IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

LAND APPEAL NO. 32 OF 2023

(Arising from Misc Land Application No. 35 of 2022 at the District Land and Housing Tribunal for Singida at Singida & originates from Land Application No 22 od 2021 at the District Land and Housing Tribunal for Singida)

HONORATHA STEPHANO NKUWI..... APPELLANT

VERSUS

ALBINO THEODORY GHUMPI .....RESPONDENT

JUDGMENT

Date of last order: 12/02/ 2024

Date of Judgment: 26/02/2024

LONGOPA, J:

The Appellant and Respondent were parties to the District Land and Housing Tribunal of Singida where the appellant was applying for setting aside of an *ex parte* judgment of the Tribunal entered in favour of the respondent against the appellant in Land Application No. 22 of 2021. The appellant was dissatisfied by that decision thus challenged it by an application to set aside the *ex parte* order on account that the appellant herein was not dully served.

On 17/2/2023, the District Land and Housing Tribunal for Singida in Misc Land Application No. 35 of 2022 dismissed the application for setting aside *ex parte* decision dated 25/2/2022. It is this decision of the District Land and Housing Tribunal that the appellant is challenging before this Court on a single ground that:

> *the trial Tribunal erred in law and fact to dismiss the appellant's application to set aside ex parte judgment while the was no proof that the appellant denied to receive summons and appeared before the Tribunal to defend her case.*

On strengths of this ground, the appellant prayed that this appeal to be upheld by quashing and setting aside the decision of the trial tribunal for being very unfair and causing injustice. The appellant also prays for costs.

On 12/2/2024 when the matter came for hearing the parties appeared in person. Mr. Bernado Stephano Nkuwi with full registered powers of attorney was the first to argue the matter. It was submitted that in the DLHT there was no evidence that the appellant/ applicant refused the service of the summons.

It was the appellant's prayer that this Court be pleased to set aside the decision to allow both parties to be heard for justice to be done. He reiterated that for a summons to be dully served, there should be proper

service of summons to either party to a case. When there is no service of summons in proper manner then party's failure to attend cannot justify the *ex parte* hearing of the matter. The appellant/ applicant has never been served nor signed any summons.

Further, there was no any other affixation of the summons at the house of the appellant/applicant. There was no any other alternative service of summons. The procedure is that when the person intended to be served is not found, alternative service through the publication in the newspaper is supposed to be followed. It was not done.

In the strengths of the above submissions the appellant urged this Court to find out that the decision of the District Land and Housing Tribunal to refuse setting aside the *ex parte* judgment was improper thus this Court should quash the same.

On the other hand, the respondent argued firmly that appellant was required to appear before the District Land and Housing Tribunal. The appellant did not appear consecutively necessitating the Tribunal to order *ex parte* hearing of the matter.

It was reiterated that the matter was initially instituted against the appellant in Ward Tribunal, but it is appellant who requested the same to heard by the District Land and Housing Tribunal. The appellant/ applicant

appeared three times only before the District Land and Housing Tribunal. But subsequently the appellant was not appearing.

It was argued that the summons was issued through the Village Executive Officer (VEO). It is the VEO who went to the appellant who did not accept the service of summons. It was argued that despite the service, the appellant /applicant has not been appearing todate. District Land and Housing Tribunal decided the matter to be heard *ex-parte* which resulted into an ex parte judgment was delivered.

In respect of alternative service, it was argued that the respondent and other villagers are not informed about the affixation of summons when the person intended to be served is not available. It has been a long time since this matter was in court/ District Land and Housing Tribunal. There are no reasons to interfere/ overturn the orders of the District Land and Housing Tribunal.

I have dispassionately considered the submissions of the parties and the record of trial and first appellate courts to determine this appeal. I shall address the grounds of appeal as follows:

The main aspect in this appeal is based on argument that the appellant is alleging that there was a denial of the right to be heard in the *ex parte* judgment. Such denial arose out of the fact that appellant was not

informed fully about the matter before the trial Tribunal. The *ex parte* judgment was confirmed in the impugned decision/ruling of the Tribunal.

I must restate that the right to be heard is among the fundamental rights protected under the Constitution of the United Republic of Tanzania, Cap 2 R.E. 2002. Article 13(6)(a) of the Constitution requires that when the rights and duties of any person are being determined that person is entitled to a fair hearing. The right to fair hearing includes the person being afforded opportunity to hear the witnesses of the other side and availed a chance to question those witnesses.

This right of fair hearing has been held by the Court to be fundamental for any decision-making organ. In **Danny Shasha vs Samson Masoro & Others** (Civil Appeal 298 of 2020) [2021] TZCA 653 (5 November 2021), at p.5, the Court of Appeal stated that:

> *The Court has emphasized time and again that a denial of the right to be heard in any proceedings would vitiate the proceedings. Further, it is also an abrogation of the constitutional guarantee of the basic right to be heard as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977.*

Furthermore, on pages 6 and 7 of the decision, the Court stated about the effect of non-compliance to this important right that:

The parties to the land dispute ought to be heard before the trial tribunal so as to uphold one of the attributes of equality before the law. Some of the parties to the land dispute were denied the right to be heard, which renders the proceedings a nullity. As discussed above, even if the trial tribunal and the first appellate court reached at a correct decision, still the first appellate court ought to have considered and direct that there was a violation of the right to be heard at the trial tribunal and therefore accord an opportunity to the parties to argue the issue before the same. The first appellate court ought to have ordered a retrial after considering that the parties were denied the right to be heard. This being an infraction which violated the rules of natural justice requiring the tribunal to adjudicate over a matter by according the parties full hearing before deciding the dispute.

This decision of the Court of Appeal emphasizes on the importance of the right to be heard and it calls for an appellate court not to take violation of it lightly. Once an appellate court considers that there is violation of the right to be heard then it is enjoined to nullify the proceedings and set aside orders arising from such proceedings.

From the record, it can be revealed that the basis of the decision of the District Land and Housing Tribunal is found on page 2 of the *ex parte* judgment dated 25/2/2022. It states that:

> *Mjibu maombi katika shauri hili alipelekewa samansi mbili lakini hakufika mahakamani hivyo kupelekea shauri kusikilizwa upande mmoja ambapo lilianza kusikilizwa mbele ya Mhe. Shuma na kabla hajamaliza alirudi kituoni kwake Kiomboi hivyo kufanya shauri kuendelea mbele yangu.*

This observation by the trial Tribunal Chairperson assumes that the appellant herein was properly served and opted not to appear. However, I am of a different view. The couching of the language does not state with certainty that the appellant was dully served and refused to appear therefrom. There is nothing to state that in clear and certain terms that service was served. There is no disclosure whether or not the summons did reach the appellant to appear before the District Land and Housing Tribunal. That is why throughout the Miscellaneous Land Application No. 35 of 2022 the applicant insisted that the appellant was not served.

Absence of certainty that there was a dully service of summons to the appellant impairs the finding of the trial Tribunal as the basis of *ex parte* proof lacks certainty. There is difference to state that the "summons was not received" and that "the summons was refused." The latter implies

blatant refusal by the appellant to accept the summons and appearance in the Court. However, the former is ambiguous. It may imply that the summons reached the appellant, or the process server did not find the appellant thus not served.

In Misc Land Application No 35 of 2022, the trial Chairman on page 3 states that:

> *Nimezingatia hoja za pande zote mbili katika shauri hili, Nimepitia mwenendo wa shauri No. 22 of 2021 ambapo unaonyesha kuwa mleta maombi hakuwahi kufika mahakamani,* ***samansi iliyopelekwa kwa mleta maombi inaeleza wito haukupokelewa.***

The quoted part of the decision can literally translate into "the summons was not received" that falls within the ambiguous meaning as I have described early. The Tribunal in the Miscellaneous Land Application No. 35 of 2022 was duty bound to satisfy itself that the service of the summons was proper and adequately informed the appellant on the requirement to appear before the Tribunal to defend the case against the appellant.

There is nowhere in the decision of the Tribunal in *ex parte* judgment where it is indicated that the summons was dully served. The fact that there is assertion that summons was issued twice to the appellant does not

necessarily imply that the appellant refused the service. If the appellant refused the service, the same would have been so stated in clear terms.

I am of the settled view that the wordings that summons were not received does not mean that the appellant refused to accept service of the same. It leaves a lot of doubts as to whether the appellant was dully served with summons to appear thus chose not to. There was neither proof of any alternative service of summons to the appellant.

This is exacerbated by the fact that the appellant had asserted that the only service he is aware of was the notice of judgment. The facts indicates that upon receipt of the notice of judgment, the appellant promptly initiated an application to challenge the same.

However, I have noted that without any further assurances Tribunal's Chairman on the same page 3, DLHT states further that:

> *Kwa mantiki hiyo, pamoja na kuwa haki ya kusikilizwa ni haki ya kikatiba* ***bado ni maoni ya baraza hili kuwa mleta maombi kwa hiari yake aliamua kulalia haki hiyo kwa kukata wito wa mahakama wa kuja mahakamani ili aweze kusikilizwa, itoshe tu kusema mleta maombi hana sababu ya msingi ya kulishawishi baraza hili kutengua hukumu yake ya upande mmoja.***

This was a misdirection on the part of the Tribunal Chairman in the Miscellaneous Land Application No. 35 of 2022. The *ex parte* judgment does not reveal refusal of service as impugned decision seems to suggest. The Chairperson erred to conclude that there was a refusal by the appellant to appear before the Tribunal. The wording of the *ex parte* judgment and the ruling on application to set aside the *ex parte* judgment have language that significantly departs as to the meaning and implication thereof.

As the appellant had firmly stated to have not been served, the Tribunal was required to take a step further to ensure with certainty that proper service of the summons did exists. Allegation of absence of the service of summons for the party to appear was a valid and cogent reason to allow the application for setting aside the *ex parte* judgment.

Failure to accommodate such arguments in absence of proof without doubts that such service of the summons existed or otherwise amounted to blatant refusal by the trial Tribunal to accommodate the fundamental right to fair hearing. As such the Tribunal reached into an erroneous decision.

In the case of **Elias Augustine vs The Chief Secretary & Others** (Civil Application No. 406/18 of 2022) [2023] TZCA 17708 (19 June 2023), the Court of Appeal of Tanzania observed that:

My reference to the judgment of the High Court vindicates the applicant in that he raised the issue of denial of the right to be heard and violation of rules of natural justice. Before me the applicant need not to prove such allegations but whether it constitutes sufficient ground to grant the application so that he may be heard. In Charles Richard Kombe (supra) it was held that denial of a right to be heard is one of the instances of illegality, others being lack of jurisdiction and limitation period. So, with respect, I do not agree with Ms. Method that the applicant's complaints do not attack the process of the decision.

This is because denial of the right to be heard is the process or procedure that may affect the decision. Even without the proceedings being part of the record, there is enough material for me to be satisfied that the issue of denial of the right to be heard was raised at the High Court and it is a point of sufficient importance.

The allegations of denial of the right to be heard was sufficient for the trial Tribunal to satisfy itself with full certainty that summons was dully served. It is settled law and practice that no party to the case should not be condemned unheard. Each party should be afforded adequate opportunity to present its case and challenge any evidence presented by the other party. Adequate opportunity entails right to know the case the party is facing, nature of evidence of the other party and presence in court

when the evidence of the other party is being presented to be able to counter the same on its truthfulness.

This is in line with the decision in the case of **Anthony M. Masanga vs Penina (mama Mgesi) and Another** (Civil Appeal 118 of 2014) [2015] TZCA 556 (18 March 2015), where the Court of Appeal stated that:

> *It appears therefore that the respondents were not afforded the right to be heard (audi alteram partem) on that aspect. In fact, nowadays, courts demand not only that a person should be given a right to be heard, but that he be given an adequate opportunity to be heard so as to achieve the quest for a fair trial. See the case of The Judge I/C High Court Arusha & Another v. N.I.N. Munuo Ng'uni [2006] T.L.R. 44 where this Court stated that: "Entitlement to a fair hearing includes the principle of audi alteram partem. So, that principle is part of the Constitution. Since we have found that the suspension order violated the principle of audi alteram partem, then, it has also violated the Constitution."*

I find that the District Land and Housing Tribunal was not entitled to refuse to set aside the *ex parte* judgment. The reason is simple and straightforward that in absence of dully service of summons to the appellant, the Tribunal proceeding with hearing of the matter one sided

violated one of important principles of natural justice i.e. the right to be heard. A decision resulting from violation of the right to be heard is erroneous decision thus cannot stand.

In the case of **Ex-B.8356 S/SGT Sylivester S. Nyanda vs The Inspector General of Police & Another** (Civil Appeal 64 of 2014) [2014] TZCA 215 (28 October 2014); [2014] T.L.R. 234 [CA], the Court of Appeal restated the effects of non-compliance to the right to be heard in the following words:

> *There are several authorities, including the case of **Peter Ng'homango v. The Attorney General (supra),** in which the Court reversed or nullified the decision of the trial court upon being satisfied that the issue of jurisdiction was unilaterally raised and decided without affording the parties an opportunity to address the same. To be particular, the Court stated that:- "In the result, we have no option but to declare the judgment of the High Court a nullity. The move by the High Court to base its decision on an unconsidered issue was a fundamental procedural error and occasioned a miscarriage of justice."*

The refusal to set aside the *ex parte* judgment marred with illegalities of denial of the appellant's right to be heard cannot stand. It goes to the root of the whole proceedings thus violating the constitutional right of fair hearing. The options in addressing such situations are quite limited. This

Court has nothing else that to disregard such decisions for being violative of the fundamental rights of individuals that are well entrenched in the United Republic of Tanzania Constitution, Cap 2 R.E. 2002.

Both parties to the dispute deserve equal treatment in upholding the right to be heard as part of the fair trial. In the circumstances of this matter as the appellant has consistently reiterated to have been denied the right to be heard, it is my settled view that the District Land and Housing Tribunal for Singida should afford such opportunity to both parties to be heard. In so doing, not only will justice be done but also it will seen to have done.

I subscribe to the decision in the case of **CRDB Bank PLC vs. The Registered Trustees of Kagera Famers Trust Fund & Others** (Civil Appeal No. 496 of 2021[2024] TZCA 94(23 February 2024), at pp. 11-12, where the Court of Appeal stated that:

> *It is trite la that any decision affecting rights or interest of any person which is arrived at without such person being afforded a right to be heard, is a nullity even if the same decision would have been arrived at had the affected party been heard.*

As I have demonstrated that evidence of dully service of summons to the appellant is lacking, I am of the settled view that the appellant was not

heard thus contravening the established law on fair hearing. Such *ex parte* judgment had effect of depriving the appellants the right to ownership of that disputed land without being heard.

This court finds that there are merits in the appeal. The appeal is has demonstrated cogent merits thus deserves to be allowed. The proceedings, ruling and drawn order of the District Land and Housing in Miscellaneous Land Application No. 35 of 2022 dated 17/2/2023 refusing to set aside an *ex parte* judgment are quashed and set aside for being erroneously.

As the impugned ruling and drawn order have effect of confirming an *ex parte* judgment that violated the right to be heard, it is pertinent for this Court to quash the proceedings and set aside the judgment and its drawn order dated 25/2/2022 in Land Application No 22 of 2021. This is by virtue of this Court being vested with revisional powers in exercise of its appellate jurisdiction.

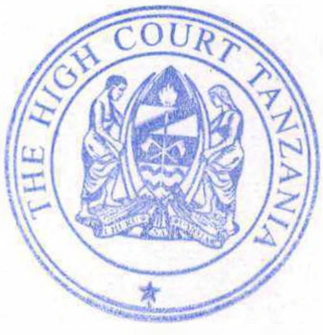
That said and done, in exercise of powers vested to this Court under sections 42 and 43(1) (b) of the Land Disputes Courts Act, Cap 216 R.E 2019, I hereby nullify the proceedings of the District Land and Housing Tribunal of Singida in Land Application No. 22 of 2022. I also set aside the impugned *ex parte* judgment.

In totality of events, both ruling and drawn order in Miscellaneous Land Application No. 35 of 2022 dated 17/2/2023 and *ex parte* judgment and order in Land Application No. 22 of 2021 dated 25/2/2022 are hereby quashed and set aside for being erroneous and violative of the fundamental right to be heard. I order expeditious retrial of the application by affording opportunity to both parties to be heard fully.

In the end, the appeal is allowed. Each party to bear its own costs.

It is so ordered.

DATED at **DODOMA** this 26th day of February 2024.



E.E LONGOPA
JUDGE
26/02/2024.