

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

Miscellaneous Land Application No. 18 of 2021

*(Originating from the High Court of Dodoma in Misc. Land application No. 26 of 2018
and Misc. Land Application No. 87 of 2019)*

MUJENGI JOSEPHAT GWAU (as Personal
Legal Representative of Allu Tausi Gwao)..... **APPLICANT**

VERSUS

ABDALLAH A. GWAU (as Personal
Legal Representative of Fatuma A. Gwao)..... **RESPONDENT**

RULING

16/6/2022 & 19/07/2022

KAGOMBA, J

MUJENGI JOSEPHAT GWAU as Personal Legal Representative of Allu Tausi Gwao (hereafter "the applicant") has filed an application under order IX rule 9(1) section 68(e) and section 95 of the Civil Procedure Code [Cap 33 R.E 2019] ("CPC") to set aside dismissal order made by this Court in Misc. Land Application No. 26 of 2017 (sic). He also applies for costs and any other relief (s) this Court may deem fit and just to grant.

The reasons for the application are stated in the supporting affidavit sworn by Elias Michael Machibya, the learned advocate duly instructed to represent the applicant. The respondent, ABDALLAH A. GWAU as Personal Legal Representative of Fatuma A. Gwao, on his part, waived his right to support or oppose the application by his failure to file a counter affidavit.

According to the supporting affidavit, the applicant is the Administrator of the Estates of the late Allu Tausi Gwao (the deceased). That, among the properties constituting the Estates of the late Allu Tausi Gwao is a house located on plot No. 9 Block H within Singida Municipality which is in dispute. It has been stated that in April, 2011 the respondent instituted a suit in the Singida District Land and Housing Tribunal, being the Land Application No. 23 of 2013 against the late Shaban A. Gwao who was the Administrator of the Estate of the late Allu Tausi Gwao claiming ownership of the said house, which ended in the applicant's favour.

It is further stated that the late Shaban A. Gwao being aggrieved by the decision of the Singida District Land and Housing Tribunal appealed to this Court vide Land Case No. 64 of 2014 which abated following his demise. For that reason, the family of the late Allu Tausi Gwao appointed the applicant as successor administrator. Having been so appointed, the applicant filed in this Court a Misc. Land Application No. 87 of 2019 for extension of time to lodge an application to set aside dismissal order which was however dismissed on 5/11/2018 for non-appearance.

The Court, on 12/2/2021, granted applicant's application for extension of time to lodge an application to set aside dismissal order, hence this application.

It is applicant's contention that his non-appearance in Misc. Land Application No. 26 of 2017 (sic) was not caused by negligence or inaction

on his part, but it was because of sickness. He stated that since 2016 he had been attending continuous medication in different hospitals including Shree Hindu Mandal Hospital, Tumain Hospital Upanga, Jakaya Kikwete Cardiac Institute and Muhimbili Orphopedic Institute due to various diseases which attacked him including diabetes, blood pressure and cardiac diseases. To prove his health struggles, he attached medical reports of diverse dates from different hospitals mentioned above.

During hearing Ms. Lilian Kimaro, learned advocate, appeared for the applicant, she adopted the supporting affidavit and clarified the reasons pleaded therein.

Ms. Lilian Kimaro submitted that order IX rule 9(1) of the CPC empowers the Courts to set aside dismissal order where there is sufficient reason. She submitted that the applicant's sickness is sufficient reason for this Court to set aside the dismissal order. To support her contention, she cited the case of **Kapapa Kumpindi V. The Plant Manager, Tanzania Breweries Limited**, Civil Application No. 6 of 2020, CAT, Mwanza, where the Court of Appeal considered the fact that the applicant was sick and granted his application to file submission out of time.

Ms. Lilian Kimaro added that the applicant was prompt to take further steps after realizing that his application was dismissed for want of prosecution by making relevant applications to initiate its restoration.

In addition, Ms. Kimaro submitted that it was prudent for the Court to order restoration of the dismissed application so as to afford the applicant a right to be heard. She cited the case of **Mbeya-Rukwa Autoparts & Transport Ltd V. Jestina George Mwakyoma**, (2003) TLR 252 in that regard.

Having read the applicant's affidavit as well considering the submission made by Ms. Kimaro during the hearing of the application, the issue for this Court to decide upon is whether the applicant has shown sufficient cause for the application to be granted.

Before discussing the substance of this application, I would like to comment on the provision of Order IX rule 9(1) of the CPC which has been applied by the applicant to move this Court to grant this application.

Basically, order IX of the CPC does not have "rule 9(1)" as referred by the applicant's advocate. Order IX has rule 9 but the same doesn't provide for an application to set aside dismissal order as contended by the applicant's advocate. For clarity the same is reproduced herein below:

9. "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 such defendant only it may be set aside as against all or any of the other defendants also."

In the circumstance of the case at hand there is no *ex parte* decree against the applicant. There is the dismissal order for want of prosecution subject to rule 2 of Order IX of the CPC because neither party appeared in Court on 05/11/2018. Therefore, the applicant had to make his application to set aside the dismissal order under rule 3 of Order IX of the CPC, which provides thus;

*3. 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.*

[Emphasis Added]

That being the case, it is apparent that the applicant's advocate misconceived the applicable provision of the law. Nevertheless, I find it inappropriate to hold this application incompetent since this Court has jurisdiction to grant the order sought. Moreover, it is the current position

of the law in our land that Courts should invoke the overriding objective principle where there are minor irregularities to achieve substantive justice. I find the citation of Order IX rule 9 (1) instead of Order IX rule (3) as one among the minor irregularities and which is curable. For that reason, I invoke the overriding objective principle by amending the provision of the law under which the application is brought to read Order IX rule 3 of the CPC and proceed with determination of the merits of this application.

The applicant's reason for non-appearance is that he had been sick since 2016 as he was suffering from various diseases mentioned herein. Proof have been availed to support the argument that the applicant had been attending continuous medication in different hospitals. That is the reason he couldn't appear in Court on 05/11/2018 when his application was dismissed for want of prosecution.

With the proof for the applicant's ill-health duly adduced, I find no good reason not to trust the applicant that he had been sick since 2006 as the attached medical reports sufficiently prove his contention. It is indicated that the applicant had been attending different hospitals at different times for medication, specifically in September and October 2018 when the Misc. Land Application was pending in Court until 05 /11/2018

when it was dismissed. In this situation of sickness, it is obvious that the applicant couldn't make follow up of his case in Court.

In the upshot sufficient cause has been shown by the applicant. I accordingly grant the application. As a consequence, the dismissal order dated 05th day of November, 2018 is set aside and Misc. Land Application No. 26 of 2018 is hereby restored. Costs to follow event.

It is so ordered.

Dated at **Dodoma** this **19th** day of **July, 2022**.




ABDI S. KAGOMBA
JUDGE