IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 05 OF 2023

(C/F Misc. Land Application No. 230 of 2021 before the District Land and Housing Tribunal of Arusha at Arusha)

JOSHUA LOLWO ..... APPELLANT

VERSUS

LOMNYAKI MESHILI ..... RESPONDENT

JUDGMENT

22nd November 2023 & 19th January, 2024

TIGANGA, J.

This Appeal arises from the decision of the District Land and Housing Tribunal of Arusha in Misc. Land Application No. 230 of 2021 delivered on 15th November 2022 refused to set aside its dismissal order dismissing Appeal No.51 of 2020 which was before the DLHT. It is that decision that aggrieved the appellant and prompted this appeal. The appellant filed two grounds of appeal as follows:

1. That, the trial tribunal erred in law and fact in failing to set aside a dismissal order despite the justifiable reasons provided by the appellant in his application.

2. That, the trial tribunal erred in law and fact in failing to properly analyse evidence.

During the hearing, the appellant was represented by Mr. George Mrosso whereas the respondent was represented by Mr. Lengai Nelson Merinyo, both learned Advocates.

Supporting the Appeal, Mr. Mrosso submitted that, section 45 of the **Land Disputes Courts Act**, Cap 216 R.E. 2019 emphasizes substantive justice as a compass in all land disputes. He referred the Court to the case of **Yakobo Magoiga Gichere vs. Penina Yusuph**, Civil Appeal No. 55 of 2017 which emphasized the courts to do away with technicalities and consider substantive justice in determining cases. In light of the above position, he submitted that the trial tribunal dismissed the appeal based on mere technicalities because on 15th April 2021 when Appeal No. 51 of 2020 was set for hearing the appellant got sick. He attended and got treatment at Kaloleni Health Centre and he even attached copies of the medical chit as proof of his treatment, but the trial tribunal ignored such fact. Furthermore, he said that not only he was sick but also that his Advocate was appearing before Hon. Gwae, J, in Land Appeal No. 01 of 2021 between John Sanyiwa

vs Marite Yasi & Another. And that he attached the summons of the High Court as well.

He argued that sickness is not a human choice, thus, one cannot be blamed for the inaction once they get sick and the same was a sufficient reason for the trial tribunal to set aside the dismissal order. He referred this court to the decision in the case of **Valerie Mc Givern vs Salim Fakhrudin Dalal,** Civil Application No. 11 of 2015CAT-Tanga that sufficient reason is relative and it is dependent upon the circumstances of each individual case.

Learned counsel went on submitting that, the main reason for non-appearance was due to sickness which was sufficient reason for the trial tribunal to set aside the dismissal order as sickness in our jurisdiction. In support of that contention, he cited the case **FINCA Tanzania Limited vs Hassan Lolila,** Civil Application No. 165/18 of 2021 CAT-DSM.

More so, he submitted that the appellant never missed even a single scheduled date throughout the appeal, thus, he could have not missed the hearing date intentionally. Further to that, a comment from the tribunal chairman in his ruling that, the summons was a fraud because they did not have the Advocate's name is an allegation that needed proof but the same

was not from either parties' affidavits or in their submissions. He reminded the court of the principle that the court should not go outside the evidence in the case. Therefore, the statement that the summons was tampered with was unwarranted and unacceptable for it was neither in the affidavit of the submissions by the parties nor in the submissions. He also reminded the court that this is the first appellate Court, which heard the case in the form of rehearing and that it is duty bound to re-evaluate the evidence on record by subjecting the same to a critical and to arrive at its own conclusion. He in the end prayed that the appeal be allowed, the order refusing the application for setting aside in Misc. Application No. 230 of 2021 be quashed and the Appeal No. 51 of 2020 be restored.

In reply Mr. Merinyo submitted that the reason for the applicant's non-appearance according to his arguments were two; first, that he was sick and attended treatment at Kaloleni Health Center, and second, that his advocate was in High Court attending another case. However, after the trial tribunal considered these reasons, it found them to have no merit and hence dismissed the application. That, there were no genuine reasons as to how the appellant's sickness made him miss the hearing, and regarding his Advocate missing the hearing he contended that the said Advocate did not

swear an affidavit connecting him to the non-appearance of the appellant during the hearing of his appeal. He invited this court to agree with the DLHT and find that the tribunal sufficiently considered the reasons and rightly dismissed them. He reminded the court that it is not enough for the applicant to allege that he was sick, he must demonstrate how that sickness prevented him from appearing to court. in support of that contention, he cited the case of **Juto Ally vs Lukas Komba & Another,** Civil Application No. 484/17 of 2019. He also asked the court to be persuaded by the position stated in the case of **Mitalami Loti Sangalai vs The Registered Trustee of Free Pentecostal Church of Tanzania**, Misc. Land Application No. 35 of 2021. Gwae, J High Court, Arusha Sub Registry.

On the issue of the failure of the advocate to appear, he said the Advocate did not swear the affidavit in support of this fact which would have connected him with his client John Sanyiwa. He said the tribunal was right to apply regulation 13(3) of the Land Disputes Courts (District Land and Housing Tribunals) Regulation, 2003. In his view, the appellant slept on his right and therefore cannot benefit from his misdeeds.

Learned counsel insisted that this is one of those cases in which the appellant and his Advocate slept over the right to prosecute appeal as they were both well aware of the day of hearing of the said appeal. He challenged the application of overriding objective as raised by the appellant on the ground that, there were no technicalities involved as the trial tribunal made its decision based on the facts of the case. To cement his argument, he cited the case of **Mariam Samburo (Legal Personal Representative of Late Ramadhani Abas) vs. Masoud Mohamed Joshi & 2 Others**, Civil Appeal No. 109 of 2016, CAT at Dsm where the Court of Appeal underscored the importance of not applying the overriding objective blindly against the mandatory provisions on the procedural law.

He asked the court to distinguish cited cases, particularly the case of FINCA HE said the decision in the case of Ramadhani Iyanja & Another vs Mwajabu Ramadhani Mboida, Misc. Lnd Application No. 17 of 2022 that the applicant in an application seeking to restore the dismissed case needs to give sufficient reasons for their non-appearance. He prayed that this appeal be dismissed with costs for want of merits.

In his rejoinder, the appellant's counsel reiterated his earlier submission and maintained that this appeal be allowed so that the parties can be heard on merit at the trial tribunal.

Having gone through the parties' submissions and the trial tribunal's records, I now proceed to determine grounds of appeal which are to prove one main issue which is whether the appeal has merits. As earlier pointed out the appeal raises two grounds namely that the only two grounds. First, the trial tribunal was not justified in refusing the application to set aside a dismissal order despite the justifiable reasons provided by the appellant, second, the trial tribunal erred in law and fact in failing to properly analyze evidence. when called to argue the appeal, the appellant argued only the first one and did not say anything about the second ground. That being the case, by necessary implication, I take him to have ignored the second ground therefore I will only deal with the first ground.

In the application for setting aside the dismissal order, the applicant is required to give sufficient reasons as to why he failed to appear on the date when the case was dismissed. In the case at hand, the applicant fronted two main reasons which prevented him from appearing on the date when the case was dismissed. The first was that he was sick, and the second one was

that his Advocate was appearing before the High Court, Gwae J, in Land Appeal No. 01 of 2021 between John Sanyiwa vs Marite Yasi & Another. It should be noted that, generally, in the application seeking to set aside the dismissal order the burden to prove that the applicant was prevented by sufficient reasons actually out of his control rests on the shoulders of the applicant. Starting with the first ground as to whether there was any evidence to prove that the applicant was on the date and at the time when the appeal was dismissed he was sick and was attending medication at Kaloleni Health Centre. While the applicant said in the affidavit filed in support of the application for setting aside the dismissal order, and the submissions in support of the application the applicant said he was prevented by sickness.

He was attending medication at the above-mentioned health center, the respondent in the counter affidavit, the investigation he conducted at the said health center where the applicant was alleged to have attended and received the treatment, revealed that the applicant went there at 15.06.50 hrs. that was proved by the evidence in the letter and the printout from the hospital showing that he attended at that time and ended at the reception. That evidence was not counted or controverted by the applicant.

On this issue, I have carefully read the ruling of the DLHT, and I find myself unable to disassociate myself from the reasoning, findings, and decision of the tribunal. First, I agree with the respondent that after the respondent had introduced the evidence weakening the evidence of the applicant, the applicant was duty-bound to counter the same. In my view, failure to counter the same was by necessary implication as good as accepting the said evidence. and was stopped to deny it later. That consequently leads to the findings that, at 09.00 hrs in the morning when the case was called and dismissed the applicant was not at Kaloleni health center as he alleged. The applicant therefore failed to tell the court what prevented him from attending court at 09.00hrs in the morning. Therefore, the learned Chairperson of the DLHT was justified in its ruling when it refused this ground as sufficient cause for setting aside the dismissal order.

The second ground was that his Advocate was appearing to the High Court before, His Lordship Gwae, J, in the case of John Sanyiwa (supra). That was counted on the ground that the summons attached to the affidavit as proof that the counsel was summoned to the High Court was issued not to him but to John Sanyiwa, the name of the counsel was just inserted thus lacking the connectivity of the counsel with the said case. Further to that,

there was no affidavit of the counsel filed proving that the applicant was really appealing to the high court. These arguments were accepted by the learned chairperson of the DLHT who on that base ruled that the ground was not a sufficient reason for the court to grant the application.

On this ground I have also carefully read the submissions made by the parties and the decision of the DLHT, I am satisfied that the DLHT was justified to rule that the reasons were not sufficient to warrant the grant of the application I hold so because there is no dispute that the summons attached to the application proving that the Advocate for the applicant was appearing before the High Court was directed to the said John Sanyiwa, the name of the council was inserted later.

Further to that, it does not show that the summons was sent to the said advocate vide the said John Sanyiwa, and as rightly submitted that since the said John Sanyiwa was the one to whom the summons was directed, it was important to have his affidavit proving that the summons was also intended to be served to the counsel, or that he engaged him as an Advocate to represent him.

Furthermore, it is common knowledge that receiving a summons does not prove that the summons served attended to the Court before which he

was summoned. It would also have been prudent for the counsel to request and bring the proceedings of the High Court of that day showing that he actually appeared before the said High Court on that date and since cases are nowadays scheduled at the same time when the impugned order was given. failure to do so justified the chairman's decision that the applicant failed to prove that he had sufficient reasons that prevented him from appearing on the date and at the time when the application was dismissed.

That being the case, and in the fine, I find the appeal to be destitute of merits, and I hereby dismiss it with costs.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 19th day of January 2024

J.C. TIGANGA

JUDGE