

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND APPEAL NO. 06 OF 2017

(From the decision of the District Land and Housing Tribunal of Tarime at Tarime in
Misc. Application No. 111 of 2016)

MAKORI MAIGE TYENYI APPELLANT

VERSUS

MARO NYAMHANGA RESPONDENT

JUDGMENT

17/01 & 18/01/2019

RUMANYIKA, J.:

Appeal is against the 05/01/2017 ruling and orders of the District Land and Housing Tribunal for Tarime at Tarime (the DLHT) dismissing application for extension of time within which Makori Maige Tyenyi (the applicant) to lodge application for setting aside *ex parte* judgment cum order of 30/11/2010.

The 3 grounds of appeal basically revolve around 2 points as under:

1. the DLHT chair having determined application basing on extraneous matters/issues.
2. the counter affidavit was incurably defective for bad jurat of attestation.

When the appeal was called on for hearing, though served, but according to copy of returned summons refused it, appearance of the respondent therefore was, for reasons, and pursuant to my 17/01/2019 order dispensed with.

Mr. Baraka Makowe learned counsel appeared for appellant and, having combined points 1 and 3, but also in a nutshell he submitted that instead of addressing the issue of "non-service" on the applicant now culminating into a premature ex parte order and proof, the chair just relied on new and extraneous matters in the counter affidavit raised by the respondent. That without being served, leave alone proof of, the present appellant could not have been aware of the matter at the time in the DLHT. That the chair just assumed it (without getting onto records with a view to establishing whether or not the appellant was duly served (leave alone service). Hence the findings that matter had been finally determined and execution done, and that the overtaken by events application fell short of merits.

Secondly, the counter affidavit was, by reason of bad jurat of attestation incurably defective. As one could not have been sworn at Musoma but at the same time the document attested away at Tarime Urban Primary Court. That with the defective affidavit, it was like the application was in the DLHT not contested. That is it.

The pivotal issue is whether the appellant was, from the beginning duly served. The answer is no! I have had opportunity and, between the lines twice and thrice read the material proceedings of the DLHT which ran from 31/12/2008 (when case was called for the 1st time) to 09/11/2010.

Not only the appellant had not, even once appeared, but also, no order or notice was ever ordered and issued to her. Leave alone proof of service. If anything, only calling for records of the trial Tribunal was always and throughout ordered by the DLHT. Exparte order and proof of 30/11/2010 therefore was both improper and premature.

It follows therefore that a fundamental criterion for a prayer for order of exparte order/proof has always been, on balance of probabilities proof of service on the defendant. Like Mr. Makowe learned counsel argued, precisely so in my considered view. It is very unfortunate that the DLHT chair did not even attempt to address and decide on the fundamental ingredient. Instead, he, with greatest respect relied on such other irrelevant and extraneous issues. Case may have had been finally determined, execution completely carried out fine! But the fact remained that the impugned exparte judgment or order was, but premature. Suffices the point to dispose of the appeal.

Decision and orders of the DLHT are quashed and set aside respectively. Order for exparte proof and judgment are, for avoidance of doubts quashed. Matter is, with immediate dispatch remitted to the DLHT for it to determine the matter interpartes.

Appeal allowed with costs. Ordered accordingly.

Right of appeal explained.


S.M. RUMANYIKA
JUDGE
17/01/2018

Delivered under my hand and seal of the court in chambers this 18th day of January, 2019 in the presence of Mr. Makowe, advocate for the appellant who is also present in person and in the absence of the respondent.




S.M. RUMANYIKA
JUDGE
18/01/2019