

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO 54 OF 2018
(Arising from Land Case No. 67 of 2011)

**KINONDONI MUNICIPAL COUNCIL.....APPLICANT
VERSUS**

**ANTHONY MASANZA.....1ST RESPONDENT
STARA MPONDA.....2ND RESPONDENT**

RULING

MASABO, J.:-

This is a ruling on an application to set aside an order of this court dated 26th March 2015 which dismissed the applicant's suit for non-appearance of the parties.

The background to the application as deciphered from the affidavit accompanying the application are that in 2011 Kinondoni Municipal Council, the applicant herein, sued the respondents in Land Case No. 67 of 2011 over ownership of a parcel of land. On 26th March 2015 the suit was called for hearing before her Ladyship Mugasha, J (as she then was) but none of the parties was present. Consequently, it was dismissed for non-appearance of the parties pursuant to order IX rule 2 the Civil Procedure Code [Cap 33 RE 2002].

The applicant was not amused. Upon obtaining an order for extension of time it has filed this application praying that this court be pleased to set aside the dismissal order.

The reasons for the prayer as deponed in the affidavit are that non-appearance on the hearing date was not occasioned by the applicant's negligence. Rather, it was due to miscommunication, accessioned by among others, the change of the presiding judge. It was deponed that, the suit was reassigned to a new judge, Mugasha J (as she then was) without notification to the parties. Upon the reassignment, the new judge fixed the hearing date in the absence of the parties and the notice for such schedule was not communicated to the parties. As both parties had no notice of the reassignment and the hearing schedule, none of them entered appearance on the date of hearing. The applicant has deponed further that there are serious triable issues regarding the ownership of the disputed land. Therefore, it is in the interest of justice that the suit be restored so that the ownership of the suit property can be determined.

Upon the application being filed, summons to the respondents were issued with no fruition. Reportedly, the first respondent who is currently domiciled at Butiama declined service. An affidavit of service by the one Albinus John Simeo, a court process server, accompanied by a letter, dated 21st April 2020 from the Village Executive Officer for Butiama Village, were produced in proof that the 1st Respondent declined service. The 2nd respondent could not be procured either. On 23rd July 2020, I granted leave for substituted service

by way of publication in respect of the 2nd Respondent. In compliance to this order the applicant published the summons in Mwananchi Newspaper of 28th July 2020. To that extent, all the parties were duly served but none of them entered appearance. An order for hearing ex parte the respondents was, consequently, granted.

During the hearing which proceed in writing, the applicant did not have much to offer. Having reiterated the dispositions made in the affidavit, Ms. Grace Lupondo, learned State Attorney, submitted that the application is meritorious as the dismissal was not occasioned by the applicant's negligence. Hence, it is in the interest of justice that the application be granted.

Oder IX rule 3 of the Civil Procedure Code provides that, where a suit is dismissed owing to non-appearance of the parties, the plaintiff may apply to set aside the dismissal order and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit. The powers vested in the court under this provision are discretionary powers exercised upon the applicant's demonstration of a good cause. Even in non-contested applications as in the instant one, the applicant is not relieved of the burden to prove to the satisfaction of the court that the non-appearance appearance leading to the dismissal order was due to a good cause. Therefore, the only issue for determination is whether the applicant's non-appearance on the date of hearing was due to a good cause.

Although no universal definition has been assigned to the term 'good cause', the term tends to be applied to cover situations where the applicant is not to blame for non-appearance. In other words, it is upon the applicant to establish that nonappearance was not occasioned by his negligence or apathy in prosecuting his suit. Guided by this position, it is my firm view that the applicant has ably demonstrated that his non-appearance was not due to his negligence. In the administration of justice, the right to information as to any change affecting the proceedings is of paramount importance. Therefore, in the instant case, it was crucial for the parties to be notified not only of the re-assignment but also of the schedule for hearing. The fact that none of the parties entered appearance on the fateful date, makes the applicant's story that they were not notified of the reassignment of the judge and the hearing schedule more plausible. Under the circumstance, the interest of justice leans in favour of the applicant.

Accordingly, I allow the application with no orders as to costs.

DATED at DAR ES SALAAM this 23rd November 2020.




J.L. MASABO
JUDGE