

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY**

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA**

MISC. LAND APPLICATION NO. 17 OF 2020

(From the High Court of Tanzania Mbeya District Registry in Misc. Land Application No. 93 of 2017. Originating from the District Land and Housing Tribunal for Rungwe at Tukuyu in Land Application No. 07 of 2016.)

MARIA RAPHAEL.....APPLICANT

VERSUS

HURUMA JOSEPH (As Administrator of
the Estate of the Late JOSEPH JAMES MWALUKOBA).....**1ST RESPONDENT**
MOSES K. MAGANGA.....**2ND RESPONDENT**
HTT IN FRANCO.....**3RD RESPONDENT**
VODACOM.....**4TH RESPONDENT**

RULING

Date of Last Order: 12/08/2020
Date of Ruling : 15/10/2020

MONGELLA, J.

This is an application for restoration of a suit to wit, Misc. Land Application No. 93 of 2017, which was dismissed by this Court for want of prosecution. It is brought under section 95 and Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 R.E. 2019. It is supported by affidavits of the applicant, Maria Raphael, one Margret Anthony, the applicant's advocate and one



Mr. Isaya Mwanry, learned advocate. It was argued by written submissions.

In arguing this application, Mr. Isaya Mwanry drafted the written submissions in holding brief for Ms. Margret Anthony, who he said was on her maternity leave. In his submission, Mr. Mwanry submitted that the applicant is an old woman residing in Ndumbi village in Rungwe District. Given her age she could not travel to Mbeya to attend the court in time. She thus decided to engage an advocate based in Mbeya to represent her. However, on the date fixed for hearing of the matter on 19th February 2020, the applicant's advocate, Ms. Anthony suddenly felt sick and attended a nearby hospital named KZ Hospital for diagnosis. She thus contacted him through phone call and asked him to hold her brief because he was within the Court building waiting to attend a criminal sessions case before another judge. He mentioned the case to be High Court Criminal Sessions Case No. 63 of 2014, Republic v. Vasco Lwenje & 2 Others. He submitted that the said case was previously assigned to Ms. Mgaya, learned advocate, but she was absent and the Deputy Registrar had to summon him on the same day to hold Ms. Mgaya's brief.

Mr. Mwanry submitted that on 19th February 2020 he attended the Judge's chambers to hold brief for the applicant's advocate, but was called and told to attend a briefing meeting before the presiding judge on the criminal case. He thus had to rush to the judge's chambers and could not communicate to either the judge presiding on the case he was holding brief or the court clerk. When he came out he was informed that the case was dismissed for want of prosecution.



Citing the case of **Nasibu Sungura v. Peter Machumu** [1998] TLR 497 he argued that the court is supposed to consider whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed. He argued that the applicant, through her affidavit together with that of Ms. Margret Anthony and Mr. Isaya Mwanry has adduced sufficient reasons. In Addition, he referred to the case of **Mwanza Director M/S New Refrigeration Co. Ltd v. Mwanza Regional Manager of TANESCO Ltd and Another** [2006] TLR 329 in which it was held that "*what amounts to good cause for non-appearance depends on the peculiar circumstances of each case.*" He mentioned the peculiar circumstances for non-appearance in this case to include the fact that the applicant relied on appearance of her advocate, the advocate fell sick of Urinary Tract Infection (UTI), and that the advocate instructed to hold brief had to attend another session in the same court.

Referring to the case of **Sadru Mangali v. Abdul Aziz Lalani & 2 Others**, Misc. Commercial Application No. 126 of 2016, he also added that the previous conduct of the applicant's was good whereby she used to enter appearance as scheduled by the court.

On his part, the 1st respondent supported the application on the grounds that the granting of extension lies within the discretion of the court. He as well argued that the reasons advanced by the applicant are sufficient, thus urged the court to grant the application. The 2nd respondent never entered appearance and no reply submission was filed on his part.



The 3rd respondent represented by Mr. Walter Shayo learned advocate, opposed the application on the ground that no sufficient ground was furnished by the applicant. He first challenged the assertion that the applicant relied on the appearance of her advocate. On this, he argued that in terms of the provisions of Order IX Rule 1 of the Civil Procedure Code, the party to a suit is also obliged to appear. He contended that the assertion by the applicant that he lives far from the court, somewhere in Ndubi village in Rungwe District is baseless as the courts do not set exceptions on place of residence in relation to appearance in court.

Regarding the reason of sickness of the applicant's advocate, Mr. Shayo argued that the applicant's advocate was supposed to furnish notice of absence, which he did not. He further challenged the authenticity of the medical chit provided on the ground that it does not disclose the name of the clinical officer who attended the patient and the date. In support of his argument he referred the court to the case of **Rosemary Stella Chambe Lairi v. David Kitundu Lairi**, Civil Application No. 517/01/2016 (CAT at DSM, unreported). In addition, he argued that the applicant was represented by Blessing Attorneys, a firm which her advocate belongs. Referring to the case of **Robert Frank Yohana and Another v. Rosemary Lyimo and 2 Others**, Misc. Land Application No. 588 of 2019 (HC at DSM, unreported), he argued that the applicant's advocate should have assigned another advocate in the firm to appear on her behalf.

Mr. Shayo also challenged Mr. Mwanry's assertion that he was asked to hold brief of the applicant's advocate. He argued that no proof to that effect was provided as no printout of the message or phone call was

attached in his affidavit to prove that he was instructed to hold the brief, and no proceedings of Criminal Sessions Case No. 63 of 2014 were attached as proof.

Lastly regarding the conduct of the applicant's advocate, Mr. Shayo referred to the case of **Christopher Mtikila v. Jacoba Nkomola & Others**, Civil Case No. 278 of 1997 (HC at DSM, unreported) and argued that it is a settled principle of law that one wrong cannot be cleared by the previous good conduct as if it were a mitigation for sentence in criminal charges.

The 4th respondent as well opposed the application. In the submissions filed by Mr. Juvenalis Ngowi, learned advocate, the 4th respondent also put up a stance that no sufficient cause has been advanced by the applicant. In his arguments, Mr. Ngowi contended that the applicant's counsel was mindful of the hearing, but did not act prudently to notify the court or the respondent's counsel to save him from travelling all the way from Dar es Salaam to Mbeya. He as well doubted Mr. Mwanry's assertion that he was sent to hold brief. He wondered how could Mr. Mwanry accept the brief while knowing that he had a criminal sessions case to attend. Referring to the case of **Justine M. Tesha v. Ministry of Natural Resources and Tourism and Another**, Miscellaneous Civil Cause No. 51 of 2003 (HC at DSM, unreported), **Christopher Mtikila** (supra) which cited in approval the case of **Issack Sebegele v. Tanzania Portland Cement**, Civil Application No. 25 of 2002, he argued further that Mr. Mwanry has asserted hearsay evidence as he never obtained the affidavit of the court clerk who summoned him to appear on the briefing session in the criminal



sessions case. Mr. Ngowi urged the court not to rely on Mr. Mwanry's assertions.

Just like the 3rd respondent, Mr. Ngowi also challenged the argument that the court should consider the previous conduct of the applicant's advocate. He was well referred to the case of **Christopher Mtikila** (supra) arguing that no wrong can be cleared by the previous good conduct.

After considering the arguments by the parties, I wish first to start with the reason that the advocate whom the applicant's advocate sent to hold her brief was attending another case before another judge. Just like the 3rd and 4th respondents, I am also not convinced by this assertion, but on a slight different perspective. My close scrutiny of the documents reveals that what has been asserted by the deponents in the three affidavits in support of the application is not supported by the documents presented as proof.

The suit was dismissed on 19th February 2020. Mr. Mwanry claims that on that particular date he had to attend a briefing meeting before another judge for Criminal Sessions Case No. 63 of 2014 between the Republic and Vasco Lwenje and 2 others on behalf of Ms. Mgaya. He has submitted a summons calling him to attend the said case on that particular date. In addition, he also submitted a cause list for the criminal sessions cases. The cause list is however contrary to what he has averred. The cause list reveals that from 18th February 2020 to 20th February 2020 the cases heard were Criminal Sessions Case No.96 of 2014, Republic v. Michael Maige and the counsels were Mr. Rwekaza and Ms. Juliana Marunda. Another



case was Criminal Sessions Case No. 19 of 2016, Republic v. Lulinda Julius and Pius Lubinza and the counsels were Ms. Margret Anthony and Mr. Chapwa.

The Criminal Sessions Case No. 63 of 2014, Republic v. Vasco Lwenje and 2 Others, he claims to have attended the briefing meeting on 19th February 2020 in the morning, appears in the cause list to have been heard from 13th February 2020 to 17th February 2020. Thus on 19th February 2020 Mr. Mwanry had no any criminal case to attend in this Court as he claims. If really was sent to hold brief for Ms. Anthony and had to leave the judge's chambers, it was then for other businesses best known to him and not to attend the briefing meeting on Criminal Sessions case No. 63 of 2014 which was finalised on 17th February 2020. I find this to be a deliberate attempt to mislead the court. I condemn such behavior and warn him accordingly.

Mr. Mwanry, also called for the court to consider the reason of sickness of the applicant's advocate. As much as I agree that sickness is a sound reason for granting the relief sought, I shall consider the same in relation to the trend of Ms. Anthony's attendance in court on previous sessions. I must first point out that I agree with the position settled in the case of **Christopher Mtikila** (supra) cited by the counsels for the 3rd and 4th respondents to the effect that "no wrong can be cleared by previous good conduct of a party as if it were mitigation for a sentence on a criminal charge." In my view, the previous conduct of a party or his advocate has to be considered along with other factors, such as that of sickness as advanced in this matter.



Mr. Shayo challenged the authenticity of the medical record presented. The one filed in the court file is also readable with difficulties. However, considering the kind of paper material used in the NHIF forms I find no genuine reason to doubt the authenticity of the document. Upon perusing closely the court record, I found that the applicant's counsel appeared in court several times. The date the matter was dismissed is the only date she missed attendance in court. Taking this record into consideration I grant the applicant's application to restore Land Application No. 93 of 2017.

The dismissal order is therefore set aside and the matter is ordered to proceed to hearing on merits. No orders as to costs.

Dated at Mbeya on this 15th day of October 2020.


L. M. MONGELLA
JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 15th day of October 2020 in the presence of the 3rd and 4th respondents' legal counsels.




L. M. MONGELLA
JUDGE