IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANOUS LAND CASE APPLICATION NO. 54 OF 2022

(Arising from Ruling of High Court Moshi dated 26/8/2022 in Land Appeal No. 39 of 2021)

JONATHAN SHADRACK LYIMO.....APPLICANT

VERSUS

ALEX MAKOMBO .....1ST RESPONDENT

MASHIMA SACCOS LTD .....2ND RESPONDENT

TANFIN CONSULTANT EA LTD .....3RD RESPONDENT

RULING

23rd March & 29th May 2023

A.P.KILIMI, J.:

Mr. Jonathan Shadrack Lyimo hereinafter to be referred to as Applicant has filed this application in this court by way of chamber summons under Order XXXIX Rule 19 of the Civil Procedure Code Cap.33 R.E. 2019 and any other enabling provision of the law. He has supported this application by affidavit duly sworn by his advocate.

The applicant is seeking the following orders;

1. This court to vacate its orders dated the 26th day of August 2022 that dismissed the Applicant's Appeal for want of prosecution.
2. Make orders for restoration of the Appeal appointing a date for hearing of the same for determination of the same on merits.
3. Costs to follow the events.
4. Any other orders as this Court may deem fit and just to grant.

In the course of hearing this application, the applicant was represented by Mr. Philip Njau learned Counsel while Mr. Tumaini Materu represented the first respondent.

Mr. Njau prefaced his submission by stating that, He prayed to adopt the sworn affidavit of Emanuel Mlacki who was the advocate of the dismissed Land Appeal No. 39 of 2021.

He further said that, the affidavit deposed the date set for hearing of the appeal, but the applicant' advocate fell sick and attended at Health Center up to 29th August, 2022. He has attached Hospital report to bolster his argument in that affidavit, he added that the issue of sickness is a natural happening, no one can escape. He then prays this court to consider proof from the Hospital and see there was a case which hindered him to attend the court.

Mr. Njau further submitted that, according to the record; it appears on 25th August of 2022, when this court made an order for oral hearing to be affected on the next date, which is on 26th August, 2022. The appellant therein was not present in the court, because the date of hearing was delivered to the advocate, who had committed himself for the oral hearing. Therefore, by any means hearing was to be submitted by advocate, and he is doubting whether the date was communicated to the appellant at all, and this doubt comes because on that date appellant himself was not present, therefore he urges that, the appellant was not aware of the date of hearing and that is why he did not appear. Even if he could have been in court, his matter could not proceed with the hearing because his advocate was not present. So that could have been taken to the benefit of doubt.

The intended appeal is aiming at challenging the decision of Chairman of Moshi District Land and Housing Tribunal, who dismissed Land Application No. 158 of 2019, wherein appellant was not given right to be heard, the records of the tribunal shows that Land Application No. 158 of 2019 was dismissed on the date it was marked for hearing.

So, Mr. Njau prays this court to go through the proceeding of tribunal in order to confirm what he has just submitted. He further argued that, in respect to Article 13 (1) to (6) (a) (b) of Constitution of United Republic of Tanzania provides equality before the law and the right to be heard. This fundamental right has been stressed in numerous Court decision and this court has never hesitated to grant prayer for application for restoration of suit, where the right to be heard has been denied. He then invited me to refer the case of **Pili Ernest v. Moshi Musami** Civil Appeal No. 49 of 2019, reported on TANZLII. Therefore, the counsel submits that the trial tribunal chairman breached the fundamental right of the appellant when he made a decision to dismiss Land Application No 155 of 2019 without hearing the parties, and without assigning any reasons for that dismissal. Upon this illegality he prayed for this court to restore the appeal, so that the illegality be pointed out and open the door for its correction.

The counsel further insisted that, where a point of law is a point of illegality the court has never hesitated to grant application, he therefore prays to site also the case of **Jamel S. Mkumba and Other v. AG,** Civil Application No. 24 of 2019 TANZILI 2023 CAT 15/2/2023, where it was observed that the point of illegality stated was enough for restoration or

extension of time. Then he concluded by praying this court to make a finding that the intended appeal was aimed at challenge the decision of the tribunal as submitted above, of which this court has a duty to open the door to enable its rectification.

In reply Mr.Materu prayed to adopt counter affidavit to form part his submission, then contended that according to affidavit deponed by applicant's advocate , the main reason of nonappearance on 26/8/2022 was illness, the attached medical report reveals, the said advocate was admitted at Himo Health Centre on 26/9/2022. Therefore, that being the case implies that no proof to indicate that on 26/8/2022 when Land Appeal was fix for hearing he was sick, so he was sober and not sick.

Mr. Materu further submitted, is the appellant who filed Land Appeal No. 39 of 2021, so he has duty to observe progress of his appeal. Engaging an advocate is not a reason to exclude appellant in his appeal, and advocate Emmanuel Mlaki was before this court 25/8/2022, therefore such an order for hearing of 26/8/2022 was communicated to the applicant.

The counsel for respondent further contended that, on the said date, the court order for last adjournment in respect to hearing, this is because

the said appeal was adjoined several time by the applicant and his advocate, due to that excuse, the court order the Applicant to consult his advocate the case be heard by written submission, the Applicant informed the court that his advocate is ready for written submission, then on 19/7/2022 the court order the same be heard by written submission, the applicant did not comply the order of the court, despite of not doing so, first respondent filed his submission on 16/8/2022. Then when the case was scheduled for mention on 25/8/2022 to see whether both parties have complied scheduling order. Applicant' advocate appeared and pray the court to be heard, the court vacated previous order and order oral hearing on 26/8/2022. On that date neither the applicant nor his advocate showed up.

Next Mr. Materu contended that, the reasons stated on the affidavit talks merely for advocate that he was not present, but not the applicant who filed the case, so he prays this court to see no reasonable grounds, and no proof of the said date that they were sick, the Hospital evidence is dated 26/9/2023 which is not disputed in this case. In respect to the right to be heard on the ground of illegality, the said reason is not pleaded in his affidavit, so the counsel prays the same not to be considered.

Lastly, Mr. Materu contended, it is not proper for the counsel for applicant to discuss outcome of intended appeal, what to be discuss is the reasons for failure to appear which constitute sufficient cause. So, he prays the court to disregard that submission, the counsel also said, cases stated by applicant' counsel are distinguishable because their circumstances are different with this case at hand, because he was given chance to be heard but he waived that right.

In brief rejoinder, Mr. Njau contended in respect to Medical Report that, the date is same except for the month which he said was an error when the Doctor was recording, he then insisted that the Advocate was admitted on the same date. Then in respect to the presence of the Applicant on 26/8/2022, the order for oral hearing to be on that date, was communicated to advocate and not applicant, therefore the Applicant was not communicated. Therefore, the applicant cannot be blamed because he could not know what transpired in court.

Lastly, Mr. Njau concluded, one of the reasons to set aside a dismiss order, is where there is illegality, and on the part of Land Tribunal when one go through chamber summons states this ground, this is illegality which he

has submitted on it, he added that, this court as a fountain of justice, is required to see if there is illegality, and see whether may issue the right orders. Then he prayed this application be allowed to restore the appeal as a means of maintaining justice.

Having considered the chamber summons, it's supporting affidavit, counter affidavit by first respondent as well as the parties' submissions. The point for determination before this court is whether applicant has successfully advanced sufficient reasons for this court to grant the prayer for re-admission of the appeal.

Before I proceed it has been convenient to me to highlight the law which will back up my considerations. Re-admission of the appeal is regulated by Order XXXIX Rule 19 of the Civil Procedure Code (Cap. 33 R.E. 2019) which states that:

> *"Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal: and,* ***where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing*** *or from*

depositing the sum so required, the ***Court shall re-admit the appeal*** *on such terms as to costs or otherwise as it thinks fit"*

[Emphasis provided]

The applicant' counsel has advanced three reasons for this court to re-admit the appeal dismissed. The first is that, the applicant's advocate fell sick and attended at Health Center. Upon my perusal of the medical sheet attached with applicant' affidavit, I concede with the respondent's counsel that the same shows he was admitted at Himo Health Centre on 26/9/2022 and not 26/8/2022 when the case was ordered for hearing.

In rejoinder the counsel for applicant insisted the date is same except for month which is an error when the Doctor was recording, and insist that the Advocate was admitted on the same date. I have paid time to think on this, to my view it does not click my mind to be true. I have asked myself why he has not said so in his submission in chief until was raised by respondent' s counsel in reply or why was not averred in applicant's affidavit.

It is a trite law submission are not evidence and they cannot be used to substitute the contents of their affidavit as it was observed by the Court of Appeal of Tanzania in the case of **Bruno Wenceslaus Nyalifa v. Permanent Secretary, Ministry of Home Affairs and the Attorney General,** Civil Appeal No. 82 of 2017 where it was held that:

> *"Submissions are not evidence submissions are generally meant to reflect the general features of a party's case. They are elaborations on evidence already tendered. They are expected to contain arguments and the applicable law. They are not intended to be a substitute for evidence."*

(See also the case of **Registered Trustees of the Archdiocese of Dar es Salaam versus The Chairman, Bunju Village Government & 11 Others,** Civil Appeal No. 147 of 2006 (unreported).

In view of the above, I think it could have been sound the said anomaly of dates be deposed in affidavit rather than submission on the hearing. In the said regard I am forced not to agree with the applicant's counsel and thus the reason of illness is hereby rejected.

Another reason, Mr. Njau said the applicant in person was not aware of the date of hearing, because the order was not communicated to him, and that is why he did not appear. Even if he should have been in court, his matter could not proceed with the hearing because his advocate was not present. In my view this argument cannot be reasonable, because the case belongs to the party himself, he is the boss and employer of his advocate, therefore anything should be reported to him as owner of the case. It is my opinion the advocate was negligent not to do so. The negligence by the advocate should not be excused in the circumstances of this matter. The advocate should act diligently to inform his client because nobody knows tomorrow. Thus, this reason is also rejected.

The next reason advanced to re-admit the dismissed appeal is illegality. The counsel for applicant expounded that at the tribunal the fundamental right was breached because the applicant was not afforded an opportunity to be heard. He said the said tribunal dismissed Land Application No 155 of 2019 without hearing the parties and without assigning any reasons for doing so.

I am mindful, what amounts to good cause depends on the peculiar circumstances of each case. (See the case of **Mwanza Director M/s New Refrigeration Co. Ltd vs. Mwanza Regional Manager of Tanesco Limited and another,** [2006] TLR 329).

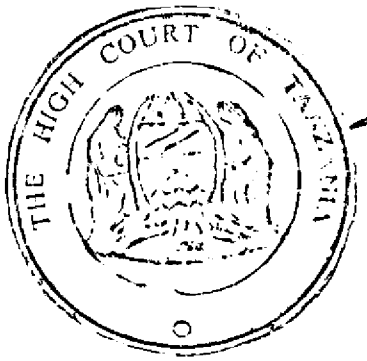
This is an application to set aside the order dismissed the appeal for nonappearance, in my opinion the important question is not whether the case for the applicant was soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant and his advocate nonappearance on the date the appeal was dismissed. (See the case of **Nasibu Sungura v. Peter Machumu** [1998] TLR 501).

In view of the above, the rationale is that, parties must obey court orders otherwise it will be the place for mockery for justice. Thus, illegality in respect to a previous case sought to be redeemed, cannot be a shield to the abuse of legal process. Having reasoned so, I also of considered opinion this is not cogent reason, I thus reject it forthwith.

In view of what I have endeavored to discuss above, I find this application is devoid of merit and is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at **MOSHI** this 29th day of May, 2023



A. P. KILIMI

JUDGE

29/5/2023