

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA

LAND APPEAL NO. 11 OF 2021

(Originating from Application No. 19 of 2020 and Misc. Application No. 127 of 2020 in the District Land and Housing Tribunal at Bukoba)

NELSON SAULO----- APPELLANT

VERSUS

SOLOMON SAULO-----1ST RESPONDENT

ALAWI JUMA-----2ND RESPONDENT

JUDGMENT

Date of the last Order: 19/07/2022

Date of Ruling: 29/07/2022

A.E. Mwipopo, J.

Nelson Saulo, the appellant herein, filed Application No. 19 of 2020 in the Bukoba District Land and Housing Tribunal for redemption of the clan land situated at Kyambalele Hamlet within Kobunshwi Village and Bukoba Rural District which was sold by the 1st Respondent namely Solomoni Saulo to Alawi Juma, 2nd respondent, without the consent of Abazigaba clan, the clan which the appellant and 1st respondent belongs. On 01.04.2020 the District Land and Housing Tribunal dismissed the application for want of prosecution. The appellant filled Application

No. 127 of 2020 in Bukoba District Land and Housing Tribunal for restoration of the Application No. 19 of 2020. The ground for restoration is that he was arrested by police in the trial Tribunal premises on the hearing date. The application was dismissed for want of merits. Aggrieved, the appellant filled the present appeal against the decision of the Tribunal. The petition of appeal filled by the appellant contains followings grounds of appeal hereunder:-

- 1. That, the learned Chairman erred in law and fact to demand the evidence which was impossible to acquire by ignoring the fact that the issue of arrest by the relevant authorities to wit police officers left with the applicant after arresting him without giving him an option except for the appellant to obey the command as he did.*
- 2. That, the learned Chairman erred in law and fact for failure to restore the main application, and failed to note the complications which made the applicant unable to report the incident of arrest around the premises of the Tribunal.*
- 3. That, the learned Chairman erred in law and fact to entertain the application for restoration (Misc. Application No. 127 of 2020) under sentimental feelings by dismissing it without regard to burden wherein the applicant was criminally implicated under the same matter which is at hand.*

On the hearing date, the appellant was represented by Mr. Ponsian Mujuni, Advocate, whereas the 1st respondent was represented by Mr. Benghez, advocate. The 2nd respondent was absent. The Court ordered for the hearing of the appeal to proceed in absence of the 2nd respondent as the 2nd respondent was served

through substitute service where the summons was published in Nipashe Newspaper dated 25.09.2021 at page 18.

The counsel for the appellant submitted on all 3 grounds of appeal together. He said that the District Land and Housing Tribunal erred not to allow the application as the appellant was arrested by Police at Tribunals premises on 29/02/2020 the date when the application No. 19 of 2020 was coming for hearing. The reason for the Tribunal to dismiss the application is failure of the appellant to inform the trial Chairman that he was arrested. That the Police Officer who arrested him was supposed to inform the Tribunal that the appellant was arrested. It is strange how the person who has been arrested will give information to the Chairman about his presence and that he was arrested. This would have amounted to resisting an arrest which is criminal offence. The Chairman of the tribunal was supposed to inquire after the appellant has informed him that he was arrested. The said ground was sufficient for the District Land Housing Tribunal to restore the application.

In response, the counsel for the respondent said that the application should not be allowed. He submitted that the Chairman of the Tribunal quoted a case of **Sadru Mangaiji vs. Abdul Azizi Lalani @ 2 Others**, Misc. Commercial Application No. 126 of 2014, High Court at Mwanza, (Unreported), where it was held that the applicant was supposed to prove what he alleges. The appellant

failed to prove the allegation that he was arrested by the police on the hearing date. There is no evidence whatsoever such as affidavit of the witness to show that he was arrested on the hearing date. The District Land and Housing Tribunal rightly held that the appellant failed to provide sufficient reason for the Tribunal to restore the application.

In his rejoinder, the counsel for the appellant said that the decision of the Primary Court in criminal case which the appellant was taken after the arrest shows that the appellant was arrested on the same date of hearing. For that reason this is sufficient proof that the appellant was arrested on the hearing date as he assisted.

From the submissions, the only issue for determination is whether the appeal before this Court has merits.

The application for restoration of the application dismissed by the District Land and Housing Tribunal for non-appearance of the applicant is governed by regulation 11 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003. The said regulation 11 of G.N. 174 of 2003 provides as follows:-

"11. - (1) On the day the application is fixed for hearing the Tribunal shall-

- a. where the parties to the application are present proceed to hear the evidence on both sides and determine the application;*
- b. where the applicant is absent without good cause, and had received notice of hearing or was present when the hearing date was fixed, dismiss the application for non-appearance of the applicant;*
- c. where the respondent is absent and was duly served with notice of hearing or was present when the hearing date was fixed and has not furnished the Tribunal with good cause for his absence, proceed to hear and determine the matter ex-parte by oral evidence.*

(2) A part 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 think fit so to do and in case of refusal appeal to the High Court.”

From above cited regulation, the District Land and Housing Tribunal has discretion to set aside the order for dismissing the application for non-appearance of the applicant. The application for restoration has to be done within 30 days if the party is dissatisfied. The Tribunal usually uses its discretion when it is satisfied that there is good or sufficient reason from the applicant for non-appearance of applicant on the respective date the application was dismissed.

In the present appeal, there is no dispute that the Application No. 19 of 2020 was dismissed by the Bukoba District Land and Housing Tribunal for non-

appearance of the appellant on 01.04.2020. The reason for non-appearance stated by the appellant in application for restoration is his arrest which he alleged in his affidavit in support of the application that it was done by the police from Katoro Police Post in the Tribunal's premises on the hearing date shortly before the case was called. The appellant asserted that the arrest was done by the police following the act of the respondent to file complaint to the police that appellant has trespassed in the suit land as result he was arrested and charged for criminal case No. 45 of 2020 in Katoro Primary Court. That, the non-appearance was not out of his negligence. The Tribunal refused to set aside its dismissal order for the reason that the appellant ought to have reported the matter to trial Chairman that he was arrested and there is no document produced by the applicant to support his assertion that he was arrested by police from Katoro Police post on the hearing date.

The appellant submitted in this appeal that it is not possible for the arrested person to give information to the Chairman about his presence and that he was arrested by the police. This would have amounted to resisting an arrest which is criminal offence. The counsel said that the Chairman of the tribunal was supposed to inquire after the appellant has informed him that he was arrested.

In emphasis, the law is settled that an applicant who is seeking to set aside dismissal order of the Court or Tribunal for non-appearance has duty to furnish

the Court or Tribunal with sufficient reason for non-appearance. Admittedly, it is not easy for the person arrested by police to be permitted by arresting officers to go around informing people that he was arrested even though it does not mean that it is not possible. This depends on the circumstances of the respective arrest. However, the person who claim it was the arrest which held him from appearing in Court or Tribunal on the hearing date is supposed to substantiate the assertion with sufficient proof that he was arrested on the said date. In the case at hand, the appellant said in his affidavit and submission that he was arrested by police officers from Katoro Police Post and he was charged for criminal trespass at Katoro Primary Court in Criminal Case No. 45 of 2020.

Nevertheless, there is nothing to support the assertion that he was arrested by the police on the hearing date. The counsel for the appellant said that the Chairman of the tribunal was supposed to inquire if the appellant was arrested after the appellant has given such information. The Chairman in his ruling considered the information asserted by the appellant, but, he found that it was not supported by any proof. The Chairman was not supposed to go to the Police Post and to the Primary Court to inquire about the incident as it is suggested by the counsel for the appellant. It was the duty of the appellant to prove what he alleges and the burden never shift to the Chairman or someone else. The general rule governing proof of case in civil suits is that he who alleges must prove. The

rule finds a backing from sections 110, and 111 of the Law of Evidence Act, Cap 6, R.E. 2019, which state as follows:

"110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side".

In the case of **Barelia Karangirangi vs Asteria Nyalambwa** [2019] 1 T.L.R. 142 it was held by Court of Appeal held that:-

".....in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."

Thus, the burden of proof that he was arrested on the date of hearing in Tribunals premises is in the shoulders of the appellant and the appellant failed to discharge such a burden.

For that reason, I find that the Chairman of the Tribunal properly held that there was no sufficient reason for the Tribunal to set aside its dismissal order. Consequently, the appeal is dismissed for want of merits with cost. It is so ordered accordingly.



A.E. Mwipopo

Judge

29.07.2022

Court: The Judgment was delivered today in the presence of the 2nd respondent and the counsel for 2nd respondent who also hold brief for the counsel for appellant.



A.E. Mwipopo

Judge

29.07.2022