

**IN THE HIGH COURT OF TANZANIA
AT DODOMA**

LAND APPEAL NO. 28 OF 2014

*(From the Decision of the District Land and Housing Tribunal of
Dodoma District at Dodoma in Land Case No. 83 of 2010 and 276 of
2013)*

OMARY BAKARI MSAFIRI **APPELLANT**

VERSUS

1. CAPITAL DEVELOPMENT AUTHORITY **1st RESPONDENT**
2. WIN SELESTINE **2nd RESPONDENT**

JUDGMENT

15/09/2016 & 13/10/2016

SEHEL, J.

This appeal is prompted by Omary Bakari Msafiri, the appellant, after being refused to set aside the dismissal order and restore Application No. 83 of 2010.

He raised two grounds of appeal, they are;-

1. That, the trial Chairman erred in law and in fact dismissing the application without considering the circumstances of the case:

2. That, the trial Chairman erred in law and in fact in failing to reinstate the Application despite the fact that there were good reasons to do so.

At the hearing of the appeal, the appellant had the services of Mr. Mlwafu and Mr. Mkami, learned advocates and the first respondent was represented by Mr. Kansumbile, learned advocate. The appellant was allowed to proceed ex-parte against the 2nd and 3rd respondents after this Court being satisfied that the 2nd respondent was duly served through publication and 3rd respondent stopped to enter appearance with no apparent reasons.

Mr. Mkami submitting on the first ground argued that the appellant was present on the day when his application was dismissed and that he did not appear before the Tribunal because the appellant did not hear his case being called. Mr. Mkami was of the view that the District Land and Housing Tribunal ought to consider the circumstances of the case that the appellant was frequently attending for his case; there was a change of venue; and the appellant had ill health since he was suffering from stomach and

he had to attend toilet frequently. He referred this Court to the case of **Mwanza Director M/S New Refrigeration Co. Ltd Vs Mwanza Regional Manager of TANESCO Co. Ltd & Another [2006] T.L.R 329** that held good cause depends on the peculiar circumstances of each case.

For the second ground Mr. Mkami said the reasons stated by the appellant were strong and sufficient for Tribunal to re-institute the application. He was of the opinion that the Honourable Chairman ought to adjourn the matter instead of dismissing it since the object of the Court is to decide rights and not to punish the parties. In support of his submission he cited the decision of the Court of Appeal of Tanzania in a case of **National Housing Corporation Vs. Etiennes Hotel, Civil Appeal No. 10 of 2005 (Unreported)**.

The respondent replied that he objects the appeal for two main reasons. First, the appellant belatedly filed his application. He said the decision was delivered on 21/12/2012 and his application was made in 2014. Secondly, the appellant failed to tender any documentary evidence to prove his allegation that he was looking

after his sick father. He therefore prayed for the appeal to be dismissed.

The appellant generally re-joined that the District Land and Housing Tribunal had opportunity to look at the reasons he advanced.

From the submission and from the grounds of appeal, the major complaint by the appellant is whether the District Land and Housing Tribunal was correct in dismissing the appellant's application for setting aside its dismissal order. It is perhaps appropriate to reproduce the appellant's reasons advanced in Miscellaneous Application No. 276 of 2013. The reasons are contained in the appellant's affidavit. They are:

"1. That, I am the applicant thus conversant with the facts I am about to depone hereunder.

2. That, on 19th July, 2010 the Applicant filed the application No. 83 of 2010 to this Honorable Tribunal for determination and hearing for the sake of ensuring access to justice in,

regard to Plot in quo. That I have never failed to attend the case when came for mentioning from 2010 to date November, 18th, 2013. A copy of the said Application No. 83 of 2010 is hereby attached and marked Annexure OM's and leave is hereby craved to make it read as part of this Affidavit.

3. That, the case proceeds to this Honorabe Tribunal for mention but at last came for hearing on 09/09/2013 was before J.W. Sillas Chairman and was absent and was adjourned to the above, but when I attended the hearing on 09/09/2013 but my file was being heard by J.W. Sillas probably not being handled to the present Chairman. Thus I was advised to make follow up of the next date for hearing of the case.

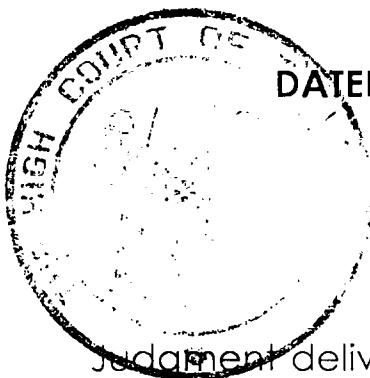
4. That, I was all along making follow-ups to the Tribunal clerk the whole mention of October, 2013 and on 15/11/2013 I have been informed that case will come for hearing on 18/11/2013 , I have attended from 9.00 am but my file never

called till the end of Tribunal cases, I faced the Tribunal Clerk but under astonished circumstances read over the order from the file that the Application No. 83 of 2010 was dismissed for want of prosecution something which abnormal and abuse of Applicant's justice in regard to the Plot in quo.

5. That, the failure to attend the case was not deliberate but was associated with ill-health problem, hence non-appearance was not deliberate.
6. That, if the orders in the chamber summons are not granted it shall be injustices to me and my family depending on the Plot in quo:"

The above reasons did not convenience the Honourable Chairman at the District Land and Housing Tribunal. The Honourable Chairman found that there is no evidence that the appellant was around when the matter was called up for hearing and no evidence that the appellant was sick. He therefore proceeded to dismiss the application for setting aside dismissal order. I took liberty to revisit the

records in Application No. 83 of 2010 and noted that in deed the appellant most of the time was present when his case was coming either for mention or hearing and he was even present on the last date when the Application was fixed to come for hearing on 18th November, 2013. This is clearly reflected in his Chamber Summons in Misc. Application No. 276 of 2013. For this reason, I concur with the learned advocates for the appellant that according to the circumstances of the case, the Honorable Chairman ought not to dismiss the Application. He should have adjourned the hearing to another date. I, therefore find merit in the appellant's appeal. The appeal is hereby allowed with costs by restoring Application No. 33 of 2010. It is so ordered.



DATED at **Dodoma** this 13th day of October, 2016.

B.M.A Sehel

JUDGE

Judgment delivered in open court at Dodoma, under my hand and seal of the court, this 13th day of October, 2016 in the presence of Mr. Mlwafu, learned advocate for the appellant and Ms. Kyamba

learned advocate for 1st respondent and in absence of the 2nd and 3rd respondents. Right of Appeal is fully explained.



B.M.A Sehel

JUDGE

13th October, 2016.

