

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

MISC. LAND APPLICATION NO. 50 OF 2022

(Arising from Land Appeal No. 4 of 2019 of the High Court of Tanzania at Tanga and originating from Land Appeal No. 9 of 2019 of Korogwe District Land and Housing Tribunal)

HATIBU SINGO.....APPLICANT

-VERSUS-

HABIBU OMARI.....RESPONDENT

RULING

Date of Last Order: 15/06/2022

Date of Ruling: 12/07/2022

AGATHO, J.:

The Applicant seeks to set aside the dismissal order entered on 11th August, 2021 by Hon. F.H Mtulya, J for failure of the Appellant (Applicant) to prosecute his case. The Applicant brought this Application by presenting his chamber Summons supported by an Affidavit deponed by Applicant for the purpose of restoring Miscellaneous Land Case Appeal No. 4 of 2019 before this Court.

Although the Applicant made efforts to serve upon the Respondent unfortunately the latter failed to enter appearance as a result this Court granted ex-parte hearing order. In the present matter it was agreed that

it be disposed by way of written submission. The Applicant successfully filed his written submission on 6th June, 2022.

In supporting his Application the Applicant prayed to the Court to set aside the dismissal order entered on 11th August 2021 by Ho. F.H Mtulya in Land Appeal No. 4 of 2019 and he cited Order IX Rule 3 of the Civil Procedure Code [CAP 33 R.E 2019].

He submitted that, he filed his appeal No. 4 of 2019 before this Court to challenge the decision of Korogwe District Land and Housing Tribunal in Appeal Land No. 9/2017, hence the Appeal No. 4 of 2019 was dismissed for want of prosecution on 11th August 2021 by Honourable Judge Mtulya, Upon failure of the Applicant and his advocate Patrick Maligana to enter appearance in Court due to unavoidable circumstance that was not communicated to the Court.

He went on stating that on 13th July 2021 the matter was adjourned for hearing and scheduled for hearing on 21st July 2021 but due to national calendar the said date of 21st July 2021 was public holiday to wit EID EL HAJ. Hence the matter was adjourned while his advocate informed him not to worry, also the presiding judge was on Criminal Session at Musoma in Mara Region.

He further submitted that, all the time the Applicant was looking forward for updates from his advocate. The said case was assigned to another judge, Hon. Mtulya, J. And the same was fixed for hearing on 11th August 2021 which was neither communicated to Applicant nor was he aware of. It was at 8;00 AM on 11th August where he received a call from his advocate informing him to be sick and was hospitalized at Karatu. And that he was informed the said Land Appeal No.4 of 2019 was fixed for hearing on that material date. The advocate so requested the Applicant to immediately attend.

He proceeded to state that when he received the call he was at his home Buiko Korogwe. And travelling from Buiko to Tanga takes almost 5 to 6 hours. When he reached Tanga at 2:00 PM he found his case has been dismissed for want of prosecution. They made several efforts to restore the said appeal on time vide Misc. Land Application No. 35 of 2021 which on 8th December 2021 was withdrawn with leave to re-file it again. Hence the present application re-filed as Misc. Application No. 50 of 2021.

He concluded his submission by citing the case **Pastory J Bunonga Vs. Pius Tofiri, Misc Land Appeal No. 12/2019 HCT** (Unreported), in which the High Court held that,

"Where it was on the balance of probabilities proved, sickness has been good and sufficient ground for extension of time or restoration of a case yes... there always must be proof by the Applicant that he fell sick and for the reason of sickness he was reasonably prevented from taking the necessary step."

The Applicant added that the dismissal was vitiated by the reasons explained above which all was beyond his normal control. The Applicant prayed this Court to set aside the dismissal order entered on 11th August 2021 and the said Land Appeal No. 4 of 2019 be set for necessary orders.

To determine the present application, foremost, it should be made clear that ex parte hearing is not a ticket for granting or giving an Applicant what is not proved or satisfied. This was stated in the case of **Mwidini Hassani Shela and 2 Others Vs. Asinawi Makutika and 4 Others, Land Appeal No. 4 of 2019 (HC-unreported)**, wherein the Court said:

"It is trite law that powers to set aside dismissal order are in the discretion of the court, however the applicant should

furnish sufficient reasons to enable the court exercise its discretionary power”.

For that purpose, there is need of examining what has been presented by the Applicant. It is clear from the records that Misc. Land Appeal No. 4 of 2019 that was scheduled for hearing on 13th July 2021 and the Applicant was present and prayed another date for hearing on 21st July 2021 when the suit scheduled for hearing however that day was Public Holiday due to the existence of Eid Al Hajj for that reason automatically rescheduled for hearing on 22nd July 2021 unfortunately parties failed to appear without any excuse. For giving for the purpose of justice his Appeal was further adjourned to 11th August 2021 for hearing. Again, on that day the Applicant failed to enter appearance.

If I count days from 22nd July 2021 to 11th August 2021 the answer is 15 days in exclusion of off days (weekends). In my view 15 days were enough for Applicant to make follow up at Registry for the purpose of knowing next date and next stage of his case. Instead of doing so the Applicant made follow up to his Advocate.

It is allowed for the client to ask his Advocate about the progress of his case. But a party to the case is primarily under duty to know the progress of his case and not any other. The Applicant communicated to

his Advocate and told not to worry since the Judge who heard his Appeal was on criminal Session in Mara region. The Applicant was required to know that it is not upon the advocate to assign cases and the issue of the presiding judge to be in Criminal Session in Mara is not maintainable since the Advocate and the party to the suit are supposed to enter appearance for orders or other directives of the Court. Failure of the Applicant to follow up at the Registry and ask for the progress of his case amounts to negligence. In the case of **ROBERT FRANK YOHANA & CLEMENT RAPHAEL VS. ROSEMARY LYIMO AND OTHERS, Misc Land Application No. 588 of 2019 High Court of Tanzania at Dar es Salaam** it was held that,

"In the event, in absence of sufficient reasons for non-appearance of the advocate and/or the applicants (Plaintiffs) for several occasions had made me conclude that both (Plaintiffs and advocate) were inactive and or negligent. This Court could not condone inaction or negligence of the parties to a case."

The Court of Appeal in the case of **LIM MAN YUNG & LIMTRADING COMPANY LTD VS. LUCY TRESEAS KRISTENSEN Civil Appeal No. 219 of 2019 Court of Appeal of Tanzania At Dar es Salaam** delivered a message to all parties who are negligent and park their cases

in court registry without justifiable reason, and the Court of Appeal had this to say:

"A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."

In the present application the Applicant dumped his case to his advocate until 11th August 2021 when he received a call from his Advocate informing him about that hearing of the case fixed on that day. That without sugar coating shows his negligent. In my view the Applicant failed to make follow up even to his advocate in the sense that any serious client would have asked/consulted his advocate a day before a day fixed for hearing. The Applicant was not serious because failed to visit the Court registry and to communicate with his advocate early to know the status of his case. In simple words the Applicant failed to make effective follow up of his case. In the case of the **ATTORNEY GENERAL VS. M/S PRIME ASSESTS, Misc Land Application No. 366 of 2018 High Court of Tanzania at Dar es Salaam** stated that:

"A person who instituted his case need to make follow up on the progress of his case except in special circumstances as in this application."

The circumstances presented by the Applicant on failure to make follow ups are not sufficient to set aside dismissal order. The Applicant ought to know that this Court is not a parking lot for cases.

Turning to the issue of illness of his advocate that dubbed to be a reason of failure to attend the Court. Oftentimes the Courts do adjourn cases when the Advocate or client is sick but that must be justified. In the application at hand the alleged illness of the advocate was not justified even by a single document. In the absence of a medical chit showing that the advocate was sick tantamount to no reason at all. See the case of **K.V. Constructions, Limited V. Mwananchi Engineering Limited and Constructions, Civil application No.50 of 2014, CAT (unreported)**. Although sickness may be used as reasonable ground to set aside but in the present Application an unjustifiable claim of sickness is not maintainable.

It is my standing that the applicant failed to present sufficient reason for setting aside dismissal Order in Misc. Land Appeal No. 4 of 2019. I

consequently dismiss the present application for want of sufficient reason.

It is so ordered.

DATED at TANGA this 12th Day of July 2022.



Date: 12/07/2022


Coram: Hon. Agatho, J

Applicant: Present

Respondent: Absent

B/C: Zayumba

Court: Ruling delivered on this 12th day of July, 2022 in the presence of the Applicant and in the absence of the Respondent.


U. J. AGATHO
JUDGE
12/07/2022

Court: Right of Appeal is available as per the law.

