

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB-REGISTRY
AT DODOMA**

LAND APPEAL NO. 22 OF 2023

*(Arising from Land Application No. 242/2022 in Dodoma District Land and Housing
Tribunal)*

EDWARD KODI NYAKUNGU *(Administrator of the Estate of the Late Agness Maile*

Kapingo)APPELLANT

VERSUS

AVELINA ISMAIL MARUGA.....RESPONDENT

JUDGMENT

28th August & 27th September, 2023


HASSAN, J.:

The appellant herein filed an appeal for execution against the respondent in the District Land and Housing Tribunal for Dodoma vide Miscellaneous Land Application No. 147 of 2021. On the 21st day of April, 2022 when the matter was set for hearing, the appellant did not appear hence the trial Tribunal dismissed the application for want of prosecution. The appellant then filed Miscellaneous Land Application No. 242 of 2022 for setting aside the dismissal order. The same was dismissed for being

devoid of merit. Being aggrieved with the decision of the trial Tribunal the appellant filed this appeal in the court on the following grounds:-

- 1. That the Hon Tribunal erred in law and fact for failure to deliver ruling of Misc Land Application No. 242 of 2022, disregarding affidavits and submission of the parties.*
- 2. That the Hon Tribunal erred in law and fact for dismissing Misc Land Application No. 242 of 2022 upon which the applicant sought to set aside dismissal order of Land Misc Application No. 147 which was erroneously dismissed instead of being struck out.*
- 3. That the Hon Tribunal erred in law and fact for dismissing Misc Land Application No. 242 of 2022 sought to set aside dismissal order of Misc Land Application No. 147 of 2021 upon which the appellant failed to appeal before the trial tribunal one time.*
- 4. That the Hon Tribunal erred in law and fact for failure to consider strong evidence adduced by the applicant/appellant.*

When the appeal came for hearing on the 28th day of August, 2023, the laymen parties appeared in person without legal representation.



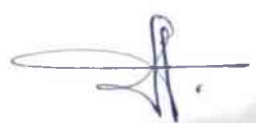
Submitting in support of the appeal, the appellant argued that he is the administrator of the estate of the late Agnes Maile Kapingo. He prayed that the application for execution which was dismissed by the DLHT be restored. That, when the same was called for hearing he was in Mara Region on a business trip and was late to come back to Dodoma to attend his case and he had no person to inform the tribunal of his absence.

The appellant submitted further that he attached his travelling tickets in his affidavit in the DLHT to show that he was not in Dodoma. He thus prayed the court to restore Miscellaneous Land Application No. 147 of 2021 in order to proceed with court process without costs.

On her part the respondent submitted against the appeal that the appellant's reason is not sufficient because he knew that the application was set for hearing and it is not true that he did not have anyone to inform the tribunal about his absence. She prayed the appeal to be dismissed.

That is what was submitted by the parties in support of and against the appeal in this court.

Having gone through the appellant's submission in the court as well as his affidavit in the trial Tribunal, the main reason for the delay is deponed at paragraph 3 of his affidavit, that he got an official trip to Mara Region on the 10th day to the 28th day of April 2022. The appellant attached bus tickets as annextures to support his allegations. And in



paragraph 5 the appellant stated that he had been attending the matter prior to the date when the application was dismissed. This fact was not disputed by the respondent in her counter affidavit rather than alleging that it is an afterthought.

Regulation 11(b) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 provides for dismissal of an application when the applicant is absent without good cause on the date fixed for hearing. Regulation 11(2) (supra) provides for a remedy thereto where the tribunal may set aside its orders if it thinks fit so to do.

In the suit at hand the main reason for absence of the appellant on the date of hearing is that he was on an official trip to Mara Region. To prove his allegations, the appellant attached the bus tickets bearing the dates, the 11th day of April, 2022 from Dar es salaam to Mara by Falcon Bus, the 18th day of April, 2022 from Mara to Manyara by Luxury express Bus and on the 28th day of April, 2022 from Manyara to Dodoma by Mghamba Express hence on the date set for hearing of the application, the appellant was on transit hence a valid reason worthy consideration by the court. It is trite law that whoever alleges has a burden of proving his allegation as per the provisions of section 110 of the Tanzania Evidence Act, Cap 6, R.E. 2019. It was therefore the duty of the appellant to prove



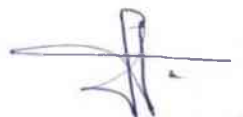
his allegations that he was on trip and he did so in his pleadings in the Trial Tribunal by attaching the bus tickets.

On the 5th paragraph of his affidavit, the appellant deposed to have been attending his case keenly, the fact which was not disputed by the respondent apart from regarding it as an afterthought. Also, in her counter affidavit, the respondent disputed the fact that the appellant had no one to inform the Tribunal on his absence, but on her part, she had no proof to dispute that fact.

The court has given direction on what to consider in applications for setting aside dismissal orders in various decisions. In **Sadru Mangaiji vs. Abdul Aziz Lalani and 2 Others, Miscellaneous Commercial Application No. 126 of 2016, High Court of Tanzania, Mwanza Registry**, (Unreported), the court held;

"It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, he has to furnish the court with sufficient reasons for non-appearance when the suit was called on hearing."

Also, in the case of **Mwidini Hassani Shila and 2 Others vs. Asinawi Makutika and 4 Others, Land Appeal No. 04 of 2019, High Court** (unreported), it was held that:-




"It is trite law that powers to set aside dismissal order are in the discretion of the court, however, the applicant should furnish sufficient reasons to enable the court exercise its discretionary power."

That said, I am of a firm position that, the appellant's reason for his absence suffices a good cause for the matter to be restored since he had been acting in good faith by attending his case prior to the day the application was dismissed.

The appeal is allowed accordingly. I order that the Miscellaneous Land Application No. 147 of 2021 be restored in the Trial Tribunal. Each party to bear its own costs.

It is so ordered.

DATED at **DODOMA** this 27th day of September, 2023.


S. H. Hassan
JUDGE

