IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CIVIL APPEAL NO. 534 OF 2020

LOSHILU KARAINE..... 1st APPELLANT

JOHN MAKUPA.....2nd APPELLANT

JOSEPH ANGESON MUSHI.....3rd APPELLANT

SAUTEU LAIZER.....4th APPELLANT

VERSUS

ABRAHAM MELKIZEDECK KAAYA (*Suing as Legal Personal Representative of Gladness Kaaya*).....RESPONDENT

(Appeal from Ruling and Order of the High Court of Tanzania at Arusha)

(Maghimbi, J.)

dated the 17th day of June, 2016

in

Miscellaneous Land Application No. 26 of 2016

.....

JUDGMENT OF THE COURT

13th & 22nd February, 2024.

FIKIRINI, J.A.:

The appellants, Loshilu Karaine, John Makupa, Joseph Angerson Mushi and Sauteu Laizer were applicants in Miscellaneous Land Application No. 26 of 2016, seeking restoration of Miscellaneous Land Application No. 282 of 2014 dismissed on 14th January, 2015 for want of

prosecution. The application for restoration, likewise was dismissed on 17th June, 2016, for want of prosecution.

To capture the facts leading to this application a brief background might be useful. Before the District Land and Housing Tribunal of Arusha at Arusha (DLHT), the respondent, Abraham Melkizedeck Kaaya (*As Administrator of the Estate of the late Gladness Kaaya*), fruitlessly sued the appellants and others not part of the present application claiming landed property namely farms nos: 1658, 1659 and 1660, situate at Olosiva Village, Arumeru District, Arusha Region. Not amused with the decision, the respondent appealed to the High Court in Land Appeal No. 42 of 2008. In course of the hearing, the court noticed that there was evidence lacking and therefore ordered the tribunal to receive additional evidence prior to composing a judgment. In compliance with the High Court order, additional evidence was taken by Honourable. C. P. Kamugisha, Chairman. Following the exercise, the Chairman composed a judgment. In its judgment dated 18th September, 2014, the respondent won.

Aggrieved the appellants challenged the DLHT decision. In the process the appellants noted they were out of time. The intended appeal

was therefore to be preceded with an application for extension of time. Consequently, vide Miscellaneous Land Application No. 282 of 2014, an application for extension of time to lodge an appeal to the High Court was made. The application was barren of fruit as it was dismissed for non-appearance. Following that, the appellants filed several applications to restore Miscellaneous Land Application No. 282 of 2014, including Miscellaneous Land Application No. 18 of 2015 which was struck out for being defective. Undeterred and luckily Miscellaneous Land Application No. 116 of 2015 for extension of time was granted on 11th February, 2016. Miscellaneous Land Application No. 26 of 2016 was heard and dismissed as alluded to above.

In the affidavit in support of the application for restoration, Ms. Christina Y. Kimale, learned counsel, deposed that in the early morning of 14th January, 2015, she fell sick with stomach upset coupled with vomiting. In the morning, she rushed to the hospital. Due to the short notice of the hearing and the sickness that struck her, she could not easily reach out either to her clients or the office so that someone else could attend and inform the court of her predicament. A certified medical

chit was annexed in paragraph 7 of the affidavit supporting the application.

Besides, she also pointed out that the service of notice on 13th January, 2015 for the hearing scheduled on 14th January, 2015 was too shot, for her to do anything. The High Court in its ruling criticized the counsel's failure to inform one or all of her clients or any other person from her chamber to attend in court and report her illness. This led the Judge to conclude that no sufficient reasons were advanced to allow the granting of the application for restoration of Miscellaneous Land Application No. 282 of 2014. Consequently, the High Court dismissed the application for restoration for lack of sufficient reasons.

Challenging the decision in Miscellaneous Land Application No. 282 of 2014, the appellants filed Miscellaneous Land Application No. 122 of 2016 for leave to appeal against the decision of the High Court in Miscellaneous Land Application No. 26 of 2016 and Civil Application No. 140/02 of 2018 for extension of time to lodge appeal. Both applications were granted thus the present appeal at hand, containing two grounds after the amendment order given on 14th February, 2023. The grounds are:-

1. The Honourable High Court Judge erred in law and fact by refusing to restore Miscellaneous Land Application No. 282 of 2014 which was dismissed for want of prosecution without taking into consideration the insufficiency of time of the notice of hearing that was served on the appellants' advocate on 13th January, 2015 to attend the hearing on 14th January, 2015 which could not accommodate unexpected events such as illness.

2. That the Honourable High Court Judge erred in law and fact by refusing to restore Miscellaneous Land Application No. 282 of 2014 dismissed for want of prosecution based on a single day notice of hearing which amounted to a denial of the right to be heard.

On the hearing date, Ms. Kimale and Mr. John Shirima both learned advocates appeared on behalf of the appellants and the respondent, respectively.

At the inception of her short address to the Court, Ms. Kimale commenced by adopting her written submissions lodged prior, in which she expounded on what transpired at 3.00 am, early hours of 14th

January, 2015. She also highlighted that the notice of hearing issued and served on her on 13th January, 2015, was too short for her to act appropriately after what had befallen her in those early hours of the morning. She thus prayed for the appeal to be allowed.

Mr. Shirima, on behalf of the respondent, had not filed a written submission, but addressed the Court, contending that while not disputing that illness is out of anyone's control, still blamed the appellants' counsel for failure to inform someone from her chamber or clients considering the notice was served and received by her on 13th January, 2015. Associating himself with the High Court decision, he contended that the appellant's counsel had ample time to do what was right. Concluding his submission, he urged the Court to dismiss the appeal.

Having heard counsel for the parties and examined the grounds of appeal, we think the appeal should not detain us long. We propose to start with the appellant's first ground of appeal, that the High Court Judge dismissed the application without taking into consideration of the short notice issued and the counsel for the appellants sickness, as the reason which hampered her court appearance.

It is settled law that, a party seeking to set aside an order dismissing a suit or application for want of prosecution has to demonstrate sufficient cause for non-appearance when the suit or application was called for hearing. The term sufficient cause has not been defined to exactly connote what, but through case laws, the term has been given a meaning which can embrace numerous situations. For example in the case of **Felix Tumbo Kisima v. TTCL Limited and Another**, (Civil Application No.01 of 1997) [1997] TZCA 58 (24th February, 1997, TANZLII) it was held that:

> *"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence, resulting in the delay in taking any necessary step."*

See also: Regional Manager Tanroads Kagera v. Ruaha Concrete Co. Ltd, Civil Application No. 96 of 2007**, Osward Masatu Mwizarubi v. Tanzania Fish Processors Ltd.**, Civil Application No. 13 of 2010 (both unreported) and **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania**

(Civil Application 2 of 2010) [2011] TZCA 4 (3 October 2011, TANZLII) to name a few.

It is evident from the affidavit supporting the application before the High Court, that the appellants' counsel was unable to appear when the matter was called for hearing due to sickness. The deponed facts in paragraph 7 of her affidavit in support of the application and the medical chit annexed marked "A" revealed that she was sick from stomach upset accompanied by vomiting that struck her at 3.00 am, dawn of the day of the hearing. And that the following morning she went to hospital.

In its ruling dismissing the application for restoration, the Judge concluded that no sufficient reason was advanced despite Ms. Kimale being able to furnish a medical chit. The Judge only pondered on the fact that the appellants' counsel failed to inform the court of her illness on the date scheduled for a hearing, through either one or all the appellants or her law firm of her illness. We think the Judge did not consider all the material facts placed before her by the appellants.

This developed from our settled position that sickness constitutes an acceptable account and sufficient cause for granting an application like the one from which this appeal stemmed, so long there is proof to

that effect. In the case of **John David Kashekya v. The Attorney General**, Civil Application No. 107 of 2012 (unreported), the Court held that:

> *"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children who are yet in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and do whatever kind of work he is required to do."*

See also: **Emmanuel R. Maira v. The District Executive Director Bunda District Council,** (Civil Application No. 66 of 2010) [2010] TZCA 87 (13th August, 2010, TANZLII) and **Hamis Macha Sancho v. Joyce Bachubila**, Civil Application No. 487/17 of 2016 (unreported).

Sickness can strike at any time. It is not out of choice and no one can be blamed for such a happening. In her account, Ms. Kimale, stated that the sickness struck her at 3.00 am, which was when she experienced stomach upset accompanied by vomiting. Plausibly, the next day in the morning even though was the hearing date, she would rush to the hospital rather than go to court. The assertion by Ms. Kimale that she fell sick and the medical chit were neither controverted by the

respondent during the hearing of the application for restoration nor considered by the Judge in her ruling. Instead, the High Court Judge focused more on communication of the sickness information to the court. Before us, Mr. Shirima though supported the High Court ruling dismissing the application, and hence did not support the appeal but admitted that sickness was out of control of anyone.

The High Court Judge's reasoning even after being availed with a medical chit annexed to the affidavit in support of the application, has strained us. We are because while we subscribe to the fact that Judges are supposed to hold parties or their counsel accountable for their actions, including not entering appearance when expected and especially after the notice of hearing has been served and received, that in our view, does not mean even credible explanation should be ignored. In the circumstances of this appeal, we find that Ms. Kimale was able to establish and prove that she fell sick in the early hours of the morning of the hearing day and therefore could not make it to court nor was she able to pass on the information of her sickness to court. It was expected for the court to consider that information unless there was a reason to dispute Ms. Kimale's alleged sickness. What the court banked on to

decline the grant of the application was the failure by Ms. Kimale to inform her clients or law firm who could have communicated the information to the court.

Whereas, we concur with the Judge that communication was important, (see: **D.N. Bahram & Co. Ltd & Others v. Tanzania Postal Bank & Others** (2006) 2 E.A. 48) it has to equally be noted that in some cases that could be difficult. For example, engaging clients could be difficult either due to distance, being out of reach or in some instances clients consider themselves done the moment they have engaged and paid for an advocate to handle their case, the fact not disputed by the Judge, as she referred to that position in her ruling. With that in mind, therefore expecting those clients to respond and act quickly would, in our view, be probably next to impossible. The expectation of having someone from her law firm, was practical, however, considering that it was a sudden sickness the likelihood of reaching out was probably, improbable. Had the High Court Judge considered the sickness claim put forward supported by the medical chit, she probably would not have reached the findings and conclusion being contested by the appellants.

In addition, we have considered the fact that the notice of hearing issued on 13th January, 2015 for a hearing to take place on 14th January, 2015 was too short for Ms. Kimale to look for an alternative one to appear in court on her behalf either to prosecute the application or inform the court of her predicament. Ms. Kimale did not dispute receiving the notice and that she had prepared herself for the hearing. This assertion should have been given weight amid the short notice.

Furthermore, after the application was dismissed on 17th June, 2016, Ms. Kimale was prompt in applying for leave to appeal in Miscellaneous Land Application No. 122 of 2016. The leave granted was not acted upon timely, resulting in an application for an extension of time before the Court of Appeal, Civil Application No. 140/02 of 2018. The application was heard and determined on 20th August, 2019. The present appeal was lodged on 19th September, 2019, which to us indicates promptness in taking action.

All these examined together, bring us to the conclusion that the first ground of appeal is with merit and suffices to dispose off the appeal without need to proceed with the second ground.

We, thus allow the appeal, quash and set aside the High Court ruling dated 17th June, 2016 and order the record be remitted back to the High Court for expeditious hearing of the application for restoration before another Judge.

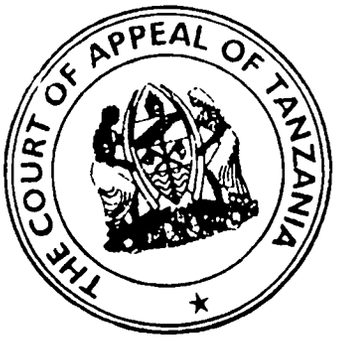
DATED at **ARUSHA** this 21st day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of February, 2024 in the presence of Mr. Kimale, learned Advocate for the Appellant, and Mr. John Shirima, learned Advocate for the Respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL