

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**MISC.LAND APPLICATION NO 52 OF 2020**

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

**MASHAKA JOHN.....1<sup>ST</sup> APPLICANT**  
**SPRIAN NYANDA.....2<sup>ND</sup> APPLICANT**  
**LEAH ALOYCE.....3<sup>RD</sup> APPLICANT**  
**FRANCIS GABRIEL.....4<sup>TH</sup> APPLICANT**  
**CHARLES KABEYA.....5<sup>TH</sup> APPLICANT**  
**MASHAKA PIJI.....6<sup>TH</sup> APPLICANT**  
**ROCK THOMAS.....7<sup>TH</sup> APPLICANT**  
**HAMISI MSUNGWI.....8<sup>TH</sup> APPLICANT**  
**GIDION MAKENDA .....9<sup>TH</sup> APPLICANT**

**VERSUS**

**JOSEPH MAGUNILA & PATNERS..... RESPONDENT**

**RULING**

*23<sup>rd</sup> March & 16<sup>th</sup> April, 2021*

**MKWIZU, J.**

Applicants were appellants in Land Appeal No 6 of 2020. Respondent filed a preliminary objection. On the 28<sup>th</sup> May, 2020, both the appeal and the preliminary objection were ordered to be heard by way of written

submissions which were to be filed simultaneously. The written submissions filing schedule required both parties to file their respective submissions on the same date and the appeal was set for mention on 6<sup>th</sup> July, 2020 to set a judgment date.

On 6<sup>th</sup> July, 2020, neither appellants nor their advocate made an appearance in court. The reason for their absence were not furnished either and the written submissions in support of the appeal were also not filed as per the court order. On the other side, Mr. Makanjero Ishengoma appeared for the respondent. He prayed to abandon the notice of objections arguing that having perused the file, they found that the preliminary objection had no merit that is why they did not file written submissions. Mr. Ishengoma also prayed for the dismissal of the appeal for want of prosecution. This court, granted the prayer, it marked the preliminary objection withdrawn and dismissed the applicant's appeal for want of prosecution for failure to file the written submissions as ordered.

A month later, that is on 5<sup>th</sup> August, 2020, Applicants (original appellants) filed this application under **Order XXXIX RULE 19 and section 95 of the**

**Civil Procedure** (Cap 33 R.E 2019) for setting aside the dismissal order dated 6<sup>th</sup> July, 2020 . The prayers in the chamber summons were that:

- 1. That this honourable court be pleased to restore Land Appeal No 6 of 2020 in the high Court of Tanzania ( at shinyanga) originating from district Land and housing Tribunal, for Kahama in Land application No 102 of 2018.*
- 2. Costs be in the main application*
- 3. Any other relief (s) this Honourable Court deems fit and appropriate to grant.*

The application is accompanied by an affidavit deposed by the applicant's counsel, Abel Simon Sizya.

At the hearing, applicants were represented by Yuda Kabughushi learned counsel who held the brief for Mr. Abel Sizya advocate with instructions to proceed whereas Mr. Pastory Biyengo also learned advocate appeared for the respondent.

Submitting on the reasons for the prayers in the application, Mr. Kabugushi pointed to paragraphs 4,5,6 & 7 of the affidavit in support of the application

explaining that on 28/5/2020 the court ordered the applicants to file their written submissions in support of the appeal and Preliminary Objection, the said written submission were to be filed by 12/6/2020 , being lay persons applicants consulted advocate Rwechungura for the preparation of the said written submissions. Advocate Rwechungura mis understood the appellants hence filed a document titled Applicants joint reply to preliminary objection on 11/6/2020 one day before the expiration of the date for filing the written submissions leading to the dismissal of the appeal on failure by the applicants to comply with the court order .

Mr. Kabugushi contended that, the non-filing of a proper document was a mistake by the advocate who was trusted by the appellants. He invited the court to find that applicants (laypersons) should not be punished for the mistakes committed by the advocate. He on that reason prayed for the court to allow the application, set aside the dismissal order allow the appeal to be heard on merit.

In reply, Mr. Biyengo submitted that the applicants had a duty to make follow up of their matter in accordance with the court procedure and instructions



irrespective of the fact that they know the law or not. He was of the view that ignorance of the law and procedure should not be used as a defence for not complying with the court orders. He said, even if it is to be taken the document filed by the applicants counsel was due to confusion by the advocate, that alone does not negate the fact that appellants failed to comply with court order. He referred the court to the case of **Valambia Vs. Transport Equipment LTD**, (1992) TLR 246 & **William Shija Vs Faithal Masha**, (1997) TLR 213 arguing that negligence of the counsel representing a party to the suit is not a sufficient reason for the court to grant the sought prayers.

In conclusion, argued Mr. Biyengo, Order 39 rule 19, of the Civil Procedure Code (Cap 33 R:E 2019) require applicants to furnish sufficient reason for nonappearance on the date the appeal was dismissed. In this application and the oral submissions by the applicant counsel, no such reasons were given and therefore the application should be dismissed for lacking in merit.

The rejoinder submissions were just reiteration of the applicant's counsel submissions in chief. Mr. Kabugushi argued in addition that the cited cases

are distinguishable for the facts in those case are dissimilar to the facts on the case under scrutiny.

I have considered the application. By its nature, applicants' duty is to equip the court with sufficient reasons as to why they were unable to file the written submissions on the date they were required to do so. In **Nasibu Sungura vs Peter Machumu** [1998] T.L.R at page 501 it was observed 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."*

The reasons for the non-filing of the written submissions by the applicants were deposed in paragraph 6 and 7 of the affidavit in support of the application that:

6. *That, since in the records there is a document indicating to have been filed on 11<sup>th</sup> June 2020 it seems the advocate who drew the document did not understand if the applicants were required to file written submission instead filed written statement of defense which was wrong.*

7. *That, taking into account that the applicant were ignorant of the law the mistake was made by the advocate who was given fee to draw the documents whodid not exercise care and diligence to his duty the mistake which was not intended by the applicants*

I have revisited the records in **Land Appeal No. 06 of 2020** subject of this application. It is evident that when the said appeal appeared for hearing on 28<sup>th</sup> May, 2020 the following order was given.

*"Order*

*1) Written submission on preliminary objection to be filed on 12/6/202*

*2) Written submission on the Appeal to be filed on 12/6/2020*

*3) Reply on the submission on the preliminary and the main appeal on 26/6/2020*

*4) Rejoinder if any to the preliminary objection and main appeal on 3/7/2020.*

*5) Mention in view of setting a judgment date on 6/7/2020 ..."*

The above order was given in the presence of the applicants. On 11<sup>th</sup> June 2020, the court received from the Appellants ( now applicant) a document titled "***Appellant's Joint Reply to Notice of Preliminary Objection'***". The applicants counsel submissions are to the effect that the advocate for the appellant misunderstood the appellants resulting into filing that wrong document.

As stated earlier, applicants did not comply with the court's order of filing Written submission in support of their appeal. And, if that is not enough, the applicants made no appearance in court when the matter was scheduled for setting a date for the decision. The applicants counsel urges the court to find that applicants are ignorant of the law and that the non-filing of the written submissions was the fault of their advocate and therefore blameless.

It is a settled law that for restoration application to succeed, applicants must furnish sufficient cause. I have exercised my mind on whether the reason given by the applicants in this application are sufficient enough to warrant the grant for the prayer sought. I am far from being convinced. Though



appellant filed a document a day before the due date for filing the Written submissions, that documents do not carry with it , either on its title or the contents the feature of the written submissions in support of their appeal .

I have perused the said document. First of all is not a Written Statement of Defence as referred to in the affidavit in support of this application. It was a reply to both a Preliminary objection and rejoinder to the Reply to the Memorandum of appeal. First two paragraphs after the title of the filed documents, appellant gave the following details:

*"**TAKE NOTE THAT,** at the first day of hearing of the respondent's notice of preliminary objection, the appellants herein shall defend or reply the point that. The appeal is properly filed before the Court as it contains copy of judgement and decree in which the appeal originates from, thus prays to the honourable court **to dismiss the point of preliminary objection with costs ...***

***WITHOUT PREJUDICE** to the foregoing and only on the alternative, the appellants herein after being served with the*

***respondents reply to the memorandum of appeal jointly  
file their rejoinder and avers as follow:" ( Emphasis added)***

The paragraph of the Appellant joint reply to Notice of preliminary objection quoted above indicate specifically that appellants were not bringing into the court records the documents in compliance with the courts order but making a reply to the PO filed and rejoining to the respondent's reply to the memorandum of appeal. The said document is so specific and express on this. It is not a reflection of a written submissions so to speak and therefore its filing cannot be regarded as a mere slip-up on the part of the appellant's advocate ( now applicants).

That said, I am satisfied that applicants have failed to establish good cause for non-compliance with the court order of filing written submission in support of the appeal. The application is unmerited, its is therefore dismissed with costs. Order accordingly.

**Dated at Shinyanga this 16<sup>th</sup> day of APRIL, 2021**

  
**E. Y. MKWIZU**  
**JUDGE**  
**16/4/2021**

