

TANZANIA / JUDGMENT

chacha mwita maricha vs haruna mtumwa kondo 2022 tzhclandd 12396 11 october 2022

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 265 OF 2021 (Arising from the District Land and Housing Tribunal for Temeke in Land Appeal No.27 of 2021) CHACHA MWITA MARICHA..... APPELLANT VERSUS HARUNA MTUMWA KONDO RESPONDENT

JUDGMENT

Date of last Order: 07.10.2022 Date of Judgment: 11.10.2022 A.Z.MGEYEKWA, J This is a second appeal, it stems from the decision of the District Land and Housing Tribunal for Temeke in Land Appeal No.27 of 2021. The material background facts to the dispute are briefly as follows; Haruna Mtumwa Kondo, the respondent instituted a case against Chacha Mwita Maricha. The hearing was exparte against Chacha Mwita Maricha and the Chairman decided in favour of the respondent. Dissatisfied, the applicant lodged an application at the District Land and Housing Tribunal for 1 Temeke to set aside the exparte Judgment. The respondent denied all the allegations. The appellate tribunal decided the matter in favour of the respondent. The District Land and Housing Tribunal decision did not amuse the appellant. He decided to challenge it by way of appeal before this court on two grounds of appeal as recapitulated hereunder:-

1. That, the Chairperson of the Appellate tribunal erred in law by failing to find that the Misc. Application No. 529 of 2020 was dated 24.3.2020 not 24.3.2021.
2. That, the Chairperson of the Appellate tribunal erred in law by failing to evaluate and consider the reasons stated by the appellant to restore the Misc. Application No. 529 of 2020. When the appeal was called for mention on 24th August, 2022 before Hon. Arufani, J this court issued an order to the parties to argue the appeal by way of written submissions The Court acceded to the appellant's proposal to have the matter disposed of by way of written submissions whereas the appellant filed his written submission on 7th September, 2022 the respondent filed his reply on 21st September, 2022. Rejoinder on 25th September, 2022 and mention date to find whether parties complied with the court order was set on 4th October, 2022. The appellant did not file his rejoinder within time, he prayed to file his rejoinder out

of time, his request was granted and he was given three days to file his rejoinder. The applicant did not comply with the court order. Thus, he urged this court to consider his reply which was filed on 10th October, 2022. The court considered the applicant's prayer. In his submission in support of the appeal, the appellant did not submit on the first ground. On the second ground, the appellant contended that the District Land and Housing Tribunal did not consider the appellant's evidence. He claimed that the respondent has never served him with the summons to inform him that there is a case against him, which was, heard *ex parte*. Thus, in his view, the *ex parte* Judgment decided in favour of the respondent was illegal. He added that there is a requirement that in the case heard *ex parte*, the party to whom an *ex parte* Judgment was issued must be summoned to appear on the date of the Judgment or ruling. The appellant went on to submit that it is a legal requirement that once the case is heard *ex parte*, the party to whom an *ex parte* order is issued must be summoned to appear on the date of delivering of the Judgment. He insisted that he was not summoned to appear on the delivery date of the Judgment. The appellant urged this court to find that he was not given an opportunity to be heard and allow the appeal, set aside the *ex parte* Judgment, and order the matter be heard interparties. In response thereto, the learned counsel for the respondent began to narrate a brief background of the matter, briefly, the counsel complained that the appellant is not specific as to which application he is challenging. He added that there is Land Application No. 27 of 2021, Misc. Land 3 Application No. 529 of 2020 and Misc. Application No. 329 of 2021. Mr. Gidion lamented that the appellant in his written submission in chief has raised new grounds of appeal; the issue of jurisdiction, validity of the lease agreement, and improper service of summons. He added that the grounds (a), (b) and (c) contained in the submissions are new grounds of appeal since the same are not contained in the petition of appeal. He added that the new grounds of appeal are not certain as to which impugned decision these grounds are originating from. Mr. Gidion went on to submit that looking at the application at hand the appellant has referred to Misc. Application No. 529 of 2020, however, the same does not tally with the petition of appeal before this court. He claimed that they do not know whether this appeal originated from the Judgment and Decree in Misc. Application No. 27 of 2021, Misc. Application No. 529 of 2020 or Application for Review No. 329 of 2021. The counsel for the respondent valiantly contended that litigation is not a game of surprise. To buttress his contention he cited the case of Philips Anania Masasi v Returning Officer Njombe North Constituency and Others, Misc. Civil Cause No.7 of 1995 HC at Songea (unreported) and the case of Halfani Charles v Halima S. Makapu & Juma S. Makapu, Misc. Land Appeal No. 85 of 2021. The learned counsel for the respondent did not end there, he asserted that the issue of the validity of the lease agreement tendered or used as evidence to verify that the appellant was a mere lessee is irrelevant since the respondent has failed to know which lease agreement the appellant has submitted on. He added that the appellant's submission on summons or service or notification is a new ground that was not raised at the District Land and Housing Tribunal. It was his submission that since the appellant has failed totally to submit on grounds of appeal and has introduced new grounds without leave of the Court, thus, the same is contrary to provisions of the law contemplated under Order XXIX Rule 2 of the Civil Procedure Code,

Cap. 33. The counsel for the respondent contended that looking at the ground of appeal, the impugned decision attached to the petition of appeal, and the prayers made thereto. He argued that it is not disputed that this appeal emanated from the review in Application for Review No. 329 of 2021 delivered on 1st November, 2021. Therefore, in his view, this court has no jurisdiction to determine the instant appeal since the same originated from review. To bolster his submission he referred this Court to Order XLII Rule 7 (1) (a), (b) of the Civil Procedure Code Cap. 33 [R.E 2019]. On the strength of the above submission, the learned counsel for the respondent beckoned upon this Court to dismiss the appeal with costs. In a brief rejoinder submission, the applicant reiterated his submission in chief. He rejoined further by insisting that there was an issue of jurisdiction which was not considered by the Tribunal. He claimed that the trial tribunal 5 enjoyed power that it did not have. He insisted that the appellant was not summoned to appear at the tribunal. He added that the memorandum of appeal clearly shows from where the appeal originates. Before I review the parties' submissions on the appeal, there is one issue that was brought up in the course of the hearing by Mr. Gidion. This is in relation to the impugned ruling; as rightly submitted by Mr. Gidion it is not clear the appellant has brought his appeal against which Application. Reading the Petition of Appeal, the appellant is appealing from the Misc. Application No. 27 of 2021. The record shows that the appellant filed a Memorandum of Review, Misc. Application No. 27 of 2021 requesting the tribunal to review the Ruling of Temeke District Land and Housing Tribunal which was delivered on 24th March, 2021. However, in his submission before this court, the appellant is referring to the Misc. Application No. 529 of 2020 complained that the Chairman did not consider the ground of illegality, the issue of jurisdiction. The Chairman determined the review and ended up dismissing the same. Dissatisfied, the appellant has lodged an appeal before this court against the review made by Hon. Chenya, Chairman. In order to do justice, I am not going to determine the grounds of appeal as presented in the Petition of Appeal. I have held such position because the said Petition of Appeal is not certain as to which decision of the trial tribunal the appellant intends to challenge. Reading the title of the Petition of Appeal, it seems the appellant is referring to the decision of the District Land and Housing Tribunal in Misc. Application No. 27 of 2021 while in the grounds of appeal, the appellant is referring to Misc. Land Application No. 529 of 2020. Again, in his submission before this court, the appellant has raised new grounds which was not raised at the District Land and Housing Tribunal. For the aforesaid reasons, it is inevitable to find the appeal incompetent before this Court. On the premises, I have no option but to strike out the appeal. The appellant will pay half costs of the case taxable by the Taxing Master. Order accordingly. Dated at Dar es Salaam this date 11th October, 2022. GEYEKWA / GE 2022 Judgment was 3nvWh October, 2022 in the presence of the appellant and respondent. cA x A A.Z.MGEYEKWA ' ■ JUDGE il,,W022 Right of Appeal fully fexM&ihed. 7

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