

TANZANIA / JUDGMENT

veronica john ufunguo vs life server microfinance company and 2 others 2023 tzhc 15704 28 february 2023

COURT
TZHCDECIDED
28 February 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA LAND APPEAL NO. 94 OF 2022 (C/F Karatu District Land and Housing Tribunal, Misc. Application No. 125 of 2021. Originated from Karatu District Land and Housing Tribunal, Application No. 24 of 2019) VERONICA JOHN UFUNGUO.....APPELLANT VERSUS LIFE SERVER MICROFINANCE COMPANY..... 1st RESPONDENT NKAYA COMPANY LIMITED..... 2nd RESPONDENT JUDITH FRANCIS LELO..... 3rd RESPONDENT

JUDGMENT

06/02/2023 & 28/02/2023 MWASEBA, J. The applicant, Veronica J. Ufunguo, filed an application at Karatu District Land and Housing Tribunal (herein DLHT) via Application No. 24 of 2019 against the respondents herein. She claimed for a declaratory order that the purported sale of the suit land by the 2nd respondent to the 3rd respondent is illegal and that the respondent had no justification to sale the disputed land. When the application was called for bearing on Page 1 of 10 08/12/2021, Ms Anna Ombay learned counsel holding brief of Advocate John Materu notified the court that he was attending another case at the High Court of Arusha before Hon. K.N. Robert J. However, the tribunal disbelieved the notice for want of a summons as a proof and proceeded to dismiss the application under Rule 11(1) (b) of the Land Disputes (the District Land and Housing Tribunal) Regulation G.N 174/03. On 24/12/2021 the applicant via his counsel filed an application for the tribunal to set aside its dismissal order dated 8/12/2021 and restore Application No. 24 of 2019. His application was dismissed with costs by the tribunal on 13/07/2022 for the reasons that no plausible reasons were given for their non-appearance on 08/12/202 when the application was called for hearing. Being aggrieved by the said decision, she knocked the door of this court armed with the following grounds of appeal:

1. That, the learned Chairman erred in law in basing his decision on the provision of Regulation 13 (1) and (3) of G.N No. 174 of 203 that was not used to dismiss Application No. 24 of 2019.

2. That, the learned Chairman erred in law and in fact in holding that there was no proof that on 8th December, 2021 the appellant's advocate was in the High Court of Arusha. <J <■ Page 2 of 10
 3. That, the learned Chairman erred in law and in fact in holding that the information given to the trial tribunal by advocate Anna Ombay that the appellant's advocate was appearing in the High Court Arusha was not sufficient in law.
 4. That, the learned Chairman erred in law and in fact in holding that the reason that the appellant could not appear in the trial tribunal on 8th December, 2021 because she went to Moshi to take her child from school is unsubstantiated.
 5. That, the learned chairman erred in law and in fact in holding that the appellant failed to provide good cause to convince the trial tribunal to restore the dismissed application. On 14/11/2022 when the application was called for mention, parties prayed to dispose of the appeal by way of written submissions and the court granted their prayer. Mr Mitego Methusela and John F. Materu, learned counsels appeared for the applicant whilst Mr Alex Mmbando, learned counsel represented the respondent. Supporting the appeal, on the first ground, Mr Materu submitted that, it was wrong for the DLHT to dismiss the application under Regulation 13
- (1) and (3) of G.N No. 174/2003 while the proper provision was Regulation 13 (2) of the same G.N because the applicants counsel did Page 3 of 10 not fail to appear twice when the matter was scheduled for hearing. He submitted further that even the applicant was not present to answer if she would proceed with her case in the absence of her counsel or not. Further to that, as the application was dismissed under Regulation 11
 - (1) of G.N No. 174 of 2003, the applicant was not required to comply with Regulation 13 (2) and (3) of the same Regulation but rather, she was only required to show sufficient cause prevented her to appear before the tribunal when the matter was scheduled for hearing. His argument was supported with the case of Adam Mohamed Zuberi vs Kulwa Mashaka, Civil Appeal NO. 175 of 2018 (Unreported). On the second ground of appeal, Mr Materu submitted that, the evidence submitted to support the application to set aside was enough to prove that he was prevented by a good cause to appear before the tribunal for hearing. He added that even Advocate Anna Ombay who hold his brief told the tribunal that he was appearing before Hon. Mzuna, J and Robert, J for hearing. Thus, the said reason was sufficient to set aside dismissal order. On the third ground of appeal, Mr Materu contended that since the application was dismissed under Regulation 11 (1) of G.N No. 174 of 2003 then Regulation 13(3) of the same G.N was inapplicable. He Page 4 of 10 submitted further that; Regulation 13 (3) is unapplicable because there was an appearance on the part of the applicant via Adv. Anna Ombay who was holding him a brief. It was his submission on the fourth ground of appeal that, it was wrong for the trial chairman to put emphasis on the absence of the applicant herself who stated she went to pick her daughter at Moshi since the applicant could appear via her advocate. He supported his argument with Section 30 of Cap 216 R.E

2019. On the last ground of appeal, which related to the third ground, Mr Materu insisted that the reason that he was appearing for another case at the High Court of Arusha in Land Case No. 16 of 2019 and 27 of 2020 was a good cause to convince the tribunal to restore Application No. 24 of 2019. He cemented his argument with the case of Cooperative and Rural Development Bank vs Filton (Tanzania) Ltd (1993) T.L.R 284. They prayed for the appeal to be allowed and the trial tribunal be ordered to hear Application No. 24 of 2019 from where it ended before dismissal and before another competent Chairman. Objecting the appeal, starting with the first and third ground of appeal, Mr Mmbando argued that, when dismissing the application for restoration the Hon. Chairman did not use Regulation 13 (1) and (3) Page 5 of 10 of GN 174 of 2003 but he was responding to the argument raised by the counsel for the applicant that he was attending another case at the High Court of Tanzania at Arusha. He further submitted that, since the applicant had representation, Regulation 13 (1) and (3) was a proper provision and the same require a counsel to furnish a proof of summons in case he is absent for the reason that he was attending another case at the Higher court. Further to that, it is impossible to exercise Regulation 11 (1) of GN 174/2003 without the conditions stipulated under Regulation 13 (1) and (3) of GN 174/2003. As for the second ground of appeal, Mr Mmbando replied that, the affidavit supporting the application to set aside dismissal order shows what transpired at the High court on 8th day of December, 2021 and not on 16th November and 29 November, when those cases were scheduled for hearing on 8/12/2021 to show if the counsel submitted his concern regarding his case at the tribunal. He contended further that the counsel for the applicant did not bother to notify the respondent regarding the scheduled date at the High court nor gave any evidence to Advocate Anna Ombay who was holding his brief to proof that he was prevented with a good cause which led the tribunal with no option than to dismiss the application. ' Page 6 of 10 On the fourth ground of appeal, the learned counsel for the respondent replied that the allegation that the applicant was at Moshi picking her child from the school was just an afterthought as the same was never mentioned by Advocate Anna on 08/12/2021. More to that, when the advocate is representing a client, he is not required to step into the shoes of her client despite that they were not present on 8/12/2021. His argument was cemented with the case of Said Abdallah Shekigenda and Hassan Shekigenda vs Abdallah Ally Shembago, Land Appeal No. 32 of 2020 (Unreported). On the fifth ground of appeal, Mr Mmbando submitted that the trial tribunal was not duly notified regarding the absence of the counsel and the applicant herself and they failed to submit proceedings of the date the High court case was scheduled for hearing. Thus, he argued that as he was aware of the High Court cases, they could have filed an adjournment letter prior to the hearing date rather than adjourning it on the day fixed for hearing. His argument was supported with number of cases including the case of Adam Mohamed Zuberi vs Kulwa Mashaka (supra) and Nyang'uye vs Walter Raphael Kiswaga and 4 Others, Misc. Land application No. 736 of 2016. He prayed for the appeal to be dismissed with costs. Page 7 of 10 In his rejoinder, Mr Materu reiterated what was already submitted in his submission in chief and prayed for the appeal to be allowed and Application No. 24 of 2019 be restored and proceed before another competent Chairman. Having gone through the rival submission by the parties, the main issue for

determination is whether the appeal has merit. In determining this appeal all the grounds of appeal will be argued reciprocally as they both challenge the act of the trial Chairman to dismiss the application to set aside dismissal order of Application No. 24 of 2019 while claiming the applicant and her counsel had good cause for their absence. Regulation 11(2) of GN 174 of 2003 stipulates that: "A part 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 orders if it thinks fit so to do and in case of refusal appeal to the High Court." (Emphasis added) Looking at this provision, it does not state clearly what are the grounds to be considered by the Tribunal to set aside its decision under Regulation 11 (1) of GN 174 of 2003 but rather if it thinks fit so to Page 8 of 10 do. That means the Tribunal will have to exercise its discretion dealing with such applications. In the Case of TANESCO vs IPTL and 2 others

- (2000) TLR 324 it was stated that: "Judicial discretion must be guided by law and rules and not by humor. It must as well not be arbitrary and fanciful but legal and regular". Being guided by the above decision, it is a settled principle that whoever seeks for setting aside dismissal order must furnish good cause for his nonappearance. This was well stated in the cases of Jumanne S/O Chakupewa Mchondo v Bahebe S/O Rutubisha & 4 Others, Misc. Land Application No. 41 of 2021, Sadru Mangalji v Abdul Aziz Lalani & 2 Others, Misc. Commercial Application No. 126 of 2016 and Nassib Sungura Vs Peter Machumu (1998) TLR 497. In the latter, it was held that: - "In an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed." In our present case the counsel for the appellant clearly stated that when the matter was scheduled for hearing at the Tribunal he was Page 9 of 10 ordered to appear in the High Court before two different judges. He furnished the honourable Chairman with the proceedings which proves that on the material date he was appearing before Hon. Mzuna J and Hon. Robert J for the backlog Land cases No.16 of 2019 and Land case No. 27 of 2020. Further to that, the learned counsel for the appellant sent his learned sister, Anna Ombay Advocate to hold his brief and she duly notified the Tribunal that Mr Materu was appearing before the High Court. In my considered view, this was a sufficient cause for nonappearance. In the upshot, I find substance in this appeal and allow it. The dismissal order is therefore set aside, and the matter is ordered to proceed for hearing from where it ended before dismissal and before another competent Chairman. Each party should bear own costs. It is so ordered. DATED at ARUSHA this 28th day of February, 2023. Page 10 of 10

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Prepared on 14 October 2026 · Esheria