

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 246 OF 2021**

*(Originating from High Court Misc. Civil Application No. 146/2019  
before Hon. Masabo, J.)*

**KINONDONI MUNICIPAL COUNCIL.....APPLICANT**

**VERSUS**

**CHARLES RICHARD KOMBE.....RESPONDENT**

**RULING**

*Date of last Order: 10/11/2022*

*Date of Ruling: 30/11/2022*

**POMO, J**

Under Order IX Rule 2 and section 95 both of the Civil Procedure Code, [Cap.33 R.E.2019] (the **CPC**) the Applicant has moved this court praying for setting aside dismissal order dated 2<sup>nd</sup> day of March, 2022 dismissing Misc. Civil Application No.146 of 2019 of this court. The application is supported by the two affidavits deposed by Leah N. Mnzava filed in court on 31<sup>st</sup> March,2021 and the one deposed by Hawa Mbwana filed on 11<sup>th</sup> July 2022

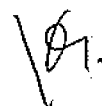
*101.*

The application is contested by two counter - affidavits deponed by Richard Madibi filed in court on 13/12/2021 and 25/07/2022 respectively

The hearing of the Application was on 10<sup>th</sup> November, 2022. Whereas the Applicant was represented by Mr. Jumanne Mtinangi, the learned Principal State Attorney; the Respondent was present and represented by Richard Madibi, the learned advocate

Submitting in support of the Application, Mr. Mtinangi argued that their application is for restoration of their application, Misc. Civil Application No.146 of 2019 before this court which was dismissed for want of prosecution on 2<sup>nd</sup> March,2021 Hon. J.L. Masabo, J. He then adopted the two affidavits supporting the application to form party of his submission. That is to say, the one deponed by Leah N. Mnzava filed in court on 31<sup>st</sup> March,2021 and the one deponed by Hawa Mbwana filed in court on 11<sup>th</sup> July 2022 and prayed to the court the application be granted.

In reply, Mr. Madibi, the learned counsel for the Respondent argued that, this court provided set of conditions on how a dismissed application can be restored by the court. The cases which were referred to are, one, **Mabwayi Mpaira vs. Keya Chanda, Misc. Land Application No.**



**61/2021 HC at Dodoma (unreported)**, at page 3 Para 1. **Two, Lusajo Watso Mwakasege vs. Niko Insurance (T) Ltd, Civil Appeal No. 5 of 2017 H/C (Commercial Division at DSM (unreported)** at pp.2 – 3. That, the above two cases stated that sufficient reasons must be adduced.

Mr. Madibi then argued that guided by the above cited cases, the applicant has failed to adduce sufficient reason to warrant the restoration sought. He then adopt the counter affidavit dated 13/12/2021 and that of 25/7/2022 respectively to form part of his submission.

It was Mr. Madibi's further argument that looking into the Applicant's affidavits it is Leah N. Mnzava who is lamenting that she never heard the case called before Hon. Masabo on 2/3/2021. To his contention this is not a sufficient reason because it is the Applicant's tendency of not attending cases pertaining to this dispute adding that they have so stated under paragraph 4 and 6 of the counter affidavit dated 13/12/2021. It was his further submission that even the application which was dismissed was of restoration as such they do not agree with the averment by Leah Mnzava that she was in court on the material date because is mere stating under paragraph 5 of the affidavit that the case was called in open courtroom No.

3. This is not true as the case was called in open courtroom No. 1. Even in the affidavit by Hawa Mbana doesn't support such averment. He rested his reply by submitting that the application is without sufficient reasons thus be dismissed with costs for want of merit

In his rejoinder, Mr. Mtinangi argued that the cited case laws are distinguishable to the application we have here. In the dismissed application which is now the subject of restoration application at hand, Leah Mnzava was in court and the reason she has advanced is that she didn't hear when the cases were called in open court and her presence in court is proved by her affidavit filed on 31/3/2021 and that of Hawa Mbwana the court clerk of Hon. J.L. Masabo, J as provided under paragraph 4 & 5. It was his contentions therefore that they have advanced sufficient reason to support the application and argued that the scenario in the cited cases do not match to the one at hand.

As to the raised argument that it is the Applicant's tendency not to appear in court, Mr. Mtinangi strongly resisted this averment adding that they do attend cases in court and case which was dismissed Leah Mnzava attended, only that she didn't hear when the case was being called in open



court. He lastly reiterated his prayer for restoration of their dismissed application

I have considered the rival arguments in support and against the Application. In moving the court, the Applicant has cited **Order IX Rule 2 and the CPC** which reads as follows: -

*"Rule 2: - Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed."*End of quote

Again, the Applicant cited **section 95 of the said CPC** which provides as follows: -

*"S.95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."* End of quote

In my considered view, none of the above cited provisions of the law is a specific provision catering for the restoration relief sought on a dismissed application for want of prosecution. The CPC provides only for restoration of a dismissed appeal or a suit (see Order XXIX Rule 19 and

Order IX Rule 3 of the CPC). That being the case, I will be moved by the cited section 95 of the CPC which vests in this court the inherent power

Having gone through the record of this application, in particular, the two supporting affidavits I observed that the reason advanced for the restoration sought is stated under paragraphs 4 and 5 of the supporting affidavit dated 31<sup>st</sup> March, 2021 deposed by Leah Mnzava read together with the affidavit dated 28<sup>th</sup> December, 2021 deposed by the Hawa Mbwana the court clerk of the Hon. J.L. Masabo, J. These paragraphs explain that Leah Mnzava who is a solicitor of the Applicant appeared in court but only that she didn't hear when the case was called on and remained in court waiting the same to be called until the time she was notified by the court clerk one Hawa Mbwana that the case was already called and got dismissed for want of prosecution. The said Hawa Mbwana deposed under paragraph 3; 4 and 5 in her affidavit supporting averment by Leah Mnzava's presence in court on 2/3/2021 the date Misc. Civil Application No.146 of 2019 was dismissed.

On the other hand, I have gone through the two counter affidavits by Richard Madibi, the learned advocate for the Respondent deposed on 13<sup>th</sup>



December, 2021 and 25<sup>th</sup> July, 2022 respectively. There is nowhere he has indicated that he attended in court on 2/3/2021 the date the said application got dismissed by the court and that through his presence in court corridor on that particular date he didn't see the said Leah Mnzava in court premises.

It is from the above observations; I find there is nothing advanced by the respondent to disbelieve what Leah Mnzava described in her affidavit that she was in court on the material date of 2/3/2021. In view of that, I find that the reason advanced by the applicant is sufficient to grant the prayer sought.

Following the above findings, I hereby grant this application and vacate the order of this court dated 2<sup>nd</sup> March, 2021 dismissing Misc. Civil Application No. 146 of 2019 for want of prosecution Hon. J.L. Masabo, J. Further, I hereby restored the dismissed Misc. Civil Application No. 146 of 2019. And it is further ordered that the parties will appear in court for the said Misc. Civil Application No. 146 of 2019 on the date to be notified.


Each party to bear its own costs



It is so ordered.

Right of Appeal explained


Dated at Dar es Salaam this 30<sup>th</sup> day of November, 2022

  
Musa K. Pomo

Judge

Ruling is delivered on this 30<sup>th</sup> November, 2022 in presence of **Julius Yosiah**, the solicitor for the Applicant and **Fatuma Abdul Thabit**, the learned advocate, holding brief for Richard Madibi the learned advocate for the Respondent



  
Musa K. Pomo

Judge

30/11/2022