of both parties and state the reasons for his decision, the same suffice and has met the ingredients of writing a ruling or judgment as provided for under Regulation 20 of the Land Disputes Courts (The District Land and Housing Tribunal), Regulations 2003. GN. 174 which states that a judgment of the Tribunal shall be short and written in simple language and shall consist of a brief statement of facts, findings on the issue, a decision, and reasons for the decision. Therefore, the Chairman was not obliged to refer to any piece of law or case law.

The question to ask from the submissions from either side above is whether allowing the application for extension of time was fatal. My answer is negative, the Chairman found that there was a need to extend time and in case the respondents succeeds to set aside the *ex parte* order they will have a chance to be heard on merit whereas the respondent will not be prejudiced.

In the upshot, I dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 12th December, 2022.


A.Z.MGEYEKWA

JUDGE

19.09.2022

Judgment delivered on 12th December, 2022 in the presence of all learned counsels for the appellant and respondents.


A.Z.MGEYEKWA

JUDGE

12.12.2022

Right to appeal fully explained.