

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

LAND APPEAL NO. 32 OF 2020

(Arising from Land Application No. 22 of 2020 originating from Land Appeal No. 35 of 2019 of the District Land and Housing Tribunal of Lushoto at Lushoto)

SAIDI ABDALLAH SHEKIGENDA.....1st APPELLANT

HASSAN ABDALLAH SHEKIGENDA.....2nd APPELLANT

-VERSUS-

ABDALLAH ALLY SHEMBAGO.....RESPONDENT

JUDGMENT

Date of last order: 27/10/2021

Date of judgment: 19/11/2021

AGATHO, J.:

The Appellants were aggrieved and dissatisfied by the decision of the District Land and Housing Tribunal for Lushoto at Lushoto delivered on 15/09/2020 and appeals to this Court against the whole decision on the following ground:-

1. That in regard to the circumstances of the case the trial Tribunal Chairperson grossly erred in law and fact to hold that the Appellant has failed to demonstrate sufficient cause for restoration and

disregard clear evidence that hearing without trial proceedings and in Appellants' absence.

The Appellant prayed that the Court allow the appeal with costs, quash and set aside the dismissal order and restore the Appellants' appeal so that it may be determined on merit. When the Matter came for hearing the Court ordered the parties to conduct it by way of written submissions. The Appellants engaged Divine Law Chambers (Advocate Philemon Raulencio), while the Respondents enjoyed the services of the learned counsel Henry Njowoka. The parties filed their submissions timely.

A brief background of this appeal will help to understand what transpired in the District Land and Housing Tribunal. The records: District Land and Housing Tribunal judgment on page 2 and the Appellants' counsel affidavit show that on 16/12/2019 the matter was set for mention and parties and their counsels appeared before the District Land and Housing Tribunal. On that date the appellate tribunal fixed the date for mention to be 14/01/2020. The Appellants' counsel claims he inadvertently recorded the date for mention to be 15/01/2020 instead of 14/01/2020. Thus, when the matter came for mention on 14/01/2020 neither Appellants nor their advocate entered appearance. But the Respondent and his

counsel appeared. The District Land and Housing Tribunal went on to fix date for hearing to be 06/05/2020. It is important to note that the Appellants' counsel went to the District Land and Housing Tribunal on 15/01/2020 where he was informed that by the tribunal clerk that the matter came for mention on 14/01/2020 and it has been scheduled for hearing on 06/05/2020. On that date the Appellants and their advocates did not appear. Consequently, the District Land and Housing Tribunal dismissed the appeal for want of prosecution.

To dispose this appeal the Court raised the following issues in line with the ground of appeal:-

1. Whether the Appellants showed sufficient cause for non-appearance before the trial District Land and Housing Tribunal?
2. Whether there is any evidence to support the advocate's claim that he was attending another matter in the Hight Court?
3. Whether the Appellants and their counsel were not negligent?
4. Whether the advocate failed to enter appearance only for one day
5. Whether the District Land and Housing Tribunal committed any mistake that led to injustice to the Appellants?
6. Whether the advocate steps into the shoes of his client?

The appeal will be disposed by examining the above raised issues. To begin with, under Regulation 11(2) of Government Notice No. 174 of 2003 requires the District Land and Housing Tribunal to grant restoration of appeal dismissed for want of prosecution after sufficient cause being adduced. Similar position was stated in the case of **Meis Industries Ltd & Ors v Twiga Bancorp, Misc. Commercial Cause No 243 of 2015 High Court of Tanzania Commercial Division 17** (unreported). The Appellant's submission was that the Applicants (Appellants) were diligent as six (6) days after the dismissal of the land appeal on 06/01/2020 they did not remain silent they took immediate action of filing an application for restoration of the appeal on 11/06/2020. The act which demonstrated sufficient and good cause as it was stated in the case of **William Joseph v Augustino Chikonde, Land Application No. 4 of 2014, High Court of Tanzania at Tanga** in which after 9 days on 04/09/2014 was held that the Applicant was diligent in prosecuting the matter. I should say the circumstances in **Chikonde's case** is distinct from the case at hand. In the present case even if the days were six (6) the Appellants were negligent. Again, the issue is not about promptness or delay in filing the application for restoration of the appeal, rather whether the Appellants showed sufficient cause for non-appearance. I think the Appellants' counsel

be laboured on the issue of time or number of days. The concern of the Court is why did they not appear for hearing. For that matter **Chikonde's case** is irrelevant in circumstances of this case. In the same vein I find the case of **Tanzania Revenue Authority v Tango Transport Company Ltd., Civil Appeal No.38 of 2003** (unreported) referred to us by the Appellants' counsel to be dissimilar to the present case.

If I may add, the case of **Nicodem s/o Damiano Ntigahela v Michael Yango James s/o Kibhala and Augustion s/o Thomas (DC) Criminal Appeal No. 66 of 2019 in the High Court of Tanzania at Kigoma** at page 3 (unreported) ruled that since the Appellant's advocate appeared regularly save for one day, he missed. The Court held that such fault cannot warrant dismissal of application. It went on holding that the trial court ought to have granted the restoration. Further, it stated that the orders issues ought not have gone to the extent of limiting the Appellant's right to be heard. The **Nicodem Damiano's case** was referred by the counsel for the Appellants, but seemingly it was the case in which the applicant (Appellant) diligently appeared, and the learned counsel missed only one day. In the present case, unlike the situation in the **Nicodem Damiano's case**, it is undisputed that the Appellants did not appear, and their learned advocate missed two (2) days, 14/01/2020 and 06/05/2020.

To make matters worse he appeared on 15/01/2020 and he was informed the matter was set for hearing on 06/05/2020. Instead of urging his clients (Appellants) to appear and file his notice of absence or appearance in the High Court he waited for he waited for the appeal's dismissal order. In the premises pleading the right to be heard as an excuse does not sit well.

Turning to the confusion of dates, when the Appellants' counsel realized of the mixing of dates 15/01/2020 instead of 14/01/2020 he went to the District Land and Housing Tribunal, and he was informed by the tribunal clerk that the matter was mentioned on 14/01/2020 and hearing is set on 06/05/2020. But what did he do thereafter? On para 6 of the Appellants counsel's affidavit, he avers that there was confusion of dates which led to the file losing its truck. This is not true. The District Land and Housing Tribunal cannot be blamed for this. Also, if at all the confusion was cleared by the District Land and Housing Tribunal clerk the same should have been backed by the affidavit of that clerk as it was rightly stated in the case of **Ludger Nyoni v National Housing Corporation, Misc. Civil Application No. 279 of 2019, High Court of Tanzania.** This also is cited the District Land and Housing Tribunal's ruling at page 3.

Intriguingly, if the confusion was cleared why did the Appellants' counsel failed to provide evidence to support his argument that he was prosecuting another matter at the High Court on the date fixed for hearing at the District Land and Housing Tribunal? Mere assertion that one is appearing before higher court in the hierarchy is not an excuse of not providing the evidence to prove the same. There was neither cause list provided nor names of parties of the High Court case given to which the learned counsel for the Appellants purported to have appeared.

Moreover, the Appellants' counsel cited the case of the **Cooperative and Rural Development Bank v Filton (Tanzania) Limited [1993] TLR No. 284**, where the Court of Appeal of Tanzania held that the advocate is bound to appear in Court of Appeal of Tanzania when the dates collide with the High Court. It is my settled view that to appear at the higher Court in the hierarchy does not entitle an advocate to disregard a lower Court's schedule. He ought to inform the lower Court. Thus, in the premises of this case the **Cooperative and Rural Development Bank case** is of little value. And the obvious conclusion is that there was no sufficient cause given as it was held in **Lwempisi General Co. Ltd & 6 Others v The National Bank of Commerce, Misc. Commercial Case No. 1 of 2018 High Court of Tanzania Commercial Division 75** (unreported), and in

the case of **Benjamini Mugagani v Bunda District Designated Hospital, Misc. Labour Application No. 1 of 2020, High Court of Tanzania 746** (unreported).

While sufficient cause has not been defined, and as was held in **Phares Wambura and 15 Others v Tanzania Electric Supply Company Ltd, Civil Application No. 186 of 2016 CAT** (unreported), sufficient cause depends on the circumstances of the case. For that reason, I concur with Hon. Chairperson of the District Land and Housing Tribunal (at page 4 of the District Land and Housing Tribunal ruling in Misc. Application No 22 of 2020) that collision of the cases between District Land and Housing Tribunal and the High Court where the Appellants' counsel said to have attended on the same day sounds sufficient cause. However, such cause must be backed up with evidence. For that reason, the Appellants have not adduced sufficient cause.

On para 7 of the Appellant's counsel affidavit filed at the District Land and Housing Tribunal, the learned advocate categorically admitted that when the case (land appeal No. 35 before District Land and Housing Tribunal for Lushoto) was scheduled for mention on 15/01/2020 but the tribunal mentioned it on 14/01/2020, he reported to the District Land and

Housing Tribunal on 15/01/2020. The matter was fixed for hearing on 06/05/2020 on the very date he was attending another case at the High Court. As already stated, the learned counsel never adduced or provided cause list or names of litigants in the case before the High Court to which he entered appearance. Therefore, this was an unsubstantiated assertion which can hardly be believed. The same was held in **Wambura and 15 Others v Tanzania Electric Supply Company Ltd, Civil Application No. 186 of 2016 CAT.**

Since this appeal was set to determine one main issue whether the District Land and Housing Tribunal dismissal of the appeal was proper in law. Along that we ask under what circumstances can an appeal dismissed for want of prosecution be restored? As shown hereinabove and elaborated further in the sections below, the Appellants failed to show sufficient cause for restoration of the dismissed appeal in the District Land and Housing Tribunal.

Before concluding I should restate that the District Land and Housing Tribunal ruling was proper, and its dismissal order is well founded in law as the Appellants were negligent and showed no diligence to follow up on their case at the District Land and Housing Tribunal. It is unclear from

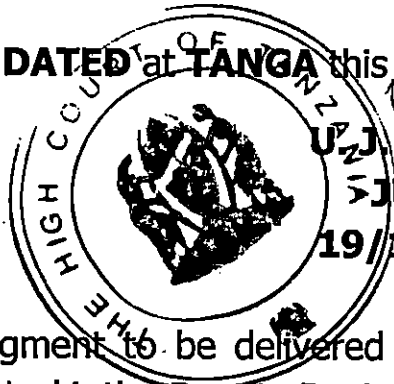
14/01/2020 to 06/05/2020 where were the Appellants and their learned counsel. Any party who is keen with the prosecution of his case will not mute for more than three months without inquiring as to the progress of his case. It is also surprising if the Appellants' counsel was informed by the clerk of the District Land and Housing Tribunal that the hearing of appeal is set on 06/05/2020 why he did not inform the District Land and Housing Tribunal and his clients who could have entered appearance.

The Appellants' counsel invited this Court to consider Regulation 13(2) of the District Land and Housing Tribunal Regulations, GN No. 174 of 2003 which provides that 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 of Court of Appeal, the tribunal may require the party to proceed himself and if he refuses without good cause to lead 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. Shortly, this submission is unfounded because what happened in the District Land and Housing Tribunal is that the Appellants and their advocates did not appear. I will demonstrate this hereinbelow.

I think it is pertinent to set matters in perspective with regards to legal representation. While legal representation is a right ensuring fair trial and right to be heard (as per Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 as amended), it is not intended to let the advocates step into the shoes of their clients. The advocate is an officer of the Court. Once hired by a client he does neither become a party to the matter nor take over the client's duty to enter appearance before the Court. There has been a tendency once an advocate is hired the client/party ceases to make appearance before the Court/tribunal. Frankly, they do so at their own peril. The case at hand is clear demonstration of clients or parties' abdication of their duties. Both the advocate and the Appellants did not appear before the District Land and Housing Tribunal on a date fixed for hearing. Consequently, the District Land and Housing Tribunal rightly dismissed the appeal for want of prosecution. Had the Appellants entered appearance on that date the appeal was dismissed I do not think the Hon. Chairperson would have dismissed it. And if the appeal would have been dismissed in the Appellants' presence, then sufficient cause for restoration of the same would have been unquestionably available.

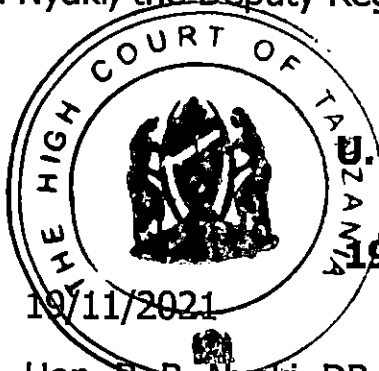
In the end I find the appeal lacking merit, and I dismiss it with costs.

DATED at TANGA this 19th Day of November 2021.



U. J. AGATHO
JUDGE
19/11/2021

Court: Judgment to be delivered today 19th day of November, 2021 by Hon. Beda Nyaki, the Deputy Registrar.



U. J. AGATHO
JUDGE
19/11/2021

Date: 19/11/2021

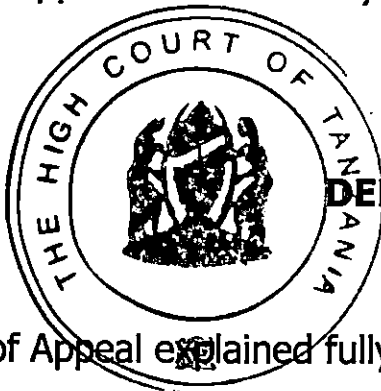
Coram: Hon. B. R. Nyaki, DR

Appellant: Ms. Elisia Paul for the Appellant

Respondent: Mr. Ally Kimweri

C/C: Zayumba

Court: Judgment delivered before Hon. Beda R. Nyaki, the Deputy Registrar this 19th day of November, 2021 in the presence of Ms. Elisia Paul for the Appellant and Mr. Ally Kimweri for the Respondent.



B. R. Nyaki
DEPUTY REGISTRAR
19/11/2021

Right of Appeal explained fully.



B. R. Nyaki
DEPUTY REGISTRAR
19/11/2021

