IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA.

LAND APPEAL NO. 16 OF 2019

(Arising from Misc. Application No. 329 of 2019 of the District Land and Housing Tribunal for Ruvuma at Songea originating from Land Application No. 62 of 2018 of Ruvuma DLHT)

ALLY RASHIDI KAYOMBO ..... APPELLANT

Versus

SELEMANI FUNGAFUNGA .....RESPONDENT

Date of last hearing: 03/12/2020

Date of judgment: 23/02/2021

JUDGMENT

I. ARUFANI, J

The appellant, Ally Rashid Kayombo filed Misc. Application No. 329 of 2019 before the District Land and Housing Tribunal for Ruvuma at Songea (hereinafter referred as the tribunal) beseeching the tribunal to grant him extension of time to file in the tribunal an application to set aside an ex parte judgment delivered on 13th day of march, 2019 in favor of the respondent, Selemani Fungafungu. The tribunal dismissed the application after finding the applicant had failed to attach an

affidavit of a traditional healer where he alleged he was being treated. Being aggrieved by the decision of the tribunal the appellant filed the appeal at hand in this court basing on the following grounds:-

1. That, the tribunal erred in law and in fact when dismissed Misc. Application no. 329 of 2019 on the ground that the appellant failed to show good and sufficient reasons for not to produce the affidavit of the material witness who was the traditional healer.
2. That, the tribunal also erred in law and in fact when failed to consider the appellant's reasons of sickness as a good and sufficient reason as there was no dispute that the appellant was sick since the hearing until the delivery of the ex parte judgment.

During hearing of the appeal the appellant was represented by Mr. Kitara Mugwe, learned advocate and the respondent appeared in the court in person and fended himself. The counsel for the appellant told the court in relation to first ground of appeal that, the tribunal erred in dismissing the application of the appellant basing on the reason that, the appellant failed to give sufficient reasons for delaying to apply for an order of setting aside the ex parte judgment delivered in his disfavor on

the ground that he failed to attach the affidavit of the traditional healer where he was being treated.

He argued that, the tribunal did not deny the fact that, the appellant was sick but it refused to grant him extension of time as the appellant failed to attach an affidavit of the traditional healer to prove he was getting traditional treatment from a traditional healer. The counsel argued further that, the proceedings of 4th august, 2019 of the tribunal shows the tribunal was informed the appellant was sick and on 17th day of September, 2019 when the judgment was delivered the appellant told the tribunal he was sick that is why he failed to apply within the time for the ex parte judgment to be set aside but the tribunal refused to grant the applicant extension of time.

He argued in relation to the second ground of appeal that, the tribunal erred in law and facts when failed to accept sickness of the appellant as a sufficient reason for granting him extension of time while the issue of the appellant to be sick was not in disputed. He said apart from that, the appellant was not notified about the date of delivery of the ex parte judgment as required by Order XX rule 1 of the Civil Procedure Code, Cap 33 RE 2019. To bolster his argument he referred the court to the case of **Cosmas Construction Limited V. Arrow**

Garments, [1992] TLR 127. At the end he prayed the appeal to be allowed with cost.

In response to the arguments advanced to the court by the counsel for the appellant, the respondent stated the appeal is out of time. He said that, although the appeal shows it was filed in the court on 28th October, 2019 but he was served with the memorandum of appeal on 2nd September, 2020. He argued further that, the appellant was required to bring evidence to the tribunal to prove he was being treated by traditional healer but he failed to do so.

He said the tribunal would have not known the appellant was really sick and he was getting treatment from a traditional healer without seeing evidence from the traditional healer where he alleged he was getting treatment. The respondent argued further that, the appellant's wife and his child informed the trial tribunal that the appellant was sick but no any medical evidence brought to the tribunal to show the appellant was sick. He said that made the tribunal to find the appellant was playing delaying tactics and decided to resolve the matter in his favor.

In his rejoinder the appellant's counsel insisted that, it was impossible for the informers of the sickness of the appellant to bring to

the tribunal evidence to show the appellant was sick. He said the issue of sickness of the appellant was not in dispute as even the respondent was not objecting the appellant was sick. The counsel for the appellant reiterated his prayer for the appeal to be allowed with cost.

After going through the records of the tribunal the court has found the issue to be determined in this appeal is whether the appellant showed good or sufficient reasons for his delay to file the application to set aside the ex parte judgment delivered by the tribunal against him within the time prescribed by the law. The court has found that, as deposed in the affidavit supporting the application and argued by the counsel for the appellant the reason of the appellant to delay to apply for an order of setting aside the ex parte judgment delivered in his disfavor by the tribunal was that he was sick.

The reason of sickness has been considered by our courts in number of cases and found when proved an applicant was really sick is a good or sufficient reason for granting extension of time is seeking from the court or tribunal. That position of the law can be seeing in the case of **Kijiji cha Ujamaa Manolo V. Hote** [1990 – 1994] 1 EA 240 where the case of **Range Chacha V. Elias Nyirabu**, (1967) HCD no. 115 was referred and stated sickness is a sufficient reason to move a

court or tribunal to grant extension of time a party is seeking from the court or a tribunal. The similar position was observed by the court in the case of **Nowa Shibanda V. Mwajuma Mwakonde,** Misc. Land Appeal No. 34 of 2019, HC at Mwanza (unreported) where it was stated that:-

> *"in deed in law illness of a party can constitute a sufficient reason for adjournment of or restoring a dismissed matter if it was the cause of the failure to appear by the applicant..."*

However, in order for illness or sickness to constitute good or sufficient reason for granting extension of time sought from the court or tribunal it must be proved the applicant was sick within the period he was required to do an act required by the law. That was stated in the cases cited hereinabove and specifically the case of **Nowa Shibanda** (supra) where it was stated that:-

> *"... such illness must be proved; medical records are good scientific proof of such illness. Nonetheless any evidence may also prove the same depending on the circumstance of each case".*

From the position of the law stated in the above cited cases it is crystal clear that, although illness or sickness is good or sufficient reason for granting extension of time sought from the court but the alleged illness or sickness must be proved. Now the question to determine here

is whether the appellant managed to prove he was delayed by sickness to apply for the order of setting aside the ex parte judgment delivered by the tribunal. The court has found that, as the ex parte judgment was delivered on 13th March, 2019 and the application for extension of time to apply for the order of setting aside the ex parte judgment was filed in the tribunal on 10th June, 2019 the court is required to see whether the appellant managed to prove he was sick for whole that period.

The court has found that, although the appellant deposed at paragraph 5 of the affidavit supporting the application that soon after the ex parte judgment being delivered he became sick and he was being treated by a traditional healer at Mpingi Village but as found by the tribunal there no any evidence adduced before the tribunal by the appellant to prove he was sick and he was getting treatment from a traditional healer for all that period of three months. It is the view of this court that, as rightly stated by the respondent in his submission and ruled by the tribunal the appellant was required to bring to the tribunal evidence like an affidavit of the traditional healer who was attending him or any other evidence to prove he was sick for all that period and he was getting treatment from such a traditional healer.

The above stated view of this court is getting support from the case of **John Chuwa V. Antony Ciza,** [1992] TLR 233 where it was held that, an affidavit of a person so material to prove the cause of delay is required to be filed in the court. Since there is no affidavit from the traditional healer or any other material evidence adduced before the tribunal to prove the appellant was sick and he was getting treatment from a traditional healer for whole of the period of the delay the court has failed to see how it can be said the tribunal erred in finding the appellant failed to show he was delayed by good or sufficient reason to apply for an order of setting aside the ex parte judgment within the time prescribed by the law.

The court has considered the argument by the counsel for the appellant that the record of the tribunal shows on 14th August, 2019 it was reported to the tribunal that the appellant was sick and on 17th September, 2019 the appellant said he was sick that is why he failed to apply for an order of setting aside the ex parte judgment. The court has also considered the argument by the counsel for the appellant that the stated reports shows there was no dispute that the appellant was sick but failed to see any merit in his argument.

The court has arrived to the above finding after seeing that, it is not stated anywhere that the appellant was suffering from which illness which he was being treated by a traditional healer. Further to that the court has found the reports the counsel for the appellant is arguing were made to the tribunal that the appellant was sick were made after the application which its decision is now being challenged before this court had already been filed in the tribunal as the application was filed in the tribunal on 10th June, 2019.

The court has found that, the report of 14th August, 2019 shows it was stated the appellant was involved into an accident and injured on his hand which means it was not the sickness he alleged he was suffering from the date he was required to apply for an order of setting aside the ex parte judgment delivered on 13th March, 2019. Therefore to say there was no dispute that the appellant was sick is not correct as there is nowhere indicated it was not disputed the appellant was sick within the period he was required to apply for an order of setting aside the ex parte judgment.

Coming to the argument that, the appellant was not notified about the date of delivery of the ex parte judgment the court has found that; first of all this is a new point raised from the bar by the counsel for the

appellant as it was neither raised in the application filed and decided by the tribunal which its decision is being challenged before this court nor featuring in any of the grounds of appeal filed in this court by the appellant. That being the fact it is crystal clear that, as held in the case of **Elisa Moses Msaki V. Yesaya Ngateu Matee,** [1990] TLR 90 the court is required to look only into matters which came up in the trial court or tribunal and decided by the trial court or tribunal and not the matters which were neither raised nor decided by the trial court or tribunal.

Secondly, the issue as to whether the appellant was notified about the date of delivery of the ex parte judgment or not is the issue which is supposed to be considered in an application for an order of setting aside the ex parte judgment if it will be filed in the tribunal and not in the application for extension of time to apply for an order of setting aside the ex parte judgment. The court has come to that view after seeing the issue which was determined by the tribunal was whether the appellant was delayed by good or sufficient reason to apply for an order of setting aside the ex parte judgment and not whether there was good or sufficient reason for setting aside the ex parte judgment. In the premises the court has found the appellant's counsel's argument and the

case of **Cosmas Construction Limited** (supra) cited to support the argument are not relevant in the matter at hand.

Before coming to an end the court has found proper to have a look onto the argument made by the respondent that the appeal before the court was filed in the court out of time. To the view of this court the respondent has misconceived the law in relation to the limitation of time for filing appeal in the court. The appellant is required to know the limitation of time to appeal to the High court for matters originating from the District Land and Housing Tribunal starts to count from the date of delivery of the impugned decision and not from the date of filing the appeal to the date of serving the respondent as he put his argument.

That being the position of the law the court has found the appeal at hand was filed in the court within the time as it was filed in the court on 28th October, 2019 and the impugned decision was delivered on 26th September, 2019. That shows the appeal was filed in the court after the elapse of 32 days which is well within 45 days provided under section 41 (2) of the Land Disputes Courts Act, Cap 216 R.E 2019. Therefore the respondent's argument that the appeal was filed in the court out of time as he was served late has no merit.

Consequently, the court has found the appeal filed in this court by the appellant has no any merit and is hereby dismissed in its entirety and the costs to follow the event. It is so ordered.

Dated at Songea this 23rd day of February, 2021.

I. ARUFANI

JUDGE

23/02/2021

Court:

Judgment delivered today 23rd day of February, 2021 in the presence of both parties in person. Right of appeal to the Court of Appeal of Tanzania is fully explained to the parties.

I. ARUFANI

JUDGE

23/02/2021