

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPEAL NO. 29 OF 2021

(Originating from Mkuranga District Land & Housing Tribunal in Misc. Land Application No. 66 of 2020)

SADAM SALEHE MBARUKU.....APPELLANT

VERSUS

PAUL BEAKER NYEREMBE & 30 OTHERS.....RESPONDENTS

Date of Last Order: 11.05.2022
Date of Judgment: 06.06.2022

JUDGMENT

V.L. MAKANI, J.

This is an appeal by SADAM SALEHE MBARUKU against the decision of Mkuranga District Land and Housing Tribunal (the **District Tribunal**) in Misc. Land Application No. 66 of 2020 (Hon. R. Mwakibuja, Chairman).

The brief background of the matter is that the respondents filed an appeal (Land Appeal No. 24 of 2020) at the District Tribunal against the decision of Mkuranga Ward Tribunal. The appeal was dismissed for want of appearance of the respondents. The respondents filed an application (Misc. Land Application No. 66 of 2020) for restoration of

the said appeal. The application was granted. However, the appellant was dissatisfied with the grant of the application hence this appeal with the following grounds:

1. *That the District Land and Housing Tribunal erred in law and fact by allowing an application for restoration without any justified reasons.*
2. *That the reasons given by the District Land and Housing Tribunal for allowing the application were not based on the fact and evidence on records.*
3. *That the quality and quantity of the evidence on record in the scale did not justify the conclusion arrived at by the District Land and Housing Tribunal which was based against the appellant in the circumstances of the case.*
4. *That the respondent failed to account for each and every day of delay so as to convince the District Land and Housing Tribunal with good causes in allowing the application.*

The appellant has prayed for the appeal to be allowed and the decisions of the District Tribunal be quashed and set aside.

With leave of the court the appeal was argued by way of written submissions. Submissions by the appellant were drawn and filed Mr. Sadam Salehe Mbaruku, Advocate while Mr. Mwangwala H, Advocate drew and filed submissions in reply on behalf of respondent.

Mr. Mbaruk gave a brief background of the appeal and argued the four grounds appeal together. Mr. Mbaruku said that the only reason given by the Tribunal for restoration of the appeal was for interest of justice. He said justice to the respondent has to be exercised in the same extent as justice to the appellant as justice is a two way traffic.

He relied on the case of **Pallock Horse vs Nairobi Wholesale Limited (1977) EA 174**. He said that it is on record at the District Tribunal that at the hearing of the application the representative of the respondents one, Paul Beaker Nyerembe did not appear as he fell sick from diarrhoea. The records further reveal that he arrived late to find that the appeal had been dismissed for non-appearance. Mr. Mbaruku said there were no sufficient reasons adduced by the respondents to show how the respondents' representative was sick. That there was no medical sheet or report to prove that the said representative was really sick on the date of hearing of the appeal. He said there was nothing stated as to why out of the 30 respondents no one else appeared at the date and time of hearing of the appeal. He said it was also not stated why the respondents' representative failed to inform the other 30 respondents of his sickness and direct them to appear on his behalf. He said that it was further not stated why advocates engaged by the respondents for purposes of appeal

did not appear at the Tribunal on the date of hearing of the application. Mr. Mbaruku said that for an application for restoration to succeed, the respondents were bound to show good cause as to why they did not appear on the date fixed for hearing. That an application for restoration is not granted as a matter of good course or by sympathy or routine but upon showing good cause. He prayed for this appeal to be allowed with costs.

Mr. Mwangwala for the respondents replied by negating the background of the matter given by Mr. Mbaruku. He argued that on the date of hearing of the appeal, Mr. Paul Nyembere who was representing the respondents suffered from diarrhoea that he failed to attend the court on time. He said the representative took medicine and arrived too late in court to find that the appeal has been dismissed for non-appearance. He pointed out that according to the nature of the people of Mkuranga, they usually use local medicine and do not attend to hospital unless the disease continues. He said on the material date the respondents' representative used local medicine which cured him and he managed to attend the court late for forty minutes and found that the appeal had been dismissed for non-appearance. He said that the respondent's representative managed

to show good cause for non-appearance. He said that the interest of justice requires the matter to be heard on merit and the Chairman was right to restore the matter on interest of justice. He relied on the case of **Serikali ya Kijiji cha Malangali vs Kasim R. Kekena, Misc. Land Application No. 233 of 2019.**

Mr. Mwangwala said the appellant did not suffer any irreparable loss by restoration of the appeal rather it was the respondent who would suffer in case it would not have been restored as the appellant had already filed execution against respondents. Mr. Mwangwala argued that the High Court of Tanzania set aside ex-parte order on the reasons that; the interest of justice requires all parties to be heard, that the grant of prayers to set aside the ex parte order will not cause respondent to suffer any loss. He supported his position by the case of **Mwanza Director M/S New Refrigeration Company Limited vs. Mwanza Regional Manager of TANESCO Limited & Another, Civil Case No.10 of 2015.** He further argued that the appellant has a hidden agenda that if the appeal at the District Tribunal would be heard it will not be in their favour as the court will identify errors done by the Ward Tribunal. He prayed for the appeal to be dismissed with costs.

In his rejoinder, Mr. Mbaruku reiterated what he stated in his main submissions. The main issue for consideration is whether this appeal has merit.

I have gone through the records. The only reasons by respondent's representative Paulo Beaker Nyembere was that he was suffering from diarrhoea so he arrived late and found that the appeal had already been dismissed for non-appearance. There is no medical certificate to support this claim, however, there was no other reason by the Chairman for restoration of the appeal other than the ground of interest of justice to the parties.

The law clearly provides that, for an application to set aside the dismissal order to succeed, the applicant has to furnish sufficient reasons for his non-appearance on the date of hearing (see the case of **Sadru Mangalji vs. Abdul Aziz Lalani & 2 others, Misc. Commercial Application No. 126 of 2016 (HC-Commercial Division, Mwanza)** (unreported).

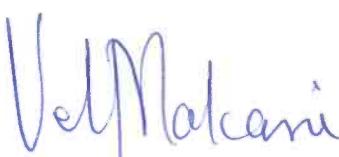
It is without dispute that respondents' representative did not supply any medical certificate to support that he was sick and suffering from diarrhoea. Mr. Mwangwala submitted that respondent used traditional medicine to get relief of diarrhoea as the people of Mkuranga customarily do. However, the issue of traditional medicine is not in the affidavit of the representative Paulo Beaker Nyembere. This is an assertion from the bar and at the appeal stage which this court cannot readily rely upon. Unfortunately, and if this was true, the respondents' advocate at the Tribunal one Mr. William Mgweno did not lead the representative even to take a supplementary affidavit to state this fact about traditional medication. This assertion is therefore an afterthought which cannot be trusted. Further, in the District Tribunal's proceedings the same Mr. William Mgweno told the Tribunal that the representative went to the hospital after attending the appeal which was dismissed. Again, this was not in the affidavit of the said representative and there is no medical certificate produced to corroborate this claim. In a nutshell, the respondents' representative has not given sufficient reasons for failure to appear on the hearing date.

The District Tribunal decided to grant the application only in the name of justice, but the reasons to support that justice were never reflected in the judgment of the District Tribunal. As correctly said by Mr. Mbaruku justice cannot be one sided, it also has to be exercised to the other party and in this case the appellant. It is therefore apparent that no sufficient reasons were adduced by the respondents to warrant the restoration of the appeal, and it was therefore improper for the District Tribunal to grant the application under the cover of interest of justice.

In the result, the appeal has merit, and the decision of the District Tribunal is quashed and set aside. Subsequently, the appeal is allowed with costs.

It is so ordered.




V.L. MAKANI
JUDGE
06/06/2022