

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 260 OF 2021
(Arising from Misc. Land Application No. 548 of 2020)**

ALOYCE CHACHA KENG'ANYA APPELLANT

VERSUS

1. HAJI MWIKALO

2. JOHN ONESMO WILSON



..... RESPONDENTS

JUDGMENT

Date of Last order: 26.07.2022

Date of Judgment: 28.07.2022

A.Z.MGEYEKWA, J

The present appeal stems from the decision of the District Land and Housing Tribunal for Temeke in Land Application No. 548 of 2020. The material background facts to the dispute are not difficult to comprehend. They go thus: the appellant and the respondent are disputing over a piece of land located. The appellant claimed that he is the administrator of the estate of his

late Makarani Mohamed Abdallah who is the father of the appellant and the first respondent is his cousin. The first respondent claimed that he legally sold the disputed piece of land to the second and third respondents to a tune of Tshs. 11,400,000/=. The appellant claims that the sale was illegal and at the time when he sold the suit land, the first respondent was not appointed as an administrator of the estate. The first respondent claimed that the suit land was family land and their late father divided some portion of the plot to his children thus the suit land is not part of those plots.

Aggrieved, the appellant appealed before this court against the decision of the District Land and Housing Tribunal for Temeke at Temeke and raised two grounds of grievance, namely:-

- 1. That the Honourable Tribunal grossly erred in law for failure to consider that the appellant established sufficient cause to grant the application.*
- 2. That the Honourable Trial Chairman grossly erred in law and facts in deciding that the applicant's affidavit was necessary while the affidavit presented in the Honourable tribunal suffice.*

When the matter came up for judgment on 26th July, 2022, the appellant enjoyed the legal service of Mr. Mwita Emmanuel, leaned counsel. The respondents were absent. Following the prayer by the Plaintiff's Advocate to

proceed *ex parte* succeeding the absence of the Defendants I am alive to the fact that the Defendants were aware of the hearing of this case since the summons were served to all respondents and later the respondents were served by way of publication in Kiswahili tabloids – *Mwananchi* Newspaper dated 9th June, 2022, the matter was scheduled for hearing on 13th July, 2022, but they did not show appearance. Again the matter was scheduled for hearing today on 27th July, 2022 but still, they did not show appearance. Therefore, this court granted the Plaintiff's prayer to proceed *ex parte* against the respondents.

In his submission, the learned counsel for the appellant was brief and straight to the point. He submitted that they have lodged the instant appeal against the decision of the Chairman in Land Application No. 548 of 2020. On the first ground, Mr. Mwita contended that the District Land and Housing Tribunal erred in law for failure to consider that the appellant established sufficient reasons for extension of time. The learned counsel for the appellant contended that the Chairman in his decision stated that there was a need for the applicant to file his affidavit. It was his view that in the applicant in his Chamber Summons, affidavit and supplementary affidavit established sufficient cause to warrant the tribunal to grant the application. He added that the Chairman did not go through and weigh the reasons

advanced by the appellant instead he went ahead and dismissed the application.

Submitting on the second ground, the learned counsel for the appellant argued that the Chairman grossly erred in law and facts in deciding that the appellant's affidavit was necessary while the affidavit presented in the tribunal sufficed. He added that the holding was *parimateria* and that the appellant's affidavit is important over the Advocate's affidavit. The learned counsel for the appellant argued that the rule governing recording affidavit is the source of information. To support his submission he cited the case of **El Nasir Import & Export Company v Jan Bros Investment Ltd & Another**, Misc. Land Application No. 713 of 2020 (unreported).

Mr. Mwita continued to submit that the counsel's affidavit contains the source of information, thus, the holding of the trial Chairman was *parimateria*. He contended that the deponent can be an advocate. To buttress his contention, Mr. Mwita cited Order XVIII Rule 3 of the Civil Procedure Code Cap. 33. He went on to submit that the case of **John Chuwa v Anthony Ciza** [1992] TLR 233 cited by the Chairman in his judgment is distinguishable from the fact of the instant case. He stated that in the cited case, the court was talking on specific manner.

On the strength above the learned counsel for the appellant beckoned upon this court to allow the appeal and set aside the judgment of the District Land Housing Tribunal with costs.

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

I have opted to combine the two grounds of appeal and argue them together because they are intertwined. The appellant's counsel is complaining that the trial Chairman grossly erred in law and fact for failure to consider that the appellant adduced sufficient cause to warrant the tribunal to grant his application and the Chairman misdirected himself to decide that the applicant's affidavit was necessary while the affidavit before the tribunal sufficed.

The record reveals that the applicant's counsel, Madata Julius Budodi filed his affidavit to support the applicant's application and Mr. Madata was representing the applicant in the said application. The counsel in his affidavit stated the reasons for his nonappearance on the day when the application was set for hearing. I fully subscribe to the submission made by Mr. Mwita that the case of **John** (supra) is distinguishable from the present case. In the cited case, the cashier affidavit was missing hence the court decided that an

affidavit of a person so material, as the cashier in the said case has to be filed. Unlike, the circumstances of the case at hand, the applicant had the representation of an advocate and he was so material because he is the one who appeared at the tribunal on behalf of the applicant. Therefore, I find that it was not correct to insist on the presence of the applicant's affidavit while the advocate was familiar with the case.

I have perused the applicant's affidavit and found that the learned counsel for the applicant narrated the whole instance. He stated the reasons for his nonappearance on the date when the case was scheduled for hearing on 7th September, 2020. The learned counsel in paragraph 2 stated that the main reason for non-appearance is because he was feeling unwell and he attached a sick chic (Annexure KLC1). The learned counsel also stated the reason for the applicant's nonappearance that on 6th September, 2020 his brother passed away and the learned counsel attached a burial certificate of the applicant's brother.

I have weighed the arguments for the application as presented by Mr. Mwita. I am in accord with the learned counsel for the appellant that Mr. Madata stated sufficient explanation the reason for not appearing at the tribunal when the case was dismissed for want of prosecution. I have also considered 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 the application of this nature. 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 **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

I have also considered the fact that the respondents would neither be prejudiced nor suffer any irreparable injury by the grant of this application as it was held in the case **Jesse Kimani v Mc Cornel and another** [1966] EA 547.

Having said so, it is my respectful view that Mr. Madata adduced sufficient reasons for his non-appearance and the applicant's appearance on the day when the application was dismissed.

In the upshot, I allow the appeal and set aside the ruling dated 4th May, 2021 and I order the Misc. Application No. 149 of 2014 dated 7th September, 2020 be restored to Temeke 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 28th July, 2022.




A.Z.MGEYEKWA

JUDGE

28.07.2022

Judgment delivered on 28th July, 2022 via audio teleconference in whereas

Mr. Mwita Emmanuel, learned counsel for the appellant was remotely present.




A.Z.MGEYEKWA

JUDGE

28.07.2022