

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT ARUSHA

MISC. LAND APPEAL NO. 10 OF 2020

(C/F from the District Land and Housing Tribunal for Mbulu at Dongobesh Misc. Land Application No. 162 of 2017, Land Appeal No. 80 of 2016 Originating from the Gehandu Ward Tribunal Application No. 3 of 2016)

PAULINA MATAY APPELLANT

VERSUS

JOSEPH AWEDA RESPONDENT

JUDGMENT

24th June & 7th August, 2020

Masara, J.

Paulina Matay, the Appellant herein, unsuccessfully sued Joseph Aweda, the Respondent, on a claim of a piece of land, at Gehandu Ward Tribunal in Land Application No. 3 of 2016. The trial Tribunal decided in favour of the Respondent. Being aggrieved, the Appellant appealed to the District Land and Housing Tribunal for Mbulu vide Land Appeal No. 80 of 2016. On 9th August, 2017 when the appeal was fixed for hearing, the Appellant's advocate did not enter appearance. He had, however, written a letter to the Tribunal Chairman praying for either an adjournment or the appeal be disposed of by way of written submissions. He also asked one of his colleagues to hold his brief, and tender the letter to the Tribunal on the material date. The Tribunal acceded to the prayer advanced and ordered the Appeal be heard through written submissions.



According to the order, the Appellant was to file his written submissions by 23rd August, 2017, reply submission was to be filed by 6th September, 2017 and rejoinder by 13th September, 2017 and 18th September, 2017 was fixed for mention so as to ascertain the judgment date. It appears from the record of the Tribunal that the Appellant's advocate did not file written submission as ordered. Even on the 18th September, 2017 when the case was set for mention, he did not enter appearance for the reason that he had an emergence in Arusha. On that same date, the Tribunal chairman dismissed the Appeal for want of prosecution.

After that decision, the Appellant's advocate filed Misc. Land Application No. 162 of 2017 on 12th October, 2017 moving the Tribunal to set aside the dismissal order. After hearing the application, the Tribunal dismissed the Application for the reasons that the Applicant's advocate failed to adduce sufficient reasons for failure to prosecute his client's case. It is against the dismissal of the Application that the Appellant seeks to challenge in this court. The Appellant has preferred this appeal on three grounds as reproduced hereunder:

- a) That, the District Land and Housing Tribunal erred in law and fact to dismiss the application notwithstanding the overwhelming evidence as deposed in the affidavit in support of the application and the oral submissions that counsel for the Appellant in Land Appeal No. 80/2016 failed to file Written Submission for the reasonable cause;*
- b) That, the District Land and Housing Tribunal failed to find out that the Respondent failed to challenge the Application in his oral submission on opposing the application; and*
- c) That, the District Land and Housing Tribunal misdirected itself in dismissing the application basing on a wrong assumption that*

counsel for the Appellant in Land Appeal No. 80 of 2016 failed to file written submission while knowing the date to file the same.

The Appellant therefore prays that this appeal be allowed with costs and the Court orders that Land Appeal No. 80 of 2016 be heard on merits. At the hearing of the appeal, the Appellant was represented by Mr. John J. Lundu, learned Advocate, while the Respondent appeared himself unrepresented.

Submitting on the first ground of appeal, Mr. Lundu was of the view that the Tribunal erred in dismissing the Application without considering the grounds contained in the Affidavit and oral submissions. Mr. Lundu reiterated that he had asked his colleague to hold his brief but there was no record in the file, therefore he could not file submissions as scheduled, that is why extension of time was sought. On the second ground of Appeal, Mr. Lundu averred that at the hearing the advocate reiterated the contents of the affidavit however the Tribunal Chairman stated that he heard both parties but the Respondent did not direct his mind on the counter affidavit.

Arguing the third ground of Appeal, the Appellant's advocate stated that the Tribunal Chairman misdirected himself as the cited case/authority is as if the Advocate was present and that he failed to file submission without reasonable grounds. He further added that the Appeal was dismissed on the mention date. Mr. Lundu prays that the appeal be allowed so that the Appeal can be heard on merits because the parties herein are not proper



parties who are supposed to litigate. He argues that it is the Respondent's mother who was to be a party and not the Respondent.

The Respondent, on his party, prayed to adopt the contents in his reply to the petition of Appeal and the same be considered as his oral submissions. Basically, the gist of his reply is that the Tribunal was right in dismissing the Application since the Appellant's advocate failed to adhere to the order of the Tribunal and he failed to account for his failure to file the written submissions. Reacting on the concern raised by Mr. Lundu whether the he is a competent party in this case, the Respondent argued that the land in dispute was given to him by her mother since 1989. She relinquished all her rights over the disputed land to him as she is of a very old age. The Respondent admitted that his mother is alive and she is now 85 years old.

I have dispassionately considered the petition of Appeal, the reply thereto and the oral submissions by both the Appellant's advocate and the Respondent. The main point of contention in this appeal is whether the Tribunal was justified in dismissing the Application to set aside the dismissal order.

I need not reemphasise that it is a cardinal principle of the law that a person against whom a dismissal order was issued has a duty to prove sufficiently the reasons for his failure to attend the court leading to the dismissal of the case or application. The court has consistently insisted that position in a number of decisions. For example, in ***Abdallah Zarafi Versus Mohamed Omari*** (1969) HCD No. 191, Said J, held:

"There are occasions when a court is empowered by law to set aside its own orders. A trial court is empowered to set aside an ex-parte decree or an order dismissing a suit passed as consequence of non-appearance so long as the person against whom the decree or order for dismissal of the suit is able to establish that he was prevented by sufficient cause from appearing in court on the material day. The same principle would apply to Appeals dismissed in consequence of non-appearance by the Appellant."

The law is also settled that failure to file written submission as ordered by the court has the same effect as non-appearance in Court on the date the case is set for hearing. The effect is either to dismiss the case or it is heard ex-parte. The Court of Appeal in ***National Insurance Corporation of (T) Ltd & Another Versus Shengena Limited***, Civil Application No. 20 of 2007 (Unreported) had this to say:

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... It is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

In the case at hand, the record of the District Land and Housing Tribunal and what can be gathered from the Affidavit of the Appellant's Advocate show that on 9th August, 2017 when the appeal was set for hearing the Appellant's advocate did not enter appearance. The sole reason he advanced was that he was engaged in other matters in Arusha as stated in paragraph 2 of that Affidavit. Further, Mr. Lundu, through his letter, had moved the court to either adjourn the appeal for some future date or allow the appeal to be argued through written submissions. The Tribunal granted one of the prayers sought by Mr. Lundu. It ordered that the Appeal be

argued through written submissions. The filing schedule was set, but Mr. Lundu did not adhere to the filing schedule. He neither filed written submission nor sought extension of time to file the same. It is also not in dispute that on 18th September, 2017 when the appeal was set for mention so as to set a judgment date, Mr. Lundu did not enter appearance for the reasons that he had an emergence in Arusha. Such emergence was not made known to the Tribunal at the time he sought to set aside the dismissal order. The inactivity of the Appellant's counsel proves nothing other than gross negligence or carelessness. It is beyond explanations that Mr. Lundu, having sent his colleague to hold his brief on 9th August, 2017, with the prayers made to the Tribunal, did not deem it appropriate to make a follow up of what transpired at the Tribunal. The fact that Mr. Lundu did not enter appearance in court on the date the case was set for mention following the scheduling order and the fact that he did not file written submissions as ordered by the court without furnishing sufficient reasons for his failure to do so, leads this Court to agree with the Tribunal Chairman that he slept over his rights. He ought to have been diligent in prosecuting his client's case as both the law and the law profession demand maximum integrity of an attorney while handling a client's case.

I do agree with the Tribunal's findings that the reasons advanced by Mr. Lundu that he was engaged in other matters in Arusha the day he was supposed to enter appearance in the Tribunal were trivial. That is more so as those matters were not revealed. The Court of Appeal in ***John Dongo***

& 3 Others Versus Lepasi Mbokoso, Civil Application No. 14/01 of 2018

(unreported) had this to say:

*"As shown earlier, the affidavit and written submission indicate the sole ground for delay is the fact that, the counsel for the applicants was overwhelmed by a myriad of both domestic and international undertakings. **It is so unfortunate, the said undertakings were not disclosed and when exactly they did take place as a way of accounting for each day of the delay.**"*

(Emphasis supplied)

Reasons for delay or failure to do anything required to be done following an order of the court has to be disclosed to the court in order to prove that the delay was not necessitated by the applicant's negligence but rather unavoidable circumstances. Had Mr. Lundu attended the Court on 18th September, 2017 when the matter was set for mention, he could have applied for extension of time to file the requisite written submissions.

Mr. Lundu has asked this Court to set aside the dismissal order as the same was done on a mention date. The claim that the appeal was dismissed on a mention date has no legs to stand on. That date was set purposely for the Tribunal to ascertain whether the parties adhered to the scheduling order and set a judgment date. Having realized that the Appellant's advocate failed to exercise his rights to file written submissions, the Tribunal cannot be faulted for taking the course it did as failure to file written submission as ordered by the court has the same effect as non-appearance in court on the day the case is set for hearing. Judgment date

could not be set since there was no written submissions from the Appellant or Respondent that would enable the Court to write a judgment.

The other issue raised in the grounds of appeal seeks to fault the Tribunal Chairman for not allowing the application given that the Respondent did not address his mind to the counter affidavit. I find this argument naval, as the Respondent's duty of challenging the application was limited to the response, he had made in the Counter affidavit. A counter affidavit is evidence and can be relied to by a court without there being a need to expound the same in oral or written submissions.

Furthermore, the claim raised by the Appellant's counsel regarding the proper party in this case between the Respondent and his mother needs not detain us as the same would be best answered while determining the merits of the Appeal filed at the Tribunal.

In the upshot, and for the reasons stated above, the appeal lacks merits. It stands dismissed in its entirety with costs. The decision of the District Land and Housing Tribunal for Mbulu refusing to set aside the dismissal order is hereby upheld.

Order accordingly.




Y. B. Masara
JUDGE
August 7, 2020