

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA

MISCELLANEOUS LAND APPLICATION NO. 68 OF 2021

**(Arising from the order of this Court in Misc. Land Appeal No. 18 of
2021, E.S Kisanya, J.)**

BETWEEN

NYAMBURA MAKEREGE APPLICANT

VERSUS

LEONADI MWITA MARO RESPONDENT

RULING

31st January & 2nd May, 2022

A.A. MBAGWA, J.

This is a ruling in respect of an application for setting aside a dismissal order in and re admission of Misc. Land Appeal No. 18 of 2021. The application is made under Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 R.E 2019] (the CPC) and it is supported with an affidavit of Nyambura Makerege, the applicant.

The facts which led to the present application can briefly be recounted as follows; the applicant lodged an appeal (Misc. Land Appeal No. 18 of 2021) in this Court against the respondent. The appeal was scheduled for hearing on 16th July, 2021 before Hon. Kisanya J. Unfortunately, the applicant could not appear and no notice was given to

the Court in that regard. Consequently, the Court dismissed the appeal for want of prosecution.

Following the dismissal by the Court, the applicant brought the instant application in a bid to have his matter Misc. Land Appeal No. 18 of 2021 heard on merits.

The applicant, states in his affidavit, that she fell seriously sick on 15th July, 2021 hence she went to Nyerere Designated District Hospital where she was admitted for treatment. The applicant further avers that at the hospital, she was examined and found with malaria.

According to the applicant, she was getting well and discharged on 20th July, 2021. The applicant attached a clinical note and a letter authored by Dr. Celestine Simango both indicating that the applicant was sick and admitted at the hospital.

The applicant further states that after recovery, she made a follow up of her case only to find that it was dismissed on 16th July, 2021 for her non-appearance.

In contrast the respondent resisted the application through a counter affidavit. The respondent disputed the applicant's averment and stated that the applicant was not sick as she wants this Court to believe. The

respondent states that on 15th day of July, 2021 he boarded the same bus with the applicant from Kenyana to Musoma. Further, the respondent claimed that on 16th day of July, 2021 the applicant came to Court late when the appeal was already dismissed.

The application was argued by way of written submissions. The applicant had the services of Emmanuel Gervas, the learned advocate whereas Daud Mahemba, the learned advocate represented the respondent.

Submitting in support of the application, Mr. Gervas argued that the only reason that caused the applicant's failure to appear before the Court on 16th July 2021 when an appeal was fixed for hearing was sickness. He elaborated further that, on 15th July, 2021 the applicant started to feel unwell and the following day on 16th July, 2021 she got admitted at Nyerere Designated District Hospital where she tested Malaria positive hence hospitalized for further treatment.

Mr. Gervas argued further that, the applicant failed to notify the Court on her sickness because there was no any relative nearby to task him/her with such duty. Referring to the cases of **Kapapa Kumpindi vs The Plant Manager Tanzania Breweries Limited**, Civil Application No. 6 of 2010, CAT at Mwanza and **Saulo Malima vs Petro King'oni**, Misc. Land Application No. 8 of 2020, HC Musoma, Mr. Gervas was of the

view that sickness is a good ground for this Court to consider and set aside the dismissal order. He thus prayed the Court to allow the application with costs.

In response, Mr. Mahemba contended that the applicant was negligently absent because she was not admitted in any hospital. He further contended that on 15th July, 2021 the respondent travelled together with the applicant in the same bus from Kenyana village to Musoma Town and that on 16th July, 2021 the applicant came late to the Court when the matter was already dismissed.

Mr. Mahemba was of the view that if the applicant was, in actual fact, admitted on 15th July, 2021 as she claims, she could provide or send a letter or information through the same relatives who were around the hospital or within Musoma town. Mr. Mahemba prayed the application to be dismissed with costs.

The applicant did not file a rejoinder.

Having gone through affidavits and the submissions by the parties, the main issue for determination is whether the applicant has advanced sufficient reason(s) for this court to set aside its dismissal order in Misc. Land Application No. 18 of 2021.

Order XXXIX Rule 19 of the CPC empowers the Court to re-admit the appeal dismissed for non-appearance of the party, if the party proved that he was prevented with sufficient cause from appearing when the appeal was called on for hearing.

Generally, it was established that sufficient cause has not been defined but it can be determined according to the circumstances of each case by looking at to whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, and lack of diligence on the part of the applicant. (See **The Registered Trustees of The Archdiocese of Dar es salaam vs The Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006; **Tanga Cement Company Limited vs Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (All Unreported) and **Benedict Mumello vs Bank of Tanzania**, [2006] E.A 22)

In this application, the applicant has advanced sickness as a ground which prevented her from appearing when the matter came for hearing. She attached the discharge summary and the letter from Nyerere Designated District Hospital at Mugumu which proved that she was admitted at the hospital on 15th July, 2021 and she was discharged on 20th July, 2021.

I am at one with the applicant counsel that sickness is a sufficient reason as explained by the Court of Appeal of Tanzania in the case of **John David Kashekya vs The Attorney General**, Civil Application No. 1 of 2012 (Unreported-CAT).

Admittedly, the evidence adduced by the applicant outweighs the respondent's mere averments that he travelled with the applicant in the same bus on 15th July, 2021 and that the applicant came late to Court on 16th July, 2021. I say so because it is the procedure at this Court that all the clients entering the Court premises must register themselves at the entrance gate. Thus the respondent was expected at least to attach a copy of the register of 16th July, 2021 to prove that the applicant was in court premises on the fateful day but came late.

Owing to the reason given by the applicant as indicated above, I am satisfied that, the applicant was prevented by sufficient cause from appearing in court when the appeal was called on for hearing. Consequently, I hereby set aside the dismissal order of this Court and readmit Misc. Land Appeal No. 18 of 2021. The appeal should therefore be restored and proceed from where it had reached on 16th July, 2021.


The enabling provision i.e. Order XXXIX Rule 19 of the Civil Procedure Code [Cap.33 R.E 2019] permits this Court order costs as it

thinks fit. Upon considering the circumstances of this case, I am opined that the applicant though had sufficient cause, should pay the respondent costs which he has incurred in pursuing this application.


It is so ordered.

Right of appeal is explained




A.A. Mbagwa
JUDGE
02/05/2022

Court: Ruling delivered in the presence of applicant and Daud Mahemba, respondent's counsel this 2nd day of May, 2022.


A.A Mbagwa
JUDGE
02/05/2022