

**IN THE HIGH COURT OF TANZANIA
AT SONGEA**

MISCELLANEOUS LAND CASE APPLICATION NO. 1 OF 2016

**(Arising from the decision of the High Court of Tanzania at Songea
in Miscellaneous Land Application No. 9 of 2015)**

MANAGING DIRECTOR

OF NSSF.....APPLICANT

Versus

DR. WIDFRED D. MWANGA.....RESPONDENT

RULING

Last Order: 28th April, 2016

Date of Ruling: 12TH May, 2016

CHIKOYO, J.

The applicant through the legal services from Membar Law Attorneys in the amended chamber summons made under **Order IX Rule 9 (1) and section 95 of the Civil Procedure Code Act [Cap. 33 R.E. 2002]** basically prays for the following;

- 1. That, this Honourable Court be pleased to set aside its order dated 26th November 2015 that dismissed the Applicant's application in Miscellaneous Land Application No. 9 of 2015 hence be pleased to order restoration of the said application as well as appointing date for hearing of this application inter parties;*
- 2. That the costs of this application be costs in the cause;*
- 3. any other order (s)/ relief (s) the Honourable Court may deem fit and just to grant in the circumstances.*

The applicant has brought this application supported by an affidavit affirmed by YASSIN SAID MEMBAR, the Advocate of the High Court on behalf of the applicant. According to the said affidavit, the grounds of which led the applicant to fail to enter the appearance on the fixed date of hearing are found under paragraphs 4, 5 and 6. For the sake of clarity and easy reference, I find it appropriate to reproduce those paragraphs, as I hereunder do;

- 4. That, before to the fixed date of 26th November 2015 i.e 24th November, 2015, the Advocate (Fay Grace Sadallah) who was been attending the court in respect***

of the matter was bereaved and so could not make it to court on the fixed date.

5. That, the same was accordingly communicated to me, however I was well could not enter appearance as I was sick and had to attend frequent check up at the hospital. And the other remaining Advocate in the office, Ms. Hajra Mungula was attending Criminal session cases which were ongoing it (sic) the High Court of Tanzania at Dar es Salaam. Copies of hospital prescriptions for Mr. Yasin Membar, Adv. and High Court summons for Ms. Hajra Mungula, Adv. are attached and collectively marked as 'Annexure 1'

6. That the same was communicated to one Mr. D. Ndunguru, Advocate based in Songea and sent him a copy of the summons with instruction to hold our brief, of which he accordingly accepted, however to our surprise he informed us that the matter was dismissed.

[Emphasis is mine]

When this application was called for hearing, Ms. Hajra and Mr. Mapunda the learned Advocates appeared for the applicant and respondent respectively.

Ms. Hajra submitted that, the instant application is intended for this court to set aside the dismissal order of this court in Miscellaneous Land Application No. 9 of 2015 made on 26/11/2015. According to her, the said matter was scheduled for hearing on 26/11/2015 but two days before its hearing, Ms. Sadala who was responsible to appear on behalf of the applicant travelled to Moshi for the funeral of her uncle. Ms. Sadala communicated to Mr. Yassin Membar the Principal Advocate of the above mentioned law firm, but unfortunately he was sick as he was attending frequent check up at the Hospital, and the only available counsel therein was Ms. Hajra who was attending criminal sessions No. 14 of 2015 involving **Republic Versus Diaka Brama Kaba and 4 Others**, before Hon. Korroso J. at the High Court of Tanzania Dar es Salaam.

As a result, Ms. Sadala communicated with Mr. D. Ndunguru the learned Advocate based in Songea and supplied him a copy of the said summons so that he could come herein to hold briefs of Mr. Yassin Membar, but later the applicant was informed that the matter has been dismissed. The applicant insists that, the dismissal order was not caused by their negligence and the applicant has an overwhelming chance of success in this matter. Ms. Hajra prayed this application be granted and she referred

this court the case of **Charles Moses Versus Shamte Habibu, PC Civil Appeal No. 1 of 2002, High Court of Tanzania at Dar es Salaam.**

In reply, Mr. Mapunda opposed this application because Ms. Sadala who was alleged to travel to Moshi did not bring a ticket to prove that fact; there is no affidavit of Ms. Sadala who is alleged to inform Mr. Yasin Membar to appear herein so to prove that allegation, and in supporting his stance he referred this court the case of **Salima Vuai Fom Versus Registrar of Corporative Societies and 3 Others [1995] T.L.R 75.**

All in all Mr. Mapunda suggested that if the applicant had genuine reasons for non appearance, obviously they could instruct a legal officer to come to notify this court since the allegation that Mr. D. Ndunguru was communicated as shown above cannot stand since there is no evidence to prove the same, hence the advanced reasons by the applicant are not sufficient to allow this application, thus he prayed this court to dismiss this application with costs.

In rejoinder, regarding to the issue of absence of a bus ticket of Ms. Sadala, Ms. Hajra argued that there is no such document since people could even hired the vehicle and travel as a group. The cited case law of **Salima Vuai Fom (supra)** is not relevant to the instant application

because what Mr. Yasin was only required is to disclose the source of information and not otherwise, thus all in all Ms. Hajra prayed this court to allow the instant application with costs.

As to me, the issue here is whether this application has merit or not. In order to determine that issue I must be confined on whether the applicant has advanced sufficient reasons which led to the said non-appearance as far as **Order IX Rule 9 (1) of the Civil Procedure Code (supra)** is concerned and not otherwise. From the outset, Ms. Hajra has insisted in some point at the hearing of this application that, the alleged intended review has an overwhelming chance of success. This is wrong and is no longer a point to be entertained in an application for a stay of execution since currently it is now trite law that be it an intended appeal has an overwhelming chances of success or not is no longer a requirement for granting a stay. **See; Juma Hamisi Versus Mwanamkasi Ramadhani, Civil Application No. 34 of 2014 (CAT-AR) (Unreported).** However, for that reason, I find it appropriate for me to subscribe that legal position to be extended and cover in the instant application since at this moment, I have not yet determined this matter on whether the alleged intended review has overwhelming chances of successes or not, consequently this allegation becomes immaterial and irrelevant.

Turning on the merit of the instant application, as I am aware of the legal position that what amount to sufficient reasons insisted in **Order IX Rule 9 (1) of the Civil Procedure Code (supra)** is well settled that is whether the applicant has advanced good reasons as to why the instant application be granted or not.

I have gone through the entire court records and the submissions from both parties, where for easy reference and sequence, on 26/11/2015 this court in Miscellaneous Land Application No. 9 of 2015 dismissed that application for want of prosecution, since the applicant did not appear herein. Hence the applicant has brought the instant application so as to enable this court to set aside the said dismissal order. I have gone the entire submissions from both parties in relation to the instant application, where I have found that the applicant has failed to advance sufficient reasons. I say so because of the following reasons;

One; since the applicant insisted in the affidavit that, as quoted in above specifically in paragraph 4 that, on 24/11/2015 that is two days before the fixed date for hearing, Ms. Sadala was bereaved hence she did not manage to attend, however in the said affidavit, the said paragraph did not go further as it remains as a mere statement, until at the hearing of the

instant application where Ms. Hajra submitted that Ms. Sadala had travelled to Moshi to attend the funeral of her uncle. The question is why the applicant's affidavit did not contain all the detailed facts as submitted herein by Ms. Hajra? Be as it may, in my view, I find this fact as an afterthought, since there is no any evidence to prove the same, and more so if that fact could be true, obviously I would have expected the applicant to state in the affidavit the full detail fact on that account, instead of the applicant to come herein by submitting new facts which are not in the affidavit, considering the fact that, this matter has been handled by the Advocates, to whom must be conversant with what should or shouldn't be contained in the affidavit.

Two; the fact that, the matter was not assigned to Mr. Yasin Membar as he was sick and attending frequent checkup as well as Ms. Hajra was attending criminal sessions in the High Court have no merit, because *firstly;* the said 'Annextures1' were not tendered in court as evidence, because the applicant only annexed in the instant application but those documents were not tendered as exhibits. For that reason, it goes without saying that, the applicant has not tendered any evidence to prove their facts, hence what is remaining is a mere words which cannot support the instant application, and those documents marked as 'Annexure1' have no

any legal value at all. *Secondly*: as if it is not enough, be as it may, this court cannot consider those documents since are secondary evidence other than primary evidence because those documents have not complied with the rules of procedures governing the law of evidence as far as tendering documentary evidence be it primary or secondary evidence in terms of **sections 66 and 67 (1) (a) (i)-(iii) of the Evidence Act [Cap. 6 R.E 2002]** are concerned, that is only primary evidence should be tendered as evidence unless under special circumstances where secondary evidence can be tendered. All in all, as I alive with the legal position that, rules of procedures should not be relaxed under any circumstances, consequently they must be complied with accordingly. **See; Thomas David Kirumbuyo and Another Versus Tanzania Telecommunication Co. Ltd, Civil Application No. 1 of 2005, (CAT-DSM) (Unreported)**. In the instant application, it goes without saying that, the applicant was supposed to comply with the above stated rules of procedures accordingly.

In the instant application, since neither those documents were tendered in court to be admitted as exhibit and were merely attached in the instant application which were secondary evidence, thus at this juncture I hereby disregard those documents and conclude that the applicant has failed to

prove those facts in the required standard of proof as far as **section 110 (1) of the Evidence Act (supra)** is concerned.

Three; regarding to the fact that, Mr. D. Ndunguru was informed by Ms. Sadala so as to appear herein to hold briefs of Mr. Yasin but surprisingly they were informed that the matter was dismissed, and according to the applicant the said dismissal was not caused by the negligence of the applicant. In my view I find this fact lacks merit because *firstly;* the applicant's assertion has no evidence to prove the same because, I could have expected the applicant to annex in the instant application and tender herein an affidavit of Mr. D. Ndunguru as exhibit to confirm that fact. *Secondly;* assuming that such affidavit was there, then obviously I could have expected Mr. D. Ndunguru's affidavit could have stated as to why he did not managed to come on 26/11/2015 as instructed by Ms. Sadala, then this court could have assessed on whether Mr. D. Ndunguru was negligent to appear or had genuine reasons for not doing the same.

For that reason, in the absence of Mr. D. Ndunguru's affidavit renders me not to comment further on that fact rather than finding that the applicant slept over their right to prosecute their matter in this court for failure to appear herein as scheduled.

I could end up here, but for the sake of clarity Ms. Hajra had referred this court the case of **Charles Moses (supra)** to support the instant application, however the said case law was not supplied to me herein, considering the fact that the said case law is unreported one, thus I did not come across of that decision, thus under those circumstances I shall not make any comment in regard to that decision.

For the foregoing reasons, I find the applicant has failed to advance sufficient reasons for non appearance herein on 26/11/2015, therefore I hereby dismiss this application with costs.

It is so ordered.



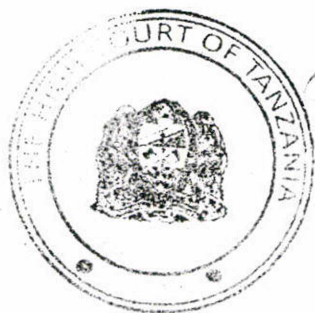

S.M. CHIKOYO,

JUDGE

12/05/2016

Ruling delivered in chambers in the presence of Mr. B. Mapunda for Ms. Hajra Advocate for the applicant, Mr. B. Mapunda Advocate for the

respondent who also present in person and Mr. Chris Court Clerk, this 12th
day May, 2016.



A handwritten signature in black ink, appearing to read "S.M. Chikoyo", is written over the printed name.

S.M. CHIKOYO

JUDGE

12/05/2016

Received
26/8/16
