

**IN THE HIGH COURT OF TANZANIA
DODOMA SUB REGISTRY
AT DODOMA**

MISC LAND APPLICATION NO. 71 OF 2023

(Arising from the Order of the High Court of Tanzania at Dodoma District Registry in Misc. Land Appeal Case no. 27 of 2022)

SILVESTER JOB CHIPONDO.....APPLICANT

VERSUS

AGNESS CHARLES ERNESTRESPONDENT

RULING

Date of last order: 18/03/2024

Date of the Ruling: 08/04/2024

LONGOPA, J.:

The applicant and respondent were the applicant and respondent before the District Land and Housing Tribunal disputing ownership of land in Land Application No. 219 of 2020 and application for review in Misc Land Application No 1 of 2020 before the District Land and Housing Tribunal for Dodoma. The District Land and Housing Tribunal decided in favour of the respondent herein in both the Land Application No. 219 of 2020 and Miscellaneous Land Application No. 1 of 2020. As a result, the applicant



preferred an appeal against the decision of the District Land and Housing Tribunal vide Misc Land Appeal No 27 of 2022 before this Court. On 22nd August 2023, the High Court (Hon. Mambi, J.) dismissed the appeal for want of prosecution as neither of the parties made appearance before the Court.

The applicant has approached this Court vide this application made under Order XXXIX Rule 17 of the Civil Procedure Code, Cap 33 R.E 2019 dated 19th September 2023 for the followings orders, namely:

- (a) That this honourable Court be pleased to set aside the dismissal order and restore the Appeal Case No. 27/ 2022 thereof.
- (b) Costs be provided for.
- (c) Any other order(s) or relief(s) as the Honourable Court shall deem fit and just to grant.

This application is supported by the affidavit of Silvester Job Chipondo, the applicant. In that affidavit, the applicant avers that:

3. That, the applicant herein has been attending the Court each and every date scheduled without missing before this Honourable Court thereof.

4. That, the case was firstly assigned to Honourable Judge Masaju and thereafter assigned to another judge and recently it came to the knowledge of the applicant that the case has been dismissed for non-appearance dated 22/08/2023 thereof



5. That, this Court scheduled the date 22/08/2023 without his knowledge and informed him and he was not aware but he made efforts to trace for it since I was told that on 06/09/2023 to be in court thereof.

6. That, also this very honourable Court scheduled the date of hearing without his knowledge and informed him thereof.

7. That, after it came to the knowledge of the applicant though he was not aware on 22/08/2023 that the said case before this very honourable court thus the Land Appeal Case No. 27 of 2022 was dismissed for non- appearance of the applicant herein thereof as per Annexure M.1.

8. That, now the applicant is seeking from this honourable Court to restore Land Appeal Case No. 27/2022 since the said non- appearance was not occurred due to applicant's negligence or deliberately as stated herein above the same.

9. That, unless this application is granted the applicant and his family shall suffer irreparable loss and his right to be heard will be infringe, as he has great chance to succeed on his Application and there is no other room to challenge for this thereof.

10. That, it is for the interest of justice that this honourable Court to grant an order for restoration to the

applicant herein, since he has great and overwhelming chance of success the same in his Appeal thereof.

On 18/03/2024, both parties appeared before me for hearing of the application. They both appeared in person and each fended for himself. It was the applicant who firstly set the ball rolling. He stated that he had always been attending the court on dates set for appearance. The absence on that particular day leading to dismissal order might have been caused by mixing up of the date when the matter was scheduled. It was his submission that this is the only plausible reason for his failure to appear on the date set for appearance before the Court.

The applicant prayed to adopt the affidavit in support of the application to form part of his submission in support of the application. He reiterated his prayers that this Court be pleased to set aside the dismissal order and order restoration of Land Appeal No. 27 of 2022.

The respondent on the other hand was of the view that failure by the applicant to appear and prosecute his case indicates that he was not interested to continue with that case. It was submitted that there were no good reasons adduced by the applicant to warrant this Court to set aside the dismissal order.

It was respondent's prayer that this application should not be granted as there are justifications whatsoever for this Court to exercise its powers

to set aside the dismissal order and order restoration of the appeal. That was all the submissions from the parties.

I have dispassionately considered the application and its supporting affidavit as well as record of this Court regarding this matter to determine merits of the application. I shall address the same as follows:

This Court exercised its powers under Order XXXIX Rule 17(1) of the Civil Procedure Code, Cap 33 R.E 2019 that allows it to dismiss the appeal where the appellant does not appear on the date set for hearing of the appeal or date set for appearance in Court. The record reveals that on two consecutive dates set for appearance i.e. 03/08/2023 and 22/08/2023, the applicant herein who was the appellant did not appear before the Court. This Court was entitled to dismiss the appeal for want of prosecution as it was the second time the appellant did not make appearance.

For this Court to set aside the dismissal order, it is pertinent that the applicant must demonstrate that he was prevented by sufficient cause for his failure to appear in Court. The mandate of this Court to set aside dismissal order and order restoration of the dismissed appeal is catered for within the Civil Procedure Code. Order XXXIX R. 19 of the CPC provides that:

19. Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it

is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

It is trite law that sufficient cause must exist for the court to depart from its dismissal order by setting it aside and replacing it with restoration order. In the case of **Yusufu Same & Another vs Hadija Yusufu** (Civil Appeal No. 1 of 2002) [2006] TZCA 141 (20 October 2006) (TANZLII), at page 9 the Court noted that:

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.

It can be discerned from the affidavit and submission made thereof in support of the application that the applicant's basis of the prayers is on two main aspects. First, that the applicant was not aware of the date set for the matter. Second, there could have been mix up of the dates on the side of the applicant that made him miss the scheduled date.

The record reveals that the applicant was present in Court on 25/04/2023 when the matter was scheduled for hearing on 06/06/2023

and following the transfer of the presiding judge the case was re-assigned to Hon. Mambi, J. on 27/04/2023. On 06/06/2023, the appellant was in Court when this Court scheduled 03/08/2023 as the date for next appearance in Court.

It is on record that on 03/08/2023 both the applicant and respondent were not in court and the Court adjourned the same for hearing on 22/08/2023. This adjournment was the last adjournment as per record of the Court. It is evident that on 22/08/2023 neither the applicant nor the respondent made appearance before the Court. It is at this juncture that the presiding judge ordered dismissal of the appeal for want of prosecution.

From the assessment of what is available on record, it is lucid that the question of the applicant being unaware of the hearing date does not hold water. It is my settled view that on 06/06/2023 when the matter was fixed for appearance in 03/08/2023, the applicant was in court. It cannot be said that lack of knowledge on part of the applicant is the cause for his failure to appear. I shall rightly dismiss the assertion of paragraphs 5 to 9 of the affidavit on lack of knowledge on the date scheduled for the parties to appear before the Court for being destitute of merits as the record reveals differently.

Regarding mixing up of the date the applicant did not put any material facts sufficient to support the assertion that might be considered

sufficient to have impaired the applicant from acting diligently. The applicant did not demonstrate how the mix up of the hearing date could not have happened before but only at this time. I am of the view that this is an afterthought that should not be entertained.

In the case of **Jamal S. Mkumba & Others vs The Attorney General** (Civil Application No. 24 of 2019) [2023] TZCA 21 (15 February 2023) (TANZLII), at page 10 the Court of Appeal reiterated criteria. It stated that:

Borrowing a leaf from applications for extension of time in which time may be extended even when an applicant has not shown good cause, if there is an illegality in the decision sought to be challenged. We are settled in our mind that the same may be the case with applications for restoration. That is, in applications for restoration like the present, a point of law of sufficient importance may constitute sufficient cause for the grant of the prayer for application. It should be noted that it is not any point of law but only one of sufficient importance which will qualify to be relied upon in the circumstances.

The instant application does not fall on this aspect of illegality as the applicant has not averred any such illegality. There is nothing of importance in the instant application to warrant invoking this Court's discretionary powers to set aside dismissal order and restore the appeal in

circumstances where the applicant has not demonstrated existence of good cause. I concur with respondent's submission that there is no sufficient cause demonstrated by the applicant to warrant this Court to grant the application.

Further, in the case **Fakhria Shamji vs The Registered Trustees of The Khoja Shia Ithnasheria (Mwanza) Jamaat** (Civil Appeal 143 of 2019) [2022] TZCA 77 (25 February 2022) (TANZLII), at pages 9-10, the Court provided the guidance on when can dismissal order be made. It stated that:

Although the term "mention" is not provided for in our CPC, but it has been a well-established practice that there is difference between a "mention" and "hearing" date. Guided by the decision in Mr. Lembrice Israel Kivuyo (supra), that dismissal can only be made on a hearing date and not "mention" as most parties consider a "mention" day as a day for necessary orders, including scheduling of a hearing date, which was not the case in the instant matter. We thus agree with Mr. Mayenga's submission that it was not fitting for the Judge to hurriedly react by dismissing the PO. The Judge did not even bother to allow Mr. Luoga to address him on the PO raised.

It is on record that 22/08/2023 was a date set for hearing of the appeal and the applicant as the appellant was not in Court thus presiding

Judge had no option other than dismissal of the appeal for want of prosecution. This is coupled with the fact that the set date was the last adjourned date for the hearing of the matter.

In the premises, I am satisfied that the applicant has failed miserably to adduce any sufficient cause for this Court to depart from its dismissal order for want of prosecution. It is not an opportune case to order restoration of the dismissed appeal as there are no material sufficient to move this Court to exercise its discretionary powers on the matter.

There is no sufficient cause demonstrated by the applicant to warrant this court to order restoration of the appeal and setting aside the dismissal order. As such, I am inclined to dismiss the application for being destitute of merits.

The application stands dismissed with no orders as to costs. It is so ordered.

DATED at DODOMA this 8th day of April 2024.



Longopaya
E.E. LONGOPA
JUDGE
08/04/2024.