

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 81 OF 2021

ROBERT SENGEREMA MAZIBA APPLICANT

VERSUS

LUMUMBA MTELA @ MTERA 1ST RESPONDENT

BAHATI MANYASI 2ND RESPONDENT

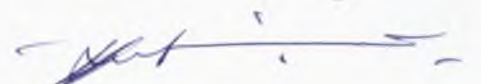
RULING

1st December, 2021, & 8th February, 2022

ISMAIL, J.

Vide this application, the Court's indulgence is sought to set aside a dismissal order, passed by this Court on 16th June, 2021, and have Misc. Land Application No. 118 of 2020 restored. The said application was dismissed on account of absence by the applicant and his counsel, when the matter was called for orders.

The application is supported by an affidavit affirmed by Masoud Shaibu Mwanaupanga, learned counsel, duly instructed to represent the applicant in the instant proceedings. Grounds for the orders sought are averred in paragraphs 3 through to 8 of the said affidavit. Briefly, the contention by the



deponent is that the Court deviated from the practice of having the matter heard by way of audio-teleconference, a practice adopted by all judges, and scheduled the matter for physical appearance of the parties without notifying the parties of this change, prior to the actual appearance. The deponent attributed the non-appearance to lack of communication and prior notice of the change of modality of the parties' appearance to the proceedings.

While the 1st respondent fully supports the application, the 2nd respondent is opposed to it. Through his counter-affidavit, the 2nd respondent has averred that the applicant was aware of the hearing date, and that the Court ordered that the parties' appearance on that day be though physical appearance and not by way of audio-teleconference.

Disposal of the application was by way of written submissions, preferred in conformity with a filing schedule, drawn by the Court on 1st December, 2021.

Hearing of the application took the form of written submissions preferred in conforming with the filing schedule

In his brief submission, Mr. Masoud Mwanaupanga, learned counsel for the applicant, argued that the mode adopted by the Court in conducting proceedings in respect of this matter was through audio-teleconference, as opposed to physical appearance. This, he argued, was the practice since the

outbreak of the Corona pandemic. He urged the Court to take a judicial notice of the public announcement given by the judiciary and posters pasted on conspicuous places calling upon stakeholders and informing them that, in some cases, they would be connected through the mobile phones for virtual appearance.

Mr. Mwanaupanga further argued that, since the inception of the matter and in all subsequent dates, appearance was virtual, citing the dates as being 17th March, 2021; 13th April, 2021 and 18th May, 2021. He contended that in all of the said appearances, prior notices were issued by the Court clerk. He argued that, failure to issue a notice when the matter came on 16th June, 2021 was a cause of the non-appearance, and he took the view that the dismissal was unjust. Learned counsel argued that the stance taken by courts is that of not punishing litigants for acts or omissions not occasioned by them. He cited the case of ***Antony Josephat @ Kabula v. Hamisi Maganga***, CAT-Civil Case No. 150 of 2020 (unreported).

He prayed that the application be granted with costs as the dismissal was not occasioned by negligence on the applicant's part.

Not unexpectedly, the 1st respondent's submission was fully in support of the application. His argument was that he too was not present in court when the matter was dismissed and the reason is that no information was

passed on to the effect that hearing would be done physically, unlike all other previous occasions when notifications preceded the parties' virtual appearance.

The 1st respondent took the view that it was unfair for the Court not to inform him that hearing would be conducted through the parties' physical appearance in court. He took the view that the application has merit.

The 2nd respondent did not file his written submission, notwithstanding the fact that he opposed the application through the counter-affidavit he filed. I will, nevertheless, determine the application based on the basis of the depositions, including his, understanding that it is the parties' deposition (affidavits) which are evidence. This is unlike the parties' submissions which are generally meant to reflect the general features of a party's case, and are elaborations or explanations on evidence already tendered (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others***, CAT-Civil Application No. 147 of 2006 (unreported)).

From these brief submissions, the issue for determination is whether the application raises sufficient grounds for its grant.

It is an established position that a party against whom a dismissal order has been passed, can apply to have the dismissal set aside and have the

A handwritten signature in blue ink, appearing to be 'J. J. J.', is written across the bottom right of the page.

matter restored and heard *inter partes*. The restoration can only be done where the applicant shows that he had good or sufficient ground. This is in terms of Order IX Rule 9 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), which provides as follows:

"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:

Provided that, where the decree is of such a nature that it cannot be set aside as against the defendant only it may be set aside as against all or any of the other defendants also."

Numerous judicial pronouncements have laid emphasis on what the quoted provision states. These 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; and ***Nzibikire Robert Isack v. Access Bank Tanzania (T) Ltd*** HC-Misc. Land Application No. 82 of 2020 (both unreported).



The contention by the applicant is that change of methodology in conducting proceedings from virtual appearance to physical appearance caught him unawares. Such change was so sudden and unnotified that it went against what happened in all appearances that preceded 16th June, 2021. In other words, it is a dismissal that has the Court to blame for. The question that flows is whether this is a reason good enough to constitute sufficient cause for setting aside a dismissal order. As I attempt to address this issue, it serves me right to go back to the proceedings that preceded the events of 16th June, 2021, when the application was dismissed.

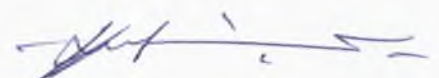
What I gather from the proceedings is that, when the matter came for orders on 17th March, 2021, parties were connected to audio-teleconference equipment and orders were issued virtually. The matter was then adjourned till 13th April, 2021, the date on which the matter came for hearing. None of the parties was in attendance before the Acting Deputy Registrar. On adjournment, the matter was set for hearing on 18th May, 2021, the date on which the parties were in attendance. Since the presiding Judge was away, the matter was set for hearing on 16th June, 2021. Nothing indicates that attendance of the parties on 18th May, 2021 was virtual, as the applicant's counsel submitted. But even assuming that such appearance was not physical as Mr. Mwanaupanga wants me to believe, there was no

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undertaking, by the Court or any its officers, that all other subsequent appearances would be done virtually as to make him assume that the next appearance which was 16th June, 2021, would be done pretty in the same way.

But even assuming that the applicant's anticipation was to have the matter heard through audio-teleconference equipment, the onus of finding out the time at which the matter would come up for hearing was his, and this would entail making an enquiry with the Bench Clerk whose communication is open to the parties and their counsel. Such enquiry would remove the "*wait and see attitude*" that the applicant seems to have adopted in this matter. In my considered view, the applicant did not employ any effort with a view to getting to know if the matter was for physical or virtual hearing. This, in my opinion, depicts negligence on the applicant's part, and I am not convinced, one bit, that the Court is to blame for the applicant's non-appearance.

The applicant's counsel has cited the decision of the superior Court in ***Anthony Josephat @ Kabula v. Hamisi Maganga*** (supra). The intention was to convince the Court to be inspired by the said decision and grant the application. As I reject the applicant's overtures, I wish to state that the cited authority draws no similarity with the issue before me. In the said decision,



variance of dates in the judgment and decree and the faulty certificate were a creation of the Court, and it was the Court that was to bear the responsibility. This is unlike the dismissal in this case which came up as a result of what I consider to be negligence on the part of the applicant in conducting the proceedings sought to be restored.

In consequence of all this, I find nothing to convince me that sufficient cause has been adduced for setting aside the dismissal order. Accordingly, I hold the application is lacking in merit and dismiss it with costs.

Order accordingly.

DATED at **MWANZA** this 8th day of February, 2021.




M.K. ISMAIL
JUDGE