

**IN THE HIGH COURT OF TANZANIA
(MUSOMA DISTRICT REGISTRY)**

AT MUSOMA

MISC. LAND APPLICATION NO. 3 OF 2020

*(Arising from the Order of the High Court of Tanzania, Musoma District
Registry, at Musoma in Misc. Land Appeal No. 27 of 2019)*

IDDY GEORGEAPPLICANT

VERSUS

MWITA ROGEKO TYENYIRESPONDENT

RULING

Date of Last Order: 16/03/2020

Date of Judgment: 23/04/2020

KISANYA, J.:

The applicant herein filed Misc. Land Appeal No. 27 of 2019 (hereinafter referred to as “the appeal”) before this Court. The said appeal was dismissed for want of prosecution on 5/12/2019. In the present application made under O.XXXIX, r. 19 and section 95 of the Civil Procedure Code [Cap. 33, R.E. 2002], the applicant requests for this Court to restore the said Misc. Land Appeal No. 27 of 2019.

At the hearing of this application, the applicant and the respondent, appeared in persons, unrepresented.

Submitting in support of the application, the applicant reiterated the reasons advanced in his affidavit in support of the application. He contended that, he had been informed by the Registry Officer one Bahati that the appeal would be heard on 5/12/2019 in the new building of this Court located at Bwire area within Musoma Municipality. The applicant submitted that, basing on that information, he went to the new building on date of hearing (5/12/2019). He was informed by the watchmen that, the Court had not moved in the new building. Therefore, he went back to the Resident Magistrate's Court of Musoma on the next day (6/12/2020) where he was informed that the appeal had been dismissed for want of prosecution on 5/12/2019. That said, the applicant urged me to restore the appeal on the ground that he was not negligent.

In response, the respondent conceded to have been informed that the appeal would be heard on 5/12/2019 in the new building of this Court. As it was to the applicant, he went to new building on 5/12/2019. However, the respondent contended that, people who went at the new building were informed that the court session would be conducted at the Resident Magistrate's Court of Musoma. Therefore, he proceeded to the Resident Magistrate Court where the appeal was called on for hearing at 3.00 pm. The respondent

submitted further that, the appeal was dismissed for want of prosecution as the appellant failed to appear without giving notice. Therefore, he requested the Court to dismiss the application on the ground that the applicant was negligent to prosecute his appeal.

I have given due consideration to the parties' submissions. As stated herein, the applicant requests for this Court to restore the appeal dismissed by the Court for want of prosecution. The relevant provision on this matter is O. XXXIX, r. 19 of the Civil Procedure Code [Cap. 33, R.E. 2002) which provides that:

“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 is mine].

The above cited provision suggests that, the applicant who seeks for restoration or re-admission of the appeal dismissed for want of prosecution is duty bound to establish and prove the sufficient cause for his or her failure to appear on the hearing date of the appeal. The issue then is whether the applicant herein has established sufficient cause which prevented him from appearing on 5/12/2019 when the appeal was placed before Hon. Galeba, J. for hearing.

The sufficient cause advanced by the applicant is that he failed to appear because he was not aware of the change of venue. He relied on information of the Court that, hearing of the appeal would be conducted on 5/12/2019 at the new building located at Bweri within Musoma Municipality. In his affidavit, the applicant states that, upon finding that the Court had not moved in the new building, he went back to the Resident Magistrate Court of Musoma on the same day (5/12/2020) and found the appeal already dismissed for want of prosecution. This is reflected in paragraphs 6 of the affidavit as follows:

“That, I decided to return to the Resident Magistrate Court’s in the same morning of 5th December, 2019 where I found out that Misl. Land Appeal No. 27/2019 had already been called for hearing in my absence and dismissed for want prosecution.”

However, this evidence was countered by the respondent. In paragraphs 5 and 6 of the counter-affidavit, he averred that the appeal was called on for hearing on 5/12/2019 at 3.00 pm. It is on record that, at the hearing of this application, the applicant changed the facts or his story. He stated to have returned to the Resident Magistrate Court on 6/12/2019. Therefore, the applicant has failed to prove that he returned to the Resident Magistrate’s Court on the hearing date (5/12/2019) as stated in his affidavit. Also, the evidence to prove that he went to the Resident Magistrate Court on 6/12/2019 is wanting. This is because that fact was stated from the

bar. The applicant was required to file a reply to counter-affidavit to and stated that fact on oath.

Although, there is no evidence to prove that the applicant went to the Resident Magistrate Court on 5/12/2019 or 6/12/2019, it is clear that, both parties do not dispute to have been informed that their appeal would come for hearing on 5/12/2019 at the new building of this Court. Also, it is not disputed that on 5/12/2019, the Court had not moved in the new building as planned. In objecting this application, the respondent has not proved or stated whether there was a court officer or other means of informing people who were at the new building that the court session was to be conducted at the Resident Magistrate Court. He stated that fact from the bar. It was not averred in his counter-affidavit for consideration by this court as evidence.

In view thereof, I find that there was miscommunication on the venue of hearing of the appeal. This is because, it was not proved that, parties were duly notified of the change of venue, either in advance or on the hearing date. In such a case, it will be unjust to impute the judiciary administrative issues or inefficiency into the applicant. In other words, the applicant cannot be held responsible for failure to appear at the Resident Magistrate's Court of Musoma if he was not informed of the change of venue.

Therefore, I am satisfied that, there is sufficient cause which prevented the applicant from entering the appearance. Substantive justice requires parties to litigate their rights to end. In the circumstance of this case, that objective can be achieved if the appeal is heard on merit.

That said and done, I grant the application. Consequently, I order that Miscl. Land Appeal No. 27 of 2019 is hereby restored or re-admitted. Costs to follow the event. It is so ordered.

DATED at MUSOMA this 23rd day of April, 2020.



E.S. Kisanya

JUDGE

23/4/2020

Court: Ruling is delivered this 23rd April, 2020 in the absence of the parties with leave of the court due to COVID-19 outbreak. Parties to be availed with copy of ruling.



E.S. Kisanya

JUDGE

23/4/2020