

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. LAND APPLICATION NO. 92 OF 2022

(C/F Misc. Land Application No. 113 of 2021 High Court of the United Republic of Tanzania, Arusha District Registry)

AKONAAY ERRO.....APPLICANT

VERSUS

JOHN BURA.....RESPONDENT

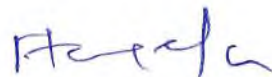
RULING

03/07/2023 & 07/08/2023

MWASEBA, J.

The applicant herein has brought this application under the provision of Order IX Rule 3 of the Civil Procedure Code, Cap 33 R.E 2019 in which the Court is moved to set aside the dismissal order dated 30th May, 2022 in Misc. Application No. 113 of 2021 and restore the same. The application is further supported by the sworn affidavit of the applicant and strongly opposed by the counter affidavit of the respondent.

The reasons for this application are set forth in the applicant's affidavit which goes as follows; That on 30th May, 2022 the matter was called by



the Court Clerk however the applicant's counsel was attending another case before the Hon. Judge in charge in Criminal Session No. 30 of 2021 between **Republic vs Ombeni Mollel @ Alfayo** where he was representing the accused person. The affidavit reveals further that when the said case was over, he rushed to Hon. Mwaseba, J. only to find the case was already dismissed for non-appearance. Thus, he prayed for the application to be granted.

When the matter came for hearing the applicant was represented by Mr. Richard Manyota, learned counsel whereas the respondent appeared in person.

Submitting in support of the application, Mr. Manyota reiterated what has already been submitted in their affidavit supporting the application and prayed for the application to be re-admitted so that the matter to be determined on merits. His arguments were supported by **Order IX Rule 3 of the Civil Procedure Code, Civil Procedure Code**, Cap 33 R.E 2019, and several cases including the case of **Waziri Msigiri vs Kisage Marwa** (Misc. Land Application No. 348 of 2021) TZHCLD 458 (31 August 2021). He prayed for the application to be allowed.



Opposing the application, the respondent prayed for his counter-affidavit to be adopted and form part of his submission. He submitted further that the applicant failed to submit a copy of the summons or cause list to prove that there was a criminal session before Hon. Tiganga, J, and that he was representing one of the accused. He distinguished all the cases cited by the counsel for the applicant for the reason that they differ from the present application. More to that, he argued that the said application was dismissed on 30/5/2022, and the present application was filed 30 days later. He thus prayed for the dismissal of the application.

Having heard the submission from both parties, the issue for determination is whether the applicant has advanced sufficient reasons for the court to grant the application.

It is a settled principal of law that in an application seeking to set aside a dismissal order for non-appearance the applicant has to adduce grounds for failure to enter appearance.

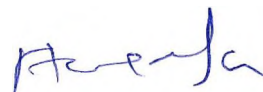
In **Shamsudin Jiwan Mitha vs Abdulaziz Ali Ladak** (1960)1 E.A. 1054 it was held inter alia that;



"In order to succeed in an application for reinstatement of a suit or appeal, the applicant has to show that he did not appear and that he was prevented from appearing by sufficient cause."

I have considered the reason advanced by the applicant. From the outset, I wish to state that I am not convinced by the said reason. As correctly submitted by the respondent, the applicant has not proved his non-appearance. This court is the court of evidence, and in any way, the court cannot act on mere words from the bar. I expected that the applicant in proving his absence ought to have supported his assertion with further evidence that on the material date, his advocate was indeed appearing before Tiganga, J. for criminal session representing the accused person one Ombeni Mollel @ Alfayo. Further to that, the reason for absence of the applicant himself is not disclosed under the affidavit filed in support of the chamber application.

Given the circumstances at hand, the applicant has not given sufficient reason for his non-appearance which is as good as to say that he slept on his right to prosecute his case and cannot at this moment seek for leniency of this court out of his own wrongdoing.



In the event, this court is satisfied that the applicant has not adduced sufficient reasons for this court to set aside the dismissal order, accordingly, this application is dismissed with costs.

It is so ordered.

DATED at **ARUSHA** this 7th day of August, 2023.



A handwritten signature in blue ink, appearing to read "N.R. Mwaseba".

N.R. MWASEBA

JUDGE