

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 69 OF 2022

(C/F Misc. Land Application No. 262 of 2020 & Land Application No. 27 of 2020 District Land and Housing Tribunal of Arusha at Arusha)

MARY TOFLO MBISE APPELLANT

VERSUS

ELISANTE TOFLO MBISE RESPONDENT

JUDGMENT

30th May & 6th July, 2023

TIGANGA, J.

This appeal emanates from the decision of Misc. Land Application No. 21 of 2020 from the District Land and Housing Tribunal of Arusha at Arusha (the trial tribunal) in which the appellant herein unsuccessfully prayed for a dismissal order of 22nd September, 2020 in Land Application No. 27 of 2020 to be set aside.

According to the trial tribunal's records, on 22nd September, 2020, Land Application No. 27 of 2020 was scheduled for hearing but in absence of the appellant herein who was represented by her Advocate Mr. Dickson A. Maturo, the matter was dismissed for want of prosecution. The appellant filed Misc. Land Application No. 262 of 2022. He prayed for the

main suit to be restored however, the same was dismissed for want of merit hence the current appeal with the following three grounds;

1. That, the trial tribunal chairperson erred in law and fact in failing to hold that, the presence of the Advocate at the trial tribunal meant that the appellant was present by way of representation.
2. That, the trial tribunal chairperson erred in law and fact in holding that, it is correct to dismiss the application for want of prosecution while the advocate for the appellant was present at the trial tribunal.
3. That, the trial tribunal chairperson erred in law and fact in refusing to accept the reason given by the appellant as a sufficient cause for her absence.

During the hearing, the appellant was represented by Dr. Daniel Mirisho Pallangyo, learned Advocate, whereas the respondent appeared in person and was unrepresented.

Supporting the appeal, Mr. Pallangyo submitted on the 1st and 2nd grounds jointly that, the trial tribunal chairperson erred in dismissing the application while the appellant's Advocate was present, instead of adjourning it under regulation 13 (1) of **the Land Dispute Courts (the District Land and Housing Tribunal) Regulations**, G.N. No. 174 of 2003 (Land Regulations). He argued that the fact that the Advocate

appeared on behalf of the appellant meant technically that, the appellant was also present as held in the case of **Romulus Msunga vs. Sukari Maribate**, Misc. Application No. 107 of 2019 High Court of Tanzania at Mwanza (unreported). That, the matter was not left unattended and since it was the first time it was scheduled for hearing and the appellant did not appear, the trial chairperson erred in dismissing it without considering the reasons for her non-appearance as well as without citing any provision which gave him such power.

He submitted further that, under regulations 11(1) and 15 of the Land Regulations, the matter can only be dismissed if the applicant does not appear without giving good reasons, and when the suit is left unattended for more than three months. He argued that in the matter at hand, none of the two was the case hence, the trial tribunal's dismissal order was erroneous.

On the 3rd ground, it was Mr. Pallangyo's submission that, in the application for restoration, the appellant swore an affidavit that, she could not appear as she got the information late from her Advocate regarding the hearing, hence, could not appear on time as she resides in Morogoro. However, in dismissing her application, the trial tribunal ruled out that, she ought to have filed his Advocate's affidavit confirming such

information. However, in the spirit of the overriding objective, which urges the courts to do away with technicalities and deal with cases justly as held in the case of **Yakobo Magoiga Gichere vs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 the trial tribunal ought to have dealt with substantive justice. He prayed that the dismissal order be quashed and set aside and Land Application No. 27 of 2020 be restored.

In reply, the respondent submitted that on the 1st and 2nd grounds jointly, the trial tribunal did not err in dismissing the application for the non-appearance of the appellant to give her evidence contrary to regulation 11 (1) (b) of the Land Regulations. She was afforded the right to be heard but together with her Advocate failed to discharge his obligations and present their case when it was scheduled for hearing. He argued that regulations 13 (2) and 15 of the Land Regulations argued by the appellant's counsel were not an issue and the fact that, the application for restoration was made under regulation 11 (2) of the Land Regulations, the appellant knew that, the main application was dismissed for non-appearance under regulation 11 (1) (b) of the same Law.

He further argued that, equating the appellant's presence with that of her Advocate is wrong as far as the giving testimony is concerned because the Advocate without his client was good for nothing hence

distinguishable from the position in the decision of **Rumulus Musunga** (supra).

As to the 3rd ground, the respondent referred the court to the case of **Kellen Rose Rwakatare Kuntu & 4 Others vs. Zithay Kabuga**, Civil Appeal No 406 of 2020 (unreported) in arguing that, the principle of overriding objective cannot be applied blindly and was not meant for Advocates to disregard procedural regulations. He argued that, without the affidavit of her Advocate, who is alleged to have supplied the information in respect to the date scheduled for hearing to the appellant, her affidavit should be expunged as the same cannot be cured by the overriding objective.

He finally argued that, the appellant had an obligation to enter an appearance to present her case, an obligation which she failed to discharge, hence the trial tribunal was justified to dismiss her main application as well as the application for restoration. He prayed that, this appeal be dismissed with cost for want of merit.

In his brief rejoinder appellant's learned counsel reiterated his earlier submission and maintained that, none of the parties would have suffered injustice had the application been adjourned instead of dismissed. He prayed that, this appeal be allowed.

Having gone through the trial court's records as well as both parties' submissions, I now proceed to determine grounds of appeal which are to prove only two issues. **First;** whether the trial tribunal was justified to dismiss the application, and **second;** whether in the application for restoration the appellant showed sufficient cause for her non-appearance.

The appellant challenges the trial tribunal for dismissing Land Application No. 27 of 2020 due to the appellant's non-appearance on 22nd September 2020, when the matter was scheduled for hearing. The impugned order reads;

"As there is no proof that Mr. Materu, Advocate is at High Court a prayer for adjournment is refused but also as the applicant is absent today without any cause and no any witness was brought today from the prosecution side, the Application is hereby dismissed for failure by the applicant to bring evidence in support/proof of his (sic) claim. No order as to costs."

After the above order, the appellant herein prayed for restoration, however, despite that being the first time she defaulted appearance, the same was denied, hence the current appeal. According to the order cited above, as rightly argued by the appellant's learned counsel, the trial tribunal did not specify on which law did he dismiss the application. However, the wording of regulation 11 (1) (b) of Land Regulations fits the puzzle. It reads;

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

(a) n/a

(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;"

In light of the above provision, the records are silent on whether or not the trial tribunal inquired from the appellant's Advocate, Mr. Maturo whether the appellant's absence constituted sufficient cause or not. It is therefore not clear as to why the trial chairman decided to dismiss the application while no reasons for the non-appearance of the appellant were adduced.

Apart from that, the appellant was represented, thus her Advocate made an appearance under section 30 of the **Land Disputes Courts Act** Cap 216 R.E 2019 which provides that;

"Proceedings of the District Land and Housing Tribunal shall be held in public and a party to the proceedings may appear in person or by an advocate or any relative or any member of the household or authorized officer of a board Corporate".

In the case of the **Post & Telecommunications vs. Terrazo Pavors**, Civil Case No. 141 of 1971 [1973] E.A.L.R 344, High Court of Tanzania at Dsm, appearance was defined as an appearance to mean;

"Appearance under the code means attendance in person or by an advocate in court on the date stated in the summons;..."

It is an undisputed fact that, the appellant and her advocate never missed appearance in court, and even on the material date, the appellant's Advocate made appearance. It is my considered view that, his appearance on the dismissal day amounted to seriousness on the part of the appellant in prosecuting her case even though she was not physically present. Considering the fact that, it was the first time the matter was scheduled for a hearing and even the respondent prayed for adjournment, prudence demanded the trial chairperson to adjourn the matter. That being the case, the trial chairperson was not justified to dismiss the appellant's application.

On the second limb, during the application for restoration, the appellant deponed that, she was in Morogoro and her Advocate gave her information regarding the hearing late hence, could not make it to court in time. The respondent claimed that such an excuse is an afterthought as the prior records showed that, she resides in Arusha and that, that her Advocate did not swear an affidavit to prove her claim. The trial tribunal ruled in favour of the respondent on the ground that, the appellant had no sufficient cause for her non-appearance.

It is worth noting that, for the dismissal order to be set aside, it must be proved that the applicant was prevented from prosecuting his case by sufficient cause. Order XLIII Regulation 6 (1) of the **Civil Procedure Code**, Cap. 33 R.E. 2022 (CPC) provides that where a suit is wholly or partly dismissed for non-appearance, the applicant/plaintiff shall be precluded from bringing a new case regarding the same cause of action. Still, he may apply for an order to set the dismissal order aside and, if he satisfies the Court, that there was sufficient cause for his non-appearance when the suit was called on for hearing. Although there is no clear definition of what a sufficient cause means, the same varies from case to case.

In the appeal at hand, as rightly submitted by Dr. Pallangyo, courts are urged to do away with technicalities and decide matters justly. The record shows that, the appellant had no tendencies of non-appearances, and the fact that, her Advocate failed to swear an affidavit to support her contention alone cannot make her loose her right. There was no other reason to challenge what she had deposed in her affidavit and I think it was a reasonable cause.

In the case of **Sadru Mangalji vs. Abdul Aziz Lalani & Others, Misc. Commercial Application** No. 126 of 2016 High Court of Tanzania at Mwanza, Mwambegele, J. as he then was referred to the case of

Shocked and Another vs. Goldschmidt and Others [1998] 1 ALL ER 372, in which the applicant's conduct before non-appearance was taken into consideration and held that;

*"I have also considered the fact that it is in the interest of justice and the practice of this Court that, unless there are special reasons to the contrary, suits are determined on merits.- see **Fredrick Selenge & Another vs Agnes Masele** [1983] TLR 99 and **Mwanza Director M/S New Refrigeration Co. Ltd vs. Mwanza Regional Manager of TANESCO Ltd & Another** [2006] TLR 2006".*

I fully adopt the above position by my learned senior brother that, since the appellant was present through her advocate in the main application and they had no tendencies of a missing court appearance, the trial court should not have entertained technicalities by punishing the appellant for a minor default by her Advocate but rather deal with substantive justice. This position was also underscored in the case of **Cropper vs. Smith** (1884) 26 CH D 700 (CA) p. 710 where it was held that:

"It is a 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 party. Court does not exist for the sake of disciplines but for the sake of deciding the matter in controversy."

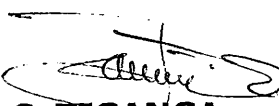
The same position was also observed in the case of **General Market Co. Ltd vs A.A. Shariff** [1980] TLR 61, where it was emphasized that rules of procedures should not be used to defeat justice.

In light of the above, this appeal is allowed, the order by the trial tribunal delivered on 22nd September, 2020 is hereby quashed and set aside. Land Application No. 27 of 2020 should resume from where it ended on the day it was dismissed. Hearing should proceed before another chairman and another set of assessors where practicable. Taking into account that, the parties are blood-related, I give no order as to the costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 06th day of July 2023




J.C. TIGANGA
JUDGE