

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
MISC. LAND APPEAL NO. 43 OF 2018**

(From Misc. Land Application No. 54/2018 and Appeal No. 26/2017 of District Land and Housing Tribunal for Rungwe and No. 06 of 2017 of Kiwira Ward Tribunal)

SAIDA SHABANI.....APPELLANT

VERSUS

ADAMU SIMON MWAMAKA.....RESPONDENT

JUDGMENT

Date of last order: 03/10/2019

Date of Judgment: 10/03/2020

NDUNGURU, J.

The appellant one Saida Shabani is appealing to this court against the ruling of Rungwe District Land and Housing Tribunal in Misc. Land Application No. 54 of 2018 delivered on 06/07/2018.

Briefly, the matter originated at Kiwira Ward Tribunal Land Case No. 06 of 2017 where the appellant sued the respondent for recovery of land. The appellant was successful. The respondent dissatisfied with the decision of the Ward Tribunal lodged an appeal to District Land and

Housing Tribunal of Rungwe, Land Appeal No. 26 of 2017. When the appeal was scheduled for hearing on 06/06/2018 the appellant who was the respondent never entered appearance thus the appeal proceeded ex-parte against her.

After the ex-parte decree the appellant filed an application to set aside ex-parte judgment but the Tribunal dismissed the application thus this appeal.

In her memorandum of appeal the appellant has advanced three grounds of appeal to wit:

- (1) That the District Land and Housing Tribunal erred in law and facts to deny the appellant's application for setting aside an ex-parte judgment regarding the fact that the appellant adduced sufficient reasons.
- (2) That the District Land and Housing Tribunal erred in law and in facts to dismiss the appellant's application in the ground that there was no proof that the applicant was in poor health despite the fact that the applicant appeared before the Tribunal with poor health conditions when requested the tribunal for appointment of a representative of her case.

- (3) That the chairman of the tribunal erred in law and facts to infringe the appellant's right to be heard and defend the land and residential house appropriated by the respondent regarding that in the trial tribunal the appellant won the case while the respondent being an invitee admitted to have only developed the land in dispute which rightfully owned by the appellant.

When the appeal was scheduled for hearing on 03/10/2019 the parties requested the appeal be disposed by way of written submission. The request being granted. The parties adhered to the scheduling order in filing their respective submissions.

In her submission in support of her appeal, the appellant submitted to the effect that the chairman of the District Land and Housing Tribunal was aware of her health problems because on 05/11/2017 and on 06th June, 2019 she had sent her relative to inform the tribunal that the appellant was sick as it is reflected even in the ex-parte judgment at page 2 but still the chairman ordered the case to proceed ex-parte against her. She went further submitting that during the hearing of the application No. 54 of 2018 seeking for an order of setting aside ex-parte judgment tendered medical documentation from

Tumbi Kihaba hospital, the document showed that the appellant was involved in the road accident and was Tumbi Kibaha Referral hospital on 16/05/2017 where she got medical treatment up to 20/06/2018 that is why she defaulted appearing during hearing of an appeal at Rungwe but the chairman never considered it and dismissed the application. She submitted that ill health is a sufficient ground to be considered in such an application. The fact that the appellant has shown the proof of illness and the fact that the tribunal was informed of the situation before hearing of the appeal the chairman has to reasonably adjourned the hearing instead of ordering it to proceed ex-parte as he did.

The appellant further was of the submission that the refusal of her application for order of setting aside ex-parte judgment has denied her right to be heard, thus against the principles of the natural justice.

The rest of the appellant's submission is the challenging of ex-parte judgment which are not part of the grounds of this appeal thus I will not go to that extent, otherwise I will be fall into a trap of discussing the merit of the ex-parte judgment which is not the intent of this appeal.

Responding to the appellant's submission, the respondent submitted that the appellant had failed to prove her sickness before the tribunal that is why the application was dismissed. He said it was upon

the appellant to show sufficient or good cause to satisfy the tribunal that her non appearance was caused by sickness. He referred to this court the case of **John Mgalula vs. Mbeya City Council**, Misc. Civil Application No. 34 of 2018 High Court (Unreported).

He further submitted that, the appellant always appeared health but she did not want the case to come to the end that is why whenever the case was called up for hearing the appellant raised unreasonable grounds praying for adjournment.

I had an opportunity of going through the records of the District Land and Housing Tribunal, the grounds of appeal and reply thereon and the submissions of the parties. The question is whether the appeal is meritorious.

At this point let me make clear that the grant or refusal of application of this nature is the discretion of court/tribunal. The only consideration is whether the applicant has shown sufficient cause/reasons which prevented him from appearing before the court or tribunal. It is further clear that the discretion empowered to the court/tribunal on that circumstance must be exercised judiciously.

Having gone through the record I have found that the appellant for his non appearance and as it is noted even in the ex-parte judgment

at page 2 that the trial chairman was aware of the ill health of the appellant but proceeded with hearing of the case.

The appellant further filed an application for setting aside an ex-parte judgment from the record it is clear that during hearing of an application, the appellant among other reasons she advanced is that during all the time when the case was called up for hearing she was sick and she was attending medical treatment at Tumbi referral hospital at Kibaha due to the road accident she incurred. The record further reveals that the appellant produced medical Report to show that she was not just sleeping over his rights.

At the outset let me point out that right to be heard is the cardinal principle of natural justice. The Court of law or any tribunal which deals with administering justice must protect by all hooks that principle. Thus the court of law and the tribunals such is District Land and Housing Tribunal must adhere to the principle all the time when sets for administering justice.

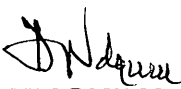
To my opinion, ill-health when proved by producing medical documentations constitutes a good cause for the court to grant an application for an order of setting aside ex-parte order. As already commended above, the appellant informed the Tribunal of her ill-health

when the appeal was set for hearing but the chairman never adhered to, Likewise during the hearing of the application for an order of setting aside the ex-parte judgment, notwithstanding the fact that the appellant produced medical certification for ill-health caused by accident but the Tribunal chairman never paid heed. I hold that the trial chairman did not exercise his discretion judiciously.

I hereby allow the appeal, by quashing the ruling of the trial tribunal dated 12/11/2018, the appellant be afforded an opportunity to be heard.

No order as to costs.




D. B. NDUNGURU
JUDGE
10/03/2020

Date: 10/03/2020

Coram: D. B. Ndunguru, J


Appellant: Absent on Notice

Respondent: Present

B/C: M. Mihayo

Court: The matter is for judgment. The Judgment is delivered in the presence of the respondent and in the absence of the appellant who is absent on Notice.




D. B. NDUNGURU
JUDGE
10/03/2020

Right of Appeal explained.