

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISCELLANEOUS APPLICATION NO. 54 OF 2019

(C/F Miscellaneous Land Application No. 3 of 2019 Originating from the decision of the district land and housing Tribunal for Karatu Application for Execution No. 63 of 2016)

JOHN PIUS TSOXHO APPLICANT

VERSUS

HERMAN PAULO AWE RESPONDENT

RULING

ROBERT, J

This application seeks for orders of this court to set aside the dismissal order made on 18th June, 2019 in Miscellaneous Land Application No. 3 of 2019 and make an order allowing the said application to proceed on merits. The application is made under the provisions of Order IX Rule 9(1) and section 95 of the Civil Procedure Code, Cap.33 R.E. 2002. The application is supported by a sworn affidavit of the Applicant, John Pius Tsoxho and resisted by the Respondent's counter-affidavit filed on 16th September, 2019.

A brief factual background of this application as gathered from affidavital depositions indicates that the Applicant and Respondent were the Judgment

Debtor and Decree Holder respectively in the Application for Execution No. 63 of 2016 at the District Land and Housing Tribunal for Karatu emanating from the Judgment of the former Customary Land Tribunal of Karatu District in Land Cause No. 68 of 1999 in respect of the boundaries of land between the Applicant and Respondent herein.

The litigation of Land Cause No. 68 of 1999 ended in the High Court of Tanzania at Arusha vide Civil Appeal No. 25 of 2004. Subsequent to the end of the litigation on 20th September, 2016, the Respondent herein filed an application for execution No. 63 of 2016 in the District Land and Housing Tribunal for Karatu which the Applicant objected unsuccessfully. As a consequence, the Applicant filed an application for extension of time to file an appeal to the High Court against the decision of the District Land and Housing Tribunal vide Miscellaneous Land Application No. 3 of 2019 lodged on 11th January, 2019.

It is alleged by the Applicant that Miscellaneous Land Application No. 3 of 2019 was fixed for mention on 7th May, 2019 as indicated in the chamber summons which differs with the date of mention appearing in the summons issued to the Applicant on 24th April, 2019. The Applicant decided to appear in court on 7th May, 2019 as indicated in the chamber summons, on arrival

the Registry Clerk informed him that the application was mentioned on 24th April, 2019 and that it was further fixed for mention on 18th June, 2019.

The Applicant stated further that on 18th June, 2019 the Applicant had two matters to attend in court namely, Land Appeal No. 3 of 2019 and Miscellaneous Land Application No. 3 of 2019. He first attended the Land Appeal No.3 of 2019 upon adjournment he rushed to the registry to inquire the fate of Miscellaneous Application No. 3 of 2019 and was informed that the application had been dismissed for non-appearance hence this application to set aside the dismissal order.

When this application came up for hearing on 1st June, 2020 both parties appeared in person unrepresented. The court ordered the application to be argued by way of written submissions.

Submitting in support of the application, the Applicant argued that the question for determination in this matter is whether the applicant has given sufficient cause for his non-appearance when the application was called on for hearing. He stated that the records indicate that on 24th April, 2019 both parties in Miscellaneous Land Application were absent and the application was set for hearing on 18th June, 2019 and both parties failed to appear

ultimately the application was dismissed for non-appearance. He argued that in considering the application of this nature the court is entitled to look into points of contention in the intended appeal and the application for extension of time if this application is granted.

Replying in opposition to the application, the Respondent submitted that the main argument in support of the Applicant's application is that on the material day which was, 18/6/2019 the Applicant was appearing in Land Appeal No. 3 of 2019 before the High Court at Commercial Court building and thus he was not able to enter appearance before this court in Miscellaneous Application No. 3 of 2019.

The Respondent submitted further that the Applicant's application is without any sufficient reason, highly misconceived and without merits for reasons stated in his counter-affidavit. He prayed for his counter-affidavit to be adopted as part of his written submissions.

The Respondent submitted that the Applicant failed to attach summons or proceedings of the particular date indicating that he was appearing in another case namely Land Appeal No. 3 of 2019; he did not mention the name of the judge before whom he appeared and therefore it is not easy for

this court to ascertain seniority of the said Judge. He submitted further that all these failures show that the Applicant was negligent for not informing the court clerk that he was called in Land Appeal No. 3 of 2019.

Submitting further, the Respondent argued that the proceedings and the Applicant's affidavit indicates that the Applicant was absent for consecutive adjournments without any notice to the court which proves that the Applicant was careless and grossly negligent and this cannot be accepted as sufficient reason to move the court in support of this application. He referred the court to the case of Frank Kibanga versus ACU Limited, Civil Case No. 24 of 2003 (unreported) where the Court of Appeal of Tanzania held that "*carelessness or inadvertence on the part of litigants or their counsel cannot be accepted as sufficient explanation to move the court's hand in the favour*".

He prayed for the application to be dismissed for lack of merit.

In rejoinder submissions, the Applicant submitted that the Respondent took a narrow approach on what constitute a sufficient cause or is trying to mislead the court. He argued that the requirement of Order IX Rule 9(1) to the Civil Procedure Code, (Cap. 33 of the Laws of Tanzania) if for the Applicant to show a good cause for his absence when his case was called.

He stated that facts under 11 and 12 of the Affidavit sufficiently display sufficient cause/what prevented the Applicant from appearing on material date when Miscellaneous Land Application No. 3 of 2019 was called for.

Submitting on the argument that he did not attach the summons to establish that he was appearing in another case, he argued that as a matter of practice court summons and proceedings are always issued on the first mention date and upon final determination of the matter respectively.

He submitted further that the Applicant's application has merit since the dismissal order in Miscellaneous Application No. 3 of 2019 was issued on the date fixed for mention contrary to the law and practice. He cited the case of National Bank of Bank of Commerce versus Grace Sengela (1982) TLR 248 in support of his submission. The Applicant prayed for the orders sought in the chamber application to be granted.

Having heard the contending submissions from both parties, I will now deliberate on the issues raised to determine whether this application has merit.

An order of this court dismissing Miscellaneous Land Application No. 3 of 2019 dated 18th June, 2019 reads as follows:

"Following continuous non-appearance on the part of the applicant in particular this application is consequently dismissed for want of appearance. I shall make no order as to costs since the respondent has neither appeared nor has he filed his counter affidavit it is so ordered".

Miscellaneous Application No.3 of 2019 which was dismissed by this court for non-appearance sought for extension of time for the Applicant to file an appeal against the decision/ruling of the District Land and Housing Tribunal for Karatu given at Karatu on 20th day of October, 2017 in Application for execution No. 63 of 2016.

This court is aware that where a case or an application is dismissed on the ground of non-appearance the applicant can apply successfully for the court to set aside the order of dismissal if the court is satisfied with the reason for non-appearance as a sufficient cause. Sufficient cause depends upon the facts and circumstances of each and every case.

In the present case, Miscellaneous Application No.3 of 2019 was dismissed due to continuous non-appearance of the Applicant. In the circumstances of this matter, setting aside a dismissal order is dependent

upon the Applicant giving sufficient reasons for his continuous absence in the proceedings of the relevant matter. The Applicant's reason for non-appearance is mainly that on 18/6/2019 when the court dismissed his application he was appearing in Land Appeal No. 3 of 2019. He not only failed to account for the continuous non-appearance in Land Application No. 3 of 2019 as stated in the dismissal order of the court but he also failed to provide any proof of his appearance in the Land Appeal No. 3 of 2019 or offer explanation on his failure to inform the court clerk of the alleged appearance in another matter.

Considering that Miscellaneous Land Application No. 3 of 2019 sought to extend time for the Applicant to file an appeal against the decision/ruling of the District Land and Housing Tribunal which was delivered two years prior to that application, the Applicant's continuous non-appearance in an application for extension of time to file an appeal out of time without sufficient cause is not only against the interest of justice which requires matters to come to an end but also unfair to the other party and an abuse of court process which cannot be countenanced.

In the end, I find no merit in this application and I dismiss it accordingly. Each party to bear its own cost.



K.N. Robert
K.N. ROBERT
JUDGE
13/10/2020