

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
MISC. CIVIL APPLICATION NO. 647 OF 2018
(Arising from Miscellaneous Civil Cause no. 13 of 2018)
MULILEGE MKOMBO MYONDI KAMEKA.....APPLICANT
VERSUS
THE DIRECTOR OF
IMMIGRATION SERVICE.....1ST RESPONDENT
THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

This is an application to set aside the ex-parte ruling entered by this court against the applicant on the 24/9/2018. The Application has been made under O.IX, r.13(1) of the Civil Procedure Code [Cap. 33 R.E 2002] and Rule 17 of the Law Reform (Fatal Accidents and Miscellaneous Provision) (Review Procedure and fees) rules, 2014. It has been made through a Chamber Summons accompanied with the affidavit sworn by the advocate for the Applicant, Mr. Desderi Ndibalema.

The Respondent, Director of Immigration services and the Attorney General who are the 1st and 2nd Respondents respectively are represented by Mr. Erigh Rumisha, State Attorney who had lodged the Counter affidavit before the matter was fixed for hearing.

During the oral submissions advocate for the Applicant Mr. Desderi Ndibalema Stated that the original case to this application, that is Miscellaneous Civil Cause No. 13 of 2018 was wrongly heard ex-parte by the presiding Judge. He alleged that the case had been fixed for hearing on the 2nd day of October, 2018 at 13.30 hrs. They were at the judge's chamber Premise by 13.10 waiting to be called for hearing at that 13.30 hrs. The advocate stated that they stayed there until 13.37 hrs when they saw the State Attorney accompanied with the Immigration Officer coming out from the Judge's Chamber. He said that the matter had been heard ex-parte and the ruling was delivered. He said that upon making inquiry to the Court Clerk who was attending that case they were told that the case had been fixed for hearing at 13.00 hrs, but that was not a time fixed. He said that they managed to consult the Judge but she told them that she was right to proceed ex-parte as they were absent.

Mr. Respicious Ishengoma prays for the ex-parte ruling to be set aside and the application be heard interparties.

In his reply the Respondent's Counsel Mr. Erigh Rumisha (State Attorney) submitted that the Applicant through the same advocate was given 30 days period to file a Review but he came to file it after the lapse of 10 days without any leave hence they did lodge a Preliminary objection which was scheduled to be heard on 2/10/2018 at 13.30 hrs and the same was actually heard on that date and time in the absence of the applicant and his Advocate. He said that the Preliminary Objection sustained. He said that the said date and time were fixed by the court in the presence of both parties on the 24/9/2018.

Mr. Erigh Rumisha (State Attorney) stated that neither the applicant nor his Advocate had shown up while the time fixed for hearing had attained, hence the court was right to proceed with hearing the matter ex-parte. The State attorney said that the applicant's arguments are not true. They are afterthought ideas. There is no evidence to prove the same. The counsel further submitted that there is no affidavit sworn by the said Court Clerk to prove the said allegations raised by the Applicant's counsel.

The State Attorney concluded by praying the application to be dismissed as negligence of the Advocate cannot be used as a ground to grant the application.

From the submissions this court have noticed that the applicant's counsel submissions based on the fact that hearing of the Preliminary Objection was heard before 13.30 hrs, the time that was fixed for that purpose. On the other hand the Respondent's counsel alleges that the hearing was conducted from that 13.30 hrs which means that Mr. Respicious Ishengoma and his client were late. It is Mr. Ishengoma's submission that they managed to consult the presiding Judge after the E-xparte Judgment being delivered and she told them that she was right to proceed as they were absent.

This implies nothing but the Applicant and his advocate were absent when the case was called on for hearing, and for this application therefore the applicant makes an attempt to convince the court for the second time to set aside the it's ex parte order.

Basically the cases are used to be heard at the time that had been fixed for that purpose, if it has been done otherwise the one who alleges must prove. In the matter at hand it is upon the applicant to prove that the said matter was heard before the fixed time. In **BARELIA KARANGIRANGI V. ASTERIA NYALWAMBWA, CIVIL APPEAL NO 237 OF 2017, CAT at Mwanza (unreported)** it was held that the principle governing proof of case in the civil suit is that the one who alleges must prove. In the said case the Court of Appeal cited sections 110 and 111 of the Tanzania Evidence Act [Cap. 6 RE 2002] to justify its findings on that issue. Adopting the same principle for the matter at hand I find no evidence has been given by the applicant's counsel to prove the allegation he has raised. According to his submissions the one who had witnessed the case being heard before the time fixed for that purpose is the Court Clerk whom he had interviewed and admitted the allegation. Had that been true the advocate was supposed to prove that fact by submitting the affidavit sworn by the said person supporting the said allegations. Failure to do so makes the court to disregard the allegation for having no proof. Such kind of allegation is supposed to be proved by the affidavit of the said Court Clerk who had attended the court together with the presiding Judge whom the Applicant's counsel stated that she admitted that the case had started before 13.30 hrs. See **NORBERT T. NGILWA V. TAH, Misc. Civil Application No. 170 of 2005, CAT at DSM (unreported)**.

The ex-parte judgment/ruling can only be set aside if there are justifiable reasons submitted by the party who is aggrieved by the said ex-parte decision as per O.IX, R.13 of the Civil Procedure Code.

The fact that there are no justifiable reasons advanced by the applicant to warrant this court to set aside the said ex-parte ruling delivered by this court on the 2/10/2018 I hereby dismiss the application with costs.

A handwritten signature in black ink, consisting of stylized initials 'SK' followed by a horizontal line.

S.M. Kulita

JUDGE

30/12/2019