

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO.305 OF 2021**

(Arising from the District Land and Housing Tribunal for Ilala at Ilala in Land  
Application No. 266 of 2020)

**CYPRIAN JOHN MUSHI ..... APPELLANT**

**VERSUS**

**TPB BANK PLC ..... 1<sup>ST</sup> RESPONDENT**

**TANZANIA QUALITY AUCTION MART LTD ..... 2<sup>ND</sup> RESPONDENT**

**SHOMARI SAIDI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 27.04.2022*

*Date of Judgment: 29.04.2022*

**A.Z.MGEYEKWA, J**

The appellants have lodged this appeal against the Ruling of the District Land and Housing of Ilala in Misc. Land Application No.430 of 2020 dated 17<sup>th</sup> January, 2021. The material background facts to the dispute are not difficult

to comprehend. They go thus: the appellants filed an application to restore the Misc. Land Application No. 430 of 2021 which was dismissed on 9<sup>th</sup> June, 2021, the appellant's grounds for nonappearance was sickness. He complied that he fall sick on 8<sup>th</sup> June, 2021, therefore, he was unable to appear at the tribunal on 9<sup>th</sup> June, 2021 when the case was scheduled for hearing. The respondent disputed the application.

The District Land and Housing Tribunal for Ilala at Ilala determined the application for restoration and found that the appellant had not adduced sufficient reasons to move the tribunal to restore the Misc. Application No. 430 of 202, hence the application was dismissed.

The appellant was not happy with the decision of the District Land ad Housing Tribunal. Therefore, he preferred this appeal on one ground of grievance; namely:-

1. That, *the District Land and Housing Tribunal erred in law and fact by dismissing Misc. Land Application No. 430 of 2021 without considering the reasons adduced by Appellant.*

When the matter was called for hearing before this court on 27<sup>th</sup> April, 2022, the appellant had the legal service of Mr. Zidadi Mikidadi, learned

counsel assisted by Ms. Fatuma Abdul, learned counsel. The 1<sup>st</sup> & 2<sup>nd</sup> respondent enlisted the legal service of Mr. Emmanuel Mwakywembe, learned counsel. The applicant served the 3<sup>rd</sup> respondent through substitution of service on 24<sup>th</sup> March, 2022 and the matter was set for hearing on 6<sup>th</sup> April, 2022 and again on 27<sup>th</sup> April, 2022. However, the 3<sup>rd</sup> respondent did not show appearance. Therefore this court granted the appellant's Advocate prayer to proceed *ex parte* against the 3<sup>rd</sup> respondent.

Getting off the ground, on the sole ground of complaint, Mr. Zidadi was brief and focused. He submitted that the appellant lodged an application for restoration of Misc. Application No. 430 of 2021 to restore the Land Case No. 308 of 2018, but the application was dismissed. He went on to submit that dissatisfied, the appellant lodged decided to lodge the instant appeal. Mr. Zidadi submitted that they proved their case that the appellant did not show appearance at the Tribunal on 9<sup>th</sup> June, 2021. He submitted that as per Regulation No. 11 (2) of the (District Land and Housing Tribunal) Regulation of.... The District Land and Housing Tribunal has discretionary power to set aside a dismissal order after being satisfied that the applicant has adduced sufficient reasons.

It was his submission that the appellant failed to appear at the tribunal for hearing because he was sick and there is a Hospital Chic which shows that he was hospitalized on 8<sup>th</sup> June, 2021 suffering from malaria. Mr. Zidadi submitted that the reason for sickness is a good ground for the application of this nature. Fortifying his submission, he cited the case of **Richard Mipawa Marara v FINCA Tanzania Ltd & another**, Land Appeal No. 51 of 2021, this court cited the case of Emmanuel Maira whereas the court held that health issues are not a choice of any human being. He blamed the Chairman for not considering the appellant's ground for sickness.

Mr. Zidadi continued to submit that the Chairman in his decision held that the appellant missed 3 hearings consecutively; on 3<sup>rd</sup> March, 2021, 24<sup>th</sup> May, 2021, and the date when the matter was dismissed on 9<sup>th</sup> June, 2021. It was his submission that the correct date to argue on was 9<sup>th</sup> June, 2021, the appellant was required to prove why he did not show appearance in exclusion of the previous dates. He added that in proofing that the appellant fall sick they tendered a sick sheet. He blamed the Chairman for not exercising the power judiciary based on evidence. Thus, it was his view that the District Land and Housing Tribunal erred in law for failure to restore the main case.

On the strength of the above submission, the learned counsel for the appellant urged this court to allow the appeal and afford the appellant right to be heard on merit.

In reply, Mr. Mkwakyembe came out forcefully and defended the District Land and Housing Tribunal's decision as sound and reasoned. Mr. Mkwakyembe argued that the appellant lodged Land Case No. 308 of 2018 but the records clearly show that the appellant did not appear at the Tribunal when the case was scheduled for hearing while Mr. Msangi, counsel Advocate appeared for the respondent.

He went on to submit that the hearing was adjourned and hearing was set on 24<sup>th</sup> May, 2022 but the appellant nor his Advocate appeared at the tribunal, he added that the matter was scheduled for hearing on 9<sup>th</sup> June, 2022 again, the appellant nor his Advocate appeared at the tribunal then under Regulation 15 (a) of the (District Land and Housing Tribunal) Regulations of... the respondent prayed the application to be dismissed for want of prosecution and the District Land and Housing Tribunal dismissed the application

Mr. Mkwakyembe continued to submit that thereafter the appellant lodged a Misc. Application No. 430 of 2021 for restoration of the Land Case No. 308

of 2018. He went on to submit that in his affidavit specifically paragraph 4, the applicant admitted that he did not show appearance on 9<sup>th</sup> June, 2021 and he communicated with his Advocate who informed him that he was not in Dra es Salaam. The learned counsel valiantly submitted that the appellant tendered a document that does not specify the name of the Doctor and the same is not signed.

Mr. Mkwenyembe did not end there, he submitted that the Chairman in his Ruling stated the reasons for dismissing the Land Case and reasons for rejecting the application. He went on to state that the Chairman observed that the last date when the appellant appeared at the Tribunal was on 3<sup>rd</sup> December, 2020 then from that date he did not show appearance until the date when the matter was dismissed. He added that the Chairman stated that the appellant did not show appearance at the previous hearing. He stated that court records are serious documents that cannot be impeached. To bolster his contention he cited the case of **Halfan Sudi v Abieza Chichil** [1998] TLR 227. The learned counsel went on to submit that Regulation 11 of the (District Land and Housing Tribunal) Regulation is in regard to the 1<sup>st</sup> day, the application can be dismissed while Regulation No. 15 included all dates.

He distinguished the cited case of **Richard** (supra) that the sickness accounted was based on one day while in the instant appeal the tribunal dismissed the case based on 3 days.

On the strength of the above submission, Mr. Mwakyembe, the learned counsel for the respondent beckoned upon this court to dismiss the appeal with costs.

In his rejoinder, the learned counsel for the appellant reiterated his submission in chief. Insisting, he submitted that the appellant justified his absence on the date when the matter was dismissed and on 10<sup>th</sup> March, 2021, and 24<sup>th</sup> May, 2021 the case was not dismissed. He submitted that the Hospital Chic with a headed paper of Kariakoo Dispensary and bears a Hospital stamp. He distinguished the cited case of **Halfan Sudi v Abieza Chichil** (supra) that it is irrelevant to the matter at hand.

In conclusion, Mr. Zidadi urged this court to allow the appeal and allow the parties to be heard on merit.

Having heard the counsels' contending arguments, the Court's duty is determined as to *whether the appeal is meritorious*.

In addressing the sole ground of appeal, the appellant's Advocate is complaining that the District land and Housing Tribunal erred in law and fact by dismissing Misc. Land Application No. 430 of 2021 without considering the reasons adduced by the appellant.

The learned counsels for both parties butting heads on the issue whether the appellant was required to give reasons for his absence on the previous days on 10<sup>th</sup> March, 2021 and 24<sup>th</sup> May, 2021 when the matter was scheduled for hearing. The learned counsel for the appellant contended that after the dismissal order which was issued on 9<sup>th</sup> June, 2021 the appellant was unable to attend his case at the Tribunal because he was sick.

In his further submission, Mr. Zidadi insisted that the appellant was required to defend himself as to why he was absent on the day when the application was dismissed in exclusion of 10<sup>th</sup> March, 2021, and 24<sup>th</sup> May, 2021 when the matter was scheduled for hearing. On his side the learned counsel for the respondent submitted to the effect that the Chairman was correct to dismiss the application for the reason that the appellant did not show appearance on the previous days when the matter was set for hearing.



I have perused the District Land and Housing Tribunal proceedings and noted that the applicant was absent on 10<sup>th</sup> March, 2021, 24<sup>th</sup> May, 2021, and 9<sup>th</sup> June, 2021 when the Chairman dismissed the application. In my considered view, I find that the appellant was right to defend his case based on the day when the application was dismissed on 9<sup>th</sup> June, 2021 for the only reason that, it was the day when the matter was dismissed. The previous days are adding up grounds for dismissing the application. Therefore the Chairman was required to analyse the reasons stated by the appellant whether his reasons for sickness were valid or otherwise.

In case the Chairman found that the reasons for sickness were vague, then in her decision, she was in position to cement her grounds for rejection the application by referring to the two days when the appellant was absent. Therefore, I am in accord with Mr. Zidadi, learned counsel that the Chairman did not consider the appellant's reasons for his non-appearance on the day when the application was set for hearing.

Next for consideration is whether the appellant proved that he was sick on the day when the matter was set for hearing. I would like to observe that as amply submitted by the applicant's Advocate, he has convinced this Court to

find that the applicant's delay was due to his sickness which is explicable and excusable as stated in the case of **John David Kashekya v The Attorney General**, Civil Application No. 107 of 2012 CAT (unreported). The Court of Appeal of Tanzania held that: -

*"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children which are yet in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and do whatever kind of work he is required to do."*

Similarly in the cited case of Richard Mipawa Manara (supra) my learned brother Hon. Kisanya, J held that:-

*"... sickness is a good cause since it not a choice of a human being but a cause over which one has no control".*

Guided by the above authorities, it is clear that sickness is reasonable ground for a person who has failed to do a certain action at the required time. In the situation at hand, the appellant claimed that he did not show appearance on the day when the case was set for hearing. In convincing the tribunal he attached a Hospital chic with headed paper Kariakoo Dispensary

dated 8<sup>th</sup> June, 2021, and an electronic pa receipt. The Hospital Chic is stamped and signed. The learned counsel for the respondent complained that the Hospital Chic does not bear the name of the Doctor in my view the signature of the Doctor or Nurse suffice to prove that the Hospital Chic was issued by the Kariakoo Dispensary.

Guided by the above cites authorities, I want to believe that the appellant was not in good health to attend the matter at the tribunal on the following day due to his sickness.

For the sake of clarity, I have read the case of **Halfan Sudi v Abieza Chichil** (supra). In **Halfan's** case, the issue for discussion was related to the impeachment of court records and the same is irrelevant to the matter at hand. In the instant case, unlike the cited case of **Halfan Sudi v Abieza Chichil** (supra), the appellant did not object that he was not present at the tribunal on 10<sup>th</sup> March, 2021, and 24<sup>th</sup> May, 2021.

Having said so, it is my respectful view that the appellant has adduced sufficient reasons for his non-appearance on the day when the application was dismissed on 9<sup>th</sup> June, 2021.

In the upshot, the present Land Case No. 308 of 2018 is restored, and the file is remitted to the District Land and Housing Tribunal for continuation from where it stopped when it was dismissed for want of prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order to costs.

Order accordingly.

Dated at Dar es Salaam this date 29<sup>th</sup> April, 2022.



A.Z.MGEYEKWA

**JUDGE**

29.04.2022

Judgment delivered on 29<sup>th</sup> April, 2022 via audio teleconference in whereas the appellant and Mr. Emmanuel Mwakyembe learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents were remotely present.



A.Z.MGEYEKWA

**JUDGE**

29.04.2022