

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

MISC LAND APPLICATION NO. 42 OF 2020

(Originating from Misc. Land Application No. 48 of 2019)

ABDALLAH HASSAN.....APPLICANT

VERSUS

MARTIN MARISEL MAKAMBA

(Administrator of the estate of

the late MARISEL MAKAMBA)RESPONDENT

RULING

02/07/2021 & 06/07/2021

KAMUZORA, J

In this Application the Applicant is seeking for an order to set the dismissal order of Misc. Land Application No. 48 of 2009 issued on 2/9/2020 by Hon. Mlacha, J and grant an order for restoration of the same Misc. Land Application No. 48 of 2019. The application is brought under the provision of Order XI Rule 4 of the Civil procedure Code Cap 33 RE 2002 and supported by the affidavit of one Samson M. Rusumo, counsel for the applicant. The application was strongly opposed by the respondent through his counter affidavit.

When the matter was set for hearing, the proposal was to proceed by way of written submission to accommodate the respondent who was reported sick. Both parties submitted their submission as scheduled; Mr. Samson Rusumo appeared and filed the written submission for the applicant and Richard Madibi filed the written submission for the respondent.

In his submission in support of the application, the counsel for the applicant prayed for the Affidavit in support of the Chamber Summons to be adopted and form part to this submission. He then submitted that, the dismissed Misc. Land Application No. 48 of 2019 was filed in this Honourable Court on 7th August 2019 and it was assigned to Hon. Demello J. that, after filing it the Applicant discovered that he had sued late Marisel Makamba without knowing that Marisel Makamba has already passed away. That, Hon. Demello, J, directed an amendment to be made to replace the late with his son Martin Marisel Makamba who is the Respondent in this current Application. That, they complied with the instruction of Hon. Demello, J., by replacing the late Marisel Makamba with his son Martin Marisel Makamba who is administrator of the estate of the late his father.

The counsel further submitted that, all the time they were appearing regularly in court of Misc. Land Application No. 48 of 2019. That, the problems of non- appearance commenced when they appeared in court and matter did not proceed just because they were told by the Clerk that case file for Misc. Land Application No.48 of 2019 was not available on that day. That on that day, the counsel was together with the Applicant aged around 75 years old who came from Turian Morogoro with his son called Idrissa Abdallah. That, they asked the Clerk to notify them through mobile phone

numbers they gave her. That, they left the court premises without being told the date for appearing in court again meaning that, no date was fixed to proceed simply because there was no case file as it had been misplaced.

The counsel submitted also that, he made follow up several times but the efforts ended in vain as the clerk was always telling them that the case file has not yet been traced or found. That, it is unfortunate that the clerk did not inform them of anything while they issued the clerk with their mobile numbers. That, the case file was found or traced and reassigned to a new Judge that is Hon. Mlacha, J., but unfortunately again the clerk did not tell them any information about that reassignment. That, eventually on 2/9/2020 when the counsel went to make follow up to the court, he was informed that the case, Misc. Land Application No. 48 of 2019 was dismissed without notifying them.

The counsel insisted that, he remember that when they lastly appeared in court and informed of the missing case file, the Applicant's son called Idrisa Abdallah who was always escorting his father (Applicant) gave his mobile phone to court clerk for further notification after getting the case file but no any communication was made to notify the said Applicant's son and Applicants' Advocates. He maintained that, the major causes for non-appearance were the misplacement of the case and failure of the clerk of Hon. Demello, J., to notify them of the recovery and reassignment of the case file to Hon. Mlacha, J as the successor judge. The counsel insisted that, the negligence committed by the clerk should not affect the Applicant as he is innocent person. The referred the principles of natural justice that no

person should be judged unheard. He referred the case of **Sadiki Athumani Vs Republic [1986] TLR 235** where Samatta J, held that;

"The requirement that a party to proceedings must be given the opportunity to state his views is a fundamental principle of natural justice"

He also referred **Revision No. 653 Of 2019, High Court of Tanzania Labour Division (Unreported)** by Hon. Z.G. Muruke,J at page 3 of the Ruling;

"It is elementary principle law that, Natural justice demand, parties to the case to be heard before an order can be made to the prejudice of their rights. Failure to hear a party is an error which goes to the root of the matter at hand is fatal. Rule of natural justice states that no man should be condemned unheard and, indeed both sides should be heard unless one side chooses not to. It is a basic law that, no one should be condemned to a judgment passed against him without being afforded a chance of being heard. The right to be heard is a valued right and it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

The counsel averred that, the case law cited hereinabove emphasize the legal position which established that right to be heard is fundamental principle. That, this right has been enshrined in Article 13(6) (a) of the Constitution of United Republic of Tanzania of 1977 where it is stated as follows:

"when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of other agency concerned"

The Applicant's counsel also submitted that, apart from what he argued, legal technicalities should not prevent or deny the substantive rights entitled to a party to case. He referred Article 107A (1) and (2)(e) the Constitution of United Republic of Tanzania of 1977 that, it prohibits the imposition of legal technicalities with intention to deny substantive rights.

"The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania and that in delivering decisions in matters of Civil and Criminal in accordance with the laws, the Court shall observe among other principles. To dispense justice without being tied up with technicalities provision this may obstruct dispensation of justice".

He explained that, this constitutional position is reiterated by the very recent case, **Revision No.653 of 2019 (supra)** at page 4.

Based on the above law and authorities the counsel maintained that, the Applicant and his advocates did not commit any negligence and legal the position as seen in the case law cited require that no person should be judged unheard, and legal technicalities not acceptable in law. He therefore

Prayed for this court to allow the application for extension of time with cost.

Responding to the applicant's submission, the counsel for the respondent prayed the counter Affidavit to be adopted as part of the respondent's submission. The respondent's counsel then submitted that, it is trite law that in any application for setting aside the dismissal order, the Applicant must adduce sufficient reason for non- appearance in court. That the Application di not adduced sufficient reasons for setting aside the dismissal order. The respondent's counsel explained that, the Applicant's Affidavit and his submission shifted blame to the court clerk that she failed to inform them about the date of appearing in court. The respondent's counsel was of the view that, the said blame cannot stand as there is no evidence as to whether the Applicant gave the said duty to the said court clerk. That, it is just a mere statement which cannot be relied upon by this Honourable Court. That, the Applicant's submission that they made follow up of the file in court is not proved as there is no any letter which has been attached to the Affidavit in evidence as to whether the Applicant made follow up the case in court.

The counsel for the respondent submitted further that, the counsel for the Applicant has failed to state the date as to when he made those follow ups. That, the counsel for the applicant stated to have made a single follow up on 2/9/2010 to the Court to which he was informed that the case had been dismissed. That, in his Affidavit and the submission he has failed to state a person who told him the dismissal of the case. That, if he made a perusal to the Court file, he could have attached an exchequer receipt for perusal and a letter requesting for a perusal. That, the same has not been attached to

his Affidavit and even the said date (2/9/2010) which he purports to be informed is questionable.

Regarding the claim by the counsel for the applicant's counsel that they were not informed the by the Court clerk for Demello, J on tracing the Court file after living a mobile number, the counsel for the respondent submitted that, there is no any evidence from the Court clerk as to whether she failed to inform the Applicant. That, the Applicant has even failed to compel the said clerk to swear an affidavit for the same if at all the said facts is true. The counsel insisted that, it is trite law that if an affidavit mention another person, that person must swear an affidavit. He referred the case of **Narcis Nestroy Vs Geita Gold Mining Limited Misc. Labour Application No. 13 of 2020, High Court of Tanzania at Mwanza (unreported)** as cited in the case of **Awadh Abood (as legal person representative of the estate of the late Salehe Abood Saleh Vs Tanzania Nation Roads Agency (TANROADS) and Another, Misc. Land Application No.53 of 2020, High Court of Tanzania, Dar es Salaam (unreported)** where it was held:

"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 counsel reiterated that, if the reason for them not appearing in court was for the court clerk not informing them, the affidavit of the said clerk is

necessary. That, it is necessary in the sense that it is also doubtful if the Applicant left a mobile number to the said court clerk. That, mere statement without an evidence of the said court clerk cannot stand.

Regarding the argument that the applicant's advocate made various follow ups of the said file in court, the counsel for the respondent countered that fact on account that, the advocate failed to attach any evidence supporting his argument. That, the Applicant's Advocate also failed even to provide a single evidence to prove that he made a follow up for the same as he is an advocate. The counsel for the respondent is of the opinion that, the Advocate was supposed to write a letter regarding the missing file, but nothing was attached to the Affidavit. That, the Applicant came with the mere words blaming the Court clerk and he even failed to mention the name of the clerk.

The respondent's counsel insisted that, the Applicant is trying to hide his negligence through a natural justice principle that no one should be judged unheard. The respondent's counsel submitted that, the Applicant is one who filed the Application hence was supposed to act diligently and thoroughly in making sure that the court file was found in time and ensure that the Respondent was well informed. That, in this Application it is the Respondent who acted diligently in making follow of the case and he knew the date and attended the mater while the Applicant was so relaxed and waiting to be informed by the court clerk.

The counsel averred that, the Rule of the nature justice has an exception as stated in the case referred by the Applicant, **Revision No. 653 of 2019 between Mussa M. Mohamed Versus. Tanzania Railway Corporation**

Formerly known as Reli Assets Holding Company. High Court of Tanzania Labour Division (Unreported) before Hon. Z.G. Muruke, J at page 3 of the ruling.

"Rule of natural justice states that no man should be condemned unheard and, in deed both sides be heard unless one side choose not to."

That, in this case the Applicant chose not to be heard and this application intends only to delaying the Respondent from enjoying his rights in the said suit property. He explained that the applicant has in many occasions failed to act diligently as he has been filing applications which lacks merits. The counsel insisted that, it is a trite law that litigation should come to an end referring the decision by the Court of Appeal in the case of **Halais Prochemie Wella A.G. (1996) TLR269 and Bank of Tanzania Vs Sai A. Marindaand and 30 others, Civil Reference No. 3 of 2014** as cited in the case of **Mohamed Ally Vs Gizele Lifiga Matola, Application for Labour Revision No. 84 of 201, High Court of Tanzania, Labour Division, Arusha (unreported)** where it was held as follows:

"We do not, however think that a party who been refused extension of time to file notice of appeal by the High Court can come to the court on "second bite" as and when he wishes on the pretext that the Rules do not set time scale for such application. Always any step in which a party to, any proceedings intend to take, must be within a prescribed time so

that litigation should come to an end hence the latin maxim – interessei rei- publicae ut sit finish litium”

The respondent counsel concluded that, this Application is devoid of merits as the Applicants came with the mere words blaming the court clerk while he did not act diligently for the same. He then prayed for this Application to be dismissed with Costs.

I have considered the length submissions by the counsel for the parties and the records in Misc. Land Application No.48 of 2019 which is subject to this application. From the records, the said application was first called in court on 16/08/2019 in the absence of both parties. It was adjourned to 10/09/2019 and both parties appeared but the case was adjourned before the Deputy Registrar to another date. On that date 26/09/2019, one Idrisa appeared and reported that the applicant was missing while and someone by the name of Martin Marcel appeared claiming to represent the respondent who has passed away. He was given leave suo motu to amend the pleadings for his name to be included as a party to the case. The case was then adjourned for hearing to 28/11/2019. On that date Mr. Samson Lusumo learned counsel appeared for the applicant and Martine Makamba appeared as administrator of the estate of the respondent and as a party to the case as the pleadings were amended to comply to the court order. The matter was adjourned before the Deputy Registrar and scheduled for hearing on 26/03/2020. Before the date scheduled, on 17/02/2020, the Trial Judge issued an order returning the case file to the Judge in charge for re-assignment and that was done in the absence of parties. On the clear date scheduled before the transfer which is 26/03/2020, the case was also called

in court but both parties did not enter appearance. Two more adjournments followed without either of the parties entering appearance. Then on the following adjournment which is 02/09/2020, only the respondent appeared and the application was dismissed with costs for want of prosecution.

It is on this basis, the applicant claim that the dismissal was not in their knowledge as no information was revealed to them. I have decided to analyse the case trend to find if the applicant argument is justifiable. The above trend justifies the applicant's claim that parties were not informed on the charge of a trial Judge. The return of the case file to the Judge In charge for reassignment, was done on the date the case was not scheduled for the parties to appear. It is obvious as claimed by the counsel for the applicant that, on the date to which the parties were supposed to appear, they could not find the file in the list of case called before Hon. De-mello. They were informed that the file was missing. But it is obvious that as the file was returned for re assignment, the same was already cause listed before Hon. Mlacha the new trial Judge and the parties could not know fact without the assistance of the court clerks. I therefore agree that there was missing information on the whereabouts of the case file that mislead both parties not to appear on the following two occasion. It was fortunate that when the matter was adjourned for the third time the respondent happened to appear and the same was dismissed.

The applicant claimed to discover the dismissal of the case on the same date and preferred the present application praying for order setting aside dismissal order. This application was presented for filing in court on 30/9/2020. The effort done by the applicant shows that nonappearance was

not intentional and that is why even the application for restoration was filed immediately after the discovery of the dismissal. I therefore find that nonappearance on that basis was justified. I proceed on granting the application by setting aside the dismissal order in Misc. Land Application No. 48 of 2019 issued on 02/09/2020 by Mlacha, J. The Misc. Land Application No. 48 of 2019 is restored and shall proceed to be heard on merit. No order for costs. It is so decided.


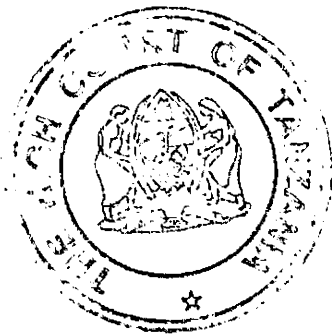


D.C. KAMUZORA

JUDGE

06/07/2021

COURT: Ruling delivered this 06/07/2021 in the presence of both parties. Right to appeal clearly explained.



D.C. KAMUZORA

JUDGE

06/07/2021