

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND CASE APPL. NO.662 OF 2017**

**SIMON PIUS MWACHILO.....APPLICANT**

*Versus*

**FRED EDWARD.....1<sup>ST</sup> RESPONDENT**

**NASMA AUCTION MART & COURT**

**BROKERS.....2<sup>ND</sup> RESPONDENT**

**OBADIA LUPHINGO MTEWELE.....INTERESTED PARTY**

*Date of Last Order: 28/05/2018*

*Date of Ruling: 08/06/2018*

**RULING**

**S.A.N WAMBURA, J.**

The applicant **Simon Pius Mwachilo** through the services of Mr. Luguwa learned counsel brought this application under Order IX Rule 9 (1) and Section 95 of the Civil Procedure Code Cap. 33 R.E 2002 and any other enabling provisions of the law for Orders that;

- a) That this Court be pleased to vacate its order of dismissing Land Case No. 92 of 2013 for fails to comply with a Scheduling Order or to appear at a 1<sup>st</sup> pre trial conference and restore the said Land Case No. 92 of 2013 and fix the date for the hearing of it on merit.*

*b) Costs of this application to follow events.*

The application was supported by the affidavit sworn by Barnaba Luguwa the applicant's advocate.

The respondents **Fred Edward (1<sup>st</sup> respondent)**, **Nasma Auction Mart & Court Brokers (2<sup>nd</sup> respondent)** and **Obadia Luphingo Mteweale (Interested party)** challenged the applicant's application and prayed for the dismissal of the same.

The 1<sup>st</sup> respondent was represented by Mr. Bugeza Advocate, while the 2<sup>nd</sup> respondent the legal services of Mr. Mwakasanga learned Counsel and the 3<sup>rd</sup> respondent Obadia Luphingo Mteweale (interested party) was represented by Mr. Mtiginjola Advocate.

With leave of this court, the application was disposed of by way of written submissions, I thank both parties for adhering with the schedule.

In support of the application, Mr. Luguwa contended that the advocate who had the conduct of this suit travelled to Tanga to

attend a hearing of the case before Hon. Aboud J between **DIAMOND RAJAB VS NATIONAL HOUSING CORPORATION** Misc. Application No. 2 of 2017. He averred that the said advocate assigned the matter to Mr. Eventius Mugiabuso to appear and proceed with the said pretrial conference unfortunately he got an engagement which compelled him not to attend. He therefore prayed to this court to grant the application as prayed.

In response, Mr. Mwakasanga and Mr. Mtiginjola learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that Mr. Luguwa has failed to provide any justifiable or sufficient cause for his absence on the 18<sup>th</sup> July 2017 when the suit was called for 1<sup>st</sup> PTC.

They contended that the learned counsel for the applicant could have produced a cause list to prove that he attended Misc. Application No. 02/2017 before Hon. Aboud J. They therefore prayed for the dismissal of the application with costs.

In reply, Mr. Luguwa reiterated his earlier submissions in chief.

It is crystal clear in law that in granting an application of this nature there must be sufficient reasons adduced by the applicant for the court to exercise its discretionary power of setting aside its Order made thereon. This is because before the court set aside its Order which has made, it must satisfy itself that the applicant has been prevented by sufficient cause from appearing in court when the suit was called on for hearing. This is the position of the law as provided for under **Order IX Rule 9(1) of the Civil Procedure Code Cap. 33 RE. 2002** which provides as follows and I beg to quote;

*“Order IX Rule 9. Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, **but he may apply for an order to set aside dismissal order and, if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.**”*

[Emphasis is mine].

This position was reiterated by this court in the case of **NASIBU SUNGURA VS PETER MACHUMU T.R.L [1998]** at page 501 where Hon. Mrema J (as he then was) held that:-

*“In an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, **but whether the reasons furnished are sufficient to justify the applicant’s non-appearance on the date the suit was dismissed.**”*

[Emphasis is mine].

Basing on the above, and in consideration of the affidavit of the applicant’s advocate as well as the circumstances surrounding this matter all that is expected is to show that the nonappearance was not caused or contributed by diligence on his part.

Mr. Luguwa averred that he did not attend to this court on 18/07/2017 because he was in Tanga attending Misc. Application No. 02/2017 before Hon. Aboud J. Unfortunately he did not tender any summons nor cause list to prove that on the said date

he was in Tanga. Again the said Mr. Mugiabuso has not sworn an affidavit as proof of the said allegation.

It is from the above, I find no justifiable reasons advanced by the applicant for this court to exercise its discretionary power to set aside its Order made on 18<sup>th</sup> July 2017.

In the upshot, and for foregoing reasons, the application is accordingly dismissed with costs.

It is so ordered.

**S.A.N WAMBURA**  
  
**JUDGE**

**08.06.2018**