IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.663 OF 2020

(Arising from Land Case No. 184 of 2006)

SAMWELI FANUEL SHANGO (Administrator of the estate of the late Keneth Fanuel Shango) ..... APPLICANT

VERSUS

TANZANIA PORTLAND CEMENT CO. LTD ..... RESPONDENT

RULING

Date of last Order: 18.08.2021

Date of Ruling: 10.09.2021

A.Z MGEYEKWA, J

This is an application for setting aside the dismissal Order made by this court on 11th December, 2021 in Land Case No. 184 of 2006. The application is brought under Order IX Rule 9 of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit of

Hassan Ally Mfaume, the applicant. The application was not contested the respondent.

When the matter was called for hearing, the parties urged this court to dispose of the application by way of written submissions whose filing was to conform to the court schedule. Whilst the applicant was to prefer his on or before 25th August, 2021, the respondent was scheduled to file his on or before 01st September, 2021. Rejoinder, if any, was to be filed on 06th September, 2021, whereas the applicant conformed to the filing schedule, nothing has been filed by the respondent, to-date, and no word has been heard from him on the reason for the inability to conform to the court schedule. This being the position, the question that follows is: what is the next course of action? The settled position is that failure to file written submissions, when ordered to do so, constitutes a waiver of the party's right to be heard and prosecute his matter. Where the inability is on the part of the respondent, the consequence is to order that the matter be heard ex-parte.

This position is consistent with the Court of Appeal of Tanzania holding in the case of **National Insurance Corporation of (T) Ltd & Another v Shengena Ltd**, Civil Application No. 20 of 2007 at DSM (unreported), it was held that:

"The applicant did not file submission on the due date as ordered. Naturally, the Court could not be made impotent by the party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

The stance taken in the above-cited case is consistent with an earlier position, taken by this Court in **P.3525 LTCOL Idahya Maganga Gregory v. Judge Advocate General**, Court Martial Criminal Appeal No. 2 of 2002 (unreported). Filing written submissions are tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submissions is similar to those of failure to appear and prosecute or defend, as the case may be.

Similar, in the case of **Tanzania Harbours Authority v Mohamed R. Mohamed** [2002] TLR 76; **Patson Matonya v Registrar Industrial CourtofTanzania & Another**, Civil Application No. 90 of 2011 and **Geofrey Kimbe v Peter Ngonyani**, Civil Appeal No. 41 of 2014 (both unreported). In consequence of the foregoing, it is ordered that the matters be determined *ex-parte,* by considering the application based on the submission filed by the applicant.

In his submission in support of the application, Mr. Joachim, learned counsel for the applicant, has begun by tracing the genesis of the matter which I am not going to reproduce in this application. He attributed the fatalities to negligence on the part of the advocate who represented the applicant in the application. He contended that the said advocate was reckless as he did not make appurtenance thus the matter was dismissed for want of prosecution. Mr. Joachim argued that the applicant now deceased was a soldier in service of Tanzania Defense, he was served several times thus he handed the case in full to his Advocate. He added that the deceased was communicating with his Advocate and was informed that the case was going on well. He added that the applicant later found that nothing was going on and as a result, his case was dismissed.

The learned counsel for the applicant complained that the applicant filed an application for an extension of time and complained that his advocate has abandoned him and he had to obtain documents afresh from the court. He added that the applicant's application was granted by this court. To fortify his submission he referred this court to the cases of **Dr. Nkini & Associates Ltd v NHC**, Civil Appeal No. 75 of 2015 CAT, and **Felix Turnbo Kisima v TTCL Ltd & Another**, Civil Application No.1 of 1997, CAT (both unreported). Mr. Joachim urged this court to be guided

by the two cited cases and find that the conduct of the Advocate is like that of an agent therefore both are at fault. Mr. Joachim argued that the applicant struggled to locate the Advocate but was blocked from communication and with judiciary help he was able to retrieve his records and proceed to pursue his right.

On the strength of the above submission, the applicant's Advocate beckoned upon this court to set aside the dismissal orders and parties to be heard on merit. He added that whatever the outcome on Land Case No. 184 of 2006 it will rest the parties in finality.

I have given a deserving weight to the submission of the applicant's Advocate. I should say from the outset that the law requires an aggrieved party seeking to set aside a dismissal order of the court 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 it was the applicant's counsel's failure to appear when the matter was called on for hearing as a result of his absence, as a result, the matter was dismissed.

The learned counsel for the applicant has submitted that it was not the applicant's fault instead his Advocate was negligent and was not communicating with the applicant. I have perused the applicant's affidavit

and found that the applicant has explained in length the historical background of the case specifically in paragraphs 8, 9 (d) 10, and 12. However, his claims are not supported by any supporting evidence. I am afraid to say that there is no proof that the applicant entrusted his Advocate There is no document to show that disciplinary measures were taken against the said Advocate whose name was not even disclosed by the applicant's Advocate. The Ruling of this court in respect to Misc. Land Application No.732 of 2019 for extension of time is not attached.to prove whether the applicant's documents were mishandled by his Advocate or otherwise.

This court cannot grant the applicant's prayer without being properly moved to grant what is sought by the aggrieved party. Contrary to the cited cases of **Dr. Nkini & Associates Ltd** (supra) **and Felix Turnbo** (supra). The cited cases are distinguishable from the instant case. In the case of **Dr. Nkini & Associates Ltd** (supra), the Court of Appeal of Tanzania was moved that disciplinary measures were taken against the learned counsel. Therefore, it is hard to believe that there were elements of negligence by his Advocate. Failure to move this court to believe that the applicant's Advocate was negligent, then the applicant's Advocate submission remains as mere words and this court cannot rely on mere

words. In case the same could have been proved then the learned counsel's negligence could constitute sufficient reason.

In the upshot, the instant application for restoration of Land Case No.184 of 2006 lacks merit, it is clear that this application cannot stand. 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 10th September, 2021.

A.Z.MGEYEKWA

JUDGE

10.09.2021

Ruling delivered on 10th September, 2021 in the presence of Ms. Julither, learned counsel for the respondent and in absence of the applicant.

A.Z.MGEYEKWA

JUDGE

10.09.2021