

**IN THE HIGH COURT OF TANZANIA**  
**(LAND DIVISION)**  
**AT DAR ES SALAAM**  
**MISC LAND APPLICATION NO. 346 OF 2017**  
**BLUE PEARL HOTEL AND APARTMENTS LIMITED.... APPLICANT**  
**VERSUS**  
**UBUNGO PLAZA LIMITED.....1<sup>ST</sup> RESPONDENT**  
**MAJEMBE AUCTION MART AND**  
**COURT BROKERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

*14/5/2018 & 22/6/2018.*

**MZUNA, J.:**

On 3/5/2017 this court struck out Land case No. 298 of 2014 for non-appearance of Mr. Peter Kibatara, the learned counsel for the applicant. Consequent after that order, the applicant filed the present application under Section 95 of the Civil Procedure Code, Cap 33 RE 2003 praying among others for the restoration of the suit. Reasons are contained in the affidavit sworn by Mr. Peter Kibatara.

Arguing in support of the application, Mr. Omari Msemo, the learned counsel capitalized on paragraphs 8 and 12 of the said affidavit and said that

on 3<sup>rd</sup> day of May, 2017 when the Land Case No. 298/2014 was called for hearing, Mr. Benard Kitivo the Principal Officer of the applicant was in court and ready to testify. That by then Mr. Kibatata, the Advocate who had the conduct of the matter on that date was sick. He had some pain which was caused by dog bite at his residence a day before that particular date.

That on 3<sup>rd</sup> May, 2017 he decided to go to AR Medical centre for medical consultation before he could attend the scheduled hearing. While there, he was informed by the Doctor verbally that he has already been inoculated and therefore no need of further treatment. That, when he rushed to court for hearing at 11:30 am he was told that the matter had been struck out at 11:00 pm as fixed.

It is argued based on **Mulla, Code of Civil Procedure**. 16<sup>th</sup> Ed. Page 2031 that the test which the court should consider to set aside the said order is only where sufficient reason/cause preventing the party from appearing has been adduced. It is submitted that his non appearance was due to the illness which he says is a sufficient reason which warrants this court to set aside its order which struck out the main suit.

In opposition, Mr. Mudhihiri Magee, the learned counsel for the respondent said that the adduced reasons have not shown sufficient cause to set aside the order.

He strongly disputed the allegation by the said counsel that he suffered a dog bite and went to Hospital otherwise he ought to have produced proof in support thereof let alone a proof that indeed the said counsel appeared before AAR Medical center. Further that there is no proof that he was vaccinated by Tetanus or rabies. He insisted that no medical chit has been attached as proof thereof and therefore they have failed to establish the fact that Mr. Kibatala was sick.

That, the allegation that Mr. Benard Kitivo was present and ready to testify is disproved by the fact that another advocate was holding brief for Mr. Kibatala. He prayed for the court to find that no sufficient reason has been shown for non appearance by the counsel when the matter was struck out.

It is a well-known practice of the law that application to restore the struck out application as the present one, there must be shown sufficient reasons justifying a party who defaulted to appear. Apparently on the date

when the case was struck out Mr. Mtatiro, the learned counsel who was holding brief for Mr. Kibatara, the learned counsel said that he was sick but admitted did not have medical chit in support of such contention. Similarly, in the filed affidavit and the adduced reasons, nothing was tendered as proof that indeed on the material date Mr. Kibatara was sick.

I would agree with Mr. Magee, the learned counsel for the respondent that nothing to back up the alleged illness and therefore it is unsupported.

It was held in the case of **K.V Construction Limited v. Mwananchi Engineering Limited & Constructions**, Civil Application No. 50 of 2004, CAT at Dar es Salaam, unreported, that in the absence of medical chit showing that the advocate was "*excused from duty because of illness*", then no sufficient reasons had been shown. The court further said that:-

*"...all advocates must take court hearing dates with the seriousness they deserve."*

Based on the above stated reasons, I find no merit in this application. The allegation that one Benard Kitivo, the Principal Officer of the applicant was present and ready to testify does not match with the court record and

is therefore an afterthought. The record shows was not in a position to proceed.

The application stands dismissed with costs.



  
**M. G. MZUNA,**  
**JUDGE.**

22/6/2018