

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SUMBAWANGA**

**AT SUMBAWANGA**

**MISCELLANEOUS APPLICATION NO. 16 OF 2021**

(Originating from Miscellaneous Land Appeal No. 44 of 2020 from Land Appeal No. 24 of 2020 in the District Land and Housing Tribunal for Katavi at Mpanda)

**SHUKURU ELIAS NYALINGA .....APPLICANT**

**VERSUS**

**ALBERTINA LUIS MWANALINZE .....RESPONDENT**

02/10/2023 & 17/10/2023

**RULING**

**MWENEMPAZI, J:**

The applicant has filed this application seeking an order of this Court to restore Land Appeal No. 44 of 2020 which was dismissed by this Court (Hon. J.F. Nkwabi, J) on the 13.07/2021. The application is made under section 95 and Order XXXIX Rule 19 of the Civil Procedure Code, [Cap 36 R.E 2019] and any other enabling provision of law. He is also praying for costs and any other order this Court will deem fit to grant.

The application is also supported by an affidavit deposed to by one Ileth Sombiro Mawalla, an advocate of the High Court and subordinate Courts. In

it the counsel and or deponent has deposed that on 09/06/2021 he became aware that the Land Appeal No. 44 of 2021 was scheduled for hearing before Judge Mkeha on the 13/07/2021. However, on the 02/07/2021 he started experiencing pain in the chest and attended at the Hospital, Dodoma General Hospital for treatment. The medical doctors prescribed for his isolation for 14 days to avoid transmitting what was believed to be Covid 19 to other people.

That it was not in his contemplation that he will be sick and also he failed to contact his client to make follow up and attend the case on 13/07/2021. Due to such failure to attend; the matter was dismissed for want of prosecution. He now seeks the indulgence of this Court to restore the appeal so that they may be heard on merits. Failure to enter appearance was due to sickness. He attached a sick sheet to verify that he was sick.

The respondent filed the counter affidavit sworn by herself. In general, she is opposing the application. The respondent has stated that the case was dismissed, for the applicant and his advocate had a habit of not entering appearance and on the date it was for a third time. The statement that the

applicant will suffer if the appeal is not restored is baseless as he lost the case two times.

Hearing was in a hybrid form. I was in the chamber and the counsel for the applicant was present. The respondent was at the Resident Magistrate Court of Katavi at Mpanda. Mr. Mathias Budodi, learned advocate was representing the applicant and the respondent appeared in person via video conference.

In the submission the counsel for applicant submitted the applicant's case reiterating the content of an affidavit supporting the application. He insisted that the applicant's counsel Eleth Sombiro Mawalla failed to enter appearance due to sickness at the time our country and the world at large had been hit by Covid 19.

After the counsel had recovered he immediately filed this application. The reason for failure to attend is sickness; sickness is beyond control of the applicant. He referred the case of **Masoud Seleman Kikula Vs. Jaluma General Supplies Limited**, Misc. Commercial Application No. 171 of 2017, High Court of Tanzania (Commercial Division) at page 11 – 12. The counsel prayed for the grant the application.

The respondent submitted briefly and was of the view that the applicant is just harassing her. She won the case in the lower tribunal so she should be left to enjoy her property.

I have as well heard parties to the application and also read the record of the Court. It is indeed true that the applicant failed to enter appearance more than three times and the appeal was being called and adjourned before the Honourable Deputy Registrar.

However, it is also true that the counsel for the applicant reasonably has shown that he was sick and was attending treatment at the hospital. I understand also that at the time our country and world at large was stuck with Covid 19.

In the cited that of **Masoud Seleman Kikula Vs. Jaluma General Supplies Limited (supra)** the trial judge Hon, Sehel J, (as she then was) cited the case of **John David Kashekya Vs. The Attorney General**, Civil Application No. 1 of 2012 (unreported) Court of Appeal of Tanzania where the Court had this to say on sickness:

*"...Sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except*

*for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do...*

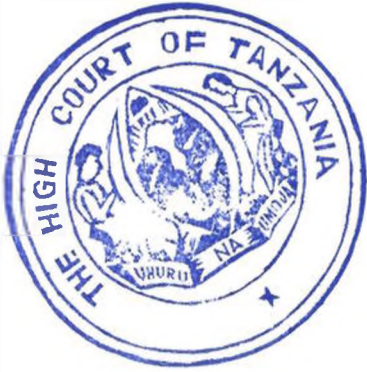
*I do not see reason for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to file...".*

The respondent has opposed the application that it is frivolous since she won the case in the lower tribunals. I find that the applicant given a valid/sufficient reasons for failure to enter appearance on the date for hearing; reasonably the counsel could not have attended the Court session with the condition. Also, I believe that will allow parties to be heard on merit as prayed.

I therefore grant the application. Each party will however bear his/her own cost. The Land Appeal No. 44 of 2021 is thus restored. The dismissal order dated 13/07/2021 is set aside. It is further ordered that the appeal be scheduled for hearing on the 21/11/2023.

It is ordered accordingly.

Dated and delivered at **Sumbawanga** this 17<sup>th</sup> day of October, 2023.



  
**T.M. MWENEMPAZI**

**JUDGE.**

ORIGINAL