

IN THE HIGH COURT OF TANZANIA

AT TANGA

MISC. CIVIL APPLICATION NO.28 OF 2010.

[Originating from High Court, land case No.9 of 2008]

**SIMON JOHN MREMA
SUING UNDER POWER OF
ATTORNEY BY JOACHIM
A. MREMA**

}APPLICANT

VERSUS

**1. CONSOLIDATED HOLDING CORP.
2. ABDALLAH KHATIB MOHAMED
3. MNKONDO AUCTION MART**

}RESPONDENTS

Date of last order: 25.11.2011

Date of Ruling: 16/3/2012

RULING

Teemba, J;

This is an application for a restoration of land case No.9 of 2008 which was dismissed with costs for non – appearance. The application is made under Order 1x Rule 4 of the Civil Procedure Code [Cap. 33 R.E. 2002] and it is accompanied with the Affidavit deponed by SIMON JOHN MREMA, the applicant.

Briefly, the facts which gave rise to this application are straight forward. On 2nd July, 2008, the applicant instituted in this court the Land Case No.9 of 2008 claiming for a declaratory order against the respondents that they unlawfully sold the house situated on plot No.515/18 KB XIV Usagara area,

within the city of Tanga which the applicant had previously mortgaged for a loan in favour of NBC. On 22nd April, 2010 the court, in the present of the parties, fixed the date of hearing to be on 8/9/2010. When the suit came for hearing all parties defaulted to enter appearance.

The court decided to dismiss the suit. Following the dismissal order, the applicant lodged this application seeking for an order to set aside the dismissal and restoration of the suit. The reasons for restoration of the suit are depicted under paragraph 5 and 6 of the applicant's Affidavit. For clarity purposes, these are hereby reproduced:

" That I appeared before the court on 9th September, 2010 as I had erroneously perceived and believed to be the right date only to be told by the Registry clerk that the case has been dismissed on a day before for non-appearance of the parties.

That I stand to state that my non – attendance on 8th September, 2010 was caused by sufficient and good cause in that it was an erroneous humanity mix up of particular happenings revolved on my minds while in Judge's chamber."

The respondents through the legal services of Mr. Akaro, learned counsel, filed the Counter Affidavit in which they strongly oppose the application. On 19/10/2011, the court allowed the parties to argue the application by way of written submissions. In his submissions, the applicant reiterates what he deposed in his affidavit. On the other hand, Mr. Akaro counter argued that the

that the applicant confused the date is not sufficient to grant the application. Secondly, Mr. Akaro argued that, the applicant did not produce evidence like the Affidavit of the Registry court clerk indicating/justifying that he appeared in court on 9/9/2010, so, Mr. Akaro, therefore, urged the court to dismiss the application with costs. The Applicant did not file any rejoinder.

I am of the settled view that the application is devoid of merit. For the application of this nature to be granted, the law requires the applicant to show sufficient cause. This is clearly provided for under **Order 1X Rule 4 of the Civil Procedure Code [Cap.33 R.E. 2002]**. For purposes of clarity, the provision is quoted below:

*"4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff may [subject to the law of Limitation] bring a fresh suit, or **he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause.... or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.**"*


[emphasis added].

The question here is whether or not the applicant established any suffice cause for his non-appearance. The only reason given by the applicant for his non-appearance is that he heard thought [as he heard] that the case would be heard on 9th September 2010 instead of 8th September, 2010. The Applicant added that he came to court on 9th September 2010 and he was informed by the

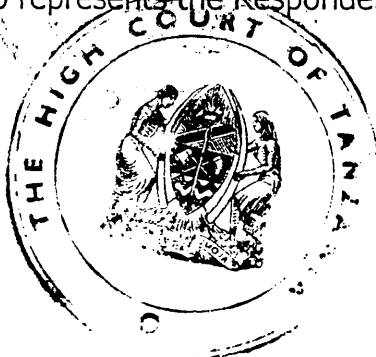
Registry clerk about the dismissal order. This allegation is not supported for there is no affidavit sworn by the said clerk to show that the applicant had truly shown up to court on 9th September, 2010.


The Applicant relied on the case of **JEHANGIR EMPORIUM VS TEEMA GARMENTS [1970] HCD. No.184**. I agree with Mr. Akaro who distinguished the case with the present one. The facts are different in the present case. In that case, the court granted the application to restore the suit on the ground that the Applicant had to appear both in the High Court but based on the judicial custom he chose to give preference to the High Court. His case at the subordinate court was dismissed for non appearance. His application to restore the case was granted because giving preference to the High Court was considered to constitute sufficient cause. The reason given by the applicant in this application is quite different and in my considered view, the confusion of dates without proof that he appeared in court on the following day is an afterthought.

For the foregoing, the Application lacks merit and it is dismissed with costs.


R.A. TEEMBA, J.
16/3/2012

Court: The Ruling is delivered in the presence of the Applicant and Mr. Akaro who represents the Respondents.




R.A. TEEMBA, J.
16/3/2012