

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 53 OF 2020

(Original from Land Case No. 27 of 2018)

BETWEEN

AWADH ABOOD *(as legal personal representative of the estate*

*Of the late SALEHE ABOOD SALEHE.....***APPLICANT**

VERSUS

TANZANIA NATIONAL ROADS AGENCY

(TANROADS).....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

Date of last Order: *27/04/2021*

Date of Ruling: *28/05/2021*

MLYAMBINA, J.

On 10th November, 2020, this Court dismissed *Land Case No. 27 of 2018* for want of prosecution. On 8th December, 2020 the Applicant filed this application for an order:

That, the Court may be pleased to set aside the dismissal order for want of prosecution.

The application has been supported with the affidavit of Patrick Charles Seuya, Advocate of the Applicant and an affidavit of the

Applicant himself. Both affidavits and submission in support of the application contains the following reasons:

One, the matter was scheduled for hearing on 10th November, 2020 at 9:00am. *Two*, the Applicant arrived at the Court premises at 08:15m and his Advocate arrived at 9:00am. *Three*, the Applicant and his Advocate waited until 11:00am without hearing their case or any other case before the trial Judge. That is when they looked for the Clerk of the trial Judge, one Mrs. Kaminda.

Four, Mrs. Kaminda informed the Applicant and his Advocate that she announced all the people who had cases before the trial Judge should go to open Court No. 3 where she would pick them. *Five*, the Applicant and his Advocate sat there all the time expecting their case to be called via speakers which is a normal practice. *Six*, the Clerk informed the Applicant and his Advocate that the matter was dismissed for want of persecution. Thus, they were shocked as they were present in the Court premises and were not called as it is the normal practice.

To substantiate the afore reasons, the Applicant, in his submission, cited the case of **Pimak Profesyonel Mutfak Ltd Sirketi v. Pimak Tanzania Ltd and Another**, Misc. Commercial application No. 55 of 2018 at page 7 where this Court held:

What amounts to sufficient cause has not been defined by the law but as correctly submitted by the learned counsel for the Applicant, certain factors may be taken into account to ascertain factors may be taken into account to ascertain whether a party has advanced sufficient cause. The factors are: whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; and lack of diligence on the part of the Applicant.

The Respondents resisted the application through the counter affidavit sworn by Daniel Nyakiha, Learned State Attorney and reply submissions drawn and filed by Gallus Lupogo, Learned State Attorney. It was noted by the Respondents that the parties were directed to be picked up from Open Court No. 3 but the rest of the reasons advanced by the Applicant were denied.

It was submitted by the Respondent that the Applicant had a tendency of defaulting appearance and this Court had already warned him by entering an order of last adjournment. Thus, the dismissal order which this Court is invited to vacate was arrived in Court in the presence of the Respondents.

On the principles underlying the setting aside of dismissal order, the Respondents properly asserted that it is a judicial discretion which has to be exercised judiciously upon advancing sufficient cause for the nonappearance or failure to prosecute. The Respondent cited the provisions of *Order IX, Rule 9 of the Civil Procedure Code, Cap 33 (R.E 2019)* which provides:

In any case in which a decree is passed ex-parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

On the principle that the Applicant must satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the Respondent denied and cited the case of **Aristibes Pius Lishebabi v. Hassan Issa Likwendembe and 3 Others**, Civil Appeal No. 5 of 2019, Court of Appeal of Tanzania at Mtwara (unreported) in which the Court

while citing other relevant authorities had the following to say at page 18:

It is a settled principle that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient reasons for his absence, the proper course for him is to file an application to that effect in the Court which entered the judgment... this is because in most cases, the reasons for the defendants absence involve matter which requires to be established by evidence.

The Respondent correctly replied that the mere allegation that a party was in Court without actually appearing before the Judge or Magistrate does not amount to appearing. Further the Court Clerk has not sworn an affidavit to prove that Applicant's allegation. As such, the Applicant's averment remains a hear say. To buttress the Respondent's submissions, a case of **Narcis Nestory v. Geita Gold Mining Ltd**, Misc. Labour Application No. 13 of 2020 High Court of Tanzania at Mwanza (unreported) was cited. In that case the Court observed:

If an affidavit mentions another person, that other person has to swear an affidavit. However, I would

add that, is so where information of that other person is material evidence because without the other affidavit it would be hearsay.

The Respondents distinguished the cited case of **Pimak Profesyonel Mutfack Ltd Sirketi** (*supra*) on two grounds: *First*, it concerned extension of time. *Second*, the Applicant advanced sufficient cause of sickness.

Upon carefully considering the evidence and submission of both parties, I should observe that the application at hand is weak and deserves to be dismissed. As properly submitted by the Respondents, the Applicant failed to advance sufficient cause for his non appearance on the day the suit was called for hearing. The allegation that he was in the Courts premise with his Advocate cannot be relied upon because several other cases were handled by the trial Judge on that date. If true the Applicant and his Advocate were in Court premise, then they were sleepy and not for case business.

Again, the allegation that the Court Clerk informed them on the status of the case, remains a hearsay evidence, as there is no an affidavit of the said Court Clerk. Apart from the cited case of **Narcis Nestory** (*supra*) the Court of Appeal of Tanzania at Dar

es Salaam in the case of **NBC Ltd v. Superdoll Trailer Manufacture Co. Ltd** Civil Application No. 13 of 2002 held that; affidavit which mention another person is herarsay unless that other person swears as well.

Even if I may agree with the cited case of **Pimak Profesyonel** (*supra*), the application at hand has not been brought promptly. The application was dismissed on 10th November, 2020 but this application was filed on 8th December, 2020. There was no good explanation of the 28 days.

In the premises of the above, the application is hereby marked dismissed with costs for lack of sufficient cause.



Y. J. MLYAMBINA

JUDGE

28/05/2021

Ruling delivered and dated 28th May, 2021 in the presence of Counsel Erick Kamala holding brief of Leonard Manyama for the Applicant and Dora Komba, State Attorney for the Respondent.



Y. J. MLYAMBINA

JUDGE

28/05/2021