

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB- REGISTRY)
AT MWANZA**

MISC. APPLICATION NO. 29 OF 2023
(Arising from the Probate and Administration Cause No. 22 of 2022)

In the matter of the Estate of the Late

CHARLES ILAGO KAPHIPA----- DECEASED

AND

In the Matter of Administration of Letters of the Administration

by DEOGRATIAS ANTHONY ----- 1st APPLICANT

MATILDA KAPHIPA KITWANGA----- 2nd APPLICANT

RULING

Last Order: 24.05.2023
Judgement Date:26.05.2023

M. MNYUKWA, J.

The applicants before this court filed this application pursuant to Order IX Rule 5, section 68(2)(e) and section 95 of the Civil Procedure Code Cap 33 RE: 2019 seeking this court for an order to set aside a dismissal order made on 17.02.2023 before this Court and restore Probate and Administration Cause No. 22 of 2022.



The application was accompanied by affidavit jointly deponed by the applicants. At the hearing of the application which proceeded orally, both applicants appeared in person unrepresented.

The first applicant was the first to submit and he prays this court to adopt the affidavit jointly deponed by the applicants and form part of his submissions. He went on that on the date the matter was set for hearing, they could not enter appearance for the reasons that they were mistakenly confused on the date of hearing as they were informed that the case was to be heard before Hon. Judge Morris on 22.02.2023.

He went on that since the appointment of administrator of the estate of the late Charles Ilago Kaphipa is of the greater importance in order to be able to prosecute the case of **Ardhi Plan vs Charles Ilago Kaphipa**, Land Case No. 214 of 2016 which is pending before the Deputy Registrar waiting the appointment of the administrator of the estate of the deceased, the late Charles Kaphipa.

On the part of the 2nd applicant, she prays for the restoration of the Probate and Administration Cause No. 22 of 2022 for they were not informed of the change of the date for hearing and when they appeared on the first date fixed for hearing that is on 22.02.2023 only to be



informed that the matter was dismissed. She therefore prays for the matter to be restored.

Finally, both applicants pleaded that their advocate to whom was engaged for drawings only did not inform they if the matter was scheduled for hearing on the date when the matter was dismissed.

After hearing the brief submissions of the applicants and the joint affidavit deposed by them, the issue for consideration and determination is whether the applicants has demonstrated sufficient cause for this Court to set aside its dismissal order and restore the Probate and Administration Cause No 22 of 2022.

In determination of this application, first of all it should be remembered that restoration of a matter dismissed for want of prosecution is only grantable when sufficient cause or causes have been established. There must be sufficient cause for nonappearance to the effect that the cause or causes of such nonappearance was beyond all powers and means of the applicant. The applicant should also account for the initiatives undertaken otherwise, parties will be defaulting appearance at their own wishes and later come to seek restoration on very flimsy stories. The Provision of Order IX rule 4 of the Civil Procedure Code Cap. 33 RE: 2019 reads: -



"4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit"

Order IX Rule 4 of the CPC, Cap 33 RE: 2019 gives power to this Court to set aside dismissal order, upon good cause being shown. The question in such application is always, whether there is good cause for setting aside the dismissal order. What is "good cause" is a question of fact, and there is no hard and fast rules that are laid down as to what constitutes and what does not constitute a good cause.

In the application at hand, the applicants gave reasons for their failure to have the case prosecuted. They averred that the case was scheduled for hearing on 22.02.2023 before Hon. Morris, J. and they had no information that the date was scheduled back to 13.02.2023 and 17.02.2023 when the matter was dismissed. I took time to go to the court records which indicates what transpires and I find that their reason is genuine. On 13.02.2023 when the matter was adjourned to 17.02.2023



with an order that parties be notified, it does not appear that parties were informed by the proper summons as it is required by the law. Following the assertion that the assertion that, the advocate engaged was for purpose of drawings only, who did not inform them on the date when the matter was scheduled for hearing, I find this is a justifiable reason too for this Court to set aside its dismissal order.

In any event, and taking into consideration that this is a probate matter, I do not think that there will be a party who is prejudiced anyhow if the application is granted, instead it will enable the applicants to administer the estate of the deceased if at all their application for Administration will be granted.

All said and considered, this application is granted, the dismissal order dated 17.02.2023 is set aside and Probate and Administration Cause No 22 of 2022 is hereby restored. No order as to costs.

Order accordingly.




M. MNYUKWA
JUDGE
26/05/2023

Ruling delivered in the presence of the applicants


M. MNYUKWA
JUDGE
26/05/2023