IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

LAND CASE APPEAL NO. 36 OF 2021

(C/f Misc Application No. 318 of 2020 originating from Application No. 86 of 2020 District Land and Housing Tribunal of Moshi)

ADINANI SALEHE ..... 1ST APPELLANT
PIUS AMBROSE ..... 2ND APPELLANT
JOSEPH HODI ..... 3RD APPELLANT

VERSUS

VALENCE JUSTINE TESHA ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The respondent herein had initially filed Application No. 86 of 2020 in the District Land and Housing Tribunal of Moshi (trial tribunal). His major claim being, the appellants had trespassed unto his land measuring 749 sqm located at Kibaoni Village, Rombo District in Kilimanjaro Region. When the matter was scheduled for hearing, he defaulted and made no appearance hence on 19th November, 2020 the honourable chairman (Hon. P. J. Mwakwandi) dismissed the same for want of prosecution. He then filed Misc. Application No. 318 of 2020 praying for the application to be restored on the ground that, he was involved in an

accident. After deliberations the trial chairman was satisfied and consequently moved by this reason whose result on 2nd September, 2021, proceeded to set aside the dismissal order and restored the application. Dissatisfied with the Restoration Order, the appellants through this court's window of appeal have raised the following grounds: -

1. That, the trial chairman erred in law and fact in holding that the respondent adduced sufficient cause to set aside the dismissal order made on 19th November, 2020.
2. That, the learned chairman erred in law and fact in failing to ascertain that the Medical Sheet submitted by the Respondent as proof of his absence before the tribunal was not genuine.

During hearing of this appeal, the appellants were represented by Mr. Gideon Mushi whereas the respondent was represented by Ms. Juliana Mushi both learned advocates.

In supporting of the appeal, Mr. Mushi submitted it was wrong for the trial tribunal to hold, the respondent had adduced sufficient reason for restoration of his matter. The law is very loud and clear as per **Regulation 11(2) of the**

District Land and Housing Tribunal G.N 174 of 2003 (GN. No. 174 of 2003), that, the respondent was to furnish sufficient reasons. In view thereof, he did not demonstrate sufficient reasons in line with the conditions set forth. He argued, the respondent herein had lost interest in prosecuting his claims from 21st July, 2020 when he did not appear on the scheduled day of hearing. The same was adjourned to 26th August, 2020, once again he was marked absent. As a result, the matter was adjourned to 20th October, 2020. As usual, the respondent was absent and the matter adjourned to 19th November, 2020. This time around the matter was dismissed for want of prosecution.

Mr. Mushi further submitted, when the respondent filed Misc. Application No. 318/2020 for setting aside the dismissal order on ground of sickness, the trial tribunal erred to set aside the same once the respondent had failed to adduce sufficient reasons for his absence in regard of all the four times he was absent. He argued, the medical chit attached revealed he was involved in an accident on 17th November, 2020 but there was no information of his whereabouts on 21st July, 2020, 26th August, 2020, 20th October, 2020 and 19th November, 2020. The foregoing notwithstanding, the medical chit was not genuine for the

reason, it was prepared two days before the alleged accident. It is thus safe to conclude, there were no sufficient reasons to restore his case by the trial tribunal. He prayed the appeal be allowed and the tribunal's decision be nullified and set aside with costs.

In reply, Ms. Mushi submitted, although the respondent failed to appear on the stated dates of 21st July and 26th August, 2020 but during those times he was dully represented by his legal counsel. Be as it may the adjournments at times were due to the absence of the tribunal's chairman.

Ms. Mushi asserted there was an accident that happened on 17th November, 2020 that caused the respondent's absence. In that regard this was a sufficient reason for the trial tribunal to set aside the dismissal order. Much so, the respondent provided a medical chit dully signed by a Medical Doctor who attended him at Karume Hospital at Rombo. She invited the court to the case of **Emmanuel .R. Maira Vs. The District Executive Director, Civil Application No.66/2010 (unreported)** underscoring sickness is a sufficient reason which is beyond human control and is inevitable to any human being. She further argued, since there are rights yet to be determined, the trial tribunal did

not error in restoring the application and ordering it be heard on merits. She prayed the appeal be dismissed with costs.

In his brief rejoinder, Mr. Mushi reiterated his earlier submission in chief and insisted, there were no sufficient reasons available for the trial tribunal to restore the case. He maintained this Court should proceed to quash and set aside the chairman's ruling delivered on 2nd September, 2021.

After going through the parties' rival submissions and the trial tribunal's record, the only issue for determination is whether this appeal is meritorious. The law is clear when the matter has been dismissed for want of prosecution, then the aggrieved party within reasonable time and upon sufficient cause can rightly apply for the restoration of the same. Regulation 11 (2) of GN. No. 174 of 2002 provides and for the sake of reference is quoted as hereunder: -

> *"(2) 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 its orders if it thinks fit so to do and in case of refusal appeal to the High Court."*

In the present appeal, the trial tribunal's record shows, the matter was first scheduled for hearing on 26th August, 2020. On that day the chairman and the respondent herein were absent and the matter was adjourned to 20th October, 2020. Come that day the respondent was absent but his advocate Ms. Juliana Mushi was present and the matter was again adjourned to 19th November, 2020 where neither him nor his advocate were present. This was when the matter was dismissed for want of prosecution pursuant to Regulation 11 (1)(b) of G.N No. 174 of 2003. On 16th December, 2020 the respondent filed his application praying the dismissal order be set aside and his application restored on the ground that, he had been involved in an accident on 17th November, 2020. He consequently received treatment at Huruma Hospital in Rombo District. The trial tribunal granted his prayer and the application was restored.

In **Mwanza Director M/S New Refrigeration Co. Ltd Vs. Regional Manager of TANESCO Ltd & Another [2006] TLR 329** it was held that;

> *"What amounts to non-appearance depends on the particular circumstances of each case"*

In the circumstances, since the respondent was represented by an advocate, the days when he was personally not around, it cannot be said there was non-appearance as suggested by the appellants. It is only on 19th November, 2020 when both respondent and his advocate defaulted appearance that counts. On the other side of the coin, the Medical Chit attached to his affidavit and the submission averred thereafter indicate the respondent was involved in an accident on 17th November and proceeded with treatment until to 24th November, 2020. Immediately thereafter did file for restoration of the said application. Since the records are clear that the respondent and his advocate did not have a habit of missing out on the scheduled hearing dates except for that one day, and the fact that he immediately applied for restoration within reasonable time and had a valid reason, I find no reason to fault the trial tribunal's decision of restoring the application. The medical document annexed was dully dated (17th November, 2020), collaborating the respondent's words that he was involved in an accident.

I am fortified in my finding by the authority in **Shocked & Another Vs. Goldschmidt and Another [1998] 1 All ER 273** where it was stated, the applicant's conduct before the

alleged non-appearance should be taken into consideration in the application of this nature. I have also considered the fact that, it is in the interest of justice and the practice of the court that, unless there are special reasons to the contrary, applications should be determined on merits as it was held in the case of **Fredrick Salenge & another Vs. Agnes Masele [1983] TLR 99**. More so, the Courts, should not be used as a tool to punish parties when they error in the course of pursuing their rights. This was observed in the case of **Cropper Vs. Smith (1884) 26 Ch D 700** that: -

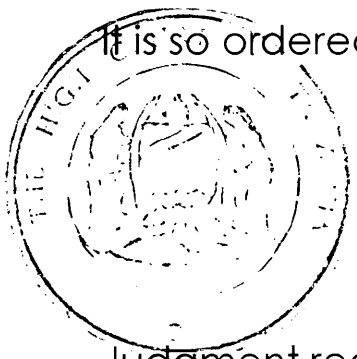
> *"It is well established principle that the object of the court is to decide the rights of the parties and not to punish them for mistakes they made in the conduct of their rights. I know of one kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct if it can be done without injustice to the other part. A Court does not exist for the sake of disciplines but for the sake of deciding matters in controversy."*

Guided by the foregoing authorities, I am of the settled opinion, the decision of restoring the application after it was dismissed for non-appearance was judiciously reached. I am also alive of the trite principle that, such

applications are within the discretion of the trial court. On the same vein, I find no reason to fault the same.

I therefore dismiss the appeal, and uphold the trial tribunal's decision of restoring Application No. 86 of 2020 and the same is to proceed on merits. Costs to be in cause.

It is so ordered.



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Judgment read this day of 7/02/2022 in the presence of Mr. Gideon Mushi for the appellant, the respondent in person and Miss Juliana Mushi for the respondent.

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RIGHT OF APPEAL EXPLAINED.

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