

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

AT MBEYA

LAND APPEAL NO. 47 OF 2023

(Arising from Misc. Land Application No. 4B of 2022 in the District Land and Housing Tribunal for Mbeya)

MASENYENGE SHILINDE APPELLANT

VERSUS

SADICK HASSAN MKOMARESPONDENT

JUDGMENT

Date of hearing: 23rd August 2023

Date of judgment: 24th October 2023

NONGWA, J.

In the District Land and Housing Tribunal for Mbeya (the DLHT) the appellant unsuccessfully filed Misc. Land application No. 4B of 2022 for restoration of the appeal which was dismissed for want of prosecution. Aggrieved the appellant has filed the present appeal.

Briefly in the ward tribunal of Chunya at Matundasi, the appellant was sued for the recovery of land which its size was not disclosed, Land Dispute No. 12 of 2020. The decision of the ward tribunal was in favour

of the respondent. The appellant appealed to the DLHT in Land Appeal No. 4 of 2022, the appeal was ordered to be argued through written submission. The appellant failed to file his submission but the respondent filed, on the date scheduled for ascertaining if submissions were filed, the respondent prayed the tribunal to dismiss the appeal for want of prosecution. The prayer was granted and appeal was dismissed for want of prosecution. Learning the dismissal of the appeal, the appellant approached the tribunal through Misc. Land Application No. 4B of 2022 for restoration of the dismissed appeal. It was averred in the affidavit that on the date the appellant was dismissed, he had sent his representative for he was attending his sick nephew in Mwanza. He thus prayed the appeal to be restored for he could suffer irreparable loss. The application was resisted by the respondent who filed a counter affidavit.

After hearing the application, the District Land and Housing Tribunal was satisfied that the appellant had failed to prove that he was attending sick nephew in absence of sick sheet of the alleged nephew or any other proof to that effect. The application was therefore dismissed as alluded earlier. The decision aggrieved the appellant, he has filed a memorandum of appeal containing four grounds of grievances;

1. That the learned chairman erred in law and fact when entered the ruling in favour of the respondent without considered(sic) that the decision of the ward tribunal tainted with illegality.
2. That the learned chairman grossly erred in law and fact when ruled out in favour of the respondent while the appellant have (sic) been attending regularly except that day his uncle was sick.
3. That the learned chairman grossly erred in law and fact in the assessment of evidence in record
4. That the learned chairman grossly erred in law and fact in failing to consider the appellant's affidavit hence, reached the wrong decision.

At the hearing of the appeal, parties appeared in persons, by consensus indorsed by the court disposal of appeal took the form of written submission. Dutifully parties complied with the scheduling order.

In his submission the appellant consolidated ground 1, 3 and 4. The gist of the submission was that there was illegality which constitutes good cause for extension of time. He cited the case of **Protas Kiria vs Grace Greyson**, Misc. Civil Application No. 25 of 2022 (Unreported) to support the argument.

It was further submission of the appellant that the principle of natural justice of hearing another party have to be observed by officers of the court when exercising judicial function, non-observance of it has the effects of vitiating the proceedings. He supported the point with the cases of **Kijakazi Mbegu and 5 Others vs Ramadhani Mbegu** [1999] TLR 174, **Hussein Khanbhai vs Kodi Ralph Siara**, Civil Revision No.

25 of 2014, CAT Arusha and **Obadia Mjarifu vs John Kigonga & 3 Others**, PC. Civil Appeal No. 32 of 2017 (both unreported).

In respect of ground 2, the appellant stated that sickness is a reason for restoration of the application, citing the case of **Vitus Vicent Mwanisawa & Another vs Nehemia Luwela**, Misc. Land Application 11 of 2022, HCT at Sumbawanga (Unreported).

Lastly, he beseeched the court when invoking its discretionary powers to consider good cause which was rejected by the tribunal. Finally, he prayed the appeal to be allowed with costs.

Resisting the appeal, the respondent addressed the court on history of the matter which I have not found necessary to paraphrase here. Replying to the grounds of appeal it was submission of the respondent that there was no any illegality which was submitted by the appellant or committed by the tribunal.

On the ground 2, it was submitted that no submission was made in regard to sickness alleged by the appellant let alone there was no proof to satisfy the court. He added that there was no evidence how and when the appellant's uncle was sick and treatment he had undergone all these were not mentioned.

With respect to ground 3, it was submitted by the respondent that it was the duty of the appellant to point out errors done by the chairman in assessing evidence, failure of that, the respondent stated that it was assumptions and fabrication by the appellant.

Submitting on ground 4, the respondent stated that appellant did not submit anything on what was contained in his affidavit in support of the application. He argued that the affidavit had nothing tangible to be considered by the chairman, the contents of the affidavit were reproduced by the respondent to which he submitted that it did not disclose good reason on which the tribunal could grant the prayer to restore the appeal.

Cases relied upon by the appellant in his submission was dismissed by the respondent for being irrelevant and out of context. Thus, the respondent prayed the appeal to be dismissed with costs.

I have considered the record of appeal and rival submissions made by the parties, the only issue calling for my determination is whether the appeal has merit. It has to be noted that the chairman is being faulted for failure to exercise his discretionary powers to restore the dismissed appeal. The law on this area is settled and clear that, in order for the applicant to succeed to prompt the court to exercise its discretion to restore an application which was dismissed, he must bring to the fore

justification that he was prevented by any sufficient cause from appearing when the application was called on for hearing. Restoration being a matter within the Court's discretion, what amounts to sufficient cause for non-appearance cannot be laid by any hard and fast rules but will be determined by reference to all the circumstances of each particular case. However, the powers must be exercised judiciously, reasonably, and based on sound legal principles and not arbitrarily. See **Metro Petroleum Tanzania Limited Others vs United Bank of Africa**, Civil Appeal 147 of 2019 [2021] TZCA 751 (www.tanzlii.org.tz; 14 December 2021)

An appellate court can only interfere with the discretion of the inferior court or tribunal if it is satisfied that that such court or tribunal has acted in any of the following circumstances; **one**, if the inferior court misdirected itself, or; **two**, it has acted on matters on which it should not have acted, or; **three**, it has failed to take into consideration matters which it should have taken into consideration, thereby arriving at a wrong conclusion. An erroneous exercise of discretion which occurs when the impugned decision was not based on facts, logic and reason but was arbitrary, unreasonable or unconscionable. I will be guided by this principle in the present appeal.

In determining whether good cause has been advanced by the applicant in application which was before the tribunal, it is the affidavit which must be looked at. I have gone through the affidavit which was attached to the chamber summons, for purpose of clarity and fully comprehending the appellant's grievances, it is hereby reproduced;

'AFFIDAVIT

I MASENYENGE SHILINDE, adults Tanzanians, and resident of Chunya, do hereby swear and state as follows;

- 1. That I am the applicant in this application hence conversant with the facts we are about to depone*
- 2. That I opened the land appeal no 4 of 2022 in the MBEYA DISTRICT TRIBUNAL AT MBEYA*
- 3. That the Land Appeal no 4 of 2022 was dismissed for want of Non Appearance on 29/08/2022.*
- 4. That the case was dismissed by I sent my representative for excuse that my nephew was sick in MWANZA*
- 5. Despite the excuse the case was struck out for want of prosecution*
- 6. That it is a pity that I had very urgency application no 4 of 2022*
- 7. Unless this honourable Tribunal of justice does not grant this leave for restoration of LAND APPEAL no 4 of 2022 I shall suffered irreparable loss*
- 8. That being with that view in My mind I sincerely do Apply for. Land case no 4 of 2022 case to restored and resumed'*

In the submission, the appellant has submitted that there is illegality and was not given right of hearing. The respondent replied that no illegality was pointed by the appellant. On my part from the contents of

the affidavit reproduced above there is no any point of illegality which was raised in the affidavit of the applicant. Even the submission that he was not heard does not feature anywhere in the affidavit. Without mincing words, the affidavit in support of the application was so skeletal and scanty as such the evidence on record was not sufficient to support the application. In the case of **Tiluhuma Pima vs Malogoi Muhoyi**, Civil Application 413 of 2022 [2022] TZCA 807 (8 December 2022) the court stated;

'The law is that unlike in ordinary cases where evidence is adduced viva voce, a formal application, as here, should be premised on factual evidence adduced by way of an affidavit. In the former, to be tested by way of cross examination and, in the latter case by an affidavit in reply.'

The matter which was not raised in the affidavit in the tribunal and for which the tribunal did not make any findings cannot be raised on appeal. Assuming the appellant is right that there is illegality and was not given hearing which is not true, the same could not have been succeeded because, the appellant did not spot the alleged illegality or make any submission on what matter he was not given hearing. The appellant just cited different cases expounding principles of law without submitting its

relevance to his case. I agree with the respondent that authorities the appellant cited were irrelevant to that case at hand.

Based on the material placed before the DLHT, the chairman acted in his mandate based on the sound principles of law that failure to file written submission as ordered is tantamount to non-appearance to prosecute the case. In those circumstance, I find that ground 1, 3 and 4 which were jointly argued by the appellant, have no merit.

The only reason advanced by the appellant for failure to file submission was that he was attending his sick nephew. In his affidavit he did not explain more. It is common ground that, health matters, in most cases, are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike, and in a proper case it has been accepted as a good cause. See **Finca Tanzania Limited vs Hassan Lolila**, Civil Application 165 of 2021 [2022] TZCA 531 (www.tanzlii.org.tz; 31 August 2022). The question that follows is whether sickness was proved in this case.

Going through what was pleaded in the affidavit, the appellant failed completely to explain that he was indeed attending his sick nephew in Mwanza. I expected from the appellant to explain in his affidavit the date he was supposed to file written submission, the date he got the

information of his sick nephew, the date he travelled to Mwanza and returned, explanations whether his nephew was hospitalized and proof thereto and averment that there was no any person to attend his nephew. This is the court of law and justice it works based on material preposition before it to which parties have been given equal chance of hearing, it cannot act on the applicant's bare word to assume that his nephew was sick of whom even his name was not disclosed.

In the circumstance, I find the chairman rightly exercised his discretion to refuse the appellant the restoration of his appeal which was dismissed for want of prosecution. The appellant did not advance good cause on which a properly constituted tribunal, directing properly its mind to the material facts put before it could have decided otherwise. In the event the appeal has no merit, it is dismissed with no order for costs.


V. M. NONGWA
JUDGE

DATED and DELIVERED at MBEYA this 24th October, 2023, in presence of Respondent and in absence of the Appellant.

Right of appeal explained.




V. M. NONGWA
JUDGE