

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[IN THE DISTRICT REGISTRY OF ARUSHA]

AT ARUSHA

LAND APPEAL NO. 32 OF 2022

(C/F District Land and Housing Tribunal for Mbulu at Dongobesh Land Application No 44/2020 Misc Land Application No. 79/2020 and Misc. Land Application No. 11/2021)

SAKTAY BARIYE HALLO.....APPELLANT

VERSUS

YAKOBO BARIYE.....RESPONDENT

RULING

03 & 04 October, 2022

KOMBA, J

This is an appeal from the decision of District Land and Housing Tribunal (the Tribunal) Dongobesh within Mbulu district where Saktay Bariye Hallo lodge three ground of appeal challenging dismissal of Land Case No. 44 of 2020 which was done expert.

Application was supported by affidavit deposed by applicant and respondent filled counter affidavit. Hearing was done by way of written submission and that applicant was presented by Advocate Erick Erasmus Mbeya while the respondent was representing himself.



The two, applicant and the respondent had land case at the Tribunal which they have to attend, on 16 February, 2021 appellant did not appear and the Tribunal dismissed the case. Advocate for the applicant explain that on 16 February, 2012 applicant was supposed to attend to the Tribunal to determine their case but he failed because he was sick and provide a medical receipt under Regulation 10 (1), (2) and (3) of Land Court Rules.

Another reason for non-appearance in the tribunal as explained by Mr. Erick was sickness of Advocates' mother who is staying in Songea so he was supposed to travel from Katesh to Songea from 10 February up to 23 February 2021 and he produce bus ticket to that effect.

Respondent who defended himself he rejected medical report on the ground that it does not relating to the case at hand because the case was dismissed on 16 February, 2021 while the medical report show it was prepared or the sick person was attended on 7th August and 25 October 2021 and that this reason is baseless.

Regarding the defense raised by the appellant advocate that he was on safari between 10th February to 23 February, 2021 respondent was of the opinion that the appellant went on safari for personal business and that the appellant and his client were not serious with the matter for failure to send a

representative to inform the Tribunal on whereabouts of their side. He said this ground is baseless and pray the same to be dismissed.

After deliberation of these issues Chairman of trial Tribunal was satisfied that appellant failed to make appearance on 16 February, 2021 for the reason as alleged, of sickness where the matter was called for hearing and the same was dismissed for want of prosecution. Upon thorough reading the medical report the Chairman of the Tribunal noted that the sick person was attended to the hospital on 7/8/2021 and 25/10/2021 while the matter was scheduled for hearing on 16/2/2021.

Chairman noted further that bus ticket which was produce during hearing of matter by the appellant advocate on the ground that he was on safari bear only one name of Erick. It is not possible to know which Erick was on safari that day. The Erich who was travelling with that ticket was going to Singida (SNGD) from MLD while in his explanation the advocate said he was going to Dar es salaam then Songea and came back to Kateshi. If at all the Erick who was travelling is the one representing the appellant, the Chairman was wondering how was he found in MDL which is not known. If at all both of them failed to show up during the date of hearing they could send a representative. The advocate failed to prove that sickness by tendering

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medical form or receipts to that effect. Tribunal dismissed application and maintain its order issued of 16 February, 2021, hence this appeal.

In support of this applicant, appellant file three grounds in his petition which are;

- 1. That, the Hon. Chairman of the District Land and Housing Tribunal grossly erred in law and fact by dismissing Applicant's application whilst shown good and sufficient cause for the non- appearance when it was fixed for hearing.*
- 2. That, the Hon. Chairman of the District Land and Housing Tribunal grossly erred in law and fact by dismissing Applicant's Application without taking into account the nature and available circumstances.*
- 3. That, the Honorable Chairman of the District Land and Housing Tribunal grossly erred in law and fact by dismissing Applicant's application for failing to considered medical proof and other circumstances that party's Advocate attending his sick mother.*

During hearing of this appeal on 03 October, 2022, Applicant was represented by Mr. Salehe Salahe and respondent did not appear although he filed counter affidavit. Mr. Salehe applied for applicant case to be restored because non-appearance was caused by sickness which was the act of God hence out of control of the applicant. He further said that the advocate was in safari but the trial court did not consider this fact, He said because respondent did not oppose this application, (which is not the case, the

responded did object this application) then it should be allowed. Mr. Salehe further pray the court to be guided by the case of **Fredick Selenge and another V. Agnes Masele** (1983) TLR 99 where the Court of Appeal said whenever possible suit should be determined on merit. Moreover, he cited section 3A and 3B of Civil Procedure Code CAP 33 focus on principle of Overriding Objective and pray the court to be guided by that principal.

The issue here is whether the appeal has merit.

I will discuss all grounds together because they carry the same message and have the same weight. Advocate and his client failed to appear on the day hearing with reasons associated with sickness. Appellant failed to prove that on 16 February, 2021 he was sick. Respondent in his counter affidavit and the chairman of the tribunal successful demonstrated how the appellant was no sick on material date.

From the record, appellant was attended to one healthy Centre in Chunya on 7/8/2021 and 25/10/2021 while the case was scheduled for hearing on 16 February, 2021. I directed myself in the case of **Robert Frank Yohana And Others V. Rosemary Lyimo and Others, Misc.** Land Application No. 588 Of 2019 [2020] TZHCLANDD 57. When the court meet with the situation like this, applicant and his advocate failed to appear without good cause, the case was dismissed for non-appearance. It was opinion the judge that the

applicants were given the right to be heard but they refused to utilize that right by opting not to appear when the matter was called on for final pretrial conference hearing.

Reading from affidavit and evidence tendered by Mr. Eric in justification for failure to attend the tribunal on 16 February, 2021 I revealed that he travelled from somewhere to Singida while he said his sick mother was in Songea. There is no record that show Mr. Erick once was in Songea or went to Dar es salaam on the way to Songea neither there was evidence to prove that actually his mother was sick, this failure is contrary to law. In civil litigation, the burden of proof to be discharged on the balance of probabilities lies with the one who alleges. Section 112 of the Evidence Act, provides as follows:

" The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."

This position was echoed in the case of **Abdul Karim Haji V Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2014 (unreported), in which Court of Appeal held that: *'....It is an elementary principle that he who alleges is the one responsible to prove his allegation.'*

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In determining whether there was sufficient cause cited with approval the case of **Mwanza Director M/s New Refrigeration Co. Ltd v. Mwanza Regional Manager of TANESCO and Another** [2006] TLR 329 where it was held that;

"The term sufficient cause for non-appearance can be defined according to the peculiar circumstances of each case."

In circumstance of the instant case, Mr. Eric who was representing appellant at the tribunal failed to justify that actually he travelled to Songea, and Mr Salehe did not substantiate this fact during hearing of this appeal hence this ground is non meritorious. Applicant denied himself the right for failure to appear on 16 February, 2021 when the trial Tribunal gave him that right.

In the event, in absence of sufficient reasons for non-appearance of the advocate and the applicant made this court to conclude that both were inactive. Thus, the application is accordingly dismissed with costs.




M.L. KOMBA
JUDGE
04/10/2022

