

**IN THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY**  
**AT MWANZA**  
**MISCELLANEOUS LAND APPLICATION No. 27 OF 2020**  
**(Arising from Land Appeal No. 76 of 2018)**  
**MASEKE EKOKORO & ANOTHER..... APPLICANTS**  
**VERSUS**  
**MACHUMU BUTOTO KUSAMA**  
**(As administrator of the estate of the late**  
**NYAMAKAMBA MAJEMBE).....RESPONDENT**

**RULING**

11<sup>th</sup> February, & 26<sup>th</sup> March, 2021.

**TIGANGA, J**

Through the chamber summons made under Order XXXIX rule 19 of the Civil Procedure Code [Cap 33 R.E 2019] which has been supported by an affidavit dully sworn by the applicant, this court has been moved to make orders setting aside the dismissal order, dated 27<sup>th</sup> February, 2020, which was made by this court, and readmit the dismissed appeal No. 76 of 2018. The applicant also prayed for costs of this application plus any other order that this court will deem fit and just to grant.

This application was however countered by the respondent who filed a counter affidavit in which he noted some facts stated in the affidavit filed by the applicant while other facts were vehemently denied.

By leave of this court, this application was argued by way of written submissions. The applicant was represented by the learned Advocate, Mr. Mwanaupanga whereas the respondent fended for himself.

Arguing in support of the application, Mr. Mwanaupanga, counsel for the applicant submitted that on that day, 27<sup>th</sup> February, 2020, when the matter was called for mention he had been instructed to represent the applicant. However, he had other matters before Hon. Ismail, J which he had to attend to first and that when he came back it is when he realised that the matter i.e. Land Appeal No.76 of 2018 had been dismissed. He submitted further that he first had to attend the matters before Ismail, J because of what he termed as the settled practice that appearance should be in order of seniority. To support his contention, he cited the case of **Posta Bank vs Shani Omary**, Miscellaneous Application No. 10 of 2005, HC-Dar-es-Salaam (unreported) in which this court held that;

*"a counsel should not attend the former if the matter is called up first due to the so called seniority syndrome"*

He claimed that the dismissal was therefore unjudicial. Further to that, counsel also submitted on the fact that the case was dismissed while it was scheduled for mention. He claimed that it is a long established principle that when a matter is called for mention/hearing as indicated in the summons, the court normally ascertains the status of the case and then schedules it for hearing. He was of the view that the court was not proper dismissing the case when the same was due for mention.

To support this he cited the case of **Shengena Ltd vs National Insurance Corporation and Another**, Civil Application No. 09 of 2008, CAT- Dar-Es-Salaam (unreported). He claimed therefore that in light of the holding in the cited case, the dismissal was not justified. He prayed for the application to be granted and Land Appeal No. 76 of 2018 be restored.

In his submission in rebuttal, the respondent claimed that the application to restore the dismissed case is intended to delay the rights of the respondent and waste precious time of this court. He further claimed that this is the fourth time the applicant is given a chance but he never abides by the procedures. He concluded his arguments by stating



that the applicant has not shown sufficient reasons to move this court to grant the application.

That marked the end of the parties' submissions both for and against the application. Without wasting much time, it is important to point out that what is to be considered in applications for setting aside dismissal orders is whether or not sufficient reasons have been advanced entitling an applicant to seek such an order. Normally, an applicant has to provide sufficient reasons for his/her non appearance at the time the dismissed matter was called for hearing.

Now from the affidavit filed in support of the application, specifically reading paragraphs 8 to 10, and the submissions thereto, the counsel for the applicant has narrated what made him fail to appear when the matter was called for hearing stating that he was attending other cases before another Judge, only to realise later that the case had been dismissed.

As rightly put by the counsel for the applicant that it is a common practice that appearance should be in order of seniority, which is in fact true, I therefore see no reason why the applicant should not be given another chance to be heard on appeal given the fact that first, there has been enough proof as to his whereabouts at the time the matter was

called for hearing and second the respondent has not shown how he will be prejudiced if this application will be granted.

In view of the above, this application is granted. The dismissal order of this court dated 27<sup>th</sup> February, 2020, is set aside and appeal No. 76 of 2018 is readmitted. No order as to costs is given.

It is so ordered.

**DATED at MWANZA, this 26<sup>th</sup> day of March, 2021**



**J. C. Tiganga**

**Judge**

**26/03/2021**