

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

**LAND APPEAL NO. 378 OF 2023**

(Originating From Misc. Application No. 111/2023, Ilala District Land and Housing Tribunal)

**JANETH JOSEPHAT NGUNG’U.....APPELLANT**

***VERSUS***

**SIMON ABEL MBATIAN.....1<sup>ST</sup> RESPONDENT**

**SUMA MBATIAN.....2<sup>ND</sup> RESPONDENT**

**NMB BANK PLC.....3<sup>RD</sup> RESPONDENT**

**TAUSI AUCTION MART & COURT BROKER CO. LTD.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

05<sup>th</sup> to 8<sup>th</sup> December, 2023

**E.B. LUVANDA, J**

This appeal is in respect of the ruling of the Tribunal refusing to set aside the dismissal order for non appearance dated 30/03/2023 in Application No. 87/2021. The Appellant named above preferred five grounds of appeal, namely:

1. That the Tribunal chairperson grossly erred in fact and law by not establishing the extent to which land application No. 87 of 2021 was negligently or deliberately abandoned by the Appellant and/or his Advocate on 30<sup>th</sup> March, 2023.

2. That the Tribunal Chairperson erred in fact and law forgetting that Land Application No. 87 of 2021 was scheduled for mention or for necessary orders to allow the parties who had applied before the Tribunal to be given more time to find ways of settling the matter and come with the deed of settlement which would be registered in Court. Therefore, the matter was not scheduled for hearing as other Respondent No. 2 and 4 were not present in court (sic, tribunal).
3. That the Tribunal erred in fact and law for not taking into consideration the affidavit filed by the Counsel for the Appellant who said that on 30<sup>th</sup> March, 2023 there was heavy traffic jam on the road and that he developed vomiting and diarrhea on the way causing him not to attend the Tribunal and reported the illness to the nearest Health Centre (Mtani Dispensary) and produced the medical receipt.
4. The Tribunal Chairperson erred in fact and law for not taking into consideration that Appellant did not attend the matter knowingly that the matter was for mention and not for hearing thus her Advocate who have instructions from her would attend as required by law as per Order III rule 1 of Civil Procedure Code Cap 33 R.E. 2019.
5. That the Tribunal misdirected for dismissing the chamber application forgetting the matter was for mention and not for hearing.

Mr. Joseph John Manzi learned Counsel for Appellant submitted generally that Civil (sic) Application No. 87/2021 was scheduled for mention on 30/03/2021 pending prayers by the Appellant for time to find ways of setting the matter out of court with the Third Respondent, which prayer was granted on 17/11/2022. He submitted that knowing the matter was scheduled for mention on 30/03/2023 the Appellant being represented by Advocate Mbelike Mangungu from the firm of RI Law & Co. Advocates, went to attend the funeral ceremony of her neighbour. He submitted that the Appellant's Counsel while on the way going to court (sic, tribunal) delayed to appear in court on time due to traffic jam and developed stomach upset by vomiting and diarrhea, thus he could not attend the Tribunal and reported the illness to the nearest health center called Mtani Dispensary. He faulted the Tribunal Chairman for dismissing the matter while under negotiation and settlement out of court and when it was for mention. He cited the **Mrs. Fakhria Shamji vs. The Registered Trustees of the Khoja Shia Ithmasheri (MZA) Jamaahat**, Civil Appeal No. 143 of 2019 (C.A.T) Mwanza, page 9 and 10, for a proposition that it is an error to dismiss the matter when is scheduled for mention.

In reply, Ms. Jamilah Kassim Athumani learned Counsel for Third Respondent, submitted that the Appellant failed to state what was the reason for non

appearance on 30/03/2023, arguing the laboratory investigation form tendered by the learned Counsel for Appellant does not show at what time she reported at the dispensary and the name of the person who attended her at the dispensary. She submitted that the Counsel for Appellant did not adduce sufficient and good cause that would have warranted the Tribunal to set aside the dismissal order.

She cited the case of **Mathias Ephraim Hanai vs. CDH Finance Company Limited & Another**, Misc. Civil Application No. 431/2021. She submitted that the argument by the Appellant that she did not appear because she was attending funeral ceremony of her neighbour, argued does not hold water and it is a proof that the Appellant did not have interest in prosecuting her case. She distinguished **Mrs Fakhria Shamji** (supra) arguing each case must be decided on its own merits, citing **Compassion International Tanzania vs. Nickson Alex**, Revision No. 66/2020 HC.

Mr. Simon Abel Mbatian learned Counsel for First Respondent, submitted that the Appellant had not stipulated the genuine reasons as to why she failed to appear before the Tribunal on the fixed date, argued the Counsel had an option to ask another advocate to hold her brief upon falling sick.

According to the record of the Tribunal, specifically an affidavit in support of the application for restoration of Application No. 87/2021 and setting aside dismissal

order dated 30/03/2023, the deponent therein stated at paragraph three that, he delayed to appear before the court (sic, tribunal) due to traffic jam. At the same time the deponent at paragraph five stated that the reasons for non appearance was not attributed by negligence rather emanate from his ill health of frequent vomiting and diarrhea, thus attended at a nearest health center styled Mtani Dispensary. The deponent did not depict time under which she was caught by the alleged traffic jam, neither mentioned which road was entangled by that challenge of heavy traffic jam, nor stated at what time the traffic jam ended. The deponent could not tell at what time she visited or reported at the alleged Mtani Dispensary. In the submission in support of this appeal, the learned Counsel for Appellant attempted to harmonize that the ailment of vomiting and diarrhea started on the traffic jam. But there is no such averment in the affidavit. What is in the affidavit, is that the Counsel for Appellant failed to attend due to two distinct reasons, heavy traffic jam and ill health. This suggest, the learned Counsel was gambling or betting. No wonder the Counsel for Appellant stated that she spent the whole day at the dispensary, at the same time stated that on the same day she made a physical follow up at the Tribunal to ascertain the status of the case, only to be told by the Tribunal clerk that the matter was dismissed.

The learned Counsel for Appellant was not specific ask at what time she visited at the Tribunal, neither disclosed the name of the alleged tribunal clerk. In fact she could not tell how she could manage to spent the whole day at the dispensary at the same time make physical follow up at the Tribunal. Neither stated if at any time during the date time on the material day, she recovered from frequent vomiting and diarrhea to enable her manage to reach at the Tribunal.

Above all, a copy of medical laboratory investigation form annexure JN1, the technician who conducted a diagnosis did not indicate time in, only depicted time out to be 19.23 hours. In other words, there is no any proof if at all at the time of dismissal the learned Counsel was at the alleged health center, or if at all the learned Counsel spent the whole day thereat, as alleged.

The argument that the Appellant failed to appear in person due to a fact that was attending burial ceremony of her neighbour, was a mere statement from the bar, not supported by any cogent evidence. As correctly ruled by the Tribunal no affidavit was sworn by the Appellant stating reasons for her non appearance. The case of **Mrs. Fakhria Shamji** (supra) is distinguishable, therein the apex Court was deliberating dismissal of a preliminary objection on the mention date and the argument were aligned on that angle vis-à-vis the right to be heard.

The appeal is without substance. There is no valid reasons for reversing the decision of the Tribunal.

The appeal is dismissed with costs.



E. B. LUVANDA

**JUDGE**

08/12/2023

Judgment delivered in the presence of Mr. John Manzi learned Counsel for Appellant and in the absence of the Respondents.



E. B. LUVANDA

**JUDGE**

08/12/2023