

TANZANIA / JUDGMENT

Land Appeal No

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 21781 OF 2024 (Appeal from the decision of the District Land and Housing Tribunal for Bagamoyo in Land Application No. 37 of 2021) HATIMA ISMAIL KHATIMA..... APPELLANT VERSUS ISSAK MRUMA A/S ISAAC ATHMAN MRUMA.... 1st RESPONDENT HASSAN HAMAD ISMAIL (an administrator of Estate of the late Ismail Khatima) 2nd RESPONDENT

JUDGMENT

Date of last Order: 28/11/2024 Date of Judgment: 10/12/2024 LALTAIKA, J, The Appellant herein HATIMA ISMAIL KHATIMA is dissatisfied with the decision of the District Land and Housing Tribunal for Bagamoyo (the DLHT) in Land Application No. 37 of 2021. He has appealed to this Court by way of a Petition of Appeal containing the following grounds: Page 1 of 12

1. That the trial tribunal erred in law and in fact by giving a whole sale judgment in favour of the respondents without evaluation and analysis of the evidence in record and submission presented in supporting the application to set aside the expert judgment
2. The trial chairperson erred in law by misusing its discretion powers (sic!) on relying on assumption reason contrary to the requirements of the laws and good practice henceforth arrived into (Sic!) an impugned judgment and decree. When the appeal was called for mention on 25/10/2024, parties had no legal representation and opted to proceed to hearing by way of written submissions. With a nod of approval by this court, a schedule to that effect was ordered. In that schedule, the Appellant's submission in chief was to be filed on 7/11/2024, Respondent's Reply: 21/11/2024, Appellant's Rejoinder if any: 28/11/2024 Mention for necessary orders to schedule the date of Judgment: 28/11/2024 at 11:00. I hereby register my commendations to the anonymous legal aid providers who drafted the documents for this appeal, for their exemplary service, and spotless compliance with the scheduled order. This positive time management habit is crucial to enable this court to fulfil its constitutional mandate of timely dispensation of justice. The next part of Page 2 of 12 this Judgment is, in that order, a summary of submissions by both parties, my analysis of the law and the verdict. The appellant submitted that he had applied to set aside the ex parte decree in Land Application No. 189 of 2017 before the DLHT for Kibaha, through Miscellaneous Application No. 37 of 2021. However, the Appellant narrated, his application was dismissed for failure to

advance sufficient reasons. He argued that the trial tribunal had erred in law and fact by delivering a judgment in favour of the respondents without evaluating or analysing the evidence on record and the submissions made in support of the application. Regarding the first ground of appeal, the appellant contended that the tribunal failed to properly evaluate the evidence in the records. He pointed out that, as per paragraph 9 of his affidavit, he was not present in Bagamoyo when the tribunal issued summons in 2017, as he was farming in a remote area in Masasi District and only returned in

2021. He asserted that the tribunal had overlooked this fact and wrongly concluded that the summons, published in a newspaper, had reached him in Masasi. The Appellant emphasized that the Tribunal had reasoned that newspapers are accessible worldwide through networks, but the appellant disputed this, emphasizing the lack of proof that he had access to a Page 3 of 12 smartphone or an internet connection in the bush. Furthermore, the Appellant lamented, the tribunal faulted him for not providing an agricultural officer's report to substantiate his farming activities. The appellant maintained that the tribunal failed to evaluate his evidence systematically and did not consider his work contract, annexed as "HIK 6," which demonstrated that he was working in a remote location. He argued that the tribunal's ruling was a mere summary of the evidence presented by both parties, lacking a proper evaluation or analysis of the legal principles guiding such applications. The appellant also contended that the tribunal had failed to assess whether the newspaper publication had actually reached him, and it ignored the significance of his documentary evidence. The appellant further argued that the tribunal's decision was influenced by evidence that was not properly before it and failed to meet the required standards of proof and evidence evaluation. He stated that his right to be heard, as enshrined under Article 13(6)(a) of the Constitution of the United Republic of Tanzania, was violated. He emphasized that the tribunal did not provide proof of effective service of summons, and as a result, he was condemned unheard. On the second ground of appeal, the appellant asserted that the trial chairperson had misused discretionary powers by relying on Page 4 of 12 assumptions rather than legal standards. He criticized the chairperson's reasoning that newspapers are universally accessible and that the summons, published in a newspaper, had effectively reached him. The appellant noted that such reasoning was based on assumptions unsupported by evidence. He argued that the tribunal disregarded material facts, including that the first respondent had no claim to the suit land, having already been refunded the purchase price of TZS 3,000,000 by the second respondent. The appellant alleged that the tribunal ignored this evidence and effectively endorsed fraudulent actions by the first respondent, who had obtained the judgment despite lacking any legitimate claim to the land. In conclusion, the appellant urged the court to allow both grounds of appeal, asserting that the trial tribunal's errors warranted the setting aside of its decision and that the respondents should bear the costs of the appeal. Taking up the podium, the 1st Respondent expressed his position that he disagreed with the two grounds of appeal and the accompanying arguments presented by the Appellant. Regarding the first ground of appeal, the 1st Respondent contended that the trial

tribunal acted correctly in law and fact. He argued that the Page 5 of 12 Appellant had failed to provide any evidence to support his claim of being in Masasi for farming between 2017 and 2021. The Appellant neither disclosed the dates he allegedly left Bagamoyo for Masasi and returned, nor named the village where he purportedly stayed. Furthermore, he did not present a letter from the village leadership, the chairman, or the Agricultural Officer to substantiate his farming activities, nor did he identify the crops he claimed to have been cultivating. The 1st Respondent maintained that the tribunal had nothing to evaluate or analyze because the Appellant had presented no evidence of his stay in Masasi. He asserted that the documents submitted by the Appellant, including annexure HIK6, were irrelevant to the claims. He explained that HIK6, which was purported to be a work contract, was merely a tractor hire agreement with an individual and did not establish the Appellant's presence in Masasi during the relevant period. The 1st Respondent further argued that the Appellant's claim of being "somewhere" in the bush in Masasi District indicated uncertainty about his location. He supported this argument by referring to definitions of the term "somewhere" from the Oxford and Cambridge Dictionaries, which describe it as an unspecified, indeterminate, or unknown place. Page 6 of 12 On the second ground of appeal, the 1st Respondent contended that the Appellant's submission largely repeated the arguments made under the first ground. He accused the Appellant of wasting time and attempting to deny the 1st Respondent the opportunity to develop the property he had rightfully purchased for TZS 6,000,000 in 2007. He dismissed the Appellant's reference to TZS 3,000,000 as irrelevant and far-fetched. The 1st Respondent noted that the Appellant had a history of avoiding cases. He referenced Application No. 119 of 2011, which the Appellant abandoned, leading to its dismissal for want of prosecution. The Appellant later unsuccessfully sought to set aside the dismissal, he averred, providing unsubstantiated claims of being in Mahenge and Ifakara. The 1st Respondent argued that the Appellant's conduct in the current appeal was consistent with his earlier behaviour, as he had evaded the proceedings in Land Application No. 189 of 2017, only to reappear after the case had been decided ex parte. While acknowledging the Appellant's reference to Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 R.E. 2019), the 1st Respondent argued that the Appellant's right to appeal and pursue other legal remedies had already been exercised through Misc. Land Application No. 37 of 2022 and Land Appeal Page 7 of 12 No. 21781 of 2024. He characterized the Appellant's actions as time-wasting strategies aimed at preventing the 1st Respondent from enjoying his property. In conclusion, the 1st Respondent submitted that the Appellant had failed to provide sufficient, valid, and compelling reasons for his non-appearance at the hearing. He maintained that the trial tribunal was correct in dismissing Misc. Land Application No. 37 of 2022 and prayed that the appeal be dismissed with costs for lack of merit. In his rejoinder, the Appellant refuted the Respondent's assertion that the term "somewhere" denotes an unknown place, arguing that while he indeed claimed to have been working "somewhere in the bush" in Masasi District, he did specify the general location. The Appellant contended that the Respondent's argument on this point was baseless. The Appellant acknowledged the Respondent's concession that the right to be heard is a

fundamental constitutional right, as enshrined in Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (Cap. 2 R.E. 2019). He submitted that the Respondent's acknowledgment amounted to an admission of his grounds of appeal and prayed for the Honorable Court to grant his appeal on this basis. Page 8 of 12 Addressing the second ground of appeal, the Appellant rejected the Respondent's claim that he was obstructing the development of the Respondent's property purchased for TZS 6,000,000. He pointed out that the Respondent had failed to explain why he agreed to be refunded TZS 3,000,000, the purchase price of the land, before the magistrate's court at Mwambao Primary Court. The Appellant argued that this unexplained fact amounted to the Respondent's tacit admission of his claims. Finally, the Appellant submitted that the Respondent's reference to Application No. 119 of 2011, and allegations of his behaviour in prior cases, were irrelevant to the matter before the court. He asserted that these new facts raised by the Respondent were contrary to the law and had no bearing on the subject of the current appeal. Consequently, he humbly prayed that the grounds of appeal be upheld. I have dispassionately considered the rival submissions and thoroughly examined the trial Tribunal's records. Essentially, the appellant is challenging an ex parte judgment delivered in Land Application No. 189 of 2017 on two grounds reproduced earlier. The following issues arise for my determination: Page 9 of 12

1. Whether the trial tribunal erred in failing to evaluate and analyze the evidence adduced in support of the application to set aside the ex parte judgment.
2. Whether the trial tribunal misused its discretionary powers in dismissing the application to set aside the ex parte judgment. On the first issue, the Appellant submitted that the tribunal failed to analyze evidence showing that he was absent from Bagamoyo between 2017 and 2021 because he was farming in Masasi District. He alleged that summons did not reach him and that the tribunal did not evaluate his documentary evidence, including Annexure HIK6, a work contract purportedly supporting his absence. The tribunal's failure to critically evaluate evidence can amount to a failure of justice. As held in *Hemed Said v. Mohamed Mbilu* [1984] TLR 113, evidence must be weighed to determine whether it meets the standard of proof. However, an applicant seeking to set aside an ex parte judgment must also provide sufficient and credible evidence to warrant the relief sought. In this case, the tribunal rightly dismissed the application because the Appellant did not provide sufficient or credible evidence to justify his absence or show that summons failed to reach him. Annexure HIK6, as noted, does not substantiate the claim of farming in Masasi, and the Page 10 of 12 Appellant's failure to name a specific location or produce corroborative evidence weakens his case. On the second issue, the Appellant accused the trial tribunal of relying on assumptions, such as the accessibility of newspapers through the internet and the assumption that he could read a summons published in a national newspaper. The Respondent defended the tribunal's decision, emphasizing the Appellant's history of abandoning cases and time-wasting litigation tactics. Discretionary powers must be exercised judiciously and in accordance with established principles. As stated in *Mbogo v. Shah*

[1968] EA 93, an appellate court should not interfere with the exercise of discretion unless it is satisfied that the tribunal misdirected itself or acted on matters it should not have considered. The trial tribunal was entitled to rely on the presumption of regular service through newspaper publication, as per Order V, Rule 20(1) of the Civil Procedure Code, (Supra). The Appellant's failure to produce evidence showing that he was not aware of the summons or that he lacked access to the newspaper publication further supports the tribunal's

conclusion.

The Respondent's reference to past litigation involving the Appellant does not form a proper basis for deciding the current case. However, this Page 11 of 12 error does not invalidate the overall ruling, as the decision was primarily based on the lack of sufficient evidence. In the upshot, the appeal is hereby dismissed. The decision of the District Land and Housing Tribunal for Kibaha in Misc. Land Application No. 37 of 2021 is upheld. Each party to bear their own cost. It is so ordered. •.\$&• Z5” E.I. LALTAIKA JUDGE 10/12/2024 Court: Judgment delivered in Court Chambers this 10th day of December 2024 in the presence of both the Appellant and the Respondent who have appeared in person, unrepresented. Page 12 of 12

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