

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

AT MTWARA

MISCELLANEOUS LAND APPLICATION NO.21 OF 2020

(Arising from Land Appeal No.13 of 2015 of the High Court of Tanzania
at Mtwara)

HASHIMU JUMA NAPEPA.....APPLICANT

VERSUS

**BAKARI AHAMADI NG'ITU (Administrator of the Estate of the
late Galus Polipili).....1ST RESPONDENT**

ADARAT ADRIAN.....2ND RESPONDENT

MIC TANZANIA LTD.....3RD RESPONDENT

HTT INFRACO LTD.....4TH RESPONDENT

RULING

9 March & 13 April, 2021

DYANSOBERA, J.:

The applicant, Hashimu Juma Napepa, has moved this court by Chamber Summons made under Order XXXIX Rule 19 and section 95 of

the Civil Procedure Code [Cap 33 R.E. 2019] and any other enabling provision of the law. The applicant is praying before this court to issue an order for setting aside dismissal order of Land Appeal No.13 of 2015. The applicant's application is supported by his affidavit sworn on 13th August, 2020 before Mr. Lazaro D. Shija an Advocate and Public Notary.

A brief account of this matter is imperative. The applicant filed his Land Case Appeal No. 13 of 2015 before this court which was eventually dismissed for want of prosecution on 12th May, 2017. Seeing that, the applicant brought his application (Misc. Land Application No.15 of 2019) for extension of time to file an application for setting aside dismissal order. This court granted the applicant's prayer on 6th August, 2020 and extended the time for filing an application for setting aside the dismissal order and directed him to file the substantive application within fourteen (14) days from that date. On 24th August, 2020 the applicant filed this application. The respondents opposed the application by way of counter affidavits.

During the hearing of this application, the applicant was unrepresented and appeared in person. The same applied to the first respondent. Mr. Robert Dadaya, learned Counsel, held brief for Mr.

Ndalo Emmanuel, learned Advocate and appeared for the third respondent. The second and fourth respondents did not appear no notice was forthcoming for their default.

The hearing of this application was conducted by way of oral submissions by the parties who appeared before this court. The applicant submitted that he is applying for setting aside the dismissal order on failure of being notified.

In the response the first respondent simply submitted that the applicant was lying as he purposely defaulted appearance. On his behalf, Mr. Dadaya submitted that they were objecting to this application and prayed that the 4th paragraph of the 3rd respondent's counter affidavit be adopted that the applicant abandoned his appeal. Mr. Dadaya submitted that from 18.8.2015 up to 28.6.2016 the applicant defaulted appearance without any sufficient cause. The learned counsel was of the view that it is the procedure in court that if a party has been confused by a court clerk it is his duty to annex an affidavit of the said clerk and further that it was incumbent upon the applicant to follow up his case. He pointed out that the on 18.8.2015, 29.10.2015 and the subsequent dates the applicant defaulted appearance in court.

Additionally, Mr. Dadaya argued that the applicant has failed to account for his defaults for the mere reason that he was given the date of mention. To fortify his argument, learned counsel cited Sections 110 (1) and (2) and 111, 112 and 113 of the Evidence Act and pressed that the applicant had to prove why he defaulted or how the clerk confused him on the dates.

In a short rejoinder, the applicant informed the court that he was told to come on 18.5.2017 but that when he came on the said date he was told that the matter was dismissed on 12.5.2017.

I have considered the rival submissions of the parties and I find myself inclined to agree with the first and third respondents through Mr. Mr. Dadaya, their learned Counsel. On the third paragraph of the affidavit, the applicant asserted that after the matter was filed before this court and fixed for different dates for mention and hearing and as an appellant he attended all the dates up to 6th April 2017 where the case was adjourned for another date which was on 18th May 2017. Also, in line with paragraph 4 of the applicant's affidavit it is shown that the applicant attended this court on 18th May 2017 where he was informed that his appeal was dismissed for want of prosecution by Hon.Twaib J. on May 2017.Indeed, these two paragraphs have prompted this court to

concede with the first and third respondents that the applicant did not attend the court sessions during mention and hearing dates up to 6th April, 2017. I am fortified in this by annexure 1 or annexure MIC-1 which shows that the applicant only attended on 30/8/2016, 21/2/2017, 6/4/2017 out of the following dates, that is, 18/8/2015, 29/10/2015, 10/11/2015, 26/11/2015, 10/12/2015, 17/3/2016, 3/5/2016, 28/6/2016, 25/10/2016, 22/11/2016, 5/5/2017 and 12/5/2017. Therefore, out of fifteen days the applicant had only attended three times as the record reveals. , Thus, it is incorrect for him to state that he attended all the dates where the court had scheduled it for either mention or hearing.

According to the record, it is as clear as day light that the applicant who, on 6th day of April, 2017 was present, was told by Hon. E. Missana, Ag DR (as she then was) that the appeal case was coming for mention on 5/5/2017 with the ancillary orders including notification to the second respondent.

As the record reveals, on 5/5/2017 all the parties to the case did not enter appearance and this court scheduled the applicant's appeal to come up on 12/5/2017 and ordered notice to the parties. On 12/5/2017 only the applicant and 1st respondent were absent. The 2nd respondent

was present while the 3rd and 4th respondents were represented. The absence of the 1st respondent was with a good reason. According to 2nd respondent who is the relative of the 1st respondent, the 1st respondent failed to appear in court because his father (1st respondent's) had died and on the previous day there was funeral at Chiola, Nachingwea.

In dismissing the appeal for want of prosecution, the record reveals that this court took into consideration the following factors: One, the applicant's previous appearances in court were inconsistent. Two, the applicant seemed to be not serious in following up his appeal. Three, the applicant defaulted appearance without notice and four, the case had been cause listed in the back log reduction session.

There were, in my view, sufficient reasons for the court to dismiss the applicant's appeal. To restore it, good and sufficient reasons have to be established to the satisfaction of the court. This is partly because the restoration of the dismissed appeal is within the discretionary powers of the court and partly because litigations must be proceeded with diligence and expedition and a court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts. Besides, the court has to make sure that its orders

it makes are complied with, otherwise, the court will be brought into disrepute.

In the up short, for the reasons stated above, the application is unmerited. I thus dismiss it with costs to the 1st and 3rd respondents.

It is so ordered.



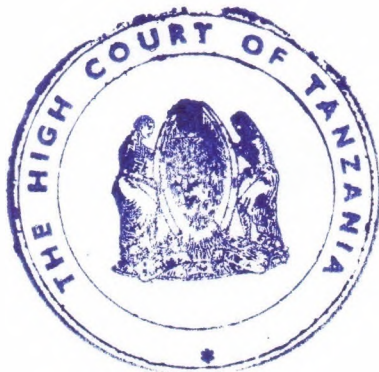

W.P. Dyansobera


JUDGE

13.04.2021

This ruling is delivered under my hand and the seal of this Court on this 13th day of April, 2021 in the presence of applicant and the first respondent.

Rights of appeal explained.




W.P. Dyansobera

JUDGE