

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

LAND APPLICATION NO. 72 OF 2022

(Arising from the ruling in Land Case No. 38 of 2015 by Madam Judge Dr. Opiyo at the High Court of Tanzania Land Division Arusha)

INSTITUTE FOR ORKONEREI

PASTORALISTS ADVANCEMENT LTD..... APPLICANT

VERSUS

DUTCH ORKONEREI SOCIAL INVESTMENT LTD.....1ST RESPONDENT

STICHTING HET GROENE WOUDT.....2ND RESPONDENT

ROTIANA SOCIAL INVESTMENT LTD.....3RD RESPONDENT

RULING

03 & 04 October, 2022

KOMBA, J

This is an application to set aside dismissal order and restoration of Land Case No. 38 of 2015 which was dismissed by this court (Opiyo, J) on 29/03/2017 for want of prosecution. The application was brought under order IX Rule 3, Rule 6 (1) (2) Section 68 (c) Section 95 and Order XLIII Rule 2 of Civil Procedure Code. The application is supported by an affidavit of Mr. George Stephen Njooka, advocate for the applicant. Only the 3rd respondent opposes the application through a counter affidavit deposed by Mr. Asubuhi John Yoyo, advocate for the 3rd respondent.

The applicant in this application who was also the applicant in Land Case No. 38/2015, filled a land case in this court seeking declaration order to nullify sale and the transfer of plots to respondents among other things. When the matter was fixed for hearing 28-30/03/2017 the applicant reported that he was not ready to proceed because one of his key witnesses is out of the country nursing his sick wife who was critically ill. He further said he was yet to engage another advocate after the first one withdrew from the conduct of this case on 17/11/2016 due to financial constraint and that he was not been able to get hold of his documents relating to the case because he has not completed to pay that advocate. He prayed for more time to look for another advocate.

Respondents (then defendants) strongly objected the prayer submitting that the way the applicant was conducting himself show that he failed to prosecute his case by showing sequence of prayers for adjournment and time to find another advocate. Court upon satisfy itself that they gave the applicant ample time to engage another advocate and other reasons which did not constitute a good cause for non prosecution of the case, it dismissed the suit. Applicant was aggrieved by the said dismissal hence this application.

When the matter came for hearing on 3rd October, 2022 the applicant was represented by Mr. George Njooka an Advocate and the 3rd respondent was represented by Advocate Asubuhi John Yoyo. It was agreed that hearing to be by oral submission.

Mr Njooka for applicant after prayer for adoption of his affidavit of George he informed the court that applicant was represented by late Martin as a director. On 2nd June it was for final PTC where the applicant was present and fixed for hearing on 22 and 23/08/2016. On 22/08/2016 Advocate for applicant prayed to rectify some documents and he was allowed and the matter was fixed 16 and 17 November, 2016. On the date planned the matter was adjourned to 17/11/2016 again adjourned to April, 2017.

On 23/03/2017 when the court called the case the Applicant appeared and prayed for adjournment for the reason that his witness had the sick wife abroad, other reason was his counsel was withdrawn from representing him so he needed time to pay for Advocate to appear 10/04/2017. His prayer was objected by the counsel for respondent for reason that applicant has never been serious in prosecuting his matter and pray for dismissal for want of prosecution, according to him, reason 4 adjournment was sufficient. The court was satisfied and dismiss the matter.

Mr. Njooka informed the court that the applicant was diligently prosecuting his matter, he has never been absent for whatever reason and that some adjournment were due to court own reason. Dismissing the matter on the ground for want of prosecution was not correct because applicant was appearing. He lamented that the applicant was supposed to produce proof of sickness but can he produce proof while it was the 1st time to apply for sickness and the witness was in abroad, he ought to be given time.

Another reason forwarded by the Applicant is lack of money to pay new counsel and the court decline saying they cannot wait for party to improve his financial position. Mr Njooka complain of the file to be called few days in advance and it is his believe that he advance sufficient cause to apply for set aside of order of Opiyo J as it caused injustice to applicant. He said this matter was out of time and the applicant sought and granted extension of time he finally pray that the order be set aside with costs.

On the other side while contesting this application the Mr Asubuhi framed two issues that whether the application at hand really meets threshold required by law to be granted and whether the court really failed to act judiciously as alluded by my learned counsel.

On the 1st he said application does not meet the legal thresholds because it is a requirement of law and whenever this court is to exercise the discretionary powers conferred to it, court must act judiciously and for that to be met it is an imperative for an applicant to lay down sufficient cause and proof upon which the court can dwell upon to act judiciously. Mr Asubuhi said the applicant pinpointed three major reasons it is our submission that these reasons are not sufficient and were never validated. The issue of key witness being outside the country, there were no prove on 29/03/2017 in court and there was no sufficient reason adduced for this court to wait for such witness only.

On the issue of failure to procure another Advocate, financial stereotype, Mr. Asubuhi said the Company has not proved to have no money and that they could use the excuse of the court on adjournment to hire new counsel, but there is laxity.

In his second issue Mr. Asubuhi submitted that the answer is no. The court needed sufficient explanation to prompt it and none were provided. He concluded by saying that the record show clear laxity and inaction for the side of applicant who failed to convince the court why the matter could have been adjourned.

Counsel prays this Court to be guided by the decision of Court of Appeal of Tanzania while dealing with the matter of similar nature in **LIM HAN YUNG & LIM TRADING VS LUCY TRESE AS TRISTENSEN** Civ Appeal 219 of 2019. In cited case, the Court was invited to consider the correctness of dismissal order given by the High Court, where it dismisses the case for failure of the plaintiff to prosecute the case. Court of Appeal of Tanzania reiterated the principle **that it is a must for the Plaintiff or the party seeking to set aside dismissal order to advance sufficient cause.**

In conclusion Mr. Asubuhi said, the case could have been different if the applicant could address issue of illegality or point of law. So the decision made by this court in 2015 was fair and verifiable given to circumstances of this case.

After hearing both sides and peruse court record the issue to be determined by this court is whether the applicant has paraded sufficient reason to warrant waiver of the dismissal order.

I have learned from the record that there are two reasons advanced for non appearance of the applicants (failure to prosecute his case), one is that the key witness is out of the country attending his wife who was sick and second

is that, he is yet to procure another advocate who can continue with the representation in court. Mr Njooka presented that because the applicant appeared on 28/03/2017 then the court errored in dismissing the case. He was supposed to refresh hi memory by perusal as I did, at page 16 and 17 of the typed proceedings that on that day the applicant prayed for adjournment because he had no witness and that he can have ample time to procure another Advocate. The matter was not heard, the applicant did not prosecute his case on 28/03/2017. Appearance in court is different from prosecuting a case. The appearance done by the applicant and failure to proceed with hearing amounted to failure to prosecute.

It is true that the applicant appeared on the material date but was he able to proceed with hearing of the matter. The answer is no as he did not have witness and failed to proceed on his own after failing to procure the service. As submitted by Mr. Asubuhi that there was no proof that on material date the said key witness was actually out of the country, besides it was not explained in court the position and importance of that witness who was nursing a 3rd party. Mr Njooka complained that it was only that day which applicant pray for adjournment for reason of sickness of witness's wife and that it was not possible for him to produce a proof rather, he could have

been given enough time. One can ask which time was enough for one to produce proof or rather after how many prayers that applicant is obliged to produce proof of his allegation. Section 112 of the Evidence Act does not provide when to prove the issue. It is when the issue arises the same must be proved.


The fact is that, counsel for the applicant withdrew from the service on 16 November 2017. When the matter came for hearing on 28 March 2017 applicant pray for time so that he can procure another counsel. Applicant had four months to do that but in vain. I am joining hands with Mr. Asubuhi that the applicant had ample time to procure for the service but he did not. Procurement and payment of legal services needs money and the applicant informed the court on 28/3/2017 that he had financial difficulty to pay for the services (refer page 18 of typed proceedings). Applicant is one who institute a suit and yet complain of financial difficulties in paying for legal service by counsel as noted by this court when delivering the ruling in 2017.

This court is aware that right to be heard is one among the principle of natural justice and a very constitutional right as it is provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 (as

amended). To my opinion there is no point in time the person can be denied his right to be heard unless there is a legally justifiable reason for holding so.


There is no assistance best to be offered to applicant than reduction a burden of procuring advocate and paying for legal services by what this court did on 29/3/2017. I am satisfied that there is no good cause advanced by applicant to warrant this court to exercise its discretion. See **LIM HAN YUNG & LIM TRADING VS LUCY TRESE AS TRISTENSEN** (supra).

Be it as analysed, the application is dismissed without costs.


M. L. KOMBA
JUDGE
07/10/2022

Judgement Delivered on 07th October, 2022 in the presence of counsel for both parties.




M. L. KOMBA
JUDGE
07/10/2022

