

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA**

AT MUSOMA

LAND APPEAL NO. 51 OF 2021

RICHARD MIPAWA MANARA APPELLANT

VERSUS

FINCA TANZANIA LTD 1ST RESPONDENT

MASHOKA AUCTION MART 2ND RESPONDENT

***(Appeal from the decision of the District Land and Housing Tribunal
for Mara at Musoma in Misc. Land Application No. 467 of 2020)***

JUDGMENT

2nd and 6th September, 2021

KISANYA, J.:

The appellant, Richard Mipawa Manara was aggrieved by the decision of the ruling of the District Land and Housing Tribunal for Mara at Musoma in Misc. Application No.467 of 2020 dismissing his application for restoration of Application No. 1 of 2018 that was dismissed for want of prosecution.

The facts giving rise to this appeal were that: At the District Land and Housing Tribunal for Mara at Musoma (the Tribunal), the appellant sued the respondents, Finca Tanzania Ltd and Mashoka Action Mart Ltd. He requested the Tribunal to declare the respondents' intention of selling

his house located at Nyasho Street within Musoma Municipality as illegal. The respondents vehemently disputed the appellant's claim. On 12th March, 2018, the appellant's case was dismissed for want of prosecution. Upon being satisfied that the applicant's absence was from the cause over which he had no control, the Tribunal set aside the dismissal order. It went on to restore the matter with effect on 16th June, 2020. When the restored case was called on for hearing on 25th November, 2020, the appellant was not in attendance. Therefore, the case was dismissed for want of prosecution, for the second time.

This culminated into the appellant filing an application seeking to set aside the dismissal order. He deposed in his affidavit in support of the application that he was sick on the hearing date. Appended to the supporting affidavit were the notice of absence filed on 19th November, 2020 and NHIF-Health Provider in-out Patient Claim Form. Upon hearing the application, the Tribunal held the view that it was not meritorious and thus, dismissed it with costs.

Aggrieved with the decision of the Tribunal the appellant has appealed to this Court on the following two grounds of appeal:-

- 1. That since there was proof on the fateful date the appellant was sick, the trial Chairman misdirected himself on point of facts and*

law to dismiss the application.

2. That the trial Tribunal acted injudiciously (sic) to consider and accord weight extraneous factors than what was presented before it.

When the appeal came for hearing the appellant appeared in person while Mr. Stephen Kaswahili, learned advocate appeared for the respondent.

Submitting in support of the appeal, the appellant argued the Tribunal failed to consider that the reason for his failure to appear on the date of hearing was sickness. He contended to have informed the Tribunal before the hearing date that he was sick and that he produced the NHIF Claim Form dated 25th November, 2020 to prove that fact. He therefore urged me to allow the appeal on the ground that the NHIF Claim Form was sufficient to prove that he was sick on the fateful day.

In his reply submission, Mr. Kaswahili conceded to the 2nd ground of appeal that the Tribunal considered extraneous matter. He went on to submit that this Court is empowered to consider whether the appellant had advanced a good cause. Therefore, addressing the first ground of appeal, Mr. Kawashili submitted that the notice of absence was not accompanied by a medical document to prove that the appellant was sick on 25th

November, 2020 or tickets to show that he travelled to Dar es Salaam for medical treatment. The learned counsel submitted further that in the absence of the medical document, the appellant failed to prove that he was sick on the fateful day. He fortified his submission by citing the decision of this Court (Mkwizu, J.) in **Revocatus Kennedy Ntanduka vs National Microfinance Bank and Another**, Land Appeal No. 24 of 2018, HCT at Shinyanga (unreported). He was of the firm view that, the NHIF Claim Form is not a medical document and that the said Form had no seal of the hospital and name of the doctor who attended the appellant. Therefore, he asked the Court to dismiss the appeal with costs.

When the appellant rose to rejoin, he reiterated his submission that he was sick on the date of hearing.

After scrutinizing the record and upon considering the parties' submissions, the issue for determination is whether the appeal is meritorious or otherwise. Before dwelling into the grounds of appeal, I find it apposite to revisit the provisions governing non-appearance of the parties before the District Land and Housing Tribunal (DLHT). Pursuant to regulation 11(1)(b) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003 (the Regulation), the DLHT is enjoined to dismiss the application for non-appearance of the applicant

where the applicant is absent without good cause and had received notice of hearing or was present when the hearing date was fixed.

In terms of regulation 11(2) of the Regulation, the recourse available to the applicant whose application is dismissed for want of prosecution is to apply to have the dismissal order set aside. The said regulation provides as follows:

"A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), within 30 days apply to have the orders set aside and the Tribunal may set aside the orders if it thinks fit so to do and in case of refusal appeal to the High Court."

In view of the above cited regulation, the DLHT has discretion of setting aside the dismissal order. That being discretionary power, it must be exercised judiciously. Although the above quoted regulation does not state the factors to be considered in deciding whether to set aside the dismissal order or not, I am of the view that, the factor to be taken into account is whether the applicant's absence was with good cause provided for under regulation 11(1)(b) of the Regulations.

Reverting to the merit of appeal, I prefer to start with the second ground that the Tribunal considered extraneous factors than what was presented before it. As indicated earlier, the appellant raised the ground of

sickness. However, nothing suggesting that the factor was considered. The Tribunal considered that the settled law that court's orders are required to be complied with the parties. Further to that, the Tribunal considered that the application had been dismissed for want of prosecution and restored.

I agree with the learned Chairperson of the Tribunal that Court's order must be respected and complied with. However, as far as the order for hearing, the court takes into account whether a party is prevented by good cause. It is upon considering that the party has not advanced good cause for non-appearance where the issue of compliance to the court's order arises. Since the Tribunal did not consider whether the appellant had advanced good cause, I am at one with both parties that it considered the extraneous matters. Thus, I find merit in the second ground.

As rightly submitted by Mr. Kaswahili, this being the first appeal, I am enjoined to re-evaluate the evidence adduced before the Tribunal and consider whether the appellant had advanced a good cause for his non-appearance. In so doing, I will be dealing with the first ground of appeal which is premised on the issue whether the appellant proved that he was prevented by a good cause?

I have gone through the appellant's affidavit before the Tribunal. The reasons for non-appearance are reflected in paragraph 2 of the

affidavit in which he deposed that:-

"That, I was the Applicant in the, Application No. 1/2018 at District Land and Housing Tribunal for Mara which was dismissed for want of prosecution but send permission letter to this honorable tribunal whereby I was serious ill the action which make (sic) me fail to appear at this honorable tribunal. I have attached the (sic) that letter and hospital payment receipt to form party this affidavit..."

In view of the above, it is apparent that the appellant raised two reasons for his non-appearance. The first reason was to the effect that he had lodged a notice of absence on the ground of sickness. This implies that the appellant had moved the court to adjourn the hearing due to sickness. The settled law as held by the Court of Appeal in **Christina Alphonse Tomas (As Administrator of the late Didass Kasele vs Saamoja Masingija**, Civil Application No. 1 of 2014 is that an adjournment of a case on the ground of sickness should be supported by medical evidence.

In the instant case, appellant informed the Tribunal that he had an appointment to see his doctor at Muhimbili Orthopaedic Institute (MOI) on 25th November, 2020. However, he did not append the appointment letter/notice or any medical document to prove that he was sick. In that regard, the Tribunal was enjoined to dismiss the application for want of

prosecution.

The second reason was sickness. I am mindful to the position of law is that, sickness is good cause. It is not choice of human being but a cause over which one has no control. This position was stated in **Emanuel R. Maira vs The District Executive Director of Bunda**, Civil Application No. 66 of 2010 (unreported) where it was held as follows:

"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."

Likewise, the principle of law is that a person who alleges on existence of certain facts is required to prove the same. Therefore, where sickness is pleaded as a ground for failure to take the required action, it must be proved by medical proof.

In our case, the appellant undertook in his notice of absence that he would avail the Tribunal with the medical document to prove that he was at MOI when the case was called on for hearing on 25.11.2020. However, he did not tender in evidence any medical document. What was appended to his affidavit is the NHIF- Health Provider in/out Patient Claim Form. I went through the NHIF Form appended to the supporting affidavit. Some parts including the mobile number of the doctor who attended the

appellant were not filled in. As that was not enough, the official stamp of the health facility where the appellant received the medical treatment was not affixed as indicated in that Form. Therefore, the said NHIF Form could not be relied upon because nothing telling that the same was issued by MOI. In the absence of the medical document, I am convinced that the ground of sickness was not proved. With the foregoing, I find the first ground of appeal unmerited and I dismiss it.

In the end, I am of the settled mind that this appeal is without merits. Accordingly, I dismiss the appeal with costs.

DATED at MUSOMA this 6th day of September, 2021.





E. S. Kisanya
JUDGE

COURT: Judgment delivered through teleconference this 6th September, 2021 in presence of the appellant and Mr. Stephen Kaswahili, learned advocate for the respondent. B/C Gideon-RMA present.

Right of appeal explained.




E. S. Kisanya
JUDGE
06/09/2021