

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 113 OF 2020

(Originating from Ulanga District Land and Housing Tribunal in Land Application No.237 of 2019)

SALIMU ALAUDIN HASHIM (Administrator of the Estate of
the Late Alaudin ALLY HASHAM)**APPELLANT**

VERSUS

MOHAMED MAGONGA.....**RESPONDENT**

Date of Last Order: 14.06.2021.
Date of Ruling: 02.08.2021

JUDGMENT

V.L. MAKANI, J

This is an appeal by SALIMU ALAUDIN HASHIM. He is appealing against the decision of Ulanga District Land and Housing Tribunal at Mahenge (the **Tribunal**) in Land Application No. 693 of 2019 (Hon. R.W. Mmbando, Chairman).

At the Tribunal the applicant/appellant herein was applying for the Tribunal to set aside the dismissal order dated 08/05/2019 by Hon. Mwakibuja Chairperson. The application was dismissed for want of

merit and the applicant being dissatisfied with the said decision, preferred this appeal basing on the grounds of appeal as hereunder reproduced:

- 1. That the trial Chairperson erred in law and fact for dismissing the application without considering reasons advanced by the counsel for the applicant in respect of the non-appearance on the hearing date.*
- 2. That the trial chairperson erred in law and fact for failure to consider the evidence adduced by the counsel for the applicant in respect of the sickness which was proved by annexure P1 to the application.*
- 3. That the trial chairperson erred in law for ordering the hearing to proceed while the same application was determined on 18/06/2019 before Hon.Mwihava, chairperson.*
- 4. That the trial chairperson erred in law in dismissing the application while the respondent conceded to the application even when they were questioned by the chairperson.*
- 5. That the reasoning advanced by the chairperson which led to the dismissal of the application is against the law.*
- 6. That the ruling of the chairperson is problematic and lacks legal support.*

The appellant therefore prayed for the ruling of the Tribunal to be quashed and this appeal be allowed.

With leave of the court the appeal was argued by way of written submissions. The appellant's submissions were drawn and filed by Mr. Innocent Mwelelwa, Advocate and Mr. H.H. Mtanga, Advocate drew and filed submissions in reply on behalf of the respondent.

In arguing the appeal, Mr. Mwelelwa for the appellant consolidated the first and second grounds of appeal and argued them together. He said that the reasons for non-appearance on 08/05/2019 were clearly stated in paragraphs 3 and 4 of the applicant's affidavit. That it was caused by the sickness of the applicant's Counsel mother. That the evidence of the said sickness was attached as **Annexure P1**. He said it was wrong for the Chairman to dismiss the application on account that there were no sufficient reasons for non-appearance on the date of hearing. He said that the said information of sickness was also communicated to Counsel for the respondent of which he never controverted. He relied on the case of **Sadru Mangaiji vs. Abdul Aziz Valani & Others, Misc. Commercial Case No.126 Of 2016** (unreported) in which he said that the court granted an application for setting aside the dismissal order on the ground of sickness of the mother of Counsel for the applicant. He insisted that it was wrong for

the Chairperson to dismiss the application while there were sufficient reasons for non-appearance.

On the other hand, Counsel said that, Misc. Land Application No.237 of 2019 was heard by another Chairperson on 18/06/2019 in which he granted the application and thereafter the main Land Application No.27 of 2018 proceeded. He said the Chairman was informed of the order dated 18/06/2019 but he neglected only to order that the application be heard due to the fact that the file for Misc. Land Application No.237 of 2019 was still within the main file. That the learned Chairperson was functus officio to determine an application which had already been determined by another Chairperson.

Submitting for the third and fourth grounds of appeal, Mr. Mwelelwa said that in Misc. Land Application No.237 of 2019 the respondent did not file his counter affidavit on account that they did not intend to challenge the said application with the view that the main application should be heard and determined. He said this fact is reflected at page 2 of the typed Ruling of the Tribunal. He said it means the facts adduced by the applicant were correct that is why they were never challenged and that it is the law that failure to file counter affidavit

on the application means that respondent has admitted the facts stated by other party. He relied on the case of **East African Cables (T) Limited vs. Spencon Services Limited, Misc. Application No.61 of 2016** (unreported) where the court stated that when the fact sworn to or affirmed is not controverted then it is deemed to be admitted. He said that the Chairman was supposed to grant the application.

On the last ground of appeal, Mr. Mwelelwa submitted that the entire ruling of the Tribunal is incapable of legal support in that it has applied a wrong principle as was said in the case of **Nasibu Sungura vs. Peter Machumu [1998] TLR...** He said the applicant furnished sufficient reasons as to why he failed to appear on the hearing date. He prayed for this appeal to be granted.

In reply, Mr. Mtanga said that both the appellant and his advocate failed to enter appearance on the date of hearing of the application without any reason. That **Annexure P1** attached to the application was not accompanied with enough reasons because it is the advocate's mother who was sick and not the applicant. He insisted that the Tribunal was right in dismissing the application for non-

appearance of both applicant and his advocate. That there was no notification from the advocate nor from the applicant. He said that the advocate was hired to represent the applicant. He added that the authorities cited by the appellant has no bearing as the case of **East African Cables** (supra) is purely based on execution or delay of the execution of decree. He further added that the advocate's mother sickness cannot prevent the applicant from attending the hearing at the Tribunal.

On the third ground of appeal, Mr. Mtanga said that, there is no evidence to prove that there was already a ruling delivered by Hon. Mwiwaha on 18/06/2019 in respect of an application to set aside the dismissal order. He prayed for this appeal to be dismissed with costs.

In rejoinder, Mr. Mwelelwa reiterated his main submissions and added that the information on absence of the applicant's Counsel was communicated to the respondent's counsel and it is unfortunate that he was delayed as he was appearing before another Chairman.

In arguing this appeal, the learned counsel for the appellant consolidated the first and second grounds of appeal and argued them

together. Other grounds were dealt with separately. However, the grounds can be regrouped to form two issues for ease of discussion; **One**, whether the applicant adduced sufficient reasons to set aside the dismissal order at the District Tribunal. **Two**, whether the same application for setting aside the dismissal order had already been determined by the Tribunal.

The main reasons advanced by Mr. Mwelelwa for the applicant for his non-appearance on 08/05/2019 when Misc. Land Application No. 27 of 2018 came for hearing is that his mother was sick and therefore, he had to go to Ikonda Hospital at Njombe where she was admitted. The application stood uncontested at the Tribunal and Mr. Mwelelwa is of the opinion that respondent's failure to controvert the application signifies that he has conceded and therefore the application should have been granted by the Tribunal. However, and with due respect to the learned Counsel by the respondent conceding does not automatically warrant the grant of the setting aside of the dismissal order, rather the law requires the applicant to furnish reasons for his non-appearance. On this, I subscribe to the case of **Nasibu Sungura vs. Peter Machumu** (supra). Now, if it was the Counsel's mother who was sick, and Counsel decided to visit her at Ikonda Hospital why

didn't the applicant appear in person or rather inform the Tribunal about the absence of his advocate? The reasons by Mr. Mwelelwa that he left the applicant to save costs is still wanting, simply because in any way be it to save money or otherwise, the Tribunal should have been duly informed of the applicant's absence. That duty was not furnished by the applicant nor his advocate. I am aware that Mr. Mwelelwa alleges that he communicated to Mr. Kusalika who was representing the respondent, and that he was appearing before another Chairman at the Tribunal. However, as correctly stated by the Tribunal's Chairman, there ought to have been an affidavit sworn by Mr. Kusalika to that effect. In the absence of such proof it becomes difficult for any court of law, including this court, to rely on statements raised at the bar. Therefore, I find no merit in the appellant's grounds that he has submitted sufficient reasons for non-appearance at the hearing date in Misc. Land Application No.27 of 2018 at the Tribunal.

On the issue that the application for setting aside the dismissal order had been previously determined by the Tribunal, I am in agreement with Mr. Mtanga that there is nothing on record showing that indeed the said application had already been determined by the Tribunal. The only records available at page 3 of the Tribunal's typed

proceedings is where the Chairman acknowledged that the matter was previously filed and proceeded in the District Tribunal in Kilombero/Ulangua at Ifakara but it was later transferred to the District Tribunal in Ulangua at Mahenge (the **Tribunal**) where it proceeded to its finality. The arguments by Mr. Mwelelwa are therefore not supported by the records. Therefore, this ground is also devoid merit.

Based on the above, I find this appeal with no merit and I find no reason to interfere with the decision of the Tribunal. The appeal is thus dismissed with costs for lack of merit.

It is so ordered.



V.L. Makani

V.L. MAKANI
JUDGE
02/08/2021