

TANZANIA / JUDGMENT

kamalia salum and another vs mathias zakari mapunda 2023 tzhc 20771 31 august 2023

COURT
TZHCDECIDED
31 August 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF
SONGEA AT SONGEA LAND CASE APPEAL NO. 39 OF 2023 KAMALIA SALUM
..... 1ST APPELLANT MOHAMED HASSAN NANGOMWA
..... 2ND APPELLANT VERSUS MATHIAS ZAKARIA MAPUNDA
..... RESPONDENT (Appeal from the ruling of the District Land and
Housing Tribunal of Songea at Songea in Misc. Land Application No. 243 of 2022)

JUDGMENT

9th and 31st August, 2023 KISANYA, J.: The appellants herein lodged a chamber summons preferred under regulation 11(2) of the Land Disputes Courts (The District Land Housing Tribunal) Regulations, 2003 (henceforth “the Regulations”), moving the District Land and Housing Tribunal of Songea at Songea (trial Tribunal) to set aside its ex-parte judgment dated 30th November, 2022 in Land Application No. 89 of 2019. In the said ex-parte judgment, the respondent, Mathias Zakaria Mapunda was declared the lawful owner of a piece of land described as Plot No. 1249, Block DD, Bombambili, Songea Municipality. Apart from the appellants’ joint affidavit, the said application was supported by an affidavit of Mussa Bakari. It was stated in both affidavits 1 that, the appellants failed to appear when the suit was called on for hearing from the 8th November, 2022 because the 2nd appellant was taking care of the 1st appellant (his wife), who was sick. After hearing both parties, the trial Tribunal held that the appellants had failed to prove the ground of sickness deposed in the supporting affidavits. In consequence, the appellants’ application was dismissed for want of merit. Not amused, the appellants have lodged the present appeal premising it on two grounds of appeal to the following effect: One, the trial tribunal erred in law and facts to dismiss the application while the appellants advanced sufficient ground to set aside the ex-parte judgment. Two, the trial tribunal erred in law and facts by deciding the matter contrary to the law. By consent of the parties, this appeal was argued by way of written submission. The appellants fended themselves without representation, while the respondent was represented by Mr. Benard Mapunda, learned advocate. Submitting in support the first ground of appeal, the appellant argued that the trial tribunal failed to consider

the ground of sickness of the 1st appellant. It was their submission that the said ground was duly proved and also that, one. Musa Bakari informed the trial tribunal about that the 1st appellant's sickness. In that regard, the appellants argued that it was wrong for the trial tribunal to adjourn the matter to the next date. They added that the 2nd appellant was not informed of the date of judgment. As for the second ground of appeal, the appellants submitted that, had the trial tribunal directed its minds correctly, it would have found that the reasons deposed in the affidavits were sufficient to set aside the ex-parte judgment. In the end, they prayed for this appeal to be allowed with costs. Responding, Mr. Mapunda started by drawing attention to the court that the appellants' written submission was filed out of time ordered by this Court. He pointed out that the written submission was filed on 17th August, 2023 in lieu of 16th August, 2023. He referred this Court to the case of *Finca (T) Limited and Kipongodoro Action Mart vs Boniface Mwalukisa*, Civil Application No. 589 of 2018 in which the Court of Appeal cited its decision in the case of *Bushiri Hassan vs Latifa Lukio Mishayo*, Civil Application No. 3 of 2017 (unreported), where it was underlined that delay of a single day must be accounted for. Countering the first ground of appeal, Mr. Mapunda faulted the appellants for being the reason of the several adjournments of the matter until when the trial court decided to proceed ex-parte. He was of the firm view that the proceedings are controlled by the court and not the parties. 3 Therefore, the learned counsel urged this Court to consider that the appellants used the trial tribunal to delay the determination of the matter. Coming to the second ground, Mr. Mapunda submitted that the trial tribunal did not error in its decision. He also stated that the appellant had not clearly explained the law which was infringed by the trial tribunal. As for the issue of summons of judgment to the 2nd appellant, the learned counsel submitted that 2nd appellant was duly informed by the person who was sent to the trial tribunal when the matter proceeded ex-parte. That said, the learned counsel beseeched that the appeal be dismissed for lack of merit. Having examined the record and the written submissions, there is no doubt that the appellant's written submissions were filed out of time scheduled by this Court for one day. In view of the position of law stated in the case of *Finca (T) Limited* (supra), the appellant ought to have prayed for leave to file their written submissions out of time. However, I have considered the length of delay and the fact that the respondent's was not prejudiced by the said delay. This is so because his written submissions in reply was filed within the time specified by this Court. In the circumstances, I find it apposite to determine the appeal on merit. As for the merit of the appeal, I am of the view that, both grounds of appeal hinge on the issue, whether the appellants advanced good cause warranting the trial tribunal to set aside its ex-parte judgment. The starting point is regulation 11(2) of the Regulations cited in in chambers summons filed before Tribunal. It stipulates: "A party to an application may, where he is dissatisfied with the decision of the Tribunal under sub-regulation (1), within 30 days apply to have the orders set aside, and the Tribunal may set aside its order if it thinks fit so to do and in case of refusal appeal to the High Court." Pursuant to the above cited provision, the trial tribunal has discretion to set aside or refuse to set aside an ex-parte judgment made under regulation 11(1) of the Regulation. It is worth noting here that, the Regulations do not state the factors to be taken into account by the trial tribunal in determining an application before it. However, borrowing a leaf from Order XIX, Rule 4 of the CPC, the underlying factors for consideration is good cause for non-appearance on

the date of hearing. That being the position, the trial Tribunal was duty bound to consider whether the appellants' affidavits in support of the application disclosed good cause for their failure to appear on the date of hearing. In his ruling on the application led to this appeal, the learned chairperson of the trial tribunal applied the stated position of law as shown hereunder: 5 "Kanuni ya 11(2) ya Mahakama ya Migogoro ya Ardhi (Baraza la Ardhi na Nyumba la Wilaya) za 2003 tangazo la Serikali na 174 inaelekeza wazi kwamba maombi ya kuweka kando hukumu yatawalishwa Baraza la Ardhi na Nyumba ndani ya siku thelathini (30) na baraza linawea kuweka kando hukumu hiyo ikiwa linaona inafaa hivyo. Swala ambalo litaangaliwa na baraza hili katika maombi haya ni iwapo waleta maombi wametoa sababu ya msingi ya kutokufika tarehe 08/11/2022." The learned chairperson went to examine the record. Having done so he noticed that when the matter came for hearing, Mussa Bakari who reported to the trial Tribunal that the applicants were sick did not produce evidence to such effect. That was also after considering that the medical document appended to the affidavit was issued on 7/11/2022 and that said Mussa Bakari was present on 7/11/2022 when the matter was adjourned for hearing on 8/11/2022. Upon further consideration of the names and other contents of the medical document relied upon by the appellants, the learned chairperson held the view that the 2nd appellant had not proved that he was taking care of the 1st appellant who was sick. Having glanced at the affidavits in support of the application, I agree with the learned trial chairperson that appellants did not prove the ground of sickness advanced therein. At the outset, it is essential to reiterate the 6 trite law that, an adjournment on the ground of sickness must be supported by medical proof. I am supported by the case of Christina Alphonse Tomas (As Administratrix of the late Didass Kasele Deceased) vs Saamoja Masingija, Civil Application No. 1 of 2014,

[2016] TZCA 289 (21 April 2016) wherein, the Court of Appeal held that: "The Court has always discouraged adjournments on grounds of sickness not supported by medical proof. The learned advocate is aware or ought to be aware that the Court has to have evidence to support grounds for an adjournment. We totally discourage the idea of seeking adjournments not supported by concrete proof that they are genuine applications." See also the decision of this Court in the case of Pastory J. Bunonga vs Pius Tofiri, Misc. Land Application No. 12 of 2019 (unreported) where it was emphasised that: "But with all fairness the fact cannot be founded on mere allegations. There always must be proof by the applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step within the prescribed time." It is on record that, vide his letter dated 6th November, 2022, the 2nd appellant informed the trial tribunal both appellants would not appear for hearing on 7th November, 2022 on the ground that he was nursing his sick 7 wife (the 1st appellant). However, no medical proof was appended to that letter. Similarly, when matter was adjourned for hearing on 8th November, 2023, the appellants sent Mr. Mussa Bakari to pray for adjournment on the same ground of sickness of the 1st appellant. Yet, no medical proof was produced by the said Mussa Bakari. On that account, I find that the trial tribunal was enjoined to order the matter to proceed ex-parte. As to what happened on 8th November, 2022, when the matter proceeded ex-parte, the appellant produced a medical card alleged to have been issued by Tumaini Dispensary

(Mzena). Pursuant to the said card one Kamalia S Mkule was attended at that hospital on 7th November, 2022. As rightly observed by the learned trial chairperson, it is not known as to why the said card was not produced when Mr. Mussa Bakari was sent to pray for adjournment, if it was issued on 7th November, 2022. That aside, the said medical card shows that the patient's name was Kamalia S Mkule, a male person, while the 1st appellant is a female namely, Kamalia Salum. It was not stated in the appellants' joint affidavit whether Kamalia S. Mkule and Kamalia Salum is one and same person. Further to this, the said card does not bear the seal of Tumaini Dispensary (Mzena). 8 I am alive to the stance stated in a number of cases including, Emmanuel R Maira vs The District Executive Director Bunda District Council (Civil Application No 66 of 2010) 2010 TZCA 87 (13 August 2010) that, sickness is a good cause. However, apart from proving the sickness, the applicant must establish how the sickness prevented him from taking the requisite step. [See the case Pastory J. Bunonga vs Pius Tofiri, Misc. Land Application No. 12 of 2019 (unreported)]. In the instant case, appellants did not prove that the 1st appellant was sick when the matter came for hearing on 8th November, 2022 and that the 2nd appellant was taking care of her on that day. On the foregoing, I cannot fault the trial Tribunal court for arriving at such finding. As regards the contention that the 2nd appellant was not served with the notice of the date of judgment, the affidavit of service bears it out that the process server failed to find him. However, I have considered that the 1st appellant is the wife of the 2nd respondent. The affidavit in support of the application shows that the duo were living together. That is why the 2nd appellant deposed to have been nursing the 1st appellant who was sick. In that regard, I am of the view that the 2nd appellant had implied information on the date of the judgment. This is so when it is considered that when the matter came for judgment, the 1st appellant was recorded to 9 have informed the trial tribunal that the 2nd appellant had an emergency. All the above considered, I find no merit in both grounds of appeal. In the event, this appeal is found devoid of merit. I hereby dismiss it with costs. DATED at SONGEA this 31st day of August, 2023 S.E. KISANYA JUDGE 31/08/2023 Judgment delivered this 31st day of August, 2023 in the presence of the 2nd appellant and the respondent and in the absence of the 1st appellant. Right of appeal explained. S.E. KISANYA JUDGE 31/08/2023 10

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