

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 196 OF 2015

(From Land Case No. 71 of 2011)

ABDI ALLI SALEHE APPLICANT

Versus

1. ASAC CARE UNIT LIMITED	1ST RESPONDENT
2. AYUB SALEH CHAMSHAMA	2ND RESPONDENT
3. KENYA COMMERCIAL BANK LIMITED	3RD RESPONDENT
(NOW KCB (TANZANIA) LTD	

Date of Last Order: 16th November, 2015

Date of Ruling: 27th November, 2015

RULING

FELESHI, J.:

This Ruling emanates from an application made by way of Chamber Summons in terms of Order IX Rule 9(1) of the Civil Procedure Code, [CAP. 33 R.E, 2002] for Orders to set aside a dismissal order made on 19/03/2015 against Land Case No. 71/2011.

In his affidavit, the applicant's counsel stated that Land Case No. 71 of 2011 was formerly assigned to Hon. J.H.K. Utamwa, J. where on 10/02/2015 they were told that the case was reserved for reassignment before another Judge following transfer of Hon.J.H.K. Utamwa, J.

The deponent added, it was announced on that date that, parties would be duly notified upon reassignment of the case to another presiding Judge. Uniformed, on 19/03/2015 in the afternoon his office assistant

heard from a Court Clerk Ms Nester that, the matter was dismissed in the same morning before Dr. E.M. Feleshi, J. for non appearance.

He added that, he was furnished with copy of the dismissal order on 14/04/2015 to find out that, the matter was scheduled on 03/03/2015 for hearing on 19/03/2015 with order of notice by summons to parties to issue but as such, the said notice of service by summons was never served to the applicant's counsel. The averments by DENNIS MICAHEL MSAFIRI, the applicant's advocate were shared by two other affidavits of AYUBU KEYA LILLA and ABDI ALLI SALEHE who are office assistant to the applicant's counsel and the applicant respectively to that effect.

The hearing of the application was conducted by way of written submissions where parties complied with, hence this Ruling. The applicant engaged the services of Dennis Michael Msafiri, the learned counsel while the 1st and 2nd respondents were represented by Gerald Shita Nangi, advocate whereas the 3rd respondent had services of Trustmark Attorneys.

Addressing the application at hand, in addition to what had been stated in the affidavits, the applicant's counsel argued that, the applicant stands not to blame for failure to be served with notice of hearing after transfer of Hon. J.H.K. Utamwa, J. He added that, he did not occasion the misfortune, rather, the same was authored by the Court. He urged this Court to be guided by what was underscored by the Court of Appeal of Tanzania in **Edson Edward Mbogoro Vs. Dr. Emmanuel John**

Nchimbi & The Attorney General, Civil Appeal No. 140 of 2006 (Dar es Salaam Registry) (Unreported) regarding defaults authored by Court staff.

On their part in unison, counsel for the respondents submitted that, the applicant has failed to substantiate the cause for failure to attend the Court as scheduled on hearing date. He argued that, as such, the applicant failed to make dully follow up of their case at their own risk. They thus urge the application to be dismissed with costs for lack of merits in law. In rejoinder, the applicant's counsel basically reiterated what had been submitted in chief praying for the application to be allowed.

Having considered the application in a wholesome and the respective submissions, as correctly submitted by the applicant's counsel, there is no evidence on record that the applicant or and his counsel were dully served with notice through summons or else that the matter had been scheduled before Hon. Dr. E.M. Feleshi, J. for hearing especially after the transfer of Hon. J.H.K. Utamwa, J. where the case had to wait for reassignment.

To this Court, that suffices to be a good cause to set aside the dismissal order in respect of the Land Case No. 71/2011 considering that the case was initially before Hon. J.H.K. Utamwa, J and upon reassignment, no notice for change of the presiding Judge was given to the applicant in person or his counsel. In the circumstances, it is will be unjustifiable and a harness of the ends of justice, which this Court is not for, to hold to the contrary.

In a nutshell, the application to set aside the dismissal order is meritorious in law and is granted with order for restoration of the Land Case No. 71/2011. Considering the circumstances of the matter as above availed, parties are ordered to bear for their own costs.

Order accordingly.

E.M. FELESHI
JUDGE
27/11/2015

Ruling delivered in Chambers this 27th day of November, 2015 in presence Mr.Denis Msafiri, Advocate for the Applicant and Ms.Regina Kiumba, Advocate for the 3rd Respondents, Mr.Sudi Chamshama, one of the Directors for the 1st Respondent but in the absence of the 2nd Respondent.

P.R.KAHYOZA
DEPUTY REGISTRAR
27/11/2015