

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 07 OF 2022

(Arising from Misc. Land Application 72 of 2021 of the High Court of Tanzania at Bukoba, Originating from Land Application No 98 of 2006 of District Land and Housing Tribunal for Kagera at Bukoba)

ABDU ABDALLAH..... APPLICANT

VERSUS

MOHAMED SADICK1ST RESPONDENT

DANIEL KANTEME.....2ND RESPONDENT

ANTHONY KASAIZI.....3RD RESPONDENT

**ABDULBASAT BADRU IBRAHIM (As an administrator of the estate of the late
Lwawaridi Badiru)..... 4TH RESPONDENT**

RULING

29/09/2022 & 23/09/2022
E. L. NGIGWANA, J.

The applicant brought this application under Order IX rule 3 and Order XLIII rule 2 of the Civil Procedure Code [Cap. 33 R.E E 2019], seeking for restoration of Misc. Land Application No. 72 of 2021 which was dismissed by this court (Mwipopo, J) on 24/11/2021 for want of prosecution. The application is accompanied by an affidavit deposed by the applicant's advocate Mr. Abel A. Rugambwa.

The background leading to this application can be stated briefly that; In the District Land and Housing Tribunal for Kegera at Bukoba, the applicant vide Land application No. 98 of 2006 sued the respondents over the land located at Kayolo Village, Ibwera Ward within Bukoba District in Kagera Region, praying

for the following reliefs; that the tribunal be pleased to issue an order to allow the applicant to redeem the clan land/farm, that the respondents be ordered to vacate the suit premises, that a permanent injunction order be issued restraining the respondents and their agents from entering the suit land, costs of the suit any other relief as the court may deem fit and just to grant. After a full trial, the DLHT found that the disputed land was not a clan land as alleged by the applicant, therefore, not subject to redemption.

The applicant was not amused by the decision of the DLHT, but filed no appeal within the prescribed time. As a result, he was prompted to lodge an application for extension of time within which to file an appeal out of time to wit; Application No.72 of 2021 but the same ended being dismissed for want of prosecution.

It is the said dismissal order that prompted the applicant on 15th day of December, 2021 to file this application for restoration. The 1st, 2nd and 4th respondents, through their advocate Mr. Niyikiza Seth, filed a counter affidavit opposing the application, however, during hearing; Mr. Niyikiza disregarded the same and supported the application. Mr. Mathias Rweyemamu, learned advocate for the 3rd respondent filed a counter affidavit, but before the commencement of the hearing, he prayed for the court to strike out the same after he had discovered that it was incurably defective, the prayer which was not objected by the applicant's advocate, thus it was granted. Consequently, a counter affidavit by the 3rd respondent was struck out.

Mr. Rugambwa, learned advocate for the applicant, prayed to this court to adopt his affidavit to form part of his submission. The affidavit supporting the application is to the effect that that; on the day and time in which Misc.

Application No.72 of 2021 was dismissed for want of prosecution, the applicant's together with advocate Mathias Rweyemamu were before His Lordship Kilekamajenga J who was pressing over Civil Application No.56 of 2021. That, as a matter of court practice; Hon. Mwipopo J was Junior to Hon. Kilekamajenga J thus, they had the duty to observe seniority but while still before Hon. Kilekamajenga J, Mr. Niyikiza, learned advocate for the 1st, 2nd and 4th respondents appeared before Mwipopo J and prayed for the court to dismiss the Application No.72 for want of prosecution, the prayer which was honored, therefore, the matter was dismissed with costs. That, the reason for the non- appearance of the applicant in person was in knowledge of his advocate who could inform the court during submission since the applicant had informed him that he failed to travel from Dar es Salaam to Bukoba due to family problems. That, the applicant is still intending to exercise his intention to appeal against the judgment and decree of the District Land and Housing Tribunal.

The learned advocate for the applicant reiterated what was deposed in the supporting affidavit. He added that, the applicant has managed to show why he entered no appearance when Misc. Land Application No. 72 of 2021 was called on for hearing. He ended his submission urging the court to grant the application for the interest of justice.

On their side, both Mr. Niyikiza, learned advocate for the 1st, 2nd and 4th respondents and Mr. Mathias Rweyemamu, learned advocate for the 3rd respondent conceded to the application owing to the reason that applicant has managed to demonstrate good cause for his non-appearance before the court when Misc. Application No.72 of 2021 was called on for hearing.

Having heard the submissions of both parties, the issue for determination is whether this application is meritorious or otherwise.

Order IX Rule 1 of the Civil Procedure Code Cap 33 R.E 2019 provides that;

Rule 1;-

"On the day so fixed for hearing, the parties shall be in attendance at the day fixed for court-house in person or by their respective recognized agents or advocate, and the suit shall then be heard unless the hearing is adjourned to a future date to be fixed by the court.

Rule 2 of the Code provides that;

"Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed."

Rule 3 provides 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."

In the case of **Meis Industries Ltd and Others versus Twiga Bancorp**, Misc. Commercial Cause No.243 of 2015 HCCD at DSM (Unreported), the court held that;


"It is trite that restoration of the case is entirely in the discretion of the court to grant or refuse it. This discretion however, has to be exercised judiciously and the overriding consideration is that there must be sufficient cause for so doing. In order for the sufficient cause to be determined, there are factors to be taken into account including

whether or not there is valid explanation for the non-appearance of the applicant during the scheduled hearing date, lack of diligence on the part of the applicant.” (Emphasis supplied)


Upon careful consideration of the affidavit which carries reasons for the non-appearance the applicant when the matter was called on for hearing, and upon lawful consideration of the submissions by the learned advocates and the law in general, I am satisfied that the applicant has managed to demonstrate sufficient cause to warrant the grant of this application.

In the event the dismissal order in Misc. Land application No. 72 of 2021 dated 24/11/2021 is hereby set aside. Misc. Application No. 72 of 2021 is hereby restored. It is so ordered. Each party shall bear its own costs.

Dated at Bukoba this 23rd day of September, 2022.


E.L. NGIGWANA
JUDGE
23/09/2022

Ruling delivered this 23rd day of September, 2022 in the presence of the 4th respondent in person, Hon. E. M. Kamaleki, Judges' Law Assistant.


E.L. NGIGWANA
JUDGE
23/09/2022