

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF TANGA

AT TANGA

MISCELLANEOUS LAND APPLICATION No. 64 OF 2020

[Arising from Land Appeal No. 26 of 2019, original Land Application No. 38 of 2017 of the Korogwe District Land and Housing Tribunal at Korogwe]

Between

ERASTO NTANGOMENGWA DUDUYE.....APPELLANT

VERSUS

MOMBO TALANTA SACCOSS LTD.....1st RESPONDENT

HASSAN SAID NGOZI.....2nd RESPONDENT

MAJEMBE AUCTION MART.....3rd RESPONDENT

RULING

MRUMA, J.

Erasto Ntangomengwa Duduye (hereinafter referred to as "the Applicant") brought this application under **Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 R.E. 2019]**, for orders that;

1. The court be pleased to set aside the dismissal order delivered on 24th September 2020, by his Lordship Mruma J, in Land Appeal No. 26 of 2020, re-admit the same and order that the said appeal be set for hearing;
2. Costs of this Application to follow the event; and
3. Any other orders which this court may deem just and fit to grant/

The grounds of the Application are amplified in the Applicant's counsel's supporting affidavit, but briefly are;

- That Land Appeal No 26 of 2019 before Mruma, J was assigned to Advocate Elisia Paul who has been handling this case and she never missed to appear even a single day;
- That on 24th September, 2020 when the above appeal was scheduled for hearing Advocate Elisia Paul's child woke up feeling unwell as such she took her child to the Hospital and called to inform advocate Noelline Bippa that she will not be able to appear. That Advocate Noelina agreed to hold her brief. At around 08:45 Advocate Noelina was in court he informed one Boniface James Mhuza that as advocate Elisia Paul was absent, the matter will not proceed for hearing. Advocate Noelina believes that the matter was called while she was in wash room because she didn't hear it being called. There is an affidavit of Boniface James Mhuza, a Record Management Assistant to the effect that he was informed by advocate Noelline that as Advocate Elisia Paulo had a sick child, the matter will not proceed as scheduled. Advocate Elisia Paul didn't swear any affidavit to support allegations that she had a sick child.

The Respondents through their counsel Mr. Mathias Nkingwa, learned advocate vehemently opposed this application and filed a joint counter affidavit in reply to the Application.

As the proceedings above would show, during the hearing of this Application, the Applicant was represented by Counsel MS. Eliia Paula of Divine Chambers Advocates, the same law firm as advocate Noelina Bippa Ibrahim who sworn the supporting affidavit. The Respondents written submissions was drawn and filed by Mr. Mathias Nkingwa of Mathias Nkingwa Law firm who was retained for purposes of preparing written submissions only. Counsel filed written submissions which have been relied on by this Court in writing this Ruling.

The only issue for determination herein is whether the Applicant has proved sufficient cause to justify the reinstatement of Civil Appeal No. 26 of 2019.

Counsel for the Applicant submitted that the Applicant's affidavit evidence was that Land Appeal No 26 of 2019 was fixed for hearing on 24th September 2020 and that it was being conducted by advocate Elisia Paul. That whereas Advocate Elisia was not in court for reason that she had a sick child but had sent Ms. Noelina Ibrahim (Advocate) to hold her brief. That Counsel Noelina informed bench clerk one Boniface James Mhuza that she had instructions to seek an adjournment for the reason that counsel Elisia was attending her child. And it was upon this basis that this Court invoked its inherent powers to dismiss the said Land Appeal. To this she noted that the applicant has since maintained her instruction to her and is ready to prosecute her client's case and that further, the Applicant herein

shall suffer irreparable loss if the said dismissal order which is the subject matter of this Application is not set aside. She referred this court to **Rule 19 of Order XXXIX of the Civil Procedure Code** as the enabling provisions of the law that the Applicant seeks to invoke the inherent powers of this court to exercise its discretion and set aside the dismissal order. She submitted that in an application for setting aside a dismissal order, the Applicant must satisfy court that he/she was prevented from prosecuting his/her case by sufficient cause. Paragraph 2 clearly states that Ms. Elisia Paul is the counsel who was prosecuting the appeal and further in paragraph 3 that on the date the appeal was dismissed Ms. Elisia's was absent because her child was unwell. The fact that counsel Elisia is the one who was conducting the matter is confirmed by the fact that she prosecuted this application.

Counsel Elisia reiterated in her submission that the failure to prosecute the Applicant's Civil appeal who had duly instructed her but for reason of sickness of her child could not appear and instead sent another Advocate one Noelina Bippa Ibrahim (from the same law firm) who informed a court clerk that the appeal will not proceed, should not be visited on the Applicant who has at all material times been ready to prosecute her case.

The Respondents opposed the application and their counsel submitted that it was patently false for the Applicant to rely on the affidavit sworn by Ms. Noelina Bippa which was defective. He stated that what is deposed in the supporting affidavit differs materially with the Applicant's submissions in support thereof therefore the counsel failed to prove the facts alleged in the affidavit. The learned counsel cited the case of Felister Kemilembe

Tuilatangwa Versus President of the United Republic of Tanzania Civil Application No. 52 of 2019 where it was held that:-

"As a general rule a defective affidavit should not be acted upon by a court of law....."

I have carefully read the submissions of Counsel on both sides and applied them in writing this Ruling. I beg to start with the issue of defectiveness of the Applicant's counsel supporting affidavit. An affidavit is said to be defective if it contravenes the law governing its formation. The affidavit doesn't become defective or invalid simply because it is in variance with the submissions in support thereof.

The dismissed appeal was presented for filing on 16th December 2019. It was called for the first time before Deputy Registrar on 30th December, 2019 and was called before a judge for the first time on 20th February, 2020. Court fixed the case for hearing on 2nd April, 2020. The parties were duly informed and indeed the Appellant's counsel who has a right to begin attended court. The matter was adjourned to another date and it was kept on being adjourned for several sessions till 18th August, 2020 when it was called before the Deputy Registrar who set it down for hearing on 24th September, 2020. On that day, Ms Elisia didn't appear and she sent Ms. Noelina Bipa who is from the same firm to seek for an adjournment. The court was very ready to proceed with the hearing of this appeal.

The main reason why Advocate Elisia didn't appear and hearing of the appeal could not proceed is that advocate Elisia was attending to her sick child. This reason has not been substantiated. Advocate Elisia didn't swear

any affidavit or produce any document not only that she had a sick child but that she has a child! A medical report of the said child would have supported what had been deposed by Advocate Noelina in her supporting affidavit. In absence of affidavit of advocate Elisia the assertions made by Advocate Noellina remain as hearsay evidence which cannot be relied by the court.

It is trite law that justice is both for the Appellant (Plaintiff) and Respondent (Defendant). The Respondent being a decree holder would wish to enjoy the fruits of her/his decree. It is therefore unfair for the Appellant to file an appeal and take about 12 months in Court without showing seriousness in prosecuting it. Needless to mention, the adversarial approach in our justice system coupled with pro adjournment Advocates and parties is the major cause of backlog in our judiciary.

On the date the appeal was dismissed, Ms. Noelina Bippa came to Court ready to seek an adjournment and not to proceed. It was against this background that the Court exercised its discretion to dismiss the appeal since the conduct of the Appellant's counsel on that particular date amounted to abuse of Court process.

This Court is very much aware of the fact that negligence of Counsel should not be visited on the client. The Courts have attempted to lay down some of the grounds and circumstances which may amount to sufficient cause. Generally a mistake by an Advocate by being negligent may not be accepted as a sufficient cause. Ideally in case like the instant case where counsel in personal conduct of a matter is not in position to attend court and chooses to instruct another (from the same law firm) to hold a brief for

her, the brief should include instructions to proceed which was not the case herein Ms. Noellina came purposely to seek an adjournment.

Be that as it may, this case was dismissed under Rule 17 (1) of Order XXXIX of the Civil Procedure Code which allows the court to exercise its discretionary powers to meet the ends of justice. Having carefully perused the records and specifically the affidavit of Noellina Bippa, I hold the view that the Appellant has failed to show any cause let alone sufficient one which prevented Advocate Elisia from appearing when the appeal was called for hearing.

I consequently dismiss this Application with costs to the Respondent.

A.R. Mruma,

Judge.

Date this.....^{24th}.....Day of September, 2021

Delivered by virtual Court (On line) this.....^{24th}.....day of September 2021.



A.R..... Mruma

Judge

^{24/9/2021}