

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 67 OF 2020**

(C/F Land Appeal No. 73 of 2019, Arusha High Court Registry)

**JULIUS BARNOTI (As Administrator of**

**The Estate of the late KELERWA LAIZER) .....APPLICANT**

**Versus**

**MOHAMED KITANGE.....1<sup>ST</sup> RESPONDENT**

**ARUSHA CITY COUNCIL.....2<sup>ND</sup> RESPONDENT**

**RULING**

18/2/2022 & 30/8/2022

**ROBERT**

The applicant in this matter seek to set aside the dismissal order of this Court in Land Appeal No. 73 of 2019 dated 25<sup>th</sup> of August, 2019 and restoration of the said appeal. The application is supported by an affidavit sworn by the applicant and resisted by respondents who filed their counter affidavit to that effect.

The background to this application as decoded from the records reveals that, the applicant having been dissatisfied with the decision of the District Land and Housing Tribunal of Arusha in Misc. Application No.

147/2014 preferred an appeal to this Court which was registered as Land Appeal No. 73 of 2019. On 25<sup>th</sup> August, 2020 the appeal was called for hearing before Hon. Gwae, J but none of the parties was present. Consequently, the appeal was dismissed for non-appearance of the parties. Aggrieved, the appellant (applicant herein) preferred this application seeking to set aside the dismissal order.

When the matter came up for hearing, the applicant was represented by Mr. Bharat B. Chadha, learned counsel whereas Mr. S.J Lawena, learned counsel appeared for the 1<sup>st</sup> respondent and Ms. Fabiola Kisarika, City Solicitor, appeared for the 2<sup>nd</sup> respondent.

Highlighting on the application, Mr. Chadha submitted that, on the date of dismissal for non-appearance, the applicant was present within the premises of the High Court from 8:30 am until 9:30 where he was informed by the Registry Officer that his appeal was scheduled to be heard by the Hon. Judge who on that day was sitting at the Labour Court building. He immediately rushed to the Labour Court and found that his appeal was already dismissed. Thus, he maintained that the applicant's non-appearance was unintentional and beyond his control.

He explained that, on the date of the dismissal of the said appeal, the applicant intended to inform the court about the alleged death of the

first respondent which he heard about when he attended the proceedings of the Bill of Costs No. 7 of 2020 between the same parties. He also intended to pray for adjournment of the proceedings pending the appointment of the legal representative. He maintained that since the 2<sup>nd</sup> respondent did not file his counter affidavit it is presumed that he had admitted to all facts averred by the applicant and the 2<sup>nd</sup> respondent never disputed the reasons for his non-appearance on 25/8/2020 in his counter affidavit as both parties were not present on that day.

He maintained that, the applicant has submitted sufficient cause for his non-appearance on the date fixed for hearing of the appeal as required under Order XXXIX Rule 19 of the Civil Procedure Code. He urged the Court to construe the words "sufficient cause" liberally in order to advance the cause of justice. To support his argument, he made reference to the cases 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) and **Yusufu Same and Another vs Hadija Yusufu**, Civil Appeal No. 1 of 2002 (Unreported). He maintained that, miscarriage of justice will be caused to the applicant in case he is visited with drastic consequences and his appeal is not admitted. In the end he prayed for the application to be allowed.

In response, Mr. Lawena argued that, the applicant shifted the blame for his non-appearance on the date fixed for hearing of the appeal by submitting that he was informed that his appeal will be heard in Labour Court building instead of the High Court without attaching an affidavit of the registry officer who gave him that information in order to prove the same. He submitted further that, the applicant and his advocate appeared before the court on the 4<sup>th</sup> of June, 2020, however, they failed to appear on 3<sup>rd</sup> July, 2020 and 25<sup>th</sup> August 2020 as ordered by the Court. The Hon Judge declared the 3<sup>rd</sup> day of July, 2020 to be the last date of adjournment and fixed the date of hearing to be 25<sup>th</sup> of August, 2020. However, the applicant and his advocate failed to enter appearance and the appeal was dismissed for non-appearance. He maintained that, the applicant failed negligently to pursue his appeal which led to the dismissal of the appeal.

With regards to the alleged death of Mohamed Kitange, Mr. Lawena submitted that the applicant and the deceased (Mohamed Kitange) were closely related and the applicant was aware of his death. Hence, the argument raised by the applicant that he want the dismissal order to be set aside so he could inform the court about the said death is of no merit. Similarly, the applicant's argument that the 1<sup>st</sup> respondent had never filed his counter affidavit is baseless as the same was filed on 16<sup>th</sup> July, 2021.

In the end, he prayed for the appeal to be dismissed with costs as the applicant failed to show sufficient reasons to move the court to set aside the dismissal order.

On her part, Ms. Kisarika, on behalf of the 2<sup>nd</sup> respondent referred the Court to paragraph 11 of the applicant's affidavit in support of this application where the applicant stated, as a reason for his non-appearance, that, his advocate was busy preparing two cases for the superior court which is Court of Appeal of Tanzania on 26<sup>th</sup> August, 2020 and East African Court of Justice on 28<sup>th</sup> August, 2020. He maintained that, the applicant failed to provide proof that he appeared in the said cases, for example, a summons to appear, a letter of engagement or a retainer agreement which could link his counsel with the said cases. She maintained that, Order XXXIX Rule 19 of the CPC requires the applicant to adduce sufficient cause for non-appearance in order for his appeal to be restored.

She maintained further that, the applicant and his advocate failed to establish sufficient cause to justify their non-appearance both on 3/7/2020 and 25/8/2020 when the matter was fixed for hearing. She referred the Court to the case of **Erica Herman Muna and Another vs**

**Herman Muna Gudadi**, Misc. Land Application No. 167 of 2016 (HC-Unreported) where this Court stated that:

*".... Even if the orders sought are purely equitable, the applicants are expected to come with clean hands. For, it is a rule of equity; he who comes to equity must come with clean hands...."*

Further to that, he maintained that the applicant failed to furnish evidence to support his allegations that it was the registry officer who informed him that the judge will be sitting at labour court.

With regards to the death of Mohamed Kitange, he argued that the applicant had ample time to notify the court about the said death and if he could appear before the court on the scheduled date, he could have notified the court for the necessary orders to be taken by the court. However, he noted that facts contained in the applicant's affidavit did not include reasons for his non-appearance apart from indicating that the Hon. Judge was seated at the Labour Court when he dismissed Land Appeal No. 73 of 2019. On that basis, he prayed for this application to be dismissed for lack of merit.

From the rival arguments of both parties and the records of this matter, the central issue for determination is whether the applicant has

adduced sufficient cause for no-appearance to warrant an order to set aside the dismissal order and order for restoration of the appeal.

In order to succeed in an application for reinstatement of a suit or appeal, the applicant has to show that he did not appear and that he was prevented from appearing by sufficient cause (see **Shamsudin Jiwan Mitha v. Abdulaziz Ali Ladak** (1960)1 E.A. 1054).

In the present application, the main reason adduced by the applicant for non-appearance on 25/8/2020 when the appeal was dismissed for non-appearance was that, having been at the premises of the High Court from 8:30 HRS, he was informed by the registry officer at around 9:30HRS that the presiding was going to be seated at the Labour Court and not at the High Court premises and therefore, at the time of his arrival at the Labour Court, the appeal was already dismissed for non-appearance. Both respondents resist this argument arguing that there is no evidence to prove the applicant's allegations, such as an affidavit from the registry officer who informed the applicant about the Hon Judge being seated at the Labour Court. Therefore, they maintained that the said reason is not sufficient to warrant this court to grant the reliefs sought.

The Court of Appeal of Tanzania having been faced with a similar situation, in the case of **David Mwakikunga vs Mzumbe University,**

**successor in Title of IDM Mzumbe**, Civil Reference No. 12 of 2004 (unreported) stated as follows:

*"From these, together with the applicant's oral submissions, it is clear to us that, the applicant is blaming the Civil Registry staff of the High Court for misleading him that the copy had first to be endorsed by the registrar before it was served on the respondent, and that the registry never returned to him the copy which he would otherwise have served the respondent. **There is neither affidavit nor evidence of any kind from the registry office confirming the same...** whatever the case, in our view, none of these amounts to sufficient ground for his failure to serve the respondent with the copy of the letter."* "Emphasis is mine".

The law is very clear that, he who alleges must prove. It is apparent that, the applicant has failed to prove his blames against the Court Registry and have just demonstrated bare allegations which could not be relied upon. It should also be noted that the applicant's appeal was dismissed for continuous non-appearance not just once, His reasons for non-appearance must reflect the reasons for the said dismissal.

The other reason adduced by the applicant in his affidavit is that, his advocate was very busy preparing for other cases at the higher court which is the Court of Appeal of Tanzania and East African Court of Justice.



However, like the first reason, this too was not backed with any evidence.  
Hence, this Court do not attach any weight to it in granting the prayers  
sought.

In the circumstances, this Court finds no merit in this application  
and it is hereby dismissed with costs for want of merit.

It is so ordered.



A handwritten signature in dark ink, appearing to read "K.N. Robert", is written over the printed name.

K.N.ROBERT  
JUDGE  
30/8/2022