

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

MISC LAND APPLICATION NO. 18 OF 2023

WILSON ROLAND MMOLE.....APPLICANT

VERSUS

MARION KARCHER.....RESPONDENT

(Arising from Land Case No. 08 of 2020 of the High Court, Tanga)

RULING

29/8/2023 and 12/9/2023

NDESAMBURO, J.:

At hand is a ruling on an application for setting aside a dismissal order dated 21th March 2023 in Land Case No. 08 of 2020. The application is pegged under Order IX Rules 3 and 6 (1) as well as section 95 of the Civil Procedure Code, Cap 33 R.E 2019. In support of the chamber summons is the affidavit of Wilson Roland Majaliwa, the applicant.

Briefly, the background of this matter is that there was, pending in this Court, a Land Case No. 08 of 2020 between these similar parties. When it was scheduled for hearing on 06th December 2022, the plaintiff's advocate Ms. Ernesta Chuwa stated that her client is

still sick. Prior to this date, the matter had previously experienced multiple adjournments due to the plaintiff's sickness.

Mr. Bwana advocate for the defendant who had attended with his client on that day, did not take this excuse from hearing the case lightly. He lamented that the sickness of the plaintiff has all along been stated without any medical evidence to support the same. He prayed for the court to issue an order of last adjournment.

The court ordered that the matter be adjourned for hearing to 06th February, 2023 which was two months later and specifically directed the plaintiff to bring witnesses on that date.

Time is not static, the fateful date came, that is 06th February 2023 and again, Ms. Chuwa submitted that her client is still sick so she prayed for another adjournment. Her client was also not ready to be heard by means of video conference from where he was. Ms. Chuwa prayed for a one-month period so as they can arrange for a legal representative to proceed with the matter as a donee of the power of attorney. She also brought medical sheets to substantiate sickness of her client.

The court granted the order for adjournment. The case was adjourned to 21st March 2023 but elucidated that the same will be the very last adjournment.

On the date of the said last adjournment, Ms. Chuwa appeared stating that they had achieved to obtain a donee, one Nakamuna Ezekiel Mchopa but he had not managed to appear in court. She therefore prayed for yet another hearing date and subsequent hearing date.

Mr. Bwana was justifiably infuriated by the prayer and prompted the court that the previous adjournment was ordered to be the last one. He prayed for the court to dismiss the case with costs accordingly. Ms. Chuwa kept beseeching the court not to dismiss the case as the donee failed to appear due to failure to obtain permission to travel to Tanga, from the place she did not disclose.

Subsequently as intimated earlier, the suit was dismissed for want of prosecution. After the dismissal, the applicant who was the plaintiff by then, filed this application with a view of seeking its restoration. In the affidavit accompanying the chamber summons, the applicant deponed that on 21st March 2023 when the case was

dismissed for want of prosecution, he was seriously sick. The affidavit of the appointed donee, and his advocate Ms. Chuwa were also annexed. The respondent filed counter affidavit and disputed all facts regarding excuses of the plaintiff and his donee being sick.

The court ordered and both parties agreed that the present matter proceeds by way of written submissions. In support of the application, Ms. Chuwa, learned advocate substantially stated that the proceedings of 21st February 2023 are not reflected in the court record. She also submitted that the deponer was sick on the date of dismissal as deponed in the affidavit. Therefore, she was of the view that the plaintiff's sickness, should be given the weight it deserves as a reason for unattendance. She invited the court to apply the principle of overriding interest to decide the matter.

Ms. Chuwa attached the cases of **Hassan Hamis Nzomari v Edmunda Thomas Lusebe & 3 Others**, Misc Land Application No 351 of 2019, HC Dar es Salaam and **Faraji Athumani Mugaye v Manager of National Microfinance Bank (NMB) Bukoba Branch**, Land Case Appeal No 17 of 2018, HC Bukoba both persuasive to this court and that of **Gaspar Peter v Mtwara Urban**

Water Supply Authority (MTUWASA), Civil Appeal No 35 of 2017, CAT at Mtwara to buttress her stance.

The Respondent through learned counsel Mr. Bwana, opposed the application unreservedly. After taking the court back to the history of what averred on the day of dismissal, the learned counsel reminded this court that powers to restore the case are discretionary however the applicant is expected to furnish the court with sufficient reasons as to why the order should be set aside. The standard of proof in this situation is on balance of probabilities, he added.

On reasons brought forward by the applicant, Mr. Bwana countered them all stating that the illness of Wilson Mmole is not proved but rather the medical chits annexed only indicates the illness of the donee. Even the documents suggesting illness of the donee are questionable as they have different dates with those pleaded in the affidavit, they also do not show that the donee was admitted in hospital or excused from duty so that he failed to travel.

Additionally, the counsel detailed the court that instead of praying for dismissal on the reason that her client was sick, the learned counsel stated in court that her client, the donee failed to

acquire permission to travel to Tanga. Mr. Bwana considers that illness of the donee was an afterthought by the applicant. Counsel Bwana was also of the view that overriding principle cannot be applied in this particular situation.

The respondent attached the cases of **Mwidini Hassani Shela & 2 Others v Asinawi Makutika & 4 Others**, Land Appeal No. 04 of 2019, HC at Dar es Salaam, **Computer & Programs Africa PTY Limited v Tanzania Electric Supply Company Limited**, Comm Case No 129 of 2005, HC at Dar es Salaam, **Amina Maulid Ambali & 2 Others v Ramadhani Juma**, CAT at Mwanza, **FINCA Tanzania LTD v Dotto Mdawalo Luseko**, Civil Application No 582/03 of 2021, CAT at Dodoma, **Mtengeti Mohamed v Blandina Macha**, Civil Application No 344/17 of 2022, CAT at Dar es Salaam and **Jovet Tanzania Limited v Bavaria N.V**, Civil Application No 207 of 2018, CAT at Dar es Salaam in support of his submission.

The applicant's rejoinder was mostly a reiteration of what had been submitted in the submission in chief.

This ruling seeks to determine the viability or otherwise of the application to restore the dismissed Land Case No. 08 of 2020. The Civil Procedure Code is silent on the time required for one to file an application to set aside a dismissal order. In the circumstances, the Law of Limitation Act, Cap 89 R.E 2019 comes into play. Under item 4 of the Second Column of part III of the schedule to the Law of Limitation Act, the law provides for a 30 days period for filing an application for setting aside a dismissal order. Land Case No. 08 of 2020 was dismissed on 21st March 2023 and this application to set the dismissal aside was lodged on 06th April 2023 which is well within time.

The main issue for determination that remains is whether this application has merit. As rightly submitted by the learned counsel for the respondent, powers to set aside a dismissal order are purely discretionary upon the court vested with such powers. All that is needed is for the applicant to furnish the court with sufficient reasons to exercise such powers in their favour: See the case of **Mwidini Hassani Shela & 2 Others v Asinawi Makutika & 4 Others, (supra)**.

In deciding this case I am guided by the wisdom of the then Lord Chief Justice of England observed in the case of **Rex v. Sussex Justices**, [1924] 1 KB 256 that justice must not only be done but seen to be done.

The major reason surrounding this matter in general has been sickness of either the applicant or the donee. On the day Land Case No. 08 of 2020 was dismissed, it was the donee who is alleged to have been sick and who was expected to attend in court.

I have weighed the arguments for and against the application as presented to me by both learned counsel. This being a court of law, the major duty is to deal with the contentious issues between parties that approach the court to the definiteness. It is only under the worst circumstances that the court will allow the case to end in technicalities.

In this case, proceedings reflect that both advocates, the applicant's advocate Ms. Chuwa inclusive, have always been diligent in pursuing the matter. In one case of **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER 372, while deciding the matter of restoration like the present, the court stated:

"The applicant's conduct before the alleged non-appearance should be taken into consideration in an application of this nature."

The record reveals that Ms. Chuwa has been tirelessly pursuing the matter and on the day of dismissal, the incident of nonappearance was occasioned by the clients. In the affidavit, the donee depones that he was sick and attached the medical sheets. In my considered view, I find that sickness is a good ground which may justify setting aside a dismissal order. In court, sickness can only at most be raised as a ground since the issue of proving whether a person was indeed sick or not can only be dealt with by the professionals. I have also taken into consideration the fact that it is in the interest of justice and the practice of our courts of law that, unless there are special reasons to the contrary, overriding objectives specified under Section 3A of the Civil Procedure Code, must be attained.

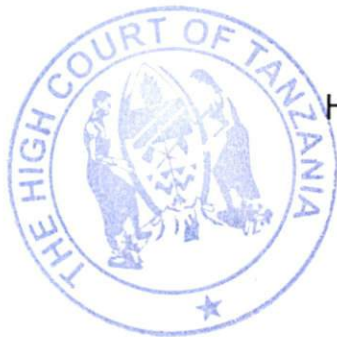
Given the above stated circumstances and guided by the spirit that there is need for achieving substantive justice which requires the parties be given opportunity to litigate their rights to a conclusive end, see **Zanzibar Shipping Corporation v Mkunazini General Traders**, Civil Application No.3 of 2011 (unreported) and as the Latin

maxim goes, *Fiat justitia ruat caelum* meaning let justice be done though the heavens fall, I find myself condemned to grant this application.

I hereby therefore grant the application, set aside the dismissal order made on 21st March 2023 and order that Land Case No. 08 of 2020 is restored.

Cost to follow the event in the main case.

DATED at **TANGA** this 12th day of September 2023.



A handwritten signature in blue ink, appearing to be "H. P. Ndesamburo".

H. P. NDESAMBURO

JUDGE