

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

MISCELLANEOUS LAND APPLICATION NO. 203 OF 2020

SUZAN RAPHIA LINJEWILE (as administratrix of
the estate of the late Remigius Majangara Linjewile).....**APPLICANT**

VERSUS

ABDALLAH HASSAN**1ST RESPONDENT**
ALBERT DAWSON KIMARO.....**2ND RESPONDENT**
(Application for an order setting aside the dismissal order of
23/3/2020 in Land Case No. 263 of 2017)

RULING

MGETTA, J:

This ruling is in respect of Chamber Summons filed on 20th April, 2020 under **Order IX rule (1) of the Civil Procedure Act, 1966** (henceforth Cap 33) by Mr. Edward Gaspar Magayane, the learned advocate for one Suzan Raphia Linjewile (an administratrix of the estate of Remigius Majangara Linjewile) (henceforth the applicant) seeking for an order for setting aside dismissal order of 23rd March, 2017 in Land Case No. 263 of 2017 (henceforth the suit). The Chamber Summons is supported by sworn affidavit of applicant's advocate.

When the application was called on for hearing, Mr. Magayane, the learned advocate appeared for the applicant; and, Mr. George Ngemela,

the learned advocate appeared for the 2nd respondent, one Albert Dawson Kimaro. The 1st respondent never appeared.

It was submission by Mr. Magayane that he be allowed to adopt the contents of the affidavit with its annexures. He submitted that the suit was dismissed for want of prosecution for allegation that the applicant failed to effect service to the 1st respondent, one Abdallah Hassan. He submitted further that the suit involved two defendants, now respondents. The duly served 2nd respondent was being represented by Eustace Rwebangira, the learned advocate. On 23rd March, 2020, he was present but the applicant and 1st respondent absent on that date.

He went on submitting that since the 2nd respondent was present, there could be an order that the suit had to proceed against the 2nd respondent who was duly served as per **Order IX rule 11 of Cap 33**. Since the matter was not dismissed for non-appearance, Mr. Magayane added, the dismissal order be set aside and the suit be restored.

In reply, Mr. George adopted the contents of the counter affidavit and proceeded to state that the suit was dismissed for want of prosecution on the date neither the applicant nor her advocate appeared. He lamented that since July, 2017 the applicant had failed to serve the 1st respondent. The applicant had failed also to apply to serve the 1st respondent even by

way of substituted service. He submitted further that the applicant and/or her advocate has failed to give sufficient reasons to have the suit restored.

In rejoinder, Mr. Magayane stated that the 2nd respondent's advocate had volunteered to have the matter dismissed in absence of both the applicant and 1st respondent, who in actual sense if present was supposed to move the court to dismiss the suit.

Having in mind of the foregoing *vivo voce* submission, I decided to go through the records of the suit. It is true that on 23rd March, 2020 in absence of both applicant (Plaintiff) and 1st respondent (defendant) as well Mr. Magayane, Mr. Eustace Rwebangira, the learned advocate for the 2nd respondent (defendant) moved this court and I quote that:

"The plaintiff is absent and has not served the first defendant. We pray that the matter be dismissed for want of prosecution".

Considering that prayer, the trial Judge ordered and I quote that:

" the matter is dismissed for want of prosecution"

Unfortunately, it was not stated under which provision of the law that dismissal order was made. However, I had to seriously examine the law and the record of the suit. I am therefore conviction that the suit was

dismissed under **Order IX rule 8 of Cap 33**, which for ease of reference, I produce as hereunder:

*"Where the defendant appears and the plaintiff does not appear when the suit is called on for **hearing**, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder".*

A glance at two previous events before the date of the dismissal order, I see that on 21st October, 2019 Mr. Magayane appeared for the applicant before Hon. Maghimbi, J. as well holding a brief for Mr. Eustace Rwebangira. On that day the suit was set for mention on 27th November, 2019, and an order for reservice upon the 1st respondent was issued. On 27th November, 2019, the suit was called on for mention before Hon. Tengwa, Deputy Registrar. Neither the parties themselves nor their respective advocates appeared before Deputy Registrar who subsequently adjourned the suit and fixed another date for mention on 23rd March, 2020.

On 23rd March, 2020 the suit was called on for mention before Hon. Maige, J. whereby the applicant and 1st respondent did not appear. Their non appearance made Mr. Eustace Rwebangira to press for dismissal of the suit for want of prosecution at the time on the reason that the applicant had failed to serve the 1st respondent. But Mr. Magayane stated that what he knew was that the suit would be brought before Hon. Maghimbi, J as the trial judge. He did not know that the same had already been transferred to Hon. Maige, J. He lamented further that he was not notified about that transfer of the suit. He submitted his non-appearance and that of the applicant could not be considered as negligence or inaction on their part. I think, at this juncture and on the strength of the contents of the affidavit, I have considered opinion that the applicant has exhibited sufficient reasons warranting the setting aside the order of 23rd March, 2017.

In the same vein, by passing, I would like to point out that the suit was dismissed on the date fixed for mention, and not for hearing as provided under **Order IX rule 8 of Cap 33** quoted herein. On 23rd March, 2017, the applicant and Mr. Magayane did not enter appearance. I now asked a question by myself whether is legally proper for the trial court to dismiss the suit on the date fixed for mention. In the case of **Shengena**

LTD Versus National Insurance Corporation and Another; Civil Appeal No. 9 of 2008 (CA) (DSM) (unreported), their Lordships (Msofffe Bwana, Mandia, JJJA (as they then were) found that nowhere under **Cap 33** one can find the word mention. They said and I quote that:

" Mention is a word commonly used and or applied by our courts in this jurisdiction. However, it lacks legal backing"

They added, while referring to their similar position in the case of the **Executive Security, wakf and Trust Commission versus Saidi Salmin Ambar;** Civil Appeal No 7 of 1996, (CA) (DSM) (unreported), that mention is not a legal requirement, but one of practice only. They went further stating in **Shengena LTD** case (supra) that:

"It is, therefore, a practice before courts of law whereby parties to a case appear before the court to ascertain the state of pleadings or stage reached in the trial and then proceed to make necessary orders. It is not the practice of Courts under our jurisdiction to dismiss or make other orders that substantially bring a case to finality on a date fixed for mention. In our considered view, therefore, a case can be dismissed for various, legally recognized grounds when it comes up for hearing, not mention"

Considering the above case law position, I am of considered view that apart from what is submitted as well stated in the affidavit sworn by the applicant's advocate, the present application is fit and meritorious.

In the event, I proceed to set aside the order of 23rd March, 2020 and the dismissed suit in Land Case No. 263 of 2017 is accordingly restored. It shall be fixed for hearing on its merits. Costs to follow the event.

Order accordingly.



**J.S MGETTA
JUDGE
30/11/2020**

COURT: This ruling is delivered today this 30th November, 2020 in the presence of Mr. George Ngemela, the learned advocate for the 2nd respondent. The applicant and 1st respondent are absent for reasons known to themselves.



**J.S.MGETTA
JUDGE
30/11/2020**