

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 234 OF 2022

**JOSEPH MLEBYA KUSSAGA (Administrator
of the late Alex Mkama Kusaga 1ST APPLICANT**

**JUDITH KUSSAGA (Administratrix
of the late Alex Mkama Kussaga 2ND APPLICANT**

VERSUS

HELLEN SHANGALI KUSSAGA 1ST RESPONDENT

**GREYSON JASON ISHENGOMA 2ND RESPONDENT
*(Appeal from the Order of this Court in Consolidated Civil Case No. 164
and 181 of 2019)***

RULING

10th and 28th June, 2022

KISANYA, J.:

Before me is an application to set aside the dismissal order made by this Court on 23rd May, 2022 in respect of Consolidated Civil Cases No. 164 and 181 of 2019. It is made under section 95 and Order XIX rule (2) and (3) of the Civil Procedure Code [Cap 33, R.E. 2019] (the CPC) and supported by an affidavit sworn by the applicant's counsel, Mr. Constantine Makala.

The background facts leading to this application can be stated briefly that: The applicants are plaintiffs in Civil Case No. 164 of 2019 which was instituted against the above named respondents. Subsequently, the 1st

respondent sued the applicants in Civil Case No. 181 of 2019. By order of this Court, both cases were merged to form Consolidated Civil Cases No. 164 and 181 of 2019. Upon both parties defaulting to appear when the Consolidated Civil Cases. No. 164 and 181 of 2019 came up for hearing on 30th March, 2022, this Court dismissed the same. It is the said dismissal order which prompted the applicants to file the present application on 6th June, 2022.

The 1st respondent who is also the plaintiff in Civil Case No. 181 of 2019 did file a counter affidavit to contest the application. As regards the 2nd respondent, the main case was ordered to proceed in his absence.

At the hearing of this application, the applicants were represented by Mr. Constantine Makala, learned advocate, whilst the 1st respondent had the legal services of Mr. Michael Lugina, learned advocate. The hearing proceeded in the absence of the 1st respondent.

Submitting in support of the application, Mr. Makala reiterated what was deposed in the affidavit in support of the application. He submitted that from 26th to 28th May, 2022, the Tanganyika Law Society (TLS) held its Annual Conference and General Meeting which were preceded by the Legal Education Seminars. The learned counsel submitted that the Honourable Chief Justice granted the TLS's request for adjournment of cases from 23rd

to 27th May, 2022. It was Mr. Makala's contention that in view of the said changes, this Court released a proposed cause list for civil case whereby the case subject to this application was fixed for mention on 30th May, 2022 in lieu of 23rd May, 2022. The learned counsel submitted that he was surprised to learn that the matter was dismissed for want of prosecution when he appeared for hearing on 30th May, 2022.

It was his further submission that Order IX, Rule 3 of the CPC empowers this Court to set aside the dismissal order upon the plaintiff assigning good cause for non-appearance. He contended that the applicants will suffer irreparable loss if the application is not granted.

When probed by the Court, Mr. Makala conceded that the applicants did not receive summons requiring them to appear on 27th May, 2022 or 30th May, 2022.

In response, Mr. Lugina did not challenge the application. He also submitted that the dismissal order touches the interest of the 1st respondent and urged this Court to set aside the same. However, he conceded that the 1st respondent had not filed an application for setting aside the dismissal order.

I have dutifully gone through the chamber summons and supporting affidavit and considered the submissions by the learned counsels for applicants and 1st respondent.

In terms of the record, the impugned order was made under Order IX, Rule 2 of the CPC due to non-appearance of the applicants and respondents on the date scheduled for hearing of the suit. In that regard, I agree with Mr. Makala that this Court is enjoined to set aside the dismissal order. However, in exercising such power, the Court must be satisfied that the applicants have advanced good cause for their non-appearance. This requirement is provided for under Order IX Rule 3 of the CPC which was also cited in the chamber summons. It stipulates that: -

“Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.”

The position that the applicant must furnish sufficient reasons to justify his non-appearance on the date of dismissal was also stated in the case of **Nasibu Sungura vs Peter Machumu** [1998] T.L.R 501 in which it was held 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 applicants non-appearance on the date the suit was dismissed. "

Being guided by the said position of law, the issue for my determination is whether the parties have shown good cause for their non-appearance on 23rd May, 2022 when the suit was dismissed. In determining this issue, I will consider the reasons deposed in the supporting affidavit.

My starting point is paragraph 2 of the supporting affidavit. It suggests that the applicants were aware that the suit had been fixed for hearing on 23rd May 2022. Indeed, as stated in the dismissal order appended to the supporting affidavit, the applicants had the legal services of Mr. Heri Kimaro on the said date (30/05/2022). Apart from scheduling the suit for hearing on 23rd May, 2022, parties were ordered to come with their respective witnesses.

As regards the ground for non- appearance, it was deposed that this Court rescheduled the hearing to 30th May, 2022 in lieu of 23rd May, 2022. It was stated on oath that the said changes were made following the Chief

Justice's leave for adjournment of cases from 23rd to 27th May, 2022 to allow advocates to attend TLS' Annual Conference and General Meeting.

I have gone through the "Proposed Cause List" (Annex 3 to the affidavit). There is nothing to suggest the said proposed cause list was based on the leave for adjournment of cases granted by the Chief Justice *vide* letter with Reference No. CA.11/354/01/11. Also, the said proposed cause list (Annex 3) show cases scheduled for hearing or mention from 23rd to 27th May, 2022. Had the proposed cause list been based on the leave referred to by the learned counsel, it would not have cases fixed for hearing and/or mention on the said dates (23rd to 27th May, 2022).

Further to the foresaid, the leave granted by the Chief Justice required the individual advocate to seek clearance from the respective registries or ask to reschedule their case with respective judges. In the instant case, the learned counsel for the applicants did neither seek clearance nor asked this Court to reschedule the hearing. And, as rightly conceded by the applicants' counsel, this Court did not issue summons requiring the parties to appear on 30th May, 2021. This implies that the Court's previous order dated 30th March, 2022 was not vacated and an order or summon to such effect was not served to the parties. Therefore, the ground that the hearing was rescheduled to 30th May, 2022 basing on the leave granted by the Chief Justice lacks merits. As if that was not

enough, there is no evidence which was produced before this Court to prove Mr. Makala's contention in his oral submission that the applicants' counsel was/were in Arusha on 23rd May, 2022.

To this end, I am of the considered view that the reasons deposed in the supporting affidavit are not sufficient to justify the applicants' non-appearance on the date of dismissal of the suit subject to this application. Had the applicants' counsel produced evidence to prove that they were in Arusha on 23rd May, 2022, I would have opined otherwise, notwithstanding that they did not seek clearance from this Court.

In the upshot, this application is hereby dismissed for want of merit with no order as to costs. The applicants may wish to exercise their right of filing a fresh suit under Order XIX, rule 3 of the CPC or lodging an appeal to the Court of Appeal against this decision.

DATED at DAR ES SALAAM this 28th day of June, 2022.



S.E. Kisanya
JUDGE