

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

Misc. LAND APPLICATION No. 85 OF 2021

*(Arising from the High Court (Musoma District Registry) in Misc. Land
Application No. 49 of 2021)*

THOBIAS NUNGU APPLICANT

Versus

DEUS KYABANA RESPONDENT

RULING

17.05.2022 & 23.05.2022

F.H. Mtulya, J.:

On 22nd September 2021, this court dismissed the application in **Misc. Land Application No. 49 of 2021** (the application) for want of prosecution. The pronouncement of this court as found at the first page of the decision displays the following words: *This matter is coming for hearing today. The applicant is absent. This application is dismissed for want of prosecution with costs.* The record shows that the last order in the application was issued on 3rd August 2021 and displays the following:

- Order:** 1. Parties appear for orders on the 22nd September 2021.
2. Notify the parties.

The dismissal order aggrieved Mr. Thobias Nungu (the applicant) hence instructed learned counsel, Mr. Switbert D.

Rwegasira to register the present application to complain on the right to be heard in the eighth paragraph of affidavit duly sworn by him on 12th October 2021. His prayer from the chamber summons is: *to set aside the dismissal order and restore the application for its final determination.* In order to persuade this court, the learned counsel registered in the affidavit two reasons of absence as reflected at the third and seventh paragraphs, namely: confusions on dates set for mention by this court; and second, lack of negligence on part of the applicant.

In reply of the complaint, Mr. Deus Kyabana (the respondent) hired Ms. Hellena Mabula, learned counsel to draft Counter Affidavit to protest the application. When the present application was scheduled for hearing in this court on 17th May 2022, the respondent invited Mr. Baraka Makowe, senior counsel to argue the protest, whereas the applicant marshalled Mr. Rwegasira. The learned minds launched several arsenals for and against the recent application with the support of the record and science in judicial systems. However, after registration of materials, the dispute was reduced up to the meaning and interpretation of the words of this court recorded on 22nd September 2021, which shows that: *the parties appear for orders on 22nd September 2021.*

According to Mr. Rwegasira, the words: *the parties appear for orders on 22nd September 2021* in the order meant the parties to appear on 22nd September 2021 for necessary orders which would have included filing of the counter affidavit whereas Mr. Makowe contended that the applicant declined to appear in his own application and the words meant the court would have decided on any order including the dismissal order. According to Mr. Makowe, the word *order* means *order* and parties were summoned for *orders* of the court and the parties were not called for *mention* of the application.

I have perused the record of this application and found that the application was called for necessary orders on 3rd August 2021. On this day, both parties were absent and this court issued two (2) orders *viz.* first, *the parties appear for orders on 22nd September 2021*; and second, *parties to be notified on the date when the application was set for orders.*

The record is silent on the second order as to whether it was appreciated and its associated proof of service. Similarly, the record is silent on respondent's counter affidavit as nothing shows it was filed. Additionally, the order which shows the application was scheduled for hearing on 22nd September 2021 is not reflected on

the record of 3rd August 2021. However, this court before it satisfied itself on the second order and see whether the parties were aware of the application hearing date, issued the dismissal order.

In the circumstances like the present one, it is obvious that both parties did not cherish proceedings of this court and appreciate the right to be heard. The right to be heard is no longer a mere natural right or human right. It is a constitutional right enshrined in the **Constitution of the United Republic of Tanzania** [Cap. 2 R. E. 2002] (the Constitution) under article 13 (6) (a), and must be cherished without any reservations. From the practice of this court and Court of Appeal, the right cannot be easily ignored and if it flouted, the decision may be set aside.

There is a large family of precedents supporting the preposition (see: **DPP v. Sabinis Inyasi Tesha & Another** [1993] TLR 237; **Mbeya-Rukwa Auto Parts & Transport v. Jestine George Mwakyoma** [2003] TLR 251; **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; **Darsh Industries Limited v. Mount Meru Millers Limited**, Civil Application No. 144 of 2015; **National Microfinance Bank v. Rose Laizer**, Revision No. 123 of 2014; and **Abbas Sherally & Another v. Abdul S.H.M. Faza Iboy**, Civil Application No. 33 of 2002).

In the precedent of **Mbeya-Rukwa Auto Parts & Transport v. Jestine George Mwakyoma** (supra), for instance, the Court of Appeal observed that:

It is a cardinal principle of natural justice that a person should not be condemned unheard, but fair procedure demands that both sides should be heard. It is not a fair and judicious exercise of powers, where a party is denied a hearing before its rights are taken away...

(Emphasis supplied).

The statement was echoed in the precedents of **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** (supra) and **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018, and uplifted the recognition of the right into the realms of human and constitutional rights guaranteed under article 13 (6) (a) of the Constitution.

This court cannot depart from its previous decisions or decisions of the Court of Appeal in cherishing the right. This court is a temple of both law and justice and entrusted with powers to ensure proper application of laws, including appreciation of the right to be heard to both parties in disputes. I have therefore decided to set aside the order of this court issued on 22nd September 2021 and

further order restoration of the application in favour of the right to be heard on merit of the application. I award no costs to this appeal as the dispute is in the course.

Ordered accordingly.



A blue ink signature of F. H. Mtulya, written in a cursive style with a long horizontal line extending to the right.

F. H. Mtulya

Judge

23.05.2022

This Ruling was delivered in chambers under the seal of this court in the presence of the respondent, Mr. Deus Kyabana and in the presence of the applicant's learned counsel, Mr. Switbert Rwegasira through teleconference.

A blue ink signature of F. H. Mtulya, written in a cursive style with a long horizontal line extending to the right.

F.H. Mtulya

Judge

23.05.2021