

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA.**

**LAND APPEAL No. 09 OF 2020**

**(C/F Karatu District Land and Housing Tribunal Application No. 72 of  
2016)**

**KARATO MASSAY.....APPELLANT**

**Versus**

**1. QWARAY MASSAY.....**  
**2. MATLE MASSAY.....** } **RESPONDENTS**

**JUDGMENT**

03<sup>th</sup> August & 24<sup>th</sup> September, 2021

**MZUNA, J.:**

This court is invited to make a judgment based on the issue as to whether a dismissal of the application by the Karatu District Land and Housing Tribunal (herein after DLHT) was proper both in law and fact.

Briefly stated, the appellant filed Application No. 72 of 2016 in the DLHT for Karatu against the respondents. He prayed for the DLHT to declare him as lawful owner of a nineteen rooms house located at Kitongoji cha Kati Karatu Town on plot No. 41 Block "C". He claimed the house to have been given to him by their late father one Massay Awtu. The appellant says, the respondents invaded it and therefore prayed for eviction from the suit land.

As opposed to that view, the respondents who are the appointed administrators of the estate of the late Massay Awutu, say the said house is the family property which falls in the estate of the deceased, the second respondent being the surviving widow of the said deceased. They say, the house is subject for sale so as to be divided to the rightful heirs. They challenged the eviction.

The present appeal emerged after the Appellant's application which was filed on 14<sup>th</sup> November, 2016, was dismissed on 29/01/2020 following some adjournments. The last two adjournments, were caused by the appellant's advocate. It is on record that the default of the said advocate and or his client led to the disqualification of the first Chairman before commencement of hearing. The order dismissing the application for want of prosecution was made under Regulation 13(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (herein after Regulations). This appeal is based on the following grounds;

- 1. That the trial Tribunal (Honourable N.M. Ntumengwa Chairman) erred on point of law and fact in that it dismissed Appellant's Application in the presence of the Applicant in contravention of Regulation 13(2) of the Land Disputes Courts (The District & Housing Tribunal) Regulation, 2002 instead of requiring the Applicant to state his case as provided by the above quoted Regulation.*
- 2. That through Appellant's Advocate who slightly delayed because of the wet weather met the trial chairman writing the order though for ends of*

*justice ought to have afforded the Advocate an opportunity to proceed with the matter but dismissed the Application.*

- 3. That the Tribunal (Honourable N.M. Ntumengwa) erred on point of law and fact in dismissing Applicant's Application who was recorded present as shown on page 17 of the typed copy of the proceedings hence contravened the provision of Regulation 13(2) of the Land Disputes Courts (The District Land & Housing Tribunal) Regulations, 2003.*

During hearing which proceeded by way of written submissions, Mr. Lecktony L. Ngeseyan, the learned counsel, advocated for the appellant whereas Mr. Bungaya Matle Panga represented both respondents.

I propose to start with issues of non appearance of the advocate followed by failure to prosecute the case by the appellant himself. The question to ask is whether the trial Chairperson in dismissing the application complied with the relevant law?

Mr. Ngeseyan in his submission in chief argued based on grounds 1 and 3 that, the provision of the relevant law was not complied with. First, the defaulting advocate must have missed attendance in court for two consecutive dates. The second condition he says there must be proof that the advocate involved is attending in the High Court or the Court of Appeal; And the third prerequisite condition is that the DLHT must ask the party concerned to proceed himself with the matter and in case he refuses without good cause, that is when the matter could be dismissed.

The learned counsel further contended that two among those three conditions were not complied with before dismissing the application. Starting with the first condition Mr. Mgeseyan argued that, the last two adjournments of 4<sup>th</sup> December, 2019 and 29<sup>th</sup> January, 2020 has some plausible explanation. That in the previous date, he was in the High Court before Hon. Banzi, J. in Economic Crimes Sessions Case No. 14 of 2019 while on the other date 29<sup>th</sup> January, 2020, he was also attending the matter in the High Court before Hon. Masara, J. in Land Appeal No. 16 of 2019. Relevant copies of summons as proof thereof were attached. For the reasons stated above he says, his non attendance for two consecutive dates was with good cause.

On his part, Mr. Panga the learned counsel responding on the issue of non-attendance for two consecutive dates, he referred this Court to the proceedings of the DLHT at pages 15-16 where the chairman among others, said that there was neither cause list nor summons to justify that the learned counsel for the appellant had a session in the High Court. Mr panga faulted the documents attached to the written submission as being novel and therefore Mr. Ngeseyen was bringing evidences of his absence on 04<sup>th</sup> December, 2020 while the regulation requires him to produce the same to the DLHT and not using this forum of appeal. He insisted that the Chairperson was justifiable because it shows the counsel for the appellant was unwilling to prosecute an application. He therefore prayed for this Court to dismiss this appeal with costs.

Reading from the above submissions, Mr. Ngeseyan and Mr Panga are all at one that indeed the counsel for the appellant was not present for the said two dates. The mode to be applied under such situation is well explained under Regulation 13 (3) of the Regulations, 2003. It reads:-

"13 (1)...

(2)...

**(3) Where a party's advocate is absent for the reasons of attending the proceedings in the High Court or Court of Appeal, the Tribunal shall not believe any other evidence as a proof for being in the superior courts other than by producing summons to the advocate and cause list from such courts.**

(4)..."

The point which calls for determination is whether the DLHT was dully notified by summons about such absence of Mr. Ngeseyan that he was in the High Court attending proceedings in Economic Crimes Sessions Case No. 14 of 2019 and Land Appeal No. 16 of 2019. According to Regulation 13(3) of the Regulations, the summons and cause list showing that the advocate will be attending in the superior courts is ether by "***producing summons to the advocate and cause list from such courts.***" Such documents must be produced to the tribunal on the date of hearing not after the dismissal order.

Page 16 of the typed proceedings of the DLHT the Chairperson is quoted to have written as follows:- "*I see no cause list nor summons from the High Court that the parties Counsels are attending High court at Arusha in*

*Criminal session as counsel Anna Ombay provide. Let this matter be set for last adjournment."*

Despite the fact that the matter was adjourned to another date still the appellant's advocate did not bother to submit the alleged summons to the tribunal until when the application was dismissed.

This court cannot accord any weight or rely on the alleged summons annexed to appellant's written submissions for obvious reasons that submissions are not evidence. They are generally meant to reflect the general features of the party's case. This holding was echoed in the case of **The Registered Trustees of the Archdiocese of Dar Es Salaam vs The Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006 (unreported) where it was held that;

*"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be substitute for evidence."*

Based on the above stated reasons, the absence of the advocate was without cogent reasons, it was therefore justifiable to say he was absent without reasonable cause.

This takes me to the second point relevant for ground two. Mr. Ngeseyani submitted that on the day which was fixed for hearing it rained heavily to the

extent of causing him to delay attendance. He said despite the fact that he reached there at the time when the Chairman was still composing an order, he was not given a chance of being heard before dismissing an application. Mr. Ngeseyeni went on pointing an accusing finger to his fellow advocate because he said that he was informed through phone message about his delay but did not respond. That despite being aware, still he sought for a dismissal of the application.

On his part, Mr. Panga's response on ground two said that, this ground does not qualify to be a ground of appeal. To strengthen his argument, he cited the case of **Phares Wambura and 15 Others vs Tanzania Electronic Supply company Limited**, Civil Application No. 186 of 2016 (unreported) where the court held that presence in court premises does not mean attendance. Mr Panga further submitted that, for the point to deserve the quality of being a ground of appeal,

He said the ground raised by the Counsel for the appellant that he delayed in court because of weather condition and also that he found the Chairman constructing an order before being delivered, do not appear in the records of the DLHT. He insisted that the counsel for the appellant did not appear in court on 29<sup>th</sup> January, 2020.

Ground No. 2 should not detain me. I should say as well submitted by the learned counsel for the respondent that attending DLHT proceedings is quite different from attending to the buildings of the DLHT. The records of the DLHT do not feature the allegation that Mr. Ngeseyan delayed due to unpleasant weather condition and that he found the Chairman constructing the order. If I may take his own words, Mr. Ngeseyan has admitted did not attend to the DLHT proceedings on 29<sup>th</sup> January, 2020 when the order for dismissal was issued.

In the case of **Phares Wambura and 15 Others vs Tanzania Electric Supply Company Limited** (supra), the court was dealing with a point that advocates for parties entered in a chamber of another Justice of Appeal only to find that their case had been dismissed for non-appearance before another Justice of Appeal. Among the grounds raised was the fact that they were within the court premise and therefore their non-appearance was with sufficient cause. The court in determining whether there was sufficient cause cited with approval the case of **Mwanza Director M/s New Refrigeration Co. Ltd v. Mwanza Regional Manager of TANESCO and Another** [2006] TLR 329 where it was held that "The term sufficient cause for non-appearance can be defined according to the peculiar circumstances of each case." Then the court (Levira, JA) at page 10-11 held that:-



*"Besides, a mere fact that applicants and their advocates were in Court premises on the hearing date does not amount to "appearance"... because they did not appear before the responsible Justice who was dealing with their matter. Parties to a case must always remember that, a Judge or Magistrate does not deal with every body who hangs around the Court's corridors but specific parties as per his or her assignment. Therefore, mere presence of a party in and/or his counsel in court premises without physically appearing or being virtually linked with a presiding Judge or Magistrate on a hearing date and time amounts to non-appearance".*

The above holding provides an answer that indeed Mr. Ngeseyan did not appear before the DLHT and therefore the Chairman was justified to dismiss the application for non-appearance.

Another point worth consideration as raised by Mr. Ngeseyan is that the Chairman contravened Regulation 13 (2) of Regulations for dismissing the application while the party was present. This fact is strongly disputed by Mr. Panga and it is well supported by the record of proceedings.

As a matter of fact, the law allows a party to prosecute his case as an alternative where the advocate fails to attend. It is an undeniable fact that the the appellant was given that chance. Reading at page 18 of the typed proceedings of the DLHT the chairman wrote; "Tribunal: Let the Applicant proceed with his case for it have been a tendency of advocate for the Applicant to be absent in attending this matter.

Applicant:- I cannot proceed alone with this matter ."

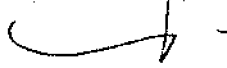
Thereafter the Chairperson dismissed the application after failure of the appellant to prosecute his case. The relevant Regulation 13 (2) of the Regulations reads:-

*“(2) Where a party’s advocate is absent for two consecutive dates without good cause and there is no proof that such advocate is in the High Court or Court of Appeal, **the Tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence to establish his case, the tribunal may make an order that the application be dismissed or make such other orders as may be appropriate. (Emphasis is Mine).***

That provision, requires the Chairman to allow the applicant himself to prosecute his case if the applicant’s advocate is not present in Court. That was done as per the record. That being the case, the appellant failed to exercise the rights accorded to him, he cannot latter complain.

For the reasons above stated, the appellant has failed to convince this court that there were good cause preventing his advocate from entering appearance in the DLHT. The argument that the other counsel was aware in his rejoinder submission, cannot be a cure for the clear provision of the law, above cited and reproduced.

Consequently, the appeal stands dismissed with costs.

  
**M. G. MZUNA,**  
**JUDGE.**  
**15/10/2021.**