

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA

MISC. LAND APPLICATION NO. 41 OF 2022

(Arising from the order of the High Court of Tanzania at Dodoma in Misc. Land Application
No. 65/2014 dated 7/3/2016)

ALBIN SACKITAIDA.....APPLICANT

VERSUS

WILBARD SOLOMON

(A personal representative of Solomon Lazaro)**RESPONDENT**

RULING

Date of Last Order: 12/07/2023

Date of Ruling: 16/08/2023

A.J. MAMBI, J.

The applicant **ALBIN SACKITAIDA** filed this application under Order IX Rule 9(1) of the Civil Procedure Code Cap 33 [R:E 2009] praying for an order of this court among others to set aside dismissal order in Misc. Land Application No. 65/2014. An order dismissing the said application was made by this Court (Kwariko, J as she then was) on 07/03/2016.

The material facts as they appear on the records are that the respondent late father, Solomon Lazaro in 2010 unsuccessfully sued the applicant before Mwanga Ward Tribunal for trespass to his land vide Land Application No 16 of 2010. Having lost the case, the respondent late father successfully appealed against the said decision at Iramba District Land



and Housing Tribunal (the DLHT) in Land Appeal No. 04 of 2011. The DLHT decision aggrieved the applicant herein, he appealed against it at this Court vide Misc. Land Case Appeal No. 67 of 2011. This Court (Mkuye, J as he then was) on 03/07/2014 upheld the decision of the DLHT. The applicant being dissatisfied once more with the decision of this Court he subsequently lodged his notice of appeal and filed an application, Misc. Land Application No. 65 of 2014 before this Court seeking a certificate on point of law for determination by the Court of Appeal. It would appear that when this matter was coming for hearing on 07/03/2016 the applicant never appeared but his advocate Mr. Machibya was present. When the learned counsel Mr. Machibya prayed to withdraw from representing his client, this Court (Kwariko, J as she then was) granted the prayer forthwith and in the meantime dismissed the application for want of prosecution, hence the current application.

The application at hand is supported by an affidavit that sworn by one Magreth Mbasha, the applicant advocate and the application was countered by the respondent.

During hearing, the applicant through the legal services of Ms. Catherine and Mr. Wambura submitted before this Court that they were relying on paragraph 2, 3, 4 and 5 of the affidavit. Mr. Wambura went on submitting that when the applicant's application, Misc. Land Application No. 65 of

2014 was pending before this Court, he was arrested and charged with murder case P.I No. 10 of 2015. The counsel submitted that the applicant was discharged later but re-arrested again and charged for murder in P.I No. 03 of 2017 and later he was again discharged. The learned counsel contended that in all that time when the applicant was criminally charged, he was not able to prosecute his application before this Court hence this Court dismissed it. Mr. Wambura further submitted that after the release from custody it was when the applicant began the processes of restoring his case by applying for extension of time for him to apply for an order to set aside the dismissal order. That, time having been extended by this Court the applicant then filed this application. In her submission the applicant counsel made reference to the decision of the court in **Bahati Musa Hamisi Mtopa vs Salum Rashid**, Civil Application No. 112/07 of 2018.

Responding to the submission by the applicant, Mr. Haule for the respondent opposed this application arguing that being arrested by the police was not a sufficient cause as the application, Misc. Land Application No. 65 of 2014 was filed on 17/07/2014 and as per para 6 of the affidavit, the applicant was arrested in October, 2015. Mr. Haule submitted that the time from when the applicant filed his case to his arrest there is a difference of one year and three months. It was Mr. Haule's view that it

appeared the applicant lost interest in his case that is why he never prosecuted it as a period of one year and three months was too long.

Rejoining, Mr. Wambura for the applicant contended that this Court dismissed Misc. Land Application No. 65 of 2014 on 07/03/2016 after the applicant was arrested and that at all the time Mr. Machibya was appearing before this Court.

Having considerably gone through the parties' affidavits, their submissions and the records before me, I find one main issue for determination, which is whether this application has merit or not. In other words before determining the main issue, one needs to ask himself, as to whether or not the applicant has advanced sufficient reasons for this court to consider his application. In other words, the question to be determined is whether the applicant has properly moved this court in its application and whether there are any good causes for his non-appearance on the hearing day.

It is trite law that any party may seek for an order for setting aside any dismissal order and the court has the discretion to grant such orders where there are sufficient grounds. This is the position of the law and case studies. Reference can be made on Order IX Rule 9 of the Civil Procedure Code Cap 33 [R: E 2019] the same reads;

'In any case in which a decree is passed ex-parte against a defendant, he may apply to the court by which the decree was

passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit." Emphasis Supplied.

The provision above emphatically tasks the applicant to prove before the court as to what prevented him from appearing before it when his suit was up for hearing. In this regard where the court is satisfied that the applicant has advanced sufficient reason in his application the court may set aside its dismissal order.

This means that in determining an application for setting aside a dismissal order, the court has to determine if the applicant has established some material amounting to sufficient cause or good cause as to why the sought application is to be granted. In other words, the court need to consider an issue as to whether the applicant in his affidavit has disclosed good cause or sufficient reasons for his nonappearance.

It should be noted at the outset that it is the discretion of the court to either grant or dis-grant an application for setting aside a dismissal order which was made due to the nonappearance of the applicant/plaintiff. It all depends on the reasons advance to the court.

Indeed, the question as to what it amounts to "sufficient cause" was underscored in **REGIONAL MANAGER TANROADS KAGERA VS RUAHA CONCRETE CO LTD CIVIL APPLICATION NO 96 of 2007**, where the court observed the following: -

*"What constitutes sufficient reasons cannot be laid down by any hard or fast rules. This must be determined by reference to all the circumstances of each particular case. This means **the applicant must place before the court material which will move the court to exercise judicial discretion** in order to extend time limited by rules"* (emphasis supplied).

Similarly, The Court in **TANGA CEMENT AND ANOTHER CIVIL APPLICATION NO 6 OF 2001** clearly held that:

*"What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account **including whether or not the application has been brought promptly; the absence of any or valid explanation for delay; lack of diligence on the part of the applicant**".* Emphasis Supplied.

My perusal from the records, show that the applicant in this case has not indicated sufficient reasons for non-appearance. Indeed, navigating throughout the affidavit it is in paragraph 6 that the applicant alleges that when his application, Misc. Land Application No. 65 of 2014 was dismissed on 07/03/2016 for want of prosecution he was in custody having been arrested for murder charge in October, 2015. However, going into the

proceedings of Misc. Land Application No. 65 of 2014 the records indicate that the said case was filed on 16/07/2014 and the applicant engaged an advocate one Mr. Machibya who for the first time appeared before this Court on 06/11/2014. However, when the case was adjourned till 24/03/2015 neither the applicant nor his counsel appeared before this Court. Equally on 28/05/2015 when the matter was scheduled for hearing, no one appeared. It was only on 16/07/2015 when the applicant himself entered appearance but when the case was adjourned to 29/09/2015 again neither the applicant nor his counsel appeared before this Court. Similarly, on 17/11/2015 no one appeared. Despite the court's lenience in adjourning the matter for several times, neither the applicant nor his counsel was appearing. Now, even if this Court is to agree that the applicant failed to appear on 07/03/2016 because he was in custody after being arrested in October, 2015, the question is; how about the other days that he or his counsel failed to appear?

By the conducts of the applicant in deserting his case and given the fact that he only appeared before this Court once out of eight times, this Court was justified to conclude that the applicant lost interest in his case. It is my view that, this was the reason which moved the applicant counsel to pray to withdraw himself from representing the applicant after having lost contacts with his him. It is my further view that had it been that the

applicant was attending this Court sessions definitely this Court could not have dismissed his case just for a single non-appearance of 07/03/2016. The applicant alleges that his non-appearance of 07/03/2016 was due to his being in custody, but since the said case was on certificate on point of law his counsel could have appeared and submit as the case was up for hearing on that day but he decided to withdraw from representation. The applicant states that the withdraw of his counsel was due to the fact that he failed to pay legal fees. However, I am of the considered opinion that failure by the applicant to pay legal fees cannot be used to punish the respondent family by dragging it in endless cases as they already have executed the decree of this Court in Land Case Appeal No. 67 of 2011 which uphold the decision of the Iramba District Land and Housing Tribunal and are now continuing using it.

Furthermore, it is my considered view that, having been engaged and since the case was coming for hearing the applicant's advocate was required to proceed with the case and nothing more no matter the fact that he lost contact with the applicant. Reference can be made in **Bahati Musa supra** cited by the applicant counsel where at page 7 the court held;

"We are firm that, like in application for extension of time, generally speaking, an error made by an advocate through negligence or lack of diligence is not a sufficient cause."

However, despite the negligence or lack of diligence of the advocate in prosecuting a case for his client, the court in certain circumstances can consider his error as amounting to sufficient cause. Reference can be made in **Yusufu Same and Another vs. Hadija Yusufu**, Civil Appeal No. 1 of 2002, that was considered by the Court of Appeal in **Bahati Musa supra** which held as follows;

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellant's advocate in his oral submission. But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate as was held by a Single Judge of the Court (Mfalila JA as he then was) in **Felix Tumbo Kisima v. TTC Limited and Another-CAT**, Civil Application No. 1 of 1997(unreported).*

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step.

In the instant case the respondent had done all that she could, leaving the matter to the hands of her advocate who had been assigned to her on legal aid. In the circumstances, while accepting that there were some elements of negligence by her counsel, in the

circumstances of the case, we join hands with our learned brother Mfalila JA in the case cited supra, and hold that the learned counsel's negligence constituted sufficient reason for delaying in lodging the appeal between 1.8.1996 and 24.10.1996"

The question at this juncture is, are there any circumstances warranting this Court to find out that the error of the applicant's advocate in Misc. Land Appl. No. 65 of 2014 amounted to sufficient cause for setting aside the dismissal order. The applicant in this case stated that his advocate was not yet paid and lost contact with him. To the applicant, that was why his advocate withdraw himself from representing. In my view and basing on the records, these are not sufficient reason to enable this Court to set aside the dismissal order. This is due to the fact that, since the matter was coming for hearing, the applicant advocate was required to proceed with the case notwithstanding the fact that he had lost contact with the applicant or because he was not yet paid his legal fees. It should also be noted that the matter has taken a very long time since it was dismissed in 2016, and it appears the respondent had already executed the decree. Indeed, even if the applicant could have been in custody as he alleged, still even when he was released, he stayed for a long time (about five months) without urgently taking reasonable steps to resurrect his case. In this regard, five months was too long for any court to consider

an application for setting aside dismissal order in the absence of sufficient reasons for such inordinate delay.

In light of the foregoing discussion, I am of the considered view that this application is devoid of merit. This court therefore, finds it proper for the interest of justice to dismiss this application for lack of merit. That said this application is therefore dismissed. No orders as to costs

Order accordingly.



A. J. MAMBI

JUDGE

16/08/2023

Ruling delivered in Chambers this 16th day of August, 2023 in presence of Ms. Wambura the learned counsel for the applicant.



A. J. MAMBI

JUDGE

16/08/2023

Right of appeal explained.



A. J. MAMBI

JUDGE

16/08/2023