

**IN IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISCL LAND APPLICATION NO. 35 OF 2019

*(Arising from Order of the High Court of Tanzania dated 16th October, 2019 (Hon. J.R. Kahyoza, J.)
in Land Appeal No. 13 of 2019)*

CHACHA NYAMURO @CHACHA

**WEREMA NYAMWERIAPPLICANT
VERSUS**

BENJAMIN NYAGIRORESPONDENT

RULING

Date of Last Order: 24/04/2020

Date of Ruling: 19/05/2020

KISANYA, J.:

By way of Chambers Summons made under Order XXXIX, rule 19 of the Civil Procedure Code, Cap. 33, R.E. 2002 (CPC), the applicant has moved this Court to be pleased to re-admit Appeal No. 13 of 2019 which was dismissed for want of prosecution.

Briefly, the applicant filed Appeal No. 13 of 2019 against the decision of the District Land and Housing Tribunal for Musoma at Mara in Land Application No 94 of 2014. When the said appeal came up for hearing on 16.10.2019 before my brother, Hon. J.R. Kayhoza, J., the applicant failed to appear. On the other hand, the respondent was present. Hence, the appeal was dismissed for want of prosecution. It is that order which prompted the application at hand.

At the hearing of this matter, both parties appeared in person, unrepresented.

As it is the practice, the applicant was called first to submit in support of the application. However, he prayed for the Court to adopt and consider the reasons advanced in the affidavit in support of Chamber Summons. The reasons averred therein were to the effect that, the applicant was in court on the fateful day, but he did not hear when the case was called for hearing before the trial judge.

In response, the respondent resisted the application. He contended that, the applicant was not in the waiting venue when the case was called on for hearing by the court clerk. He therefore urged me to dismiss the application on the ground that the applicant had not shown the sufficient cause for failing to appear on 16.10.2019. The respondent also requested the Court to adopt his counter affidavit in opposing the application.

The applicant rejoined by reiterating that, he was in the court premises and that, he could not hear his name because the case was called on for hearing when he was in the rest room. Upon being probed by the Court, the applicant conceded that he had not stated that fact in the affidavit

Having gone through the Chamber Summons, Affidavit, Counter-Affidavit and the rival arguments of both parties, I am convinced that, this application is based on O. XXXIX, r. 19 of the CPC. This provision empowers the Court to readmit an appeal that was dismissed for want of prosecution. It provides as follows:

*Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it is proved that **he was prevented by any sufficient cause from appearing when the appeal was called on for hearing** or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.” [Emphasize supplied].*

It is clear from the above cited provision that, the application for readmission of the appeal stands if the applicant proves sufficient cause which prevented him from appearing when the appeal was called on for hearing. Now, the issue is whether the applicant has established the said sufficient cause. I have gone through his affidavit, the reason for failing to appear is stated as follows:

- 4. THAT; on 16th October, 2020 when my appeal was fixed for hearing; arrived before this honourable court at about 8.30 am.*
- 5. THAT, very unfortunately, although I was before High Court premises on 16th October, 2019 when the appeal was fixed for hearing I did not hear my name being called as per relevant case was taken to Hon. Judge for hearing.*
- 5. THAT, suddenly; around 10:00am as I was at Court premises, I saw the Respondent leaving Court premises to Bus Stand.*
- 6. THAT; I immediately proceeded to the Deputy Registrar for consultation to inquire about my appeal which was before court for hearing on that date.*
- 7. THAT; Deputy District Registrar assigned me Registry officer assigned to appear before Hon. Judge on that date to assist me make a follow up and upon consulting Registry officer he informed me that my appeal had been dismissed*

a few minutes ago for want prosecution.

What I have gathered from the above evidence is that, the applicant claims that he was in the Court on **16.10.2019** and that, he didn't hear the case being called on for hearing by the registry officer. Further, the applicant states to have appeared before the Deputy Registrar to register his claim.

On the other part, the responded countered the applicant's evidence by stating that, the applicant was abusing the Court process. He averred that the applicant was not in the court when the appeal was called on for hearing by the court clerk/registry officer. The respondent stated further that, the court clerk /registry officer went to the waiting venue where he called the case loudly but the applicant was not within vicinity of the Court. This evidence is articulated in counter paragraph 2 of the counter-affidavit.

The applicant did not file a reply to counter-affidavit to challenge the respondent's evidence that, the court clerk went to the waiting area to call the parties to the case loudly. It is during the rejoinder submission, not even in his submission in chief when the applicant stated that, the case was called on for hearing at the time when was in the restroom. I am of the considered view that, if the reasons which prevented the applicant was that of going to the restroom when the case was called on for hearing, he ought to have stated so in the affidavit or reply to counter affidavit. This was done. Such fact was stated from the bar. It cannot be considered because it is not in evidence.


For the reasons stated herein, I find that the applicant has failed to show

the sufficient reason which prevented him from appearing when the appeal was called on for hearing. Also there is no sufficient evidence to prove that, the applicant was in Court on when the case was called on for hearing on 16.10.2019. The evidence of Deputy Registrar or Registry officer who are said to attend him on the fateful day was not given or tendered.

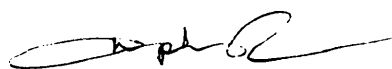
In the end result, the application is hereby dismissed for want of merit. The applicant to bear costs of this application. Any party dissatisfied with this ruling may appeal to the Court of Appeal in accordance with the law.

DATED at MUSOMA this 19th day of May, 2020.




E.S. Kisanya
JUDGE
19/5/2020

Court: Ruling delivered this 19th day of May, 2020 in the absence of the parties with leave of the Court. Parties to be notified.


E. S. Kisanya
JUDGE
19/5/2020