

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO. 96 OF 2019

(Originating from Land Case No. 68 of 2016, Misc. Land Application No. 99 of 2017, Misc. Land Application No. 54 of 2018 in the High Court of United Republic of Tanzania)

ALFRED ELIAU SAYOLOI.....APPLICANT

VERSUS

JOSEPH PETER MASSAWE.....1ST RESPONDENT

JOEL MCHOMBU ELIENEZA.....2ND RESPONDENT

SIDAY LEMAOO MBAMAY.....3RD RESPONDENT

WILSON T. MGONJA.....4TH RESPONDENT

RULING

01/09/2020 & 16/11/2020

GWAE, J

The applicant herein has lodged this application under the provision of section 95 of the Civil Procedure Code, (Cap 33 R.E 2002) praying for the following orders.

- i. That the Honourable Court be pleased to set aside a dismissal order in Land Case Number 68 of 2016 dismissed for want of prosecution on 08/06/2017 and restore the said case.

- ii. Any other order and relief the Honourable Court may deem just and fit to grant.

The application is duly supported by an sworn affidavit of the applicant together with an affidavit of Mr. Daudi Haraka (advocate), the 1st and 2nd respondents opposed the application by filing a joint counter affidavit, the 3rd and the 4th respondents neither entered appearance nor filed their counter affidavit.

The applicant's application is to the effect that on the date (08/06/2017) when the matter (Land Case No. 68 of 2016) was dismissed he was sick and could not attend the court, the applicant attached medical reports which were collectively marked annexure 2. The applicant further stated that his advocate (Edna Mndeme) who was representing him in that particular case had travelled to Dar es Salaam to attend another matter which was filed under certificate of urgency and her brief was to be held by Mr. Daudi Haraka (Adv) who unfortunately also fell sick and left the matter unattended leading to the dismissal of the suit. This assertion is supported by the sworn affidavit of Mr. Daudi Haraka who declared to have fell sick before going to court and was attended at Brown Medical center, a medical report was attached to that effect and marked as Annexure 4.

The 1st and the 2nd respondents on the other hand contested the application and stated that despite the claim of illness by the applicant but yet the records revealed that neither the applicant nor his advocate had entered appearance

before the court on previous dates (six times) leave alone the date when the matter was dismissed for want of prosecution. Further to that, the respondents were of the view that even the medical reports attached to the applicant's application did not reflect the types of illness as described by the applicant in his affidavit.

When the matter came up for hearing before me, **Ms. Edna Mndeme** Advocate, appeared for the applicant while **Mr. Vivianus Rugakingira** learned Counsel appeared for the 1st Respondent and 2nd Respondent.

In her submission in support of the application, Ms. Mndeme essentially reiterated what had been stated in two affidavits supporting the application with an addition that the dismissal order is tainted with irregularities for the reason that the case was dismissed while it was fixed for mention and not for hearing. Supporting this argument, the learned counsel cited a decision of the Court of Appeal in the case of **Mr. Lembrice Israel Kivuyo vs. M/S DHL World Wide Express & another**, Civil Appeal No. 83 of 2008 (Unreported).

In reply, the counsel for the 1st and 2nd respondents adopted the respondents' counter affidavit and proceeded to submit that the absence of the applicant's advocate ought to have been backed up by necessary proof such as the tickets, more so Advocate Haraka having fell sick should have acted diligently by sending another person to court or notify the court in writing. Mr. Lugakingira

further submitted that for an application for re-admission of a case dismissed for non-appearance sufficient reasons must be advanced which in this case the counsel was of the view that the applicant's counsel did not account for her absence on other days prior to dismissal order.

In rejoinder submission, Ms. Mndeme submitted that she had demonstrated sufficient reasons for her no appearance in her submission in chief which is also backed up by the affidavit of Advocate Haraka. About her absence to appear on other dates prior to dismissal order the counsel stated that their absence was justified for the reason that the case file had been misplaced and the trial Judge was on criminal session.

I have dispassionately considered the application together with the rival submissions from both parties. Before going to the gist of this application I propose to start by addressing on the enabling provision of the law cited by the applicant in the chamber summons.

Reading carefully the chamber summons, the applicant has patently moved this court by section 95 of the CPC for the orders; to set aside the dismissal order in Land Case No. 68 of 2016 and restore the said case. Section 95 reads as follows;

"95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be

necessary for the ends of justice or to prevent abuse of the process of the court."

It is my settled view that this provision is only applicable in situations where there is no other provision of the law to cater for the problem, the provision basically safeguards the inherent powers of the court in cases where there is no specific provision of the law to move the court. According to Mulla Code of the Civil Procedure Code, Vol 1, (1st ED) at page 942 it states that;

"The inherent powers are to be exercised by the Court in very exceptional circumstances for which the code lays down no procedure".

Suffice it to say, where there is a specific piece of legislation or provision of the law the inherent powers cannot be invoked. The Court of Appeal of Tanzania in the case of **Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Ltd. (IPTL) & 2 others** [2000] TLR 324 spoke louder than my words on the application of section 95 of the CPC and for the purposes of this application I shall reproduce part of the holding herein under;

"As I understand it, this section does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do and does, is to save inherent powers of those courts. The section is undoubtedly a very useful provision, but it is not a panacea for all ills in the administration of justice in civil cases. Commenting on section 151 of the Indian Code of Civil Procedure which is *pari material*

with that section, the learned authors of The Law of Civil Procedure, (6 ed), observe, at page 324, as follows:

The power is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment."

Back to the case at hand, Order IX rule 3 of the CPC R.E 2019 reads as follows;

"3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit."

I am persuaded and convinced that the above cited provision of the law is applicable in moving this court to grant for the sought orders of setting aside the dismissal order, and under these circumstances this court has not been properly moved by the applicant by citing section 95 of the CPC only as the enabling provision in moving this court nevertheless I am aware of the overriding principle enacted in the year 2018 requiring courts to substantively determine cases on their merits rather than being tied up by legal technicalities. This position was correctly demonstrated by the Court of Appeal (**Ibrahim, CJ**) in **Yakobo Magoiga Gicherevs. Peninah Yusuph**, Civil Appeal No. 55 of 2017 (unreported) where it was held;

"With the advent of the principle of overriding objective brought by the written law (Miscellaneous Amendments) (No. 3) Act No. 8 of 2018 which requires the courts to deal with cases justly and to have regard to substantive justice

As the applicant was granted extension of time on 29/10/2019 by this court (**Mzuna, J**) vide Misc. Land Application No. 54 of 2018 and since reason for non-appearance on the dismissal date, the matter was being fixed for mention as was in other previous court's sessions that is from 10/10/2016 to 8th June 2017 as well as reasons given namely; sickness of the applicant and that of advocate Haraka. I am therefore convinced that there are reasons for an order of restoration to be made

Consequently, this application is granted, Land Case No. 96 of 2016 is here re-admitted. Each party to bear its costs



M. R. GWAE

JUDGE
16/11/2020

Order: Parties and or their representatives to appear on 15 /12/2020 for necessary in respect of Land case No. 3 of 2016



M. R. GWAE

JUDGE
16/11/2020

