

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 232 OF 2022**

(Arising from Misc. Land Application No. 69 of 2022, originating from Land Application No. 100 of 2021 in the District Land and Housing Tribunal for Temeke at Temeke)

KHALID BAKARI APPELLANT

VERSUS

RAMADHANI MOHAMED YUSUPH RESPONDENT

JUDGMENT

Date of last Order: 01.12.2022

Date of Judgment: 07.12.2022

A.Z.MGEYEKWA, J

The appellant has lodged this appeal against the Ruling of the District Land and Housing of Temeke at Temeke in Land Application No.69 of 2022 dated 28th September, 2022. The material background facts of the dispute are not difficult to comprehend. They go thus: the appellant

lodged an application for setting aside an *exparte* judgment and decree in Land Application No. 69 of 2022. The appellant claimed that on the date of hearing the case Mr. Eliamin Daniel, counsel for the appellant was appearing before Hon. Biswalo, J at High Court, Labour Division in Labour Revision No. 299 of 2020 at Dar es Salaam.

The respondent opposed the application. Mr. Lutufyo contended that the appellant's counsels were aware that the matter was scheduled for hearing *exparte* against the appellant and they were summoned to appear on the date of delivery of the Judgment but they opted not to appear at the trial tribunal. The District Land and Housing Tribunal decided the matter and ended up dismissing the application with costs.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged an appeal containing five grounds of appeal as follows:-

- 1. That, to the prejudice of the Appellant, the Tribunal erred in law and in fact in ordering Ex-parte proceeding even though the appellant's counsel had already notified the Tribunal of his absence.*

2. *That, the Trial Tribunal erred in law and facts in holding that the appellant counsel sickness is not sufficient cause to set aside an ex parte Judgment.*
3. *That, the Trial Tribunal erred in law and fact by dismissing the Misc. Application on the basis of irrelevant facts which are subject to proof.*
4. *That, Trial Tribunal erred in law and fact for failure to consider inconveniences on the part of the Appellant including reasons of the sickness of Appellant Counsel.*
5. *That, the Trial Tribunal erred both in law and facts for failure to take into consideration that both interest of justice and the interest of the case would not demand the Appellant be denied the right of hearing/ to be heard by an ex-parte order and also dismissal of the Misc. Application No. 69 of 2022 to set aside ex-parte order for unjustifiable cause.*

When the matter was called for hearing before this court on 21st November, 2022, the appellant enlisted the legal service of Ms. Kumbukeni Kondo, counsel also holding brief for Mr. Lutufyo Mvumbagu, counsel for the respondent. On the parties' concurrence, the hearing of the matter was through written submissions the filing of which

followed the schedule drawn by the Court save for the appellant's counsel who waived her right to file a rejoinder.

The learned counsel for the appellant opted to combine the second and fourth grounds. Except for the first and fifth grounds which she argued separately. Ms. Kumbukeni did not address the third ground.

Submitting on the first ground, the learned counsel for the appellant contended that it is within the record of the trial tribunal that on 11th November, 2022, the counsel for the appellant lodged a notice of absence, requesting an adjournment of the matter on 15th November, 2021 since the counsel was to appear before Hon. Biswalo Mganga, J in Labour Revision No. 299 of 2020. To support her submission she referred this court to annexure Roel – EDI attached in the affidavit in Misc. Application No. 69 of 2022 and the same is stamped with the seal of the trial tribunal.

Ms. Kumbukeni asserted that besides the said notice the Chairman continued with hearing the matter *ex parte* for the reason that there was no any reason for absence. She added that even in the Application for setting aside the *ex parte* Judgment in Misc. Application No. 69 of 2022, the appellant's counsel availed the tribunal for the same reasons still, the

trial Chairman refused to set aside the *exparte* Judgment and order. To buttress his contention, the learned counsel for the appellant cited the case of **Mwasa Jeremiah and 112 others v Tanzania Railway**, Misc. Land Case No. 459 of 2020 HC Land Division (unreported). She stated that the Chairman in his ruling stated that the notice of absence was mixed with an additional list of documents. Ms. Kumbukeni valiantly contended why was the appellant problem while neither the appellant nor his counsel mixed the documents, and why is the appellant punished for an error he did not commit. Fortifying her submission she cited the case of **Edson Osward Mbogoro v Dr. Emmanuel John Nchimbi & Attorney General**, Civil Appeal No. 140 of 2006 CAT at Dar es Salaam.

Arguing for the second and fourth grounds, the learned counsel for the appellant contended that in the case of **Abdallah Zarati v Mohamed Omari, (PC)**, Civil Appeal No. 150 –D- 68 (1969) HCD, the Court held that the Court is entitled to set aside the *exparte* order or Judgment where there is the existence of numerous causes that prevented the party from appearing in court to defend his cases such as illness, bad weather, death of family member and the like.

The counsel went on to submit that Ms. Kumbukeni Kondo was assigned to attend the case on 21st December, 2021 unfortunately she fell sick and hence could not appear at the tribunal and to prove the same they attached in the affidavit a hospital certificate. She added that surprisingly, the trial tribunal on page 9 paragraph 2 in the first two lines stated that the issue of sickness had no proof. Ms. Kumbukeni went on to submit that sickness is beyond human control, no one is in a position to decide when to be sick. She spiritedly argued that the trial tribunal refused to set aside the *ex parte* Judgment was unfair.

On the last ground, Ms. Kumbukeni contended that the tribunal ordered to proceed with *ex parte* hearing and dismissed the Misc. Application No. 69 of 2022 for unjustifiable cause, the same violated Article 13 (a) – (d) of the Constitution of the United Republic of Tanzania 1977 a, hence denied the appellant's right to prove his case against the respondent. To bolster her submission she cited the case of **Mbeya Rukwa Auto & Transport Ltd v Jestina George Mwakyoma** [2003] TLR 250 CAT. Ms. Kumbukeni valiantly argued that denial of the trial tribunal to set aside the *ex parte* Judgment and order having cognizance that the counsel for the appellant was at the High Court and the reason for sickness denies the appellant the right to be heard which is fundamental.

The learned counsel for the appellant continued to argue that in the record of the tribunal, the appellant appeared at the tribunal, and on 15th November, 2023 was the first date of absence, hence the trial tribunal ought to have considered that before proceeding *ex parte* the appellant is given the benefit of doubt with the single adjournment. To buttress her contention she referred this Court to the case of **Deo Kazeni Mbwambo v Godson Kaizer Mollel**, Land Appeal No. 64 of 2019 [2021] TZHC 2790. She added that the appellant was diligent and after receiving the copy of the Judgment on 13th March, 2022 within three days that is on 16th March, 2022 he filed Misc. Application No. 69 of 2022 to set aside the *ex parte* order.

In conclusion, the learned counsel for the appellant beckoned upon this court to quash and set aside the ruling and order of the trial tribunal in Misc. Application No. 69 of 2022 and the *ex parte* proceedings in Application No. 100 of 2021 and order the Application No. 100 be heard interparties and allow the appeal with costs.

Responding, the learned counsel for the respondent opted to combine and argue all grounds together. The counsel was brief and focused. Mr. Lufuyo argued that it is indisputable fact that the trial tribunal is vested with discretion

to set aside *ex parte* Judgment, however, the applicant is required to assign sufficient grounds or reasons which prevented him to appear before the Court at the time of delivery of the said *ex parte* order.

The counsel went on to state that the main reason to ask is whether the appellant managed to assign sufficient ground before the tribunal to warrant his application to be granted. In his view, the appellant failed to assign any sufficient reasons which prevented him or his counsel to appear on 15th November, 2021 when the said *ex parte* order was delivered. The counsel stated that if I traverse through the records of the trial tribunal I will realize that this case has been prosecuted by two counsels namely; Kumbukeni Kondo and Eliaman Daniel was disclosed and not Kumbukeni Kondo, the same applies on 21st December, 2021, whereby only reasons for Kumbukeni Kondo were disclosed as opposed to Eliaman Daniel. Mr. Lutufyo was in accord with the trial tribunal's decision that the appellant failed to adduce sufficient grounds.

The counsel stressed that the appellant and his counsel have never appeared before the tribunal from 15th December, 2021 up to the conclusion of the matter despite the fact that they were served to appear at the tribunal.

In conclusion, the learned counsel for the respondent stressed that the appellant has not adduced sufficient reasons to warrant the trial tribunal to

grant his application. Mr. Lutufyo urged this Court to dismiss the appeal in its entirety with costs for want of merits.

On the strength of the above submission, he urged this court to dismiss the appeal with costs.

After a careful perusal of the submission made for the appeal by the appellant and the respondent and after having gone through the court records, I have come to the following firm conclusions. In determining this appeal the main issue calling for determination is *whether the appeal is meritorious*.

I have opted to combine the second, third and fourth grounds since they are intertwined. Except for the first ground which will be argued separately.

On the second, third and fourth grounds; the appellant complained that he notified the tribunal of his absence. Ms. Kumbukeni also raised a ground of sickness and stated that sickness is a good ground to move the tribunal to allow her application. Also, the appellant's counsel is faulting the Chairman for failure to find that the appellant adduced sufficient reasons to move the tribunal to extend the time to set aside the *ex parte* judgment.

I have weighed the arguments for and against the appeal as presented to me by both learned counsel. I think the applicant's counsels have sufficiently explained the reason for not appearing in court when his case was dismissed for want of prosecution. I have reached that conclusion having considered; among other things; the conduct before the dismissal order.

In **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER372 it was stated that the applicant's conduct before the alleged non-appearance should be taken into consideration in an application of this nature. Ms. Kumbukeni, respondent's counsel was present in court on 12th July, 2022 when the matter was scheduled for mention, and the tribunal scheduled a hearing on 21st September, 2022. On the said date, Mr. Eliamin Daniel appeared at the tribunal and the matter was scheduled for hearing on 27th October, 2022. Mr. Lutufyo, counsel appeared for the applicant and Mr. Eliamani Daniel appeared for the respondent. Mr. Lutufyo was ready for hearing but Mr. Daniel prayed for an adjournment. The tribunal scheduled hearing on 15th November, 2022. However, on 15th November, 2022, the applicant and his counsel appeared in court for hearing.

The record reveals that Mr. Daniel wrote a letter informing the tribunal four days before the hearing date that on 15th November, 2021 he will appear before Hon. Biswalo, J. In my considered view, I find that the Advocate appearing in superior courts and officially notifying the tribunal is one of the good grounds which may justify setting aside an *ex parte* decision. See the case of **Fatuma Kitwana Yusuph v Millenium Microfinance (T) Ltd**, Land Appeal No. 41 of 2020. Therefore, I am in accord with Ms. Kumbukeni that the issue whether the letter was properly placed in the file of the tribunal has nothing to do with the respondent's counsel who has done his part by submitting the said letter to the tribunal, and the same bears a stamp to show that it was received.

I have also considered the fact that it is in the interest of justice and the practice of this court that, unless there are special reasons to the contrary, applications are determined on merits as it was held in the case of **Fredrick Sclenga & another v Agnes Masele** [1983] TLR 99 and **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

I do differ with the trial tribunal findings and Mr. Lutufyo submission that the case has been prosecuted by two counsels namely; Kumbukeni Kondo

and Eliaman Daniel thus Ms. Kumbukeni Kondo, counsel was also required to disclose her reasons for non-appearance, this does not concern the tribunal since already Eliamani Daniel informed the tribunal that he will not be able to appear at the tribunal on the date when the matter was scheduled for hearing. The counsels are the ones who know their scheduling of handling their cases therefore since Eliamani Daniel informed the tribunal the same sufficed. In my considered view, I find that the absence of Ms. Kumbukeni should not be used to disallow the appellant's application to set aside the *exparte* Judgment.

The ground of sickness is an added ground that the respondent's counsel was not able to appear at the tribunal when the Chairman delivered the *exparte* Judgment. However, as long as the appellant's counsels managed to state good reasons for their absence on the hearing date, the same suffices.

In the upshot, the appeal succeeds and is accordingly allowed. I proceed to quash and set aside the Ruling and orders thereto of the District Land and Housing Tribunal for Temeke in Misc. Application No. 69 of 2022 and the *exparte* proceedings in Application No. 100 of 2021. I order that Application No. 100 of 2021 be restored to the tribunal for continuation

from where it stopped. For the avoidance of doubt, the circumstances of this appeal are such that there should be no order to costs.

Order accordingly.

Dated at Dar es Salaam this 7th December, 2022.




A.Z.MGEYEKWA

JUDGE

07.12.2022

Judgment delivered on 7th December, 2022 in the presence of Ms.

Kumbukeni Kondo, counsel for the appellant.




A.Z.MGEYEKWA

JUDGE

07.12.2022

Right to appeal fully explained.