

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 152 OF 2018

YUSUF BAKARI NYAHORI *(As Administrator*

of the Estate of MWANAASHA YUSUF MATIENYI **1ST APPLICANT**

FATUMA BAKARI **2ND APPLICANT**

VERSUS

COMMISSIONER FOR LANDS,

MINISTRY OF LANDS HOUSING AND

HUMAN SETTLEMENT DEVELOPMENT **1ST RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL **2ND RESPONDENT**

MUSOMA MUNICIPAL DIRECTOR **3RD RESPONDENT**

DONALD J. KAMORI **4TH RESPONDENT**

HILARY PATRICE OTAIGO **5TH RESPONDENT**

SAID ABDALLAH MATAMBO **6TH RESPONDENT**

RULING

10th June, & 29th July, 2021

ISMAIL, J.

This is a ruling on an application for setting aside an order of dismissal of the suit (Land Case No. 9 of 2015). This matter was dismissed by the

Court on 22nd June, 2016, on account of the absence of the applicants on the date the matter was scheduled for hearing. The application for restoration is supported by the applicants' joint affidavit in which reasons for their absence have been adduced. Reasons for the absence are enumerated in paragraphs 6 and 7 of the joint affidavit. These are: demise of the then 1st plaintiff, Yusuph Bakari Nyahori, who passed away on 30th May, 2016; and the 2nd applicant's illness that led to her hospitalization at Musoma Regional Hospital.

The application has been valiantly opposed by the 1st, 2nd and 3rd respondents, through a counter-affidavit sworn by Elia Anatory Kamihanda, the 1st respondent's officer. The contention by the said respondents is that the prayers in the application are not tenable, on account of the fact that, after extension of time in Misc. Land Application No. 254 of 2016, which was complied, the subsequent attempt is not maintainable. It is worth noting that, the 4th and 5th respondents who were served through substituted service by publication in the newspaper, chose to enter a disappearance. The 6th respondent who appeared through his administrator did not contest the application.

When the parties appeared before me, they prayed that the application be argued by way of written submissions. Having acceded to the prayer, a

schedule for filing the submissions was drawn. The parties were largely compliant with the schedule. While applicants enlisted the services of Mr. Emmanuel Sayi, learned counsel, Ms. Subira Mwandambo, learned State Attorney, alongside Mr. Doodluck Lukandiza, learned advocate, represented the respondents.

Mr. Sayi's submission reiterated what is stated in the affidavit, arguing that serious illness of both of the plaintiffs (applicants), and eventual demise of the then 1st plaintiff, is what prevented them from appearing in court on the date the matter was set for hearing.

Mr. Sayi argued that illness of both of the parties and death of one of the parties was a good cause for their non-appearance in court, arguing that in that respect, the provisions of Order IX rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) had been complied with. He prayed that the application be granted.

The respondents' submission was equally laconic. The counsel contended that dismissal of the matter was inevitable given the applicants persistent non-appearance in court, whenever the matter was called for orders. The respondents wondered how the death of the plaintiff that allegedly occurred a month prior to the hearing date would have any bearing on the non-appearance on the date the case was dismissed. The counsel

argued that, since the exact date on which the 1st plaintiff fell ill has been concealed, seeking refuge on the date of the demise was inappropriate.

With respect to compliance with Order IX rule 3 of the CPC, the counsel's argument is that the fact that reasons for non-appearance are flimsy and unjustified, no good cause had been established. The respondents took the view that the dismissal order was quite justified and inevitable. They prayed that the application be dismissed with costs.

Deducing from the parties' brief submissions, the issue to be resolved is whether the application is meritorious.

It is a trite position that a plaintiff whose suit is dismissed on account of his non-appearance, when the suit is scheduled for hearing, may apply for setting aside the dismissal order and have the matter restored. He can do so, and the court may grant, subject to demonstration of a good cause for his non-appearance. Good cause is what is also referred to as sufficient cause. This is in terms of Order IX rule 6 (1) of the CPC. The position in the cited provision has been judicially acknowledged, through various decisions. They include ***Benedict Mumello v. Bank of Tanzania*** [2006] E.A. 227; and ***Pimak Profesyonel Mutfak Limited Sikreti v. Pimak Tanzania Limited & Another***, HC-Comm. Application No. 55 of 2018 (unreported).

As stated in the supporting affidavit, and the submission that supported the application, the reason for the plaintiffs' absence is the illness and subsequent demise of the erstwhile 1st plaintiff. This coincided with the illness and eventual hospitalization of the 2nd applicant. The indisposition is what is contended to be the reason that prevented them from attending to the call when the matter came up for hearing. Annexures FMZ 2 and 3 have been relied upon in proving the applicants' contention. The view held by the 1st, 2nd and 3rd respondents is that, absence of particulars on the date of ailment prior to the 1st plaintiff's death casts doubt on the veracity of the applicants' contention.

What comes out of respondents' contention is that death of the 1st plaintiff is not something that is contested. It is only on the missing details of his ailment that the respondents have opened the lid on. The other point of the respondents' disquiet is that the plaintiff's demise occurred a month prior to the hearing date. None of these issues raised take away the fact that the 1st plaintiff fell ill and passed away, as a result. The fact that no details of illness were given do not rule out the truth that the deceased would not attend the proceedings on the date the matter was scheduled for hearing. I hold that, with respect to the 1st plaintiff, the reason given constitutes sufficient or good reason for non-appearance.

Coming to the 2nd applicant's reason for her absence, I propose to address it by first stating that the established position is that, where illness is cited as a reason for a party's non-appearance, then, upon proof, such illness can constitute a ground for setting aside a dismissal or an *ex-parte* decision. This was underscored in the case of ***John David Kashekya v. The Attorney General***, CAT-Civil Application No. 2012 (unreported). In this decision, the Court of Appeal made the following observation:

".... sickness is a condition which is experience by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for checkup for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient enough for granting the application for extension of time to file"

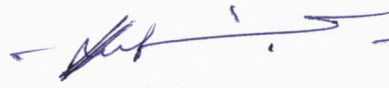
This is what the 2nd applicant has done, she has produced a medical chit that exhibits her ailment, hospitalization and eventual discharge, and subsequent medical attention that she received. The last of such service was extended to her on 20th June, 2016. This convinces me that her non-appearance, two days after she had been treated and described as still unwell, was for a justified reason. This reason constitutes sufficient cause described in rule 6 (1) and the decisions cited above.

I, therefore, consider this application meritorious and falling within the realm of applications for which restoration is merited. Consequently, I grant the application and restore the suit. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 29th day of July, 2021.




M.K. ISMAIL
JUDGE

Date: 29/07/2021

Coram: Hon. C. M. Tengwa, DR

Applicant: Mr. Emmanuel Sayi, Advocate

Respondent: Ms. Subira Mwandambo, State Attorney

B/C: J. Mhina

Court:

Ruling delivered today in the presence of both sides.

C. M. Tengwa

DR

At Mwanza

29th July, 2021

