IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY
AT ARUSHA

MISC. LAND APPLICATION NO. 110 OF 2023

(Emanating from Land Revision No. 16 of 2022 of the High Court of the United Republic of Tanzania at Arusha, Arising from Misc. Application No. 46 of 2022 & originating from Land Application No. 02 of 2016 in Tlaw Ward Tribunal)

LUCIA PHILIPO .... APPLICANT

VERSUS

JULIAN JEMS SARWAT *(As an Administrator of the estate of the late KAROTO NIIMA)* **......................... RESPONDENT**

RULING

17th April & 24th May 2024

Masara, J

In this Application, the Applicant herein beseeches this Honourable Court to set aside the dismissal order made on 16th August 2023 in Land Revision No. 16 of 2022. Briefly, the Applicant was also the Applicant in Land Revision No. 16 of 2022 before this Court. The said application had been scheduled for hearing, following an order of last adjournment where the Applicant had also defaulted appearance. Incidentally, the Applicant did not enter appearance, hence the application was dismissed for want of prosecution. The Applicant has brought this Application supported by an affidavit seeking for the Court to vacate from its order dated 16/08/2023.

At the hearing of this Application, which proceeded by way of written submissions, Mr Joseph Moses Oleshangay, an advocate from the Legal and Human Rights Centre drafted submissions on behalf of the Applicant. The Respondent was initially represented by Mr Pendael Munisi but the written submission on his behalf does not indicate that representation, as it is signed by the Respondent in person.

Before dealing with the submissions, it is imperative to note that on 13 December 2023, the Applicant prayed to be represented by her daughter, Joseph Anacleth Augustino. The Power of Attorney dated 14th November 2023 was admitted and an order for amendment of the Application was made. The Amended Chamber Summons to that effect was filed in Court on 11 January 2024. However, in the written submissions, parties continued to refer to the parties as originally brought before the amendments. In this ruling, reference to the Applicant refers to the original Applicant, Lucia Philipo.

Submitting in support of the Application, Mr Joseph stated that on 16/8/2023 when the matter was called for hearing the Applicant and her advocate were in the court premises at the waiting lounge but did not hear when the court clerk called the case and, unfortunately, when it was

inquired, they were informed that the application had already been called and dismissed.

That the said miscommunication, combined with the Applicant's severe health issues and financial difficulties prevented the Applicant from promptly addressing the dismissal. The Applicant's Counsel added that, the Applicant suffers from severe spinal cord problems and varicose veins in her left foot which affects her mobility and health in general. That, such handicaps hinder the Applicant from carrying out her activities including, among others, attending court proceedings and other legal obligations.

Mr Joseph further submitted that it is a well-established jurisprudence in Tanzania that dismissal for want of prosecution is a serious matter that needs to be exercised cautiously; specifically, when the absence of a party is due to reasons beyond her control. He referred to the case of **Rashid Salum vs The Republic (2015)** (*sic*). Reverting to the current application, it is the Applicant's claim that her absence was not deliberate, rather, it arose from inadvertence and lack of proper notification.

Counsel for the Applicant went on to state that, the principles of natural justice require that parties to the legal proceedings must be given a fair opportunity to present their case in order to ensure a fair hearing not withstanding procedural irregularities. To cement on this, he referred to

the decision whose full citation was not disclosed; named **Kweka vs Bwana (2008)** (*sic*). That, it is in the interest of justice that the applicant be given an opportunity to present its case on merit rather that dismissing the same summarily.

Substantiating on the other points, Counsel for the Applicant contended that access to justice should not be denied based on financial means. That, the Applicant, being a poor and lay person, was not aware of what to do until she knocked the door of the office of the Legal and Human Rights Centre for legal assistance where she was advised to file an application to set aside the dismissal order. On the grounds for extension of time, the learned counsel made reference to the decisions in **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, and **Nasibu Sungura vs Peter Msechu, Civil Appeal No 24 of 2017.** Basing on the above, Counsel for the Applicant prayed that this Court reconsiders the dismissal of their case and that the case be reinstated as there was no any negligence on part of the Applicant but rather the Applicant was only a layperson with several health issues and unaware of what to do together with financial difficulties.

Opposing the Application, the Respondent sought to adopt the contents of the counter affidavit to form part of his submission and prayed, *a priori*, that the Application be dismissed for lack of clarity and legal points.

Concerning the merits of the Application, the Respondent contended that on the date when the matter was called for hearing, neither the Applicant nor her advocate was present in Court. He added that it was not the first time that the Applicant had defaulted appearance as she did so on three different occasions.

It was the claim by the Respondent that, court business is governed by law and procedure; thus, an aggrieved party must seek for necessary orders within the time prescribed by law. To buttress her submission in this regard, she referred to the decisions in **Belias Bunini vs Akiba Commercial Bank PLC, Misc. Application No. 78 of 2021**, and **Tanzania Fish Processors Ltd vs Christoph Luhangula, Civil Appeal No. 161 of 1994.**

Regarding health issues and financial difficulties by the Applicant, it is the response from the Respondent that the said ground has no merits as the Applicant had an advocate who was assisting her in pursuing her rights and could have preferred an application timely. He made reference to decisions in **Bushiri Hassan vs Latifa Lukio Mashayo, Civil**

Application No. 3 of 2007; Regional Manager, Tanroads Kagera vs Raha Concrete Company Ltd, Civil Application No 96 of 2007; and **Phares Wambura and 15 Others vs Tanzania Electric Supply Company Limited, Civil Application No 186 of 2016.**

The Respondent further stated that as per the case of **Lyamuya Construction Company Limited** (Supra) as cited by the Applicant, the Applicant has not been able to account for all the period of the delay.

With regard to the claim of illegality, it is the Respondent's submission that the claimed procedural irregularities have never been pointed out in the submissions, hence the Respondent prays that the Application be dismissed.

In a brief rejoinder submission, the Applicant retorted that the dismissal of the case without availing the applicant a right to be heard is a violation of the constitutional right to be heard enshrined under the Constitution of the United Republic of Tanzania of 1977. She cemented her submission with the decision in **Rev. Christopher Mtikila vs The Attorney General (1995).** The Applicant further prayed that this Court invokes the oxygen principle as stipulated in the case of **Dangote Cement Limited vs NSK Oil Gas Limited, Misc. Civil Appeal No. 8 of 2020** and grant the order sought.

I have considered the affidavit in support of the Application, the counter affidavit opposing the same as well as the arguments for and against the Application contained in the written submissions. It is a settled principle of our law that an Applicant seeking to set aside a dismissal order for want of prosecution has to furnish the dismissing court with sufficient reasons for her non appearance when the matter was called for hearing. From the affidavit of the Applicant and the submissions made in support thereof, the Applicant's failure to appear in Court when Land Revision No. 16 of 2022 was called for hearing was due to the fact that she, her daughter and her advocate did not hear when the Application was called for hearing. The Applicant also cites sickness and financial difficulties as contributing factors.

Starting with the first reason, it is the claim of the Applicant that they were present at the Court premises but could not hear their case being called by the court clerk. On the side of the Respondent, he countered this assertion stating that it was not possible for three people to be present at the court premises and not hear when the matter was being called. To him, the Applicant and her advocate did not attend Court on that day.

I have carefully gauged the two counter arguments. From the record, on 24/07/2023 Land Revision No. 16 of 2022 was set for hearing before this Court, where it was noted that the Applicant was absent. The matter was adjourned until 16/08/2023 as a last adjournment, following appearance defaults by the Applicant.

Again, on 16/08/2023, neither the Applicant nor her advocate entered appearance before the Court. Notably, the Respondent entered appearance on both occasions represented by Mr Munisi, learned Advocate. The Respondent's advocate prayed that the matter be dismissed for want of appearance of the Applicant. Hence, this Court dismissed Land Revision No. 16 of 2022 for want of prosecution.

I do not find the ground of miscommunication cited by the Applicant convincing enough to justify the Applicant's non appearance. I say so because, the Applicant was represented by an advocate who happens to be an officer of the Court. Being an officer of the Court and in circumstances where there was a miscommunication on the part of the court clerk, the advocate was duty bound to promptly approach the bench and address the said miscommunication. There is nothing on record to indicate that after they were informed that the matter had been dismissed for want of prosecution, they informed the presiding Judge of the mishap.

Further, if it was in fact true that they were present and the Court clerk met them, I find nothing in their affidavit to indicate the reluctance of the Court Clerk to depone an affidavit in their support. A litigant and his or her advocate have a duty to ensure that their interests are properly and diligently represented. This burden is even heavier when an advocate is involved. The Court would in some instances exercise leniency where a party is unrepresented. It is not the same where an advocate is involved. This duty was stressed by the Court of Appeal in the case of **Heritage Insurance Company Tanzania Limited vs First Assurance Company Limited, Civil Appeal 165 of 2020 [2023] TZCA 175, Tanzlii**, where the Court cited with approval the case of **Ashmore vs Corp of Lloyd's [1992] 2All ER 486**. Where it was held that:

> *"His Lordship sounded a warning to litigants and* ***particularly their legal advisors*** *of their duty to cooperate with the court by ensuring that they present their cases with focused, chronological and brief pleadings defining issues in such a way simplifying the matters and not raising a multitude of ingenious arguments hoping that the judge will fashion a winner.* ***We can only hope that litigants and their advocates shall strive to adhere to the requirements prescribed by the Rules."*** (Emphasis added)

From the guidance above, a litigant and her advocate have an unescapable duty to focus in prosecuting their matter, including appearing

in court when the matter is called. It does not make any practicable sense to throw tantrums on court clerks for their own faults. If there was such a miscommunication, the Applicant's advocate was duty bound to promptly notify the Court for an immediate remedial action and not to act sloppy as in this matter. One wonders why an application for restoration had to be made 44 days thereafter!

On the claim of the Applicant's sickness, whereas this defence in right circumstances can be a reason to condone a delay by a party, that may not apply in all circumstances where sickness is raised as a ground. It is elementary that sickness is a condition which is experienced by the person who is sick; it is not a shared experience except for a sick person who is in a position to express her sickness feelings. That position was propounded in the decision of the Court of Appeal of Tanzania in the case of **John David Kashekya vs The Attorney General, Civil Application No. 1 of 2012** (unreported). For sickness to be a sufficient reason for a delay or absense, the same must be sufficiently proved. The Court of Appeal of Tanzania in the case of **Juto Ally vs Lukas Komba & Another, Civil Application No. 484/17 of 2019** (unreported), had the following to say:

"...Indeed, ***she has not explained how her illness contributed to the delay*** *as the medical evidence she attached to her affidavit concerns the period specifically for the dates when she attended to hospital on 8th October, 2016 and 19th June, 2016. Besides, there is no indication that on those particular dates she was admitted and for how long. The only indication is that she attended at Mwananyamala Hospital as an outpatient where* ***she was attended and allowed to go to her residence on both occasions."*** (Emphasis added)

In the instant Application, I do not consider the ground of sickness to be a precursor of the delay or non appearance for that matter. I say so for the following reasons: to begin with, other than merely stating in the affidavit and submissions that the Applicant is an old person having spinal cord problems, left foot problems resulting from Varicose vein as well as impaired hearing, those assertions are not backed up with any documentary evidence, be it a medical chit or otherwise.

Secondly, the Applicant, in Land Revision No. 16 of 2022, was moving this Court to revise the decision of the District Land and Housing Tribunal for Manyara (DLHT); as such the Applicant was by law not duty bound to appear in Court in person to prosecute her matter. Because she was legally represented, appearance by her advocate would have sufficed. She could only appear in person if she did not have an advocate or a legally authorised representative.

Notably, the affidavit filed in support of the Application reveals that the Applicant had a daughter, Josephine Anacleth Augustino, who, at all times, escorted her to Court. In cases of inability by the Applicant to appear in person, the said daughter could have appeared to give notice of the Applicant's absence. Thus, it is the conclusion of this Court that the order sought by the Applicant cannot be granted on the ground of sickness.

The Applicant also raised financial constraints as a justifying ground for the Application. Undoubtedly, this Court is enjoined to treat all parties equitably notwithstanding the financial means of one or all of them. Furthermore, this Court understands that the right to legal representation though a constitutional right, has to be exercised in a rightful way. That right, for those who cannot afford legal counsel, can be exercised through *pro bono* legal service providers. I must also add, *a priori*, that the rule of practice that requires a legally represented person to address the court only through her advocate is merely a rule of etiquette and decorum which does not, in deserving circumstances, take away her right to address the court personally. The Court of Appeal confirmed this in the case of **James Burchard Rugemalira vs Republic, Criminal Appeal 391 of 2017 [2019] TZCA 188, Tanzlii** where the Appellant, who was represented

by an advocate made a prayer before the Court to avail him an opportunity to first present his case personally. That request was granted.

In the current matter, the Applicant seems to suggest that she did not timely apply for restoration of the dismissed application because she was unable to pay her former advocate to do so. Whereas it would have been highly unprofessional for an advocate who defaulted appearance to demand new instruction fees for an application to restore a matter he defaulted appearance, there is nothing to prevent the Applicant herein to promptly seek *pro bono* legal services as was eventually done in this Application. Further, such Application could be done by the Applicant in person. Hence, the claim of financial difficulties can not stand in this matter.

From the foregoing, I am not convinced by the Applicant's reasons for non-appearance when the matter was called for hearing. I am likewise not convinced with the grounds of delay to file for restoration of the dismissed application. In the end, the Application is devoid of merit and is dismissed forthwith. As the Applicant is represented under a legal aid scheme, I make no order as to costs.

I so order.

DATED and **DELIVERED** at **ARUSHA** this 24th day of May 2024.

Y.B. Masara

JUDGE