

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.348 OF 2021

(Originating from Land Appeal No. 141 of 2015)

WAZIRI MSIGIRI APPLICANT

VERSUS

KISAGE GINGHE MARWA RESPONDENT

RULING

Date of last Order: 27.08.2021

Date of Ruling: 31.08.2021

A.Z MGEYEKWA, J

This is an application for setting aside the dismissal order made by this court made on 5th September, 2017 in Land Appeal No. 141 of 2015. The application is brought under Order XXXIX Rule 19 and section 95 of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit of Anindumi Jonas Semu, learned Advocate, and contested by a counter affidavit of Kisage Ginghe Marwa, the respondent.

When the matter was called for hearing before this court on 12th August, 2021, the court ordered the parties to argue the application by way of written submissions whereas, the applicant's Advocate filed his submission in chief on 19th August, 2021 and the respondent Advocate filed his reply on 24th August, 2021. The applicant's Advocate waived his right to file a rejoinder.

It was Mr. Anindumi Semu, learned counsel for the applicant who started the ball rolling. Having adopted the affidavit supporting the application the learned counsel submitted that they have filed their application in regard to dismissal order in Land Appeal No. 141 of 2015 date 05th September, 2017. He stated that the applicant has brought this application under Order XXXIX Rule 19 of the Civil Procedure that the application was before this court and on the date of hearing it was set aside because the applicant appeared in court in the absence of his Advocate. The applicant's advocate submitted further that he wrote a letter to the Registrar for verification and the letter was endorsed on 28th day of August, 2017 conforming that the learned Advocate for the applicant is attending a criminal session. He stated that Hon. Judge saw the letter and realized the applicant's Advocate did not mention to whom he was appearing before. Therefore, Hon. Judge directed the client to

proceed arguing his case but he could not proceed. Therefore, Hon. Judge decided to withdraw the application on the condition that after confirming that the criminal session was in progress then she will reinstate the application.

Mr. Semu submitted that a court may re-admit the appeal where the party has given sufficient reasons. Fortifying his submission he cited the case of **Benedict Mumello v Bank of Tanzania**, Civil Application No.12 of 2002, CAT at Dar es Salaam the Court of Appeal of Tanzania cited with approval the case of **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No.6 of 2001 (unreported). The Court of Appeal of Tanzania held that:

" what amounts to sufficient cause has not been defined. From the decided cases a number of factors has to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."

The learned counsel for the applicant submitted that the applicant has been diligently pursuing the original case from the year 2007 in the District Land and Housing Tribunal for Kinondoni. He added that the applicant's

Advocate was entering appearance in the Appeal until 14th August, 2012 in the absence of the applicant.

Mr. Semu continued to submit that it was unfortunate that due to misdirection of the date of hearing obtained from the court clerk, it was from the best knowledge of the applicant that the matter was scheduled for hearing on 18th September, 2017. He went on to state that the applicant missed one appearance on 5th September, 2017, the day when the matter was dismissed for non-appearance. To support his submission he referred this court to paragraphs 4 of the applicant's affidavit. The learned counsel for the applicant submitted that upon dismissal of the matter, the applicant acted promptly by filing necessary application to restore the same. He referred this court to paragraphs 5, 6, 7, and 8 of his affidavit.

On the strength of the above submission, Mr. Semu beckoned upon this court to re-admit the applicant's appeal. It was his view that the appeal has overwhelming chances of success.

In rebuttal, Mr. David started by submitting that the applicant's Advocate has cited a wrong application number. He argued that the title reads Misc. Application No. 676 of 2021 which does not exist, the same was disposed of by Ho. Karayemaha, J on 2ND July, 2021.

The learned counsel for the respondent went on to submit that the issue for determination before this court is whether the applicant has advanced good cause to warrant this court to readmit the dismissal appeal. He contended that the applicant's Advocate on paragraph 2 of the affidavit has plainly stated that on 14th August, 2017 hi client Waziri Msigiri entered an appearance in person when Land Appeal No. 141 of 2015 was called for hearing. And this court set a hearing date, the matter was scheduled for hearing on 5th September, 2017 and he was present. He argued that there is no evidence that the Judge changed the hearing date from 18th September, 2017 to 5th September, 2017. He went on to state that the learned counsel for the applicant was expected to attach a copy of court proceedings dated 14th September, 2017 to justify the blame which he is throwing to this court. Insisting, he argued that there is no affidavit to support the learned counsel submission. He lamented that the applicant left the Land Appeal No. 141 of 2015 unattended without serving the respondent that is the reason for the respondent's nonappearance.

Mr. David did not end there he submitted that Order XXXIX Rule 17 sub-rule 1 of the Civil Procedure Code Cap. 33 [R.E 2019] clearly state that:-

"...where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed."

The learned counsel for the respondent continued to argue that on 5th September, neither the applicant nor his Advocate appeared in court considering that the applicant was present on the last state of court session thus it was his view that this court rightly dismissed the appeal. He valiantly argued that the applicant is pointing a finger at this court as a source of dismissal of the said appeal without taking clear as to how the court contributed. He added that if this trend will be accepted without proof then the court will be setting a bad precedent in the future. Stressing, he submitted that the applicant neither his Advocate has given good cause for readmission of the said appeal.

On the strength of the above, the learned counsel for the respondent beckoned upon this court to dismiss this application with costs.

I have considered the learned counsels' arguments for and against the application. It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, has to furnish the court with sufficient reasons for non-appearance when

the suit was called on for hearing. It is evident from the affidavit supporting this application that counsel for the applicant's failure to appear when the matter was called on for hearing as a result of his absence; he claimed that this court set a hearing date on 18th September, 20217. I have perused the applicant's affidavit and found that the learned counsel or the applicant admits that when the matter was called for hearing on 14th August, 2017 the applicant was present thereafter in his knowledge he knew that the next hearing date was on 18th September, 2017, just came to know that the appeal was scheduled on 5th September, 2017 and the same was dismissed. However, the applicant's submission is not supported by any documentary evidence. As rightly pointed out by the learned counsel for the respondent that the learned for the applicant did not even bother to attach the previous court proceedings dated 14th August, 2017 to assure this court that the matter was called for hearing on 18th September, 2017 and not 5th September, 2017.

I have weighed the arguments for and against the application as presented to me by both learned counsels. I am in accord with the learned counsel for the respondent that the applicant's counsel has not given sufficient explanation the reason for not appearing in court when the case was dismissed for want of prosecution. However, I have considered other

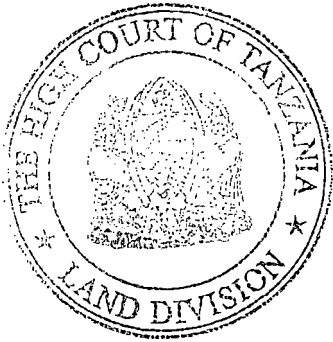
things; the conduct before the dismissal order. In **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER372 it was stated that the applicant's conduct before the alleged non-appearance should be taken into consideration in the application of this nature. I have also considered the fact that it is in the interest of justice and the practice of this court that, unless there are special reasons to the contrary, applications are determined on merits as it was held in the case of **Fredrick Sclenga & another v Agnes Masele** [1983] TLR 99 and **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this application as it was held in the case **Jesse Kimani v McCornel and another** [1966] EA 547. In view of the above, I consider his excuse was genuine since the applicant' missed only one hearing and after the dismissal order he took various steps to reinstitute his appeal.

In the upshot, the present Land Appeal No. 141 of 2015 be restored to the register for continuation from where it stopped when it was dismissed for want of prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order to costs.

Order accordingly.

DATED at Dar es Salaam this 31st August, 2021.




A.Z.MGEYEKWA

JUDGE

31.08.2021

Ruling delivered on this 31st August, 2021 in the presence of both parties.




A.Z.MGEYEKWA

JUDGE

31.08.2021