

TANZANIA / JUDGMENT

LUTAMBI JUDGMENT

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA LAND APPEAL NO. 9387 OF 2024 (Arising from Misc. Application No. 417 of 2023 and Land Application No. 88 of 2023 in the District Land and Housing Tribunal for Mwanza at Mwanza) PASCHAL THOBIAS.....APPELLANT VERSUS HUSSEIN LUTAMBI.....RESPONDENT

JUDGMENT

27th September, 2024 & 28th March, 2025 KAMANA, J. Initially, this matter was set for judgment on 27th September, 2024. However, while drafting the judgment, I thought having the records of Land Application No. 88 of 2023 between the parties was necessary. Given that, I ordered the calling of the said records that led to the Miscellaneous Application No.417 of 2023. That being the case, the delivery of this judgment was delayed for some months waiting for the records in question. Because of that, I must apologize for the delay. In this appeal, Paschal Thobias, the appellant, challenges the decision of the Mwanza District and Housing Tribunal (DLHT) (Lekamoi, 1 Chairman) which dismissed his application to set aside the exparte ruling entered in favour of Hussein Lutambi, the respondent in Land Application No. 88 of 2023. The reason for the dismissal was that the appellant failed to prove that he was not properly served to justify his non-appearance. Aggrieved by such a decision, the appellant preferred this appeal which is premised on three grounds. First, the DLHT erred in law and fact by holding that the summonses were duly served to him; second, the DLHT erred in law and fact for recognizing all affidavits for proof of service sworn by the same process server that the appellant had refused to attend before the DLHT while it was prudent for the service of summons be effected by a different process server; and third, the DLHT erred in law and fact by relying on the fact that the appellant was called via phone as a means of summoning him while a phone call is not mentioned as a means of service of summons. The appeal was, by order of this court, disposed of by way of written submission. Worthy to note is that in determining this application, my focus will be on establishing whether the appellant was properly served with the summons. 2 In a nutshell, Ms. Matilda Joseph, learned Counsel who drafted the appellant's submission, contended that the appellant was not properly served. She held the view that the purported service contravened the provisions of Order V Rule 16(1) of the Civil Procedure Code, Cap. 33 [RE.2022]. She asserted that the said Order directs that when it is impossible to serve the defendant for a reason that the defendant avoids service of summons or for any other reason, the recourse is to affix the summons to the courthouse and the

defendant's last known residence or office, as the case may be. Fortified by that position, Ms. Joseph argued that the applicant needed to affix the summons to the DLHT premises to allow the appellant or his relatives to know about the pending case. Mr. Joseph Kinango, learned Counsel for the respondent, prefaced his submission by alerting this court that the appellant was appealing against two matters that were before the DLHT, which in his opinion was not right. Without much ado, I have seen nothing suggesting Mr. Kinango's contention. The grounds of appeal are self-explanatory in that they challenge the decision of the DLHT that refused to grant the appellant's prayer to set aside *ex parte* judgment in Land Application No. 88 of 2023. 3 Arguing against the appeal, the learned Counsel submitted that the appellant was properly served as evidenced by the affidavits sworn by the process server, one Silas Luca Isangi. He contended that according to an affidavit sworn on 15th May, 2023, the appellant was not available. It was further stated that when he was phoned by the process server on 10th May, 2023, the appellant stated that he was not in Mwanza and that he would be in Mwanza on 30th May, 2023. Mr. Kinango argued that the information about the fact that he was not in Mwanza and the date of his return to Mwanza was admitted by the appellant in his affidavit, which proves that he communicated with the process server. The arguments of the legal minds precipitated me to order the records of Land Application No. 88 of 2023 to ascertain whether the appellant was properly served with the summons. According to the records, on 17th May, 2023, Ms. Monica Kabadi, learned Advocate who appeared for the applicant (now the respondent), informed the DLHT that the respondent (now the appellant) was not available. Given that, the Chairman ordered that the respondent be served with the summons. 4 On 6th June, 2023, Ms. Kabadi informed the DLHT that the respondent was not available. She proceeded to ask the court for a leave to amend the application and to serve the respondent by way of publication. The DLHT granted her prayers. On 3rd July, 2023, Ms. Kabadi informed the DLHT that they had served the respondent through Mwananchi Newspaper dated 12th June, 2023, and prayed for an *ex parte* hearing against the respondent. Her prayers were granted. I have decided to narrate the events that led to the *ex parte* hearing which led to the *ex parte* judgment that aggrieved the appellant to have a clear picture of what transpired in the DLHT. One of the issues that I have noted is the absence of proof of services of the summons, except for the extract from Mwananchi Newspaper. The absence of said proof of services in the DLHT's records convinces me that there were no attempts to serve the appellant by the process server. This is because if there were such attempts, how did Ms. Kabadi fail to submit the affidavit of the process server to the DLHT? I have noted the copies of the purported summonses as filed by the respondent when countering the appellant's affidavit in the application that led to this appeal. In my view, the same are worthy of no consideration as they are not reflected in the records of Land 5 Application No. 88 of 2023. In the absence of such proof in the records of Land Application No. 88 of 2023, the DLHT was not justified in dismissing the application that led to this appeal. To sum up, it is my holding that the absence of proof of service by the process server in the records is sufficient to set aside *ex parte* judgment for the reason that the applicant was not served. This is because there is no way the appellant could know about the case without being served with the summons. The service by publication was prematurely done as the respondent did not exhaust the modes of service as provided in Order V of the Code. In the context of this matter in which the respondent asserts that the applicant was avoiding service,

the proper recourse was to affix the summons to the DLHT's premises and the respondent's last known residence in terms of Rule 16(1). Since that was not done, I hold that there was no service known in law. I allow the appeal, with costs, by quashing the orders pronounced by the DLHT. Further, I invoke my revisional powers and set aside the proceedings of the DLHT in Land Application No. 88 of 2023 except those before 2nd June, 2023. As a consequence, the exparte judgment is also set aside. The appellant be properly served. 6 Order accordingly. Right To Appeal Explained. DATED at MWANZA this 28th of March, 2025. KS KAMANA JUDGE 7

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