

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

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**MISC CIVIL APPLICATION NO. 156 OF 2022**

*(Originating from Misc. Civil Application No. 468 of 2022)*

**SEVERINI JOHN** \_\_\_\_\_ **APPLICANT**

**VS**

**SADIKIELI BARIYE** \_\_\_\_\_ **RESPONDENT**

**RULING**

*01/06/2023 & 11/08/2023*

**BADE, J.**


The Applicant is seeking to set aside an order arising from Misc. Civil Application No 68 of 2022 and readmit the same. This matter was filed as an application to set aside a dismissal order by my sister Komba, J. dated September 28, 2022. The application was supported by the sworn affidavit of Severini John deponed on 24th October 2022. Meanwhile, the respondent filed its counter affidavit in opposition sworn by Sadikiel Bariye and deponed on 30th November 2022.

When the application was called for hearing, the Respondent was represented by Counsel Benjamin Robinson Tenga, while the Applicant had fended for himself.

Initially, the respondent had notified of raising a preliminary point of objection and later on abandoned the same.

The Applicant argues that his reasons for seeking to reinstate the dismissed application are that he was uninformed of the movement of the matter from one judge to another.

The Applicant maintains that the matter was dismissed on 28/09/2022. On this date, he was in attendance because previously the case came for mention on 27 September 2022, and was scheduled next to each other consecutively, and he was informed by the Respondent's friends that the matter shall be dismissed if he does not attend. He contends that as he sat waiting to be called, the Respondent's advocate John Lundu was also around, inside the courthouse. He insists that he was waiting with the Respondents, and then saw the Respondent leaving the benches, and that in his knowledge and belief, was that the matter is being heard by Mwaseba, J. but could not find any of them at the Judge's chamber, and



until when he finally met the RO, who informed him that the matter was heard by Hon. Judge Komba, and that the matter had been dismissed. He insists that his confusion is pegged on the fact that the matter was moved from one Judge to another, and that made it impossible for him to know where to go and wait for the matter or who to actually ask. This confusion was not out of negligence, and that he was genuinely following his matter that was filed in the court.

He insists that he has electronic tickets that one has to get when visiting IJC even though he did not produce them with his supporting affidavit, and made earnest pray that the matter be reinstated so the case can be heard on merits and *interpartes*.

On the other hand, the respondent is resisting the application. The Applicant's counsel maintained that the Applicant had served my client with the summons, and the record would show the matter was set for mention on 09/06/2022, before Mwaseba, J. after which he defaulted appearance on this date despite his serving them with summons. The case was adjourned to 02/08/22 and again he defaulted. Then the matter was scheduled for Hg on 27/09/2022 and the applicant did not show up once again. The respondent on the other hand was present and was informed

that the file has moved from Judge Mwaseba to Judge Komba. The matter was scheduled that it was going to be heard the next day, and when the applicant still defaulted appearance on this day, that is when the matter was dismissed.

The counsel contends that the reason that he was unaware of the moving of the file is flimsy, as the issue is he was not in attendance at the previous sittings of the court. If he was in attendance he would certainly know of this movement.

The application is brought under Order IX rule 3, which requires the applicant to provide good cause for the court to grant the prayed orders.

The court has ruled in **Registered Trustees of Pentecostal Church of Tanzania vs Margaret Mukama**, Civil Appeal no 45 of 2015, (unreported) where at p5 of the case it is stated "an ex parte judgment is only available if the judgment debtor has good cause to justify his non-appearance".

The Counsel insists that the applicant should have given good cause for his non-appearance. That the applicant's reference to the receipts should not

be considered as they are being introduced now and were not part of his supporting affidavit.

He maintains that the applicant had enough chance to find and establish the movement of the case or what is happening on the same, and thus he has not provided sufficient reasons as even the present application records will show that he did not enter appearance on the matter before you previously and that he really is imploring delaying tactics as he already won, and concluded that the application should be dismissed with costs.

On rejoinder, the Applicant chimes back that he had asked advocate Fridolin Bwemela to register his apologies and ask for the next date for the hearing of the matter as he was held by pressing emergency family reasons, but unfortunately, the said person forgot and did not do as asked. He declares his ignorance of the court's legal procedures and technicalities as a lay person and prays for the court to exercise leniency on the matter. He reiterates his stance that he was around in the court premises, but could not find the proper venue, insisting that he did not disobediently or negligently opted not to enter an appearance. He concludes that If all parties herein were truthful, the other side would have said what happened

because they did see each other in court on the particular date, and they made an appearance without informing him.

Having heard both parties, the issue before me is whether this application is merited, and particularly whether the applicant has adduced sufficient reason to warrant this court to set aside the dismissal order.

I have considered the learned arguments for and against the application. It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution has to furnish the court with sufficient reasons for nonappearance when the suit was called on for hearing. It is evident from the affidavit supporting this application that the applicant's failure to appear when the matter was called on for hearing was not a result of negligence or inadvertence.

Looking at the record of the court proceedings the matter was dismissed while the same was scheduled for mention, and if it was scheduled for hearing, then the notice of the hearing was extremely scanty. From the counter affidavit of the respondent, it is noted on paragraphs 5, 6 and 7 where the dates set are narrated. I have also noted the reassignment as well as setting the matter for hearing was done within the same day.

While this court does not condone the applicant's acts of filing a matter and leave it to fate as charged by the respondents which quite unwarranted and unfortunate, I am alive to the fact that a person might be undergoing financial difficulties, which should not be the cause for denied justice. In all fairness though, I am of the considered view that the notice of hearing that brought about the order of dismissal was too short. The matter was set for mention on 27<sup>th</sup> September 2022. The same day, the matter was reassigned to another judge and set to be heard the next day.

In any case, the Civil Procedure Code would have required a dismissal of a matter if the same was set for hearing, and the party who is supposed to prosecute the matter default appearance. Such a dismissal would have been properly based on want of prosecution. The justice of the matter in my view, would require that enough notice is given to the party, who was absent in court when the matter was being mentioned and set for hearing. Looking at the notice of hearing within the next day and without having the consent of all the parties that they will be having a hearing on the next day is rushed in my considered view, its only justification is if all parties were present and acceded to being set for hearing the next day. In the sequence

of events in the instant case, this is not only a hearing but also a reassignment to another Judge.

I am guided by the provisions of order IX Rule 3 of the Civil Procedure Code which read as follows:

"Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) ..... apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.

This Court has had opportunities time and again to consider the sufficiency of reasons to reinstate a dismissed matter, and it has often held in consideration of the fact that it is in the interest of justice and the practice of the court that, unless there are special reasons to the contrary, suits are determined on merits, and what amounts to good cause depends on the peculiar circumstances of each case - See **Fredrick Selenga & Another vs Agnes Masele** [1983] TLR 99 and **Mwanza Director MIS New Refrigeration Co. Ltd vs Mwanza Regional Manager of TANESCO Ltd & Another** [2006] TLR 329



Even in their strictest forms, I believe the rules are not meant to defeat justice or deny parties a fair and just day in court. I am satisfied that there is a good cause for the non-appearance of the applicant on the day the application was set for hearing, and as such I allow the application.

The parties shall appear before the Judge to schedule Hearing of the Application for Leave, which was dismissed and now restored.

It is so ordered.

**DATED at ARUSHA on the 11th August 2023**



A handwritten signature in blue ink, appearing to read "A.Z. Bade", written over a horizontal line.

**A.Z. BADE  
JUDGE  
11/08/2023**

**DELIVERED at ARUSHA on 11th August 2023** in chambers in the presence of the Counsel for the parties/ and or parties in person.



A handwritten signature in blue ink, appearing to read "A.Z. Bade", written over a horizontal line.

**A.Z. BADE  
JUDGE  
11/08/2023**