

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

LAND APPEAL NO. 26645 OF 2023

(Originating from Misc. Application No. 266 of 2019, Temeke District Land and Housing Tribunal)

NAOMI ATHANAS LEGUNA.....APPELLANT

VERSUS

HEMED SHAMTE.....RESPONDENT

JUDGMENT

22/03/2024 to 16/04/2024

E.B. LUVANDA, J

In the memorandum of appeal, the Appellant named above raised two grounds of appeal challenging the decision of the Tribunal which disallowed his application for setting aside the Tribunal's dismissal order dated 31/07/2019 in Application No. 300 of 2016. The grounds of appeal are: One, the trial Chairperson erred in law and fact when dismissed the application in holding that the Applicant's application was left unattended for three months while not; Two, the trial Chairperson erred in law and fact by dismissing the Applicant's application illegally for want of prosecution on the mentioned stage, an action when (sic) resulted in a miscarriage of justice by its failure to

restore Land Application No. 30/2016; Three, the trial Chairperson erred in law and fact by dismissing the application, flouted both the reasons that the Applicant was attending the seminar, but held that the same was hearsay in the absence of the affidavit, without considering the annexed letter and the fact that the deponent of the affidavit had the knowledge of it and verified and that the deponent was at the High Court on the material date on allegation there was no any proof despite the reason and its annexes (sic).

Mr. Mussa Kyoba learned Counsel for the Appellant submitted that Application No. 30 of 2016 was dismissed for being unattended for three months consecutively, under regulation 15(a) of the Dispute Courts (the District Land and Housing Tribunal) Regulation GN 174 (sic, 173) of 2003. He submitted that going through the records before the dismissal of Application No. 30 of 2016 on 31/07/2019, on the Appellant's Counsel appeared on 21/06/2019 before Honorable Chenya who informed them that the matter will be assigned to another Chairperson. He submitted that on the very date they appeared before Hon. Mnzava who was not ready to hear the matter hence deferred to 31/07/2019 when the suit was scheduled for mention to set a hearing date. He submitted that the suit was dismissed inside (sic) forty days but dismissed on the reason under regulation 15(a), arguing the dismissal was premature. He submitted that a case cannot be dismissed on the date of mention, citing

the case of **National Bank of Commerce vs Grace Sengela** [1982] TLR 248.

For ground number two, the learned Counsel submitted that the learned Chairperson did not extricate the authenticity of annexure THA-2, arguing the facts of the letter speak for themselves, for the explanation that there was no need to append an affidavit. He faulted the holding by the Tribunal that failure to append an affidavit amount to hearsay, arguing it was a mistaken belief for reason that it was proved on the authenticity of information gathered from the Applicant vide the deponent's verification clause, citing **Lisa E. Peter vs Al-Hushoom Investment**, Civil Application No. 147 of 2016.

The learned Counsel submitted that he could not procure summons for attending Land Case No. 460 (sic) Ramadhan Mbwana vs Hamad Safari Land Division, for reason that it was a continuation of schedule of the hearing, arguing he requested for proceedings which were never availed.

He submitted that the Applicant had a good cause for her non appearance for being in Morogoro attending seminar as proved by the letter.

Mr. Frank Mposso learned Counsel for Respondent, in reply submitted that the law is clear that when the party to the suit have failed to appear on her case and left it unattended for more than three months then the Tribunal have the power to dismiss the case, citing regulation 15(a) of GN 173 (supra). He

submitted that Application No. 30 of 2016 was dismissed on 20/01/2020 while the last appearance of the Appellant and her counsel was on 25/10/2019. He submitted that the Tribunal had made a last adjournment for the Appellant to appear, but the Appellant and her counsel disobeyed the order thus the Tribunal dismissed the application. He cited the case of **Gibbe East Africa Ltd vs Syscon Builders Ltd and Others**, Civil Application No. 5 of 2005; **John Mwansau vs The Republic**, Criminal Revision No. 8 of 2000, for a proposition that court orders must be obeyed. He distinguished **National Bank of Commerce** (supra) being irrelevant and overtaken by event by GN 173 (supra) that it provides for dismissal of cases left unattended for three months.

For ground number two, the learned Counsel submitted that the said letter does not reveal or demonstrate the dates which the Appellant was at Morogoro attending seminar. He submitted that the Appellant failed to advance sufficient reasons to move the Tribunal to exercise its discretion power to set aside the dismissal order, arguing the affidavit sworn by the Appellant's counsel was not supported by evidence to backup their allegation that the Appellant was at Morogoro and her counsel was attending a case at the High Court. He cited the case of **Joachim Lory vs Magreth Peter**, Civil

Appeal No. 348 of 2021 and **Joseph Thomas Kleruu vs CRDB Bank PLC**,
Misc. Civil Application No. 331 of 2022 HCT.

On rejoinder, the learned Counsel for Appellant submitted that the date when the application was dismissed was below three months, counting from the last date of appearance which was 25/10/2019 to 20/01/2020.

To my respective view, the learned Chairperson overstretched in the impugned ruling at page six last paragraph extreme bottom proceeding to the next page seven first paragraph, also at the second paragraph last line of the same page seven by bringing into play the provision of regulation 15(a) of GN 173 (supra), which brought a confusion that the learned Chairperson meant that Application No. 30 of 2016 was dismissed for reason that it was abandoned and left unattended for a period of three months, while in fact the learned Chairman was merely suggesting that the said rule allow dismissal of the matter where the Applicant abandon it for a period of three months. Also, the learned Chairperson made an obiter that the Tribunal had made a last adjournment without avail.

Going by the records in Application No. 30 of 2016, on 21/06/2019 Honorable Chenya-Chairman remitted the matter to the Chairman in charge for reason that he was transferred to another duty station. Later on, the same date parties re-appeared before Hon. Kirumbi-Chairman who made an order for re-

assignment to Hon. Mnzava-Chairman who slotted the matter for hearing on 31/07/2019 at 9.00 hours. On 31/07/2019 which was an aggregate of forty days counting from the last date of appearance on 21/06/2019, Honorable Mnzava dismissed the application for reasons that the matter remained pending for three years without being heard and Ms Mauki learned Counsel who was holding brief for Mr. Mussa Kyoba for the Appellant had no instructions to proceed and did not tender proof of summons or cause list from the High Court where Mr. Kyoba advocate was alleging appearing, citing regulation 13(3) of GN 173 (supra).

Therefore, the dismissal order made no mention of three months abandonment nor cited regulation 15(a) GN 173 (supra), neither questioned on personal appearance of the Appellant. Nowhere the proceedings reflect an order for last adjournment or a schedule for mention. All these were new matters which were introduced in the submission and impugned ruling. The records in Application No. 30 of 2016 depict the matter was mentioned at once on 12/04/2016 only where the Counsel for Appellant attended. Thereafter the matter was mounted for hearing and it was called on sixteen sessions where the Counsel for Appellant attended fifteen sessions in exclusion of the last session when the matter was dismissed.

It is to be noted that the dismissal order was made under the provision of regulation 11(1)(b) of GN 173 (supra). However, the learned Chairman invoked the provisions of regulation 13(3) of GN 173 (supra) for an attempt to introduced the requirement of court summons or causelist. To my view the dual provisions are mutually exclusive, in that regulation 11(1)(b) cater for hearing generally and where the applicant is absent without good cause, while regulation 13(3) is all about representation before the Tribunal and the situation where the advocate is absent.

Be as it may, at paragraph two and six of the affidavit in support of the application, the learned Counsel for Appellant pleaded to have been appearing in Land Case No. 460 of 2017 before Mallaba, J as he then was, and appended three letters annexure TA-1 to the affidavit, where he requested for court proceedings for a coram dated 31/07/2019 in Land Case 460 of 2017. Those letters were received by this Court on 1/08/2019, and reminder were received on 21/08/2019 and 29/08/2019. According to the learned Counsel, eventually on 29/08/2019 he was told by the personal secretary of the Judge that there is a problem of printer machine for printing the same.

To my view, the learned Chairperson ought to have considered the facts pleaded reflecting efforts made to prove the non attendance on 31/07/2019 to have met the minimum threshold of establishing that the absent was for good

cause in terms of sub-regulations (1)(b) and (2) of regulation 11 GN 173 (supra).

I therefore fault the decision of the Tribunal and rule that the Appellant established a good cause for non-attendance on 31/07/2019. Consequently, the dismissal order dated 31/07/2019 is set aside for the matter to proceed with expeditious hearing as per the order of the Tribunal dated 21/06 2019.

The appeal is allowed. No order for costs.



E.B. LUVANDA
JUDGE
16/04/2024

Judgment delivered in the presence of Mr. Mussa Kyoba learned Counsel for the Appellant and Ms. Beatrice Njau Advocate holding brief for Mr. Frank Mposso learned Counsel for the Respondent.



E.B. LUVANDA
JUDGE
16/04/2024