

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

MISC.LAND APPLICATION NO 22 OF 2020

***(Arising from Land Application No. 102 of 2019 of Kahama District Land
and Housing Tribunal)***

MADUHU THOMAS ILANGA APPLICANT

VERSUS

1.NATIONAL MICROFINANCE BANK PLC.....

2. DOLPHIN GENERAL

BUSINESS ENTERPRISES CO. LTD

} RESPONDENTS

RULING

23rd March & 16th April, 2021

MKWIZU, J.

This is a ruling in respect of restoration application filed by the applicants herein. It is made under order XXXIX rule 19 of the Civil Procedure Code [Cap 33 RE 2019], accompanied by an affidavit deposed by the applicant's counsel, Mr. Joseph Mugabe. The prayers in the chamber summons are as follows:

- 1. That this honourable court be pleased to set aside an order of this court before honourable Mkwizu J, dated 14th may. 2020 dismissing the appeal for non-appearance and order that the Appeal be restored.*
- 2. That costs be in the cause*
- 3. Any other relief (s) this Honourable Court deems fit and appropriate to grant.*

The background leading to this application can be stated briefly that, Applicant was the appellant in Land Appeal No. 04 of 2019 originated from Land Application No. 113 of 2018 of Kahama District Land and Housing Tribunal.

On 14th May, 2020 when the Appeal was called on for hearing, the applicant made no appearance and no reason were furnished to the court. The appeal was therefore dismissed for want of prosecution under Order 9 Rule 8 and 12 of the Civil Procedure Code Cap 33 R: E 2019. It is from the said dismissal order, the applicant on 15th May, 2020 filed this application on the aforementioned prayers.

At the hearing, the applicant had the service of Mr. Frank Samwel Advocate while Mr. Pastory Biyengo appeared for the respondent. Mr. Frank submitted that, the application is for setting aside the dismissal order dated on 14th May, 2020 dismissing applicant's appeal No. 04/2029 . He adopted the affidavit in support of the application to form part of his submissions.

On the reason for non-appearance when the appeal was dismissed, Mr Frank said, the advocate who was supposed to appear was appearing before Tiganga J in the High Court Mwanza . He however instructed the applicant to appear and seek adjournment but unfortunately, on the said date, applicant was in court but in the washroom when the matter was called on for hearing. He submitted that, thereafter, applicant rushed into the preparation of the documents and the filing of the present application whereby the affidavit in support of this application was sworn on the same day followed by the filing of this application on the following day. Mr Frank invited the court to find that applicant was on his knees pursuing his right. He therefore prayed for the application to be allowed.

Responding to the application, Mr. Biyengo submitted that there is no proof by the applicant that his advocate was appearing before the High Court in Mwanza and that applicant was in the court premises when the matter was dismissed by the court.

Mr. Biyengo argued that, the law under Order 39 Rule 19 of the CPC Cap 33 requires applicant in an application of this nature to adduce sufficient reasons on why he was unable to appear in court when the matter was dismissed. He said, this application misses such an explanation. He lastly prayed for the dismissal of the application with costs.

In rejoinder, Mr. Frank essentially reiterated his submissions in chief.

I have carefully considered the chamber summons, supporting affidavit as well as the parties submissions. The question before this court is whether applicant has successfully advanced sufficient reasons for this court to grant the prayer for readmission of the appeal. Re admission of the appeal is regulated by **Oder XXX,IX Rule 19 of the Civil Procedure Code (Cap 33 R:E 2019)** which states:

*"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."* (Emphasis provided)

The reason given by the applicant for non-appearance on the date the when the appeal was dismissed is the advocate responsible was attending another matter before Tiganga J in Mwanza High Court and that applicant was in court by at the washroom at the time the appeal was called on for hearing. I have perused the affidavit in support of the application. There is no summons or any document attached to prove that indeed the applicant's advocate was appearing before Tiganga J in Mwanza High court. We are all aware that, appearances by parties or advocate in court is by court summons which usually indicates *inter alia* number of the case, dates of the hearing or mention and the judge or magistrate before whom the matter appears. Either the matter would have been listed in the cause list which, in this matter would have proved the facts that indeed the applicant counsel

had a matter before another judge in the mentioned high court of course with material facts indicating that the counsel in question was the representing advocate in that matter . In this matter, the appearance by the applicant's counsel before Tiganga J, was not supported by any document except a blank averment in the affidavit. In paragraph 6, of the supporting affidavit it is indicated that the cause list was attached, the said attachment however is not on the records. Alternatively, the counsel would have brought into the courts records for justification courts proceedings on the date he was appearing before Tiganga J .This would have cleared the doubt on whether the averments in paragraph 6 of the affidavit are true or not. The application as it is now, is insufficient of proof. It is uncertain whether the averments are true or not.

In his oral submissions, applicant counsel submitted that, applicant was in court but attending the call of nature at the time when the appeal was called on for hearing. Again, this claim is not supported by the affidavit. I thus, agree with Mr. Biyengo that the application for re admission by the applicant is without cogent reasons. In **Nasibu Sungura vs Peter Machumu** [1998] T.L.R at page 501 the court stated that:-

"an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed."

In this application, applicant failed to explain why he was unable to enter appearance when the appeal was dismissed. The application is unmerited, it is therefore dismissed with costs.

Order accordingly.

Dated at Shinyanga this 16th day of APRIL, 2021

