

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. LAND CASE APPEAL No 20 OF 2020

*(Arising from the decision of the District Land and Housing Tribunal for Mwanza in Misc.
Application No. 362C of 2019)*

DOLAH S. J. KITUNDU.....APPELLANT

VERSUS

JUMA HAMIS JUMA & TWO OTHERS.....RESPONDENT

JUDGMENT

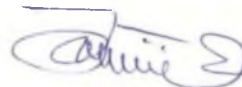
24/05/2021 & 15/06/2021

TIGANGA, J.

In this appeal, the abovenamed appellant is challenging the decision of the District Land and Housing Tribunal (herein referred to as the DLHT) in Miscellaneous Application No. 362C of 2019, refusing to set aside the dismissal order in respect of Land Application No. 302 of 2019 which was dismissed for nonappearance. Only one ground of appeal was raised, which is;

1. That the Honourable Chairman erred in law and in fact in deciding that the appellant has failed to establish good cause to set aside the dismissal order dated 8th October 2019.

The appellant was represented by Mr. Muhingo, learned counsel whereas the 3rd respondent was represented by Mr. Mulokozi, also



learned counsel. The 1st and 2nd respondents however did not appear and neither did they make any submissions against the appeal, although they were dully served and proof of service was given. The hearing was done ex parte against the 1st and 2nd respondents.

It was agreed that, the appeal be disposed of by way of written submissions, in compliance with the schedule, the parties filed their submissions for and against the appeal as required.

For the appeal, counsel for the appellant began his submission by narrating the background leading to the appeal at hand. Regarding the reason as to why the appellant has lodged this appeal, counsel stated that the same was prompted by a dismissal of the appellant's application to set aside the dismissal order given by the District Land and Housing Tribunal in respect of Application No. 362 of 2015. He submitted that the dismissal was due to nonappearance of both the appellant and her advocate at the time the application was called for hearing.

It was argued that the nonappearance was caused by the fact that the appellant was sick so she could not attend the court and that the advocate did attend but was late and found that the application had already been dismissed. An application for restoration of the dismissed

application was lodged but it was again dismissed for the reason that the appellant failed to show sufficient reasons for nonappearance.

Counsel submitted that the fact that the appellant was sick on the date the application was set for hearing amounts to good cause to move the District Land and Housing Tribunal to grant the application for restoration of the dismissed application. He stated further that although the appellant failed to produce medical documents, it was wrong to conclude that she had neglected the application.

Citing the authority in **CRDB Bank Ltd vs NBC Holding Corporation & Another** [2006] TLR 422, counsel submitted that it was not correct for the District Land and Housing Tribunal to punish the appellant, who was a client, for the wrong committed by her advocate. Also, counsel relied on the authority in **Mwanza Director M/S New Refrigeration Co. Ltd vs Mwanza Regional Manager of Tanesco Ltd & Another** [2006] TLR 329 which stated that what amounts to good cause for nonappearance depends on particular circumstances of each case, stating that the circumstances of this case amounts to good cause as the appellant did not negligently fail to appear in court, she was sick and informed her advocate. Also, that she had been dully attending the court except for that particular day.



He concluded his submission by praying for the appeal to be allowed so that the main application can be heard on merits as the appellant will suffer irreparable loss if the application will not be heard.

In his reply, counsel for the 3rd respondent disputed the appeal for the main reason that the appellant failed to establish sufficient proof that she was sick on the date the application was called for hearing. Also, the fact that the advocate showed up late showed that the appellant had lost interest on the application.

Counsel submitted further that appearance can be identified in three categories i.e. in person, through an advocate or agent and appearance through a relative or authorised person, however, in this case the appellant never appeared either in person, through her advocate or relative and no notice was filed before the DLHT notifying on their absence or that they would come late.

It was his submission also that the reason advanced by the appellant that she was sick without any documentary proof has no merit and the same is baseless and therefore cannot be termed as sufficient ground to allow this appeal. He concluded that the trial tribunal was right in rejecting the application and that the appeal also should be dismissed.

After going through the submissions advanced by counsel for the parties, records of the appeal and the ground for this appeal advanced by the appellant, one main question that calls for determination is whether or not the appellant advanced good cause to set aside the dismissal order.

The answer to this is clearly shown in the records. The only reason advanced by the appellant as to why she could not appear to prosecute her case was because she was sick. Failure to appear due to sickness is always considered to be a good cause, though I agree that the appellant did not have documentary evidence to prove that she was indeed sick. However, she submitted further that she took a step forward and informed her advocate that she would not be able to make it to the tribunal due to her sickness. The advocate, being the representative was then duty bound to make appearance on behalf of his client, however, he arrived a bit late and the matter had already been dismissed. It would therefore not be fair to put the blame on the appellant who made an effort to inform her advocate of her inability to appear that day. The slight mistake by the appellant's counsel to arrive late without any notice whatsoever cannot be imputed on the appellant. See **Shah Hanraji Bharmal vs Santoshi Kumar** (1961) E.A 679.

Apart from what has been stated above, I would like to state that I share the same view with the counsel for the appellant that the DLHT was supposed to take into consideration the fact that the appellant had been making appearance throughout the case except the day when the matter was dismissed; that would have shown that the appellant had all the intentions of prosecuting her case therefore deserving of the benefit of the doubt.

I therefore strongly believe that, since the appellant made an effort to inform her counsel that she would not be able to appear due to sickness, meant that the matter was left in the hands of her counsel and thus his own failure to attend the matter in time cannot be used against the appellant and that to me suffices to be termed as good cause to set aside the dismissal order in respect of Application No. 362 of 2015.

This appeal therefore succeeds it is allowed to the extent explained above and the impugned ruling is hereby set aside and it is ordered that the main application i.e. Land Application No. 362 of 2015 be heard on merits from where an order for dismissal for non appearance was made.

It is so ordered

DATED at MWANZA this 15th day of June 2021



J.C. TIGANGA

JUDGE

15/06/2021

ORIGINAL