

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA

LAND APPEAL NO.4071 OF 2024

(Arising from the Decision and Order of the District Land and Housing Tribunal for Mwanza at Mwanza before (Hon. Kato, Chairperson) in Land Application No. 42 of 2023, dated 21st February, 2024.)

FRANK E. MAFURU 1ST APPELLANT
MECTRIDA BUHORA 2ND APPELLANT

VERSUS

BODI YA WADHAMINI YA MSIKITI WA IJUMAA 1ST RESPONDENT
KAMATI YA MPITO TAASISI YA MSIKITI WA IJUMAA 2ND RESPONDENT

JUDGMENT

6th & 11th March, 2024

CHUMA, J.

In the instant appeal, the appellants are challenging the decision and order of the Mwanza District Land and Housing Tribunal dated 21.02.2024 with the following two grounds:-

- 1. That, the chairman of the tribunal erred in law and fact by dismissing land application no. 42 of 2023 for want of prosecution.*
- 2. That, the chairman of the tribunal erred in law and fact by not accepting the reason for absence of appellant's advocate on the date scheduled for hearing and prayed the following orders;*

That this honorable court be pleased to quash and set aside the dismissal and all other orders issued by the Hon. chairperson of the tribunal dated 21.02.2024. That his honorable court to be pleased to issue an order of

restoration of land application no 42/2023 and all orders arising from it.
Cost of this application and any other reliefs as the court deems fit.

Before this court Mr. William Myumbu and Msafiri Henga Learned counsels appeared for the appellants and Mr. Wilbard Kilenzi Learned counsel represented the respondents.

Arguing for the appellant Mr. William Myumbu Learned Advocate contented that the tribunal decision though the provision relied upon not expressly provided but it appears that it was based on GN 174/2003 Regulation 13 Sub regulation 2. The provision empowers the tribunal to dismiss the matter in case the advocate fails to appear before the court on two consecutive dates without good reason.

And that from the record of the tribunal starting on 24th January 2024 when the matter was set for hearing, Mr. Msafiri Henga Advocate entered an appearance for the appellant, the applicant therein while John Phillip advocate appeared for the respondents holding the brief of Mr. Stephen Kaswahili, but the hearing was adjourned because Mr. Phillip had no instruction to proceed and the matter was set for hearing on 31st January 2024. The hearing was then adjourned on the fault of the respondent.

On 31st January 2024, the record is silent on what happened to 19th February 2024 when the matter was set for hearing. Mr. Msafiri Henga for appellant and Kaswahili for respondents both appeared but the hearing never proceeded without reason. However, it was reported from the parties that the trial tribunal Chairman was not around. The hearing was adjourned to 21st February 2024.

On 21st February 2024, Mr. Msafiri Henga did not appear but notified the tribunal via letter of his absence as he was appearing at another tribunal at Mugumu Serengeti before Hon Magambo Mayeye but the tribunal rejected the notice and proceeded to dismiss the application with cost. He went on to submit that the tribunal order contravenes Regulation 13(2) of GN No.174/2003 because the regulation is applicable where the advocate fails to appear in court in two consecutive dates without reason. The record reveals that only 21st February 2024 the applicants here in the appellant's Advocate entered no appearance but with notice as submitted above. He appreciated the existence of Regulation 13(3) of The Dispute Land And Housing Tribunal Regulation GN. No. 174/2003. This provision empowers the tribunal to adjourn the case if the advocate appears before the Court of Appeal or High Court. In our case, the advocate was appearing before another tribunal maned by Mr Magambo at Serengeti

who is Senior to Hon Kato. Though it is not provided by the law but it has been a practice for the court and Advocate to enhance and maintain order of seniority. It was prudent for the trial Tribunal to adjourn the matter for the interest of justice. From the record, the order was issued after rejecting prayer by the appellants to adjourn the hearing for want of the absence of their advocate.

To fortify his view Mr. Myumbu referred this court to a case of **Lucas Gisiland v Republic** Criminal Appeal No 89 of 2021 CAT at Dar es Salaam (Unreported) in which on page 7 the court insisted the right of legal representation to the parties as a fundamental aspect. He further argued that, from the referred case, the trial tribunal had a duty to allow parties to find another advocate for the interest of justice. It was unfair for the trial Tribunal to dismiss the application for want of prosecution.

Regarding the issue of assigning good cause for non-appearance, he once again drew this court's attention to the case of **Mwanza Director MS New Refrigeration Company Ltd V Mwanza Regional Manager of Tanesco Ltd and another** 2006 TLR 329, the decision there was to the effect that what amounts to good cause depends on the circumstances of the case. He urged this court to consider the

circumstances of this case and allow the instant appeal in the interest of justice.

Giving Mr. William Myumbu a helping hand Mr. Msafiri Advocate rose and joined hands with what was submitted by his fellow Advocate insisting this court to allow the appeal, quash the lower tribunal record, and set aside all orders issued there at with cost.

In response, Mr. Kilenzi Advocate vehemently opposed the appeal for being baseless because of the failure of the appellant's advocate to understand the rationale behind the issued order. Mr. William submitted on the events that occurred at the tribunal from 24.12.2023 to 21st February 2024 when the matter was dismissed. The center of the issued order originates from 18.12.2023 in which the trial tribunal warned the adjournments of the matter because of the parties mostly the appellant's advocate and ordered that on 21.2.2024 applicants should represent themselves bearing in mind that the matter was filed under a certificate of urgency. Mr. Kilenzi argued further that the non-appearance of the applicant had a series of events such as 20../2023 the applicant's advocate did not appear, and Kaswahili's advocate was present and Mr. Revocatus's advocate held a brief of Mr. Msafiri submitted that the application was no longer under emergency. On 5.4.2023 the applicant's

advocate also was not in court and Sepetu Revocatus did hold a brief, on 24.4.2023 as well advocate never appeared in court. On 7.5.2023 again applicant's advocate was not ready for a hearing and the matter was then set to 25.9.2023 in which as usual Mr Sepetu did hold brief of Mr. Masafiri's advocate who reported appearing before the CAT without notice contrary to GN No 174 of 2003 though trial tribunal adjourned the matter and directed the advocate to submit proof of his absence. But to date, the advocate defaulted such an order. On 23.10.2023 the applicant's advocate failed to appear and the last adjournment was ordered. Then on 18.12.2023 the appellant's advocate also entered no appearance without tangible reasons. It was that day when the tribunal ordered the parties to represent themselves on 21st February 2024. Therefore the consecutive dates begin on 25.9.2023 and 23.10.2023 in which the tribunal ordered parties to represent themselves on 21.02.2024.

The order dated 18.12.2023 indicates that the appellant's advocate had no good appearance in court a tendency that led the tribunal to order the parties to represent themselves. The appellant's advocate ought to have applied to set aside the order of 18.12.2023 but failed to do so. The attendance of the advocate after that order had no legal impact because of the order dated 18.12.2023.

The tribunal dismissal order indicates that parties were ordered to proceed but they were not ready to proceed and as a result, invoked the provision of Regulation 13(2) of GN No.174/2003.

It was further argued by the respondent's counsel that the letter of adjournment had no attachment of summons to support his notice for the tribunal to believe that the advocate was really appearing at Serengeti. The law allows adjournment only where the advocate is appearing before the CAT or High Court. But also, the issue of seniority goes without proof on whether real Magambo is a senior to Mr Kato. He finally prayed this appeal be dismissed for want of merits with cost.

In his brief rejoinder, Mr. William Myumbu counsel for the appellant countered that there is no doubt that the matter was dismissed under regulation 13 of GN No.174/2003. The regulation empowers the tribunal to dismiss the matter when the matter is set for hearing and the advocates fail to appear on two consecutive dates. The record reveals that after the tribunal ordered the parties to represent themselves, the advocates were still recognized by the tribunal in subsequent proceedings. Even the invoked provision applies to non-attendance or appearance of an advocate. The applicable regulation in circumstances ought to be regulation 11. Regulation 13 (2) applies only where there is no good cause

or where he is appearing before the court of appeal or High Court. But before the issue of the high court or court of appeal if there is good cause the matter may be adjourned. Mr Myumbu appealed to this court to consider their submission as meritable and allow their appeal with cost.

I have given careful deliberation to the arguments for and against advanced by both learned counsels. Having done so the issue before this court for determination is whether there are tangible reasons on which the trial tribunal's decision can be faulted.

The Trial Tribunal record indicates as rightly pointed out by Mr Kilenzi advocate for the respondent that its decision to dismiss the application for want of prosecution resulted from the denial of the appellants to proceed with the hearing. The tribunal invoked the provision of Regulation 13(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations of GN No.174/2003. For ease of reference the regulation provides;

"Where a party's advocate is absent for two consecutive dates without good cause and there is not proof that such advocate is in the high court or court of appeal, the tribunal may require the party to proceed himself and if he refuses without good cause to lead the evidence in establish his case, the

tribunal may make an order that the application be dismissed or make such other order as may be appropriate"

The above quoted provisions presuppose two crucial issues which need to be established and addressed. One is whether the appellant's advocate entered no appearance before the court on two consecutive dates without good cause and two whether the appellants refused to proceed with the hearing without good cause.

To start with the first issue the two consecutive dates before 18.12.2023 as correctly submitted by Mr.Kilenzi Learned counsel for respondents begins on 25.9.2023 and 23.10.2023 in which the tribunal ordered parties to represent themselves on 21.02.2024. On 25.09.2023 Mr.Msafiri was absent and Mr.Revocatus did hold his brief and the matter was adjourned for the interest of justice. In its order for adjournment the trial tribunal's record at page 34 reads,I quote in its Language used:

"Amri...

Kutokana na hoja za Mawakili kuhusu ahirisho la leo kwa sababu ya wakili wa waleta maombi kuwa na session(vikao) vya Mahakama ya Rufani:Baraza katika kutenda haki linatoa ahirisho hili kwani kupitia mwenendo wa shauri hili mawakili wote wamekuwa wanahudhuria mbele ya Baraza..."

Again on 23.10.2023 the appellant's advocate was absent with notice and the tribunal adjourned the matter to another date for hearing.

It is beyond doubt that the record does not reflect or support such order that the appellants advocates absconded court session in two consecutive dates without good cause prior to 18.12.2023. This is because the record indicates the reasons for failure of the advocates to appear before that tribunal and even the trial tribunal commended on the attendance of advocates there at as reflected at page 34 of the untyped proceedings of the trial tribunal. Therefore, the test of the first limb of regulation 13(2) was not met to warrant the trial tribunal order for the appellants to represent themselves on 21st February 2024. The very order is then has no where to stand on.

As matter of argument even if we are to count two consecutive dates from 18.12.2023 to 21st February when the application was dismissed yet still the record indicates that the application was before the tribunal on 21.12.2023, 24.1.2024, and 19.2.2024 where the appellant's advocate was present and so the meaning of two consecutive dates does not apply basing on the meaning of consecutive as per Webster's New World Law Dictionary, ***"Two or more periods of incarceration time that are to be served in succession"***.

As to the second limb of it, the appellant refused to proceed with the hearing for want of the absence of their counsels and the documents which reported were in possession of their advocates. In my understanding and from the record, though the tribunal order dated 18.12.2023 was not justifiable but since then the appellant's advocates had no locus before that tribunal. Hence the issue of notice of appellants advocate had nothing to do there at. I however wonder why the trial tribunal proceeded to recognize the appellant's counsel in subsequent proceedings despite the existence of an order issued on 18.12.2023. As submitted by Mr.Kilenzi advocate their attendance had no legal effect.

On the other hand, I failed to subscribe to the trial tribunal when observed that the applicant had no good cause for failure to proceed with the case. This is because the records appears to be infavour of the appellants.

On 21st January 2024 the appellants recorded at page 48 to 49 of the untyped proceedings thus;

"...Mleta maombi 1(Frank Mafuru)

Tunaomba tarehe nyingine

Mactrida (Mleta maombi 2)

Tunaomba tarehe nyingine kwani wakili wetu ndio ana documents zote..."

The above quoted words in my understanding being the reason by the appellant to request for adjournment for want of documents which was in possession of their advocates is a good cause so to say.

In **R vs. Governor of Winchester Prison exp Roddie** [1991] AU ER 931 at Page 934 which was cited in **Aidan Chale vs. Republic**, Criminal Appeal No 130 of 2003 CAT (unreported), good cause was defined as under: -

"It will usually consist of some good reason why that which is sought should be granted. It need not be something exceptional. To amount to good cause there must be some good reason for what is sought".

Given the above argument and cited case no doubt the circumstance of this case the appellant advanced good reason for their adjournment prayer to enhance fair trial as well which is a constitutional right.

In view of the above analysis, I find merit in this appeal and allow it. I consequently quash the trial tribunal decision and set aside orders issued on 21st February 2024. I order the matter be restored and remitted back to the DLHT for hearing on merits before another Chairman competent to try it with immediate effect and it should be finalized within a shorter period of time. Cost to follow the event in the main application.

DATED AT MWANZA this 11th day of March 2024



**W. M. CHUMA
JUDGE.**

Judgment delivered in chamber before Mr. William Myumbu and Mr. Wilbard Kilenzi learned counsels for the appellants and respondents respectively this 11th day of March 2024.

**W. M. CHUMA
JUDGE.**