

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

**BUKOBA SUB- REGISTRY**

**AT BUKOBA**

**MISCELANEOUS LAND APPLICATION NO. 86 OF 2023**

*(Originating from Land Case No.15/2023 H/C Bukoba Sub- Registry at Bukoba)*

**RAPHAEL. K. MAGONGO.....1<sup>ST</sup> APPLICANT**

**JOVITH RUTAKANGWA MULISA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**KISHOJU VILLAGE EXECUTIVE COUNCIL.....1<sup>ST</sup> RESPONDENT**

**MISSENYI DISTRICT COUNCIL.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

*07/02 /2024 & 15/03/2024*

***E.L. NGIGWANA, J***

This is an application for setting aside the dismissal order and restoration of Land Case No 15 of 2023, which was dismissed by the trial judge after the plaintiffs (now applicants) and/ their advocate had failed to attend the mediation session.

Basically, the said matter was dismissed under Order VIII Rule 29 (a) of the Civil Procedure Code, [Cap.33 R.E 2019] which provides that; where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may dismiss the suit, if the non-complying party

is a plaintiff, or strike out the defence, if the non-complying party is a defendant.

The application was preferred under Order VIII Rule 30 (1) (2) and (3) of the Civil Procedure Code, [Cap. 33 R.E 2019]. The application is made by chamber summons supported by a joint affidavit of the applicants. The applicants are praying for the following orders:-

- 1. That, this Honourable Court be pleased to set aside the dismissal order dated 15/11/2023 and re-store Land Case No.15 of 2023.*
- 2. Costs of this application be provided for.*
- 3. Any other reliefs as may deem just to grant.*

The respondents filed a counter affidavit sworn by Anna Said who is the Principal Officer of the 1<sup>st</sup> respondent; Kishoju Village Executive Council, in opposition to the application.

At the hearing of this application, the applicants were represented by Mr. Ibrahim Mswadick; learned advocate, whereas Mr. Victor Joseph Mhana; learned State Attorney, represented the respondents.

The application was heard orally. Supporting the application, Mr. Mswadick prayed to adopt the applicants' joint affidavit. He contended that the

reasons for the grant of this application are premised under paragraph 7 of the supporting joint affidavit. He claimed that the 2<sup>nd</sup> applicant became seriously sick on 14/11/2023 whereas he was attended at Buyango Dispensary on 15/11/2023.

He further submitted that as an advocate who was representing the applicants (plaintiffs in the main case), also became very sick from 13/11/2023 whereas, on 15/11/2023, he was attended at St. Therese Health Centre at Bukoba. (Medical chits, one from Buyango Dispensary and another from St. Therese Health Centre were attached to the joint affidavit to form part of it). It was his further submission that sickness is one of the grounds to be considered in applications for restoration of the dismissed suit.

Mr. Mswadick submitted further that, the 1<sup>st</sup> applicant lives at Rusumo Ward within Ngara District, therefore, initially, he had instructed him to proceed with mediation in his absence, therefore was not aware of when was the matter scheduled for mediation.

Mr. Mswadick further contended that, on 17/11/2023, the 2<sup>nd</sup> applicant, after attaining some improvements, made follow-ups of his case and

finally learnt that it was dismissed on 15/11/2023, as a result, this application was promptly filed on 20/11/2023. He finalized his submission that if this application is granted, the respondents will not be prejudiced.

Opposing the application, Mr. Joseph Mhana prayed to adopt the counter affidavit. He submitted that on 24/10/2023 the applicants and their advocate entered no appearance before the Mediator (Otaru J) when the matter was mentioned before her for the first time, whereas, the mediation session was scheduled to commence of 15/11/2023.

Mr. Mhana went on submitting that the allegation that the applicant's advocate was sick on 15/11/2023 cannot stand owing to the reason that, on the same date, Mr. Ibrahim Mswadick appeared before Hon. Banzi J in the case of Fredrick Felician versus Sagidu Sadick , Misc.Civil Application No. 45 of 2023. He contended that the Medical Chit from St. Therese therefore; was fraudulently obtained.

It was his further submission that, if at all the learned advocate encountered serious health problems on 15/11/2023 after appearing before Banzi J, he ought to have notified the Mediator or he should have filed the notice of absence. To support his argument, Mr .Mhana cited the case of

**Swalahadin Twaha Ismail versus Amran Masudi Kayumba**, Misc. Land Case Application No.16 of 2023 (HC), where before dismissing the applicant's application, the court was satisfied that the applicant's sickness was not such much serious to prevent him from coming to court on the material date nor did it prevent him from notifying the court about his absence. The court arrived at that conclusion after noting that the applicant went to Hospital and later on came to court.

He also urged the court to be guided by the Court of Appeal decision in **Jamal S. Mkumba & Abdala Issa Namungu & 359 others, versus The Attorney General**, Civil Application No 240/01 of 2019 where the applicants' application for restoration of their appeal was dismissed with costs for want of sufficient cause for non-appearance. He also submitted that any person who seeks excuse on the ground of sickness has to account for all days of delay in order for the court to exercise its discretion. To bolster his stance, Mr. Mhana cited the Case of **Nehemia Mugasa (suing as Attorney of Betha Mugasa) versus CMC Motors Limited**, Civil Application No.566/01 of 2022. According to Mr. Mhana, the applicants ought to have accounted for the date of 24/10/2023 in which they did not appear before the Mediator.

Mr. Mhana further submitted that the allegation that the 1<sup>st</sup> applicant told his advocate that he would not enter appearance during mediation is an assertion which is not reflected in the joint affidavit. He added that the affidavit of the advocate ought to have been attached to support the application. He finalized his submission stating that the acts by the applicants and their advocate show that they had no interest to pursue their case, thus prayed to the court to dismiss this application for want of merit.

In his rejoinder, Mr. Mswadick submitted that the Medical chits are self-explanatory on his sickness and the sickness of the 2<sup>nd</sup> applicant. He added that there was no need to account for 24/10/2023 owing to the reason that the matter was not dismissed on that date. He added that, on 15/11/2023, he suddenly became very serious and rushed to Hospital, but he did not come back to court, therefore the case of **Swalahadin Twaha Ismail versus Amran Masudi Kayumba**, (Supra) is distinguishable. He added that, each case has to be decided on its own circumstances and as per circumstances of this case; there was no need for him to swear an affidavit.

Having heard submissions of the parties, the issue for determination is whether the applicant has demonstrated sufficient cause to warrant this Court to set aside its dismissal order and restore the dismissed suit to wit; Land Case No.15 of 2023.

It is trite law that powers to set aside a dismissal order are in the discretion of the court, however, the applicant should furnish sufficient reasons to enable the court exercise its discretionary power. In other words; sufficient cause for non-appearance is the only acceptable reason for the Court to exercise its discretion to set aside dismissal order for non-appearance.

The application at hand was made under Order VIII Rule 30 (1) (2) and (3) of the Civil Procedure Code, [Cap.33 R.E 2019]. Rules 30(1) and 30(3) provide as follows;

*"30 (1) Any party aggrieved by an order made under the above rule shall, within seven days from the date of the order, file in court an application for restoration of a suit or a written statement of defence"*

*"30 (3) Upon the applicant **showing good cause** the court shall set aside orders made under rule 29 of this Order and restore the suit or the*

*defence and remit the case to the mediator who shall issue a notice for mediation”*

Reading the above provisions of the law, it is apparent that for the dismissal order to be set aside, **One**, the application must be lodged within seven (7) days from the date of the order, and **two**, it must be proved that the applicant was prevented by sufficient cause from attending the mediation session.

In the application at hand, it is apparent that the main case which is sought to be restored was dismissed on 15/11/2023. It is also not in dispute that the application at hand was filed on 20/11/2023, meaning; it was filed within seven days from the date of the order.

The applicants’ major reason for failure to attend the mediation session on 15/11/2023 is sickness. The medical chits were annexed to the joint affidavit forming part of it. The same revealed that the 2<sup>nd</sup> applicant was attended at Buyango Dispensary on 15/11/2023 while the learned counsel Mr. Ibrahim Mswadick was attended on 15/11/2023 at St. Therese Heath Centre, and after being attended, and considering his health complications, he was advised to take bed rest for three (3) days.



The fact that he appeared before Banzi J, on the same date, does not mean that he did not suddenly fall seriously sick and rushed to Hospital to rescue his life. **In the case John David Kashekya versus The Attorney General**, Civil Application No. 107 of 2012 CAT (unreported) the Court of Appeal of Tanzania held that: -

*"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children who are yet in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and do whatever kind of work he is required to do."*

Similarly in the case of **Richard Mipawa Manara versus FINCA Tanzania Ltd & Another**, Land Appeal No.51 of 2021 my learned brother Hon. Kisanya, J held that:-

*".. Sickness is a good cause since it not a choice of a human being but a cause over which one has no control...."*

Guided by the above authorities, it is trite that sickness is a reasonable ground for a person who has failed to take a certain action at a required time.

It follows therefore that, sickness may constitute sufficient cause for restoration of the dismissed case for non- appearance if it is proved that a party or parties were really prevented by sickness from entering appearance in court.

Considering that applicants' joint affidavit and submission by the learned counsel Mr. Ibrahim Mswadick, I am satisfied that the learned counsel Mr. Ibrahim Mswadick and the 2<sup>nd</sup> applicant were prevented by sickness to appear before the mediator on 15/11/2023.

Moreover, the argument by the learned State Attorney Mr. Mhana that the applicants ought to have accounted for their non-appearance before the mediator on 24/10/2023 is misplaced because the suit was not dismissed on that date, meaning there was no order issued on that date which aggrieved the applicants. The matter was not about extension of time.

It should also be noted that after noting that the matter was dismissed, the applicants acted promptly by lodging the application at hand. It is also worth noting that it is a principle of law that each case has to be considered on its own circumstances. As far as this application is concerned, the main case was dismissed at the mediation stage, therefore

it is my considered view that, if this application is granted, the respondents will not be prejudiced anyhow.

Having said all that, I find this application meritorious, and I allow it. The dismissal order made by this Court on 15/11/2023 in Land Case No.15 of 2023 is set aside, and the case is restored accordingly. Each party has to bear its own costs. It is so ordered.



E.L. NGIGWANA

JUDGE

15/03/2024.

**Court:** Ruling delivered this 15<sup>th</sup> day of March 2024 in the presence of the 2<sup>nd</sup> applicant and his advocate Mr. Ibrahim Mswadick, Mr. Lameck Buntutu and Ms. Anna Ngira, both State Attorneys, Hon. E. M.Kamaleki, JLA and Ms. Queen Koba.



E.L. NGIGWANA

JUDGE

15/03/2024.

