

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA

LAND APPEAL NO. 41 OF 2020

(Originating from Misc. Land Application No. 22 of 2020 before Chato District Land and Housing Tribunal)

MARY MLEND AAPPELLANT

VERSUS

FATUMA SHABANI.....1ST RESPONDENT

AMAN SHABANI2ND RESPONDENT

WINIFRIDA CLEMENCE.....3RD RESPONDENT

JUDGMENT

1ST & 13th April, 2022

Kahyoza, J.

Mary Mlenda appeals against a decision of the District Land and Housing Tribunal (the DLHT) rejecting the application to set aside the dismissal order. **Winifrida Clemence**, one of the respondents vehemently opposed the appeal. The issue is whether **Mary Mlenda** adduced good cause for her non-appearance.

A brief background is that; **Mary Mlenda** filed an application in the DLHT praying for declaration that she is the owner of the suit land. She

defaulted to enter appearance several times. The chairman of the DLHT dismissed the application for non-appearance to prosecute her application. Aggrieved, **Mary Mlenda** applied to set aside the dismissal order in vain. Subsequently, she filed the current appeal.

Mary Mlenda raised five grounds of appeal. Mr. Costantine advocate who represents **Mary Mlenda** argued five grounds of appeal jointly. He submitted that all grounds of appeal rebut the decision of the DLHT that the appellant had no good cause for her non-appearance. He submitted that as shown in the first and fifth grounds of appeal the appellant adduced good cause for non-appearance. He submitted that the applicant employed one person Masanja Mgofiro advocate to represent her. On 4/12/2019 one person Kaijage appeared and held Mr. Masanja's brief for the appellant. On that Mr. Kaijage prayed for another date for hearing a preliminary objection the appellant had raised. He submitted that the after the adjournment Masanja Mgofiro did not attend to the DLHT although he notified the appellant that he attended.

The appellant's advocate submitted the appellant appeared in person on 11/2/2020 and the DLHT fixed the application for hearing on 6/5/2020 and 8/6/2020. He contended that on that date the appellant did not appear

but she notified the DLHT the reason for her non-appearance. He added that the application was dismissed on 16/6/2020, the date the appellant's advocate had confirmed to attend but he did not attend. He contended that the appellant's non-appearance was due to the fact that she travelled to attend a sick person.

The appellant's advocate prayed this court to consider the appellant's good conduct, as she appeared without failure before the application was dismissed. He prayed the application to be granted.

Winifrida Clemence's representative vehemently opposed the appeal. He refuted the contention that the appellant had an advocate. He submitted that there was no document to prove that Mr. Masanja was representing the appellant. He submitted further that on 13/1/2020 the appellant appeared and prosecuted the application personally. Furthermore, he contended that on 11/2/2020 the appellant entered appearance in person and withdrew the preliminary objection she had previously raised. After she withdrew the preliminary objection the DLHT fixed the application for hearing on the 19/2/2020. The appellant defaulted to appear. The application was adjourned and fixed for hearing on 6/5/2020. On that date, the appellant did not appear without assigning

reasons for her non-appearance. The application was adjourned to 8/6/2020 when the appellant was again absent without reasons. The matter was adjourned to 16/6/2020 on which day the appellant did not enter appearance and the matter was dismissed.

Winifrida Clemence's representative concluded that the application was dismissed for the appellant's non-appearance for four consecutive hearing day times. He added that the appellant did not adduce good reasons for her non-appearance. She did not prove that she had travelled by producing receipts. He added that if even the appellant's advocate had appeared he would not have rescued the situation as the matter was fixed for hearing. He prayed the appeal to be dismissed and the decision of the DLHT upheld.

In his rejoinder, Mr. Costantine submitted that there is no requirement that once an advocate is engaged he must submit a letter. He added that non-appearance of the advocate is not a proof that he was not engaged. Emphatically, the appellant's advocate submitted that appellant notified the DLHT the reason for her absence on 6/5/2020 and 8/6/2020.

It is settled that a party seeking to set aside a dismissal order must furnish good cause for his non-appearance. See the holding in **Nassib Sungura Vs Peter Machumu (1998) TLR 497** where this Court held-

"In an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed."

I wish to state without much ado that the appellant adduced no good cause for non-appearance before the DLHT on the day the DLHT dismissed the application. **The law serves the vigilant, not those who sleep.** This maxim was derived from the Latin maxim "***vigilantibus non dormientibus jura subvertunt***". The maxim is in four walls with the decision in **Luswaki Village Council and Paresui Ole Shuaka Vs Shibesh Abebe**, Civ application No 23/1997 (Unreported) where the Court underscored a need for parties to be diligent and vigilant by stating that-

"...those who seeks the aid of the law by instituting proceedings in court of law must file such proceedings within the period prescribed by law...Those who seeks the protection of the

law in the court of justice must demonstrate diligence”
(Emphasis is added)

The appellant was not diligent and vigilant to prosecute the application, to say the least. One of the grounds advanced was that the appellant was represented by Mr. Masanja advocate who assured her that he will attend. It is nowhere in the record that Mr. Masanja advocate represented the appellant. Had it been true that Mr. Masanja advocate represented the appellant from 4/12/2019, the appellant would not have prosecuted the application personally on 11/2/2020. It is on record that the appellant appeared personally on 11/2/2020 and applied to withdraw a preliminary objection. This is a proof beyond reasonable doubt that the appellant was prosecuting the application personally. She did not enjoy services of any advocate.

The appellant contended she was absent for a reason for four consecutive dates is also baseless. The appellant's advocate submitted that the appellant gave reasons for her non-appearance on 6/5/2020 and 8/6/2020. He contended that she told the tribunal that she had travelled to Dar es salaam. It is a false contention. It is not in DLHT's record that the appellant informed the tribunal that she had travelled. The record depicts

that the appellant only notified the DLHT on her absence once on the 5.8.2019. She wrote a letter on 2.8.2019 to notify the DHLT that she would be unable to attend on 5.8.2019 as she was making follow up of her benefits. It is an established principle of law that he who alleges must prove and do so to the balance of probability. The appellant did not prove that she informed the DLHT her reasons for her non-appearance on 6/5/2020 and 8/6/2020.

Even if, we agree that the appellant notified the DLHT the reasons for her absence on 6/5/2020 and 8/6/2020. Would that justify her non-appearance on 16/6/2020? Without hesitation, I reply negatively, that it is not a justification. If the applicant is absent even once for no good reason, the DLHT has mandate to dismiss the application. I am alive of the requirement of sub-regulation (2) of regulation 13 of the **Land Disputes Courts** (the District Land and Housing Tribunal) Regulations G.N. No. 174/2003, but that requirement refers to advocate's non-appearance. Regulation 13(2) does not regulate non-appearance of parties to the DLHT. It stipulates-

"(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 the Court of Appeal, 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 orders as may be appropriate.”

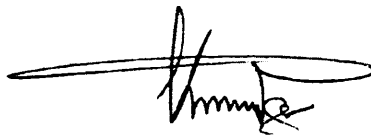
It is not a requirement of the law that the DLHT shall only dismiss an application only when the applicant is absent for **two consecutive dates or more**. The DLHT is justified to dismiss the application for non-appearance of the applicant even on the first date of hearing. I have said that party who institutes a suit must be vigilant and diligent to prosecute it. The appellant was not vigilant and she must be grateful to the DLHT for not being keen to dispose application timely. The appellant filed the application in the DLHT in August, 2018. The DLHT dismissed it for want of prosecution on 16/6/2020. I repeat, the appellant ought to be thankful to the DLHT. She had no intention to prosecute the application but cause hardship to the respondents.

The appellant did not convince me that she had good cause for non-appearance before the DLHT on 16/6/ 2020. I find therefore, all five grounds appeal without merit and dismiss them.

In the end, I dismiss the appeal for want of merit with costs. I uphold the decision of the DLHT.

I have perused the record of this appeal and found that **Winifrida Clemence**, one of the respondents appeared twice physically and several times on line. For that reason, I tax, costs awarded in this appeal, under item 44 of the **Advocates Remuneration Order**, G.N. No. 263 of 2015, at Tzs. 200,000/=.

It is ordered accordingly.

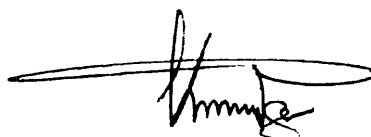


J. R. Kahyoza

JUDGE

13/4/2022

Court: Judgment delivered in the absence of the parties. B/C Ms. Martina present.



J. R. Kahyoza

JUDGE

13/4/2022

