

TANZANIA / JUDGMENT

# JEREMIA FIMBO JUDGMENT

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (THE SUB-REGISTRY OF  
MWANZA) AT MWANZA LAND APPEAL NO. 7234 OF 2024 (Arising from Judgment and decree of  
The District Land and Housing Tribunal for Mwanza at Mwanza in Application No.127 of 2020)  
JEREMIA FIMBO ..... 1ST APPELLANT CHRISTOPHER MASELE  
..... 2ND APPELLANT CHIGANGA MPALANGE .....  
3RD APPELLANT VERSUS PAUL KING'ARA MTUI ..... RESPONDENT

## JUDGEMENT

12th & 24th July, 2024 CHUMA, J. The respondent sued the appellants before the District Land and Housing Tribunal for Mwanza (the DLHT) seeking among other reliefs, a declaration to be a lawful owner of four houses located at Kigoto (Bulale) - Buhongwa within Nyamagana District, Mwanza. Hearing of the case was conducted in the absence of the appellants on account that efforts of serving them summons were barren of fruits. Consequently, an ex parte judgment was entered in the respondent's favor and the appellants were ordered to 1 leave vacant possession. The decision displeased the appellants hence this appeal raising the following grounds:

- i. That the honorable tribunal erred in law and fact by entertaining and delivering an ex parte judgment in favor of the respondent without giving the appellants the right to be heard. ii. That the honorable tribunal erred in law and fact by pronouncing judgment in favour of the respondent while there was non-joinder of the necessary parties. iii. That the honorable tribunal erred in law and fact by entertaining and deciding the matter in favour of the respondent without considering the opinion of the assessors. iv. That the honorable tribunal erred in law and fact by deciding and delivering judgment in favour of the applicant without evaluating the evidence properly adduced by the applicant
- v. That the honorable tribunal erred in law and fact by pronouncing the judgment in favour of the applicant while the land in dispute was owned by a non-citizen contrary to the requirements of the law. 2 At the hearing of the appeal, the appellants appeared in person and fended for themselves. The respondent had the services of Joseph Mugabe, the learned advocate. The appellants' submission was more of a reiteration of the complaints made in their petition of appeal. That, they were not afforded the right to be heard, the DLHT did not properly evaluate the evidence, the proceedings were invalid for non-joinder of necessary parties, assessors' opinions were not considered and the tribunal failed to consider the fact

that the suit land was owned by a non-citizen which is against the law. Mr. Mugabe's reaction to the 1st ground was that the appellants were afforded the right to be heard, for, they were served with summons and others refused to sign. On the 2nd ground, the learned advocate argued that Mwanza City Council and Administrator General were joined in the suit on 29 April 2022 and 16 May 2023 respectively. But after that, the case remained pending until it was ordered to proceed ex parte. Against the 3rd ground on failure to consider the assessors' opinion, the argument is wanting of proof since because their judgment was based on the respondent's citizenship which was not discussed by the respondent, 3 Mr. Mugabe adamantly contended. Regarding the complaint on improper reevaluation of evidence raised in ground 4, the learned advocate supported the Chairman's appreciation of the evidence of the contract, communications from Mwanza City Council Nyamagana District, and property tax from Tanzania Revenue Authority, that it proved on a balance of probability the respondent's ownership over the suit land. Lastly, on ground five, Mr. Mugabe submitted that the issue of the respondent's non-citizenship is a new fact in this appeal since it was neither advanced by the parties nor decided by the DLHT. Having objectively examined the record and considered the parties' arguments for and against, it is now time to assess the merit or otherwise of each complaint. The first take is whether the impugned decision of the DLHT was reached without the appellants being afforded the right to be heard. To put differently, did the trial court satisfy itself that the appellants were duly served with the summons to appear for hearing but they failed hence the case proceeded ex parte. Issuance and service of summons are regulated under Order V of the Civil Procedure Code and for the purposes of this appeal rules 8 and 12 fit on all fours. The law imposes a mandatory requirement that service of summons must be made in person or by an agent 4 who is empowered to accept service, in which case service on such agent shall be sufficient. Where the copy of summons is delivered, a person who the copy was delivered must sign with a view of acknowledging the service. The provisions are quoted in the following wording: Order V. Rule 8: Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Order V. Rule 12 Where the serving officer delivers or tenders a copy of the summons to the defendant personally or to an agent or other person on his behalf, he shall require the person to whom the copy is so delivered or tendered to sign an acknowledgment of service endorsed on the original summons. My scrutiny of the proceedings of the DLHT, it is evident that on 21 December 2020, the DLHT issued a summons requiring the appellants to appear on 28 January 2021. Neither of the appellants responded to the call hence the matter was adjourned and fixed for mention on 23 February 2021. There is still no indication if any appellant entered an appearance on that 5 date. Once again, the DLHT adjourned the case until 16 March 2024, on that particular date the Chairman recorded that the appellants were absent without prior notice. It proceeded with an ex parte hearing and eventually composed its decision. For the foregoing facts, no evidence was rendered to confirm that the summons issued on 21 December 2020 was duly served on the appellants ahead of the ex parte order or any other date in terms of Order 5 rule 12 of the CPC. Mr. Mugabe's proposition that service was proper on the ground that the

appellants signed the summons but did not attend the hearing, is not supported by any evidence on record. Similarly, the learned advocate's argument that there was an occasion where the appellants refused to sign has no merit because nothing was advanced to establish such a blanket statement or rather a mere saying. For that type of argument, there should be evidence from the court process server to prove through an affidavit that the appellants refused to sign and thus denied themselves the right to be heard. Further, despite the case remaining pending for a year or so, there are no endeavors shown by the Chairman to satisfy himself on proof of service or taking further steps like issuing fresh summons or indulging parties to substituted way of service. In other words, it is not reflected anywhere if all modes of service were exhausted before ordering the ex-parte hearing. The court record is also silent on what transpired from 16 March 2021 to 11 March 2022 when the impugned judgment was delivered. Improper conduct of the proceedings by the DLHT is also echoed in the impugned judgment where the assessors on page 5 aired out as follows: Methusela; "...ipo haja ya wajibu maombi wote" watatu wapatiwe samasi". Mzee Cheneko; "... hakuna ushahidi wa kuthibitisha wajibu maombi walipokea samasi kuhusu mgogoro huu nina wasiwasi mleta maombi hakuwapelekea wajibu maombi ili asikilizwe peke yake". The record reveals nothing commented by the trial tribunals' Chairman in respect of the matter of service after the assessors opinion rather than general finding differing with assessors opinion reflected on page 8 of the record. I think he ought to have said a word on it. Be that as it may, the legal implication of such a flaw was addressed in the case of Regional Manager, Kunming Pharmaceutical 7 Corporation v. Paul Magasha (Civil Revision 33 of 2003) [2007] TZHC 276 (4 May 2007). The suit was set for hearing and the applicant was summoned by way of publication but the hearing did not take place. It was rescheduled a month later, on 17 October 2001. However, no summons was issued, and if there was, no proof that it was served on the applicant defendant to appear on that particular date. Based on those facts, this court expressed the following: "There was no material upon which the trial Magistrate could have acted to write and deliver an ex parte judgment. The ex parte judgment therefore has no leg to stand on. In the final analysis, this court finds that there were material errors in the proceedings going to the merit of the case, involving injustice. The proceedings are quashed and the ex parte judgment and decree together with the execution proceedings and Garnishee Order Absolute, are set aside. It is ordered that the suit be commenced de novo, before another magistrate". With all the above, it is clear that the DLHT assumed its powers to proceed with an ex parte hearing prematurely as it did not satisfy itself on the proof of service. In that regard, the complaint that the appellants were denied the right to be heard need not be ignored or taken lightly because that is the reality. In the case of Abbas Sherally & Another v. Abdul S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported), the Court of Appeal stressed the right to be heard before adverse action is taken, the Court said: "The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous 18 decisions. That right is so basic that a decision that is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice". Similarly, in Mbeya Rukwa Auto Parts and Transport Limited v.

Jestina George Mwakyoma [2003] T.L.R. 251, the Court held that the violation of the right to be heard is a breach of the cardinal principle of natural justice and 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. See also Mary Mchome Mbwapbo 9 & Amos Mbwapbo v. Mbeya Cement Company Ltd (Civil Appeal No. 161 of 2019) [2022] TZCA 179 (4 April 2022) For the foregoing position of the law, there is no doubt that the appellants were condemned unheard hence the proceedings before the DLHT from 16 March, 2024 when it made ex parte order, were vitiated. It follows therefore that the complaint on improper service of summons is capable of disposing the entire appeal without venturing to the rest grounds of appeal. I, therefore, quash the proceedings in Land Application No 127/2020 and set aside ex parte judgment and decree. I order the re-hearing of the application inter-parties before another Chairperson with competent jurisdiction. The Appeal is then allowed and costs to follow the event. Dated at MWANZA this 24th day of July 2024. W. M. CHUMA JUDGE 10 Judgment delivered in court before the appellants in persons and Ms. Elizabeth Muna, the learned advocate for the respondent this 24th day of July 2024. W. M . CHUMA JUDGE Court Right of Appeal explained. W. M . CHUMA JUDGE 11

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