IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPEAL NO. 57 OF 2021

(Originating from Land Application No. 514C of 2018 and arising from Land Application No. 514 of 2016 in Mwanza District Land and Housing Tribunal)

TRYPHONY GWALANDA t/a GWALANDA..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK & ANOTHER....RESPONDENT

JUDGMENT

Last Order date: 17.08.2021
Judgment Date: 30.08.2021

M. MNYUKWA, J.

The Appellant Tryphony Gwalanda t/a Gwalanda appealed against the decision of the District Land and Housing tribunal of Mwanza in Application No. 514C of 2018 which was dismissed for failure to show good cause to restore his earlier application that was also dismissed.

To appreciate the essence of the issue, it will be important to state the material facts. The appellant instituted before the District Land and Housing Tribunal (henceforth to be referred as DLHT), Land application

No 514 of 2016. In between, the appellant filed a Misc. Land Application No. 514 B at the DLHT that was tried and granted the relief sought on 30/12/2016. This resulted to resume the main Land Application No. 514 of 2016. The matter was scheduled for hearing since 21/04/2017 but adjourned for several times for different reasons. When the matter was coming for hearing on 05.12.2018, the appellant and his advocate Mr. John Edward prayed the matter to be adjourned for the reason that the appellant was sick therefore cannot proceed with the hearing of the case. The respondent counsel objected to the appellant's prayer on the reason that the appellant has failed to prove that he was sick as he did not tender any document to prove his sickness, also the case took long from the day it was filed.

He prayed the court to dismiss the application because the appellant failed to prosecute the case. The Chairman of the DLHT dismissed the application because there was no sufficient reason to adjourn the application as provided for under Order XVII of the Civil Procedure Code, Cap 33 R.E 2019.

Dissatisfied, on 11.12.2018, the appellant lodged before the DLHT Application No. 514C of 2018 for setting aside a dismissal order. The same was dismissed on 02.10.2020 for failure to show good cause. The

appellant preferred this appeal against the decision in application No. 514C which dismissed the application for setting aside a dismissal order.

The appellant fronted three grounds of appeal as follows; -

1. *That the honorable chairperson erred in law and in fact for holding that there were no sufficient reasons to set aside the dismissal order dated 05.12.2019.*
2. *That the honorable chairperson erred in law and in fact for misdirecting and improperly evaluating the written evidence available that the applicant was absent when the dismissal order was entered.*
3. *That the honorable chairperson grossly erred in law and fact for failure to consider that there was no reason for dismissal of the same.*

The appeal was argued by way of written submissions pursuant to the court order dated 27.07.2021 whereby parties complied. The applicant employed the services of Mr.Julius Mushoboz learned advocate while the respondent afforded the services of George Mwaisondola,

The appellant was the first to toss the ball and he prays to abandon the second ground of appeal.

Submitting on the first ground of appeal, he referring this court to the case of **Bruno Wenclaus Nyalifa v the Apartments Secretary, Minister of Home Affairs and Another** Civil Appeal No. 82/2017, CAT

at Arusha (Unreported). He submitted that, the trial chairperson erred for holding that there was no sufficient reason for setting aside a dismissal order dated 05.12.2018. He averred that, on the day when the matter was dismissed, the appellant was present but sick and what was sought by the appellant learned counsel was an adjournment, and the chairperson of the tribunal misdirected that the applicant was absent. Referring to the trial court proceedings, he avers that the records show that the applicant was absent while he was present.

On the second ground of appeal, he claims that the honorable chairperson erred in law and in fact for failure to consider that there was no reason for dismissing the application. He averred that the appellant was sick and his advocate prayed for adjournment. He went on to state that the tribunal had a mandate whether to adjourn the matter or refrain from the adjournment and order the appellant to testify for the appellant was present rather than dismissing the application which was unjustifiable. He went on to submit that, for the series of adjournments, the appellant was present and dismissing the application was not fair. He prays the appeal to be allowed with costs.

Responding on the first ground of appeal, the learned advocate for the respondent, averred that it is the duty of parties to prosecute their cases failure of which courts are mandated to dismiss. He submitted that

the applicant application was dismissed for failure to appear on the date when the same was called for hearing and no sufficient reasons were given for the absence. Defending his point, he referred to Regulation 15(a) of GN. No. 174 of 2003 that when the matter is left unattended for the period of 3 months the tribunal may dismiss the application. He insisted that the appellant failed to attend his case without good reasons and the tribunal was right to dismiss the application. He went on to state that, the documents showing that the appellant was sick ought to be tendered at the day of hearing to exhibit that the appellant was truly sick.

On the second ground of appeal, he insisted that the appellant contention of sickness was a mere afterthought. He submitted that the exhibits that were annexed to the affidavit did not produce sufficient reasons. He went on to state that, the tribunal has discretionary power to make certain decisions in order to control proceedings before it. He added that the denial of restoration by the tribunal was based on the fact that the main application sought to be restored had no merit for the appellant being a defaulter who was always absent and resulted the case stood undetermined.

Responding to the third ground of appeal, he insisted that litigations must always come to an end. In support of his argument, he cited page 15 para 2 on the case of **SME Impact Fund & 2 Others v Agroserve**

Co. Limited, Civil Appeal No. 8 of 2018, HC Bukoba (Unreported). He avers that the trial tribunal was right to deny restoration. He insisted that orders of the court should always be respected by parties and their advocates and for this reason courts need not to depart from their previous orders. He therefore prays this appeal to be dismissed with costs.

Rejoining, he added that, for what has been submitted by the respondent, the appellant has never failed to attend because even on the date when the matter was dismissed, the appellant was present as required by law. He supported his assertion by citing Order IX Rule 1 of the Civil Procedure Code Cap, 33 [R.E 2019] that the appellant was present in person and with his advocate but he failed to proceed due to sickness and the tribunal unjustifiably proceed to dismiss the application.

He went on to submit that, even after the dismissal, the tribunal again dismissed the application for restoration even though they have produced the documentary evidence to show that at a material date, the appellant was sick. Insisting he went on citing the case of **Bruno Wenslaus** (supra) and the case of **Jumuiya ya Wafanyakazi v Shinyanga Region corporation Union** [1997] TLR 20, that the trial tribunal was not right to disregard the annexture for affidavit since it is a substitute of oral evidence.

He also acknowledged that, litigation must come to an end but insisted that it should not be in violation of cardinal principles of natural justice and depriving any party the right to be heard. Supporting his assertion, he cited the case of **Elikana Bwenda v Sylvester Bukoko** Civil Appeal No. 07 of 2020, HC (unreported) and insisted that cases referred to by the respondent are distinguishable. He prays this court to allow the appeal with costs.

I have given careful consideration to the arguments for the application herein advanced by the applicant as well as the respondent learned counsel. I find the central issue for consideration and determination is whether the appeal before me is meritious.

Before going to the discussion as submitted for and against by learned counsel, I must bring to attention that the right to be heard is a constitutional right provided for under article 13(6)(a) of the United Republic of Tanzania Constitution that parties must be afforded an opportunity to defend their suits. I say so because the genesis of this appeal was a result of the dismissal order by the trial tribunal where by the appellant claims that he was deprived with the right to be heard.

On the first and second grounds of appeal, the appellant claims that the trial chairman erred for holding that there was no sufficient reason

for setting aside a dismissal order the claim which was objected by the counsel for the respondent who insisted that the trial tribunal was right.

I went through the records to find out the claims by the appellant and it is very clear on record that Civil Case No 514 was dismissed on 25.12.2018 for want of prosecution. On Page 14 of the typed proceedings, the honourable chairperson dismissed the application with remarks as I quote:

> *"..Order XVII states clearly that court may adjourn the hearing of the suit if sufficient and good cause is given. I am of the view that the reason is a good cause but since there is no any document to support that the applicant is sick, I find it to be not sufficient cause to adjourn the case taking into consideration that the applicant is present in person. That being the case I proceed to dismiss the application for want of prosecution..."*

From the reasoning of the trial tribunal, though he acknowledged that the appellant was present, he could not find that the reason of sickness without documentary evidence was the sufficient reason. Unfortunately, the Chairperson of the trial tribunal did not state under which provision of the law the case was dismissed. For easy of reference, let me reproduce Order XVII of the Civil Procedure Code Cap 33 [R.E 2019.] It provides that:

"At any stage of the suit the suit the court may if sufficient cause is shown, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit."

From what was decided, the appellant made an application for restoration of the dismissed case vide Misc. Civil Application No. 514C which is the subject to this appeal and annexed the document which proves that at a material date when the matter was dismissed he was indeed sick but that reason was not accepted by the trial tribunal which proceed to dismiss the application.

From the submissions of the parties, I disagree with the respondent learned counsel submissions that the Land Application No 514 of 2016 was dismissed for failure of the appellant to appear on the date when the same was called for hearing. I say so because, the records shows that the appellant was present together with his advocate and the proceedings of trial tribunal at page 14 the Chairman acknowledges that the appellant was present in person.

On the records when the matter was first dismissed, as it appears on page 11 of the typed proceedings, it is clear that both the lerned counsels were present. Under Order IX Rule 1 of the Civil Procedure Code Cap, 33 [RE: 2019], the law requires the parties to the case to be present in person or under representation. The Order reads that: -

"On the day so fixed for hearing, the parties shall be in attendance at the day fixed for court-house in person or by their respective recognized agents or advocate, and the suit shall then be heard unless the hearing is adjourned to a future date to be fixed by the court."

I subscribe to the appellant's submissions that the trial tribunal erred dismissing the application in presence of all parties for the remedy available to him was to adjourn as prayed by the appellant learned advocate.

Furthermore, it was improper for the trial tribunal to dismiss the application for restoration on the reason that the document to prove that the appellant at a material time was sick ought to be produced when the matter was scheduled for hearing. I hold that because, for the interest of justice, when the appellant took efforts and filed the application No. 514C for setting aside the dismissal order attaching with the documentary evidence which was not produced at a time the matter was dismissed but the trial tribunal did not consider the same. I did not subscribe with the trial tribunal reasoning that the document could not be regarded when the application to set aside the dismissal order was determined. The law gives the court power to dismiss matters before it but it has to be done judiciously. In the case of **Tanesco v IPTL and 2 Others** (2000) TLR 324 it was held that

"Judicial discretion must be guided by law and rules and not by humor. It must as well not be arbitrary and fanciful but legal and regular"

Following what has been discussed above, I find that the trial tribunal did not act judiciously in dismissing the application No. 514 of 2016 and subsequently dismissing the application for restoration which is the subject to this appeal. The trial tribunal could have adjourned the matter and give the appellant time to exhibit his sickness in the first instant and disputed on the exhibit tendered to show that he was sick.

Again, in the application for restoration of the dismissal application, it is my considered view that it was not right for the trial tribunal to inquire only as to why he did not produce the medical certificate on the date when the application was dismissed without inquiring on the authenticity of the medical report which was submitted before him if at all he had a reasonable doubt on it. Thus, if he found that the medical report that was submitted cannot be relied on, the Chairperson was expected to state the reasons to justify as to why he did not take into consideration the medical report submitted by the appellant and dismiss the application. Unfortunately, it is neither the tribunal nor the advocate of the respondent who question the authenticity of the medical report submitted by the appellant.

Refusing the appellant to restore his application is equal to have denied him his right to prosecute his case which is contrary to the principle of natural justice which is the cornerstone in the administration of justice. This has been pointed out by the Court of Appeal in the case of **Mbeya - Rukwa Auto Parts and Transport Ltd Vs. Jestina George Mwakyoma** Civil Appeal No. 45 of 2000 (unreported) observed that: -

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law."*

As submitted by the counsel of the respondent that, litigation should come to an end, but the modality of ending it should not cause injustice to the other party. As it was highlighted in the case of **Elikana Bwenda v Sylvester Kuboko,** Civil Appeal No 7 of 2020, HCT at Kigoma that

> *"It is a settled that the decision reached in violation of constitutional right to be heard can not be allowed to stand even if it is the same decision which would have been reached had the parties been heard."*

In the final analysis, I find the Ruling of the trial Tribunal in Application No 514C of 2018 to have been a nullity for violation of the right to be heard. Accordingly, its Ruling and Drawn Order dated 02/10/2020 is declared to be null and void. I therefore proceed to allow the appeal and invoke the power given under section 43(1) (b) of the Land Disputes

Courts Act, Cap 216 R.E 2019 to quash and set aside the decision and any order emanated from the Application No 514C of 2018. I remit back the file to the trial Tribunal at Mwanza so as the Application No 514 of 2016 to be heard as if the same was not dismissed for want of prosecution. To avoid bias, the matter should be hard before another Chairperson. Each party to bear his own costs. It is so ordered.

The right of appeal is fully explained.

M. MNYUKWA
JUDGE
30/8/2021

Judgment delivered on 30/08/2021 via audio teleconference whereby all parties were remotely present.

M. MNYUKWA
JUDGE
30/8/2021