

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 623 OF 2021

*(Originating from Misc. Land Appeal No.93 of 2021 dismissed on 28
October, 2021)*

OMARY MOSI APPLICANT

VERSUS

MARIAM OMARY ISMAIL RESPONDENT

RULING

Date of Judgment: 13.12.2021

Date of the last order: 25.01.2022

A.Z. MGEYEKWA, J

This is an application for setting aside the dismissal order made by this court made on 28th October, 2021 in respect to Misc. Land Appeal No.93 of 202. The application is brought under Order XXXIX Rule 19 of the Civil Procedure Code Cap 33 [R.E. 2019]. The application is supported by an affidavit of Omary Mosi, the applicant, and contested by a counter affidavit of Mariam Omary Ismail.

When the matter came up for orders on 13th December, 2021, the applicant enjoyed the legal service of Mr. Emmanuel Mtalo, learned counsel holding brief for Mr. Masinde Chisumo, learned counsel while the respondent appeared in person, unrepresented. The respondent urged this court to allow them to argue by way of written submission. This Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to.

Mr. Masinde, urged this court to adopt the applicant's affidavit to form part of his submission. The learned counsel for the applicant contended that as per the requirement of the law, the applicant lodged his appeal at the District Land and Housing Tribunal. He added that it was the duty of the District Land and Housing Tribunal to forward the petition of Appeal to this court within 14 days as per section 38(3) of the Land Disputes Courts Act Cap.216 R.E. 2019. He quoted the provision of the said section which provides: -

“Upon receipt of a petition under this section, The District Land and Housing Tribunal shall within fourteen days dispatch the petition together with the records of the proceedings of the Ward Tribunal and the District Land and Housing Tribunal to the High Court.”

Mr. Masinde submitted that the Tribunal did not comply with the above section since the petition of appeal was forwarded to this court on 09th September, .2021 whereas 108 days lapsed. He further contended that the applicant had made necessary follow-ups to make sure the file is remitted to the High court but in vain. To bolster his submission, he stated that the applicant wrote a letter of complaints to this court on 14th September, .2021 in which among other things the applicant was complaining against the District Land and Housing Tribunal failure to remit his file to this court and he was not informed whether his case had already forwarded to this court or not.

Mr. Masinde continued to argue that the applicant's failure to appear in court was due to lack of notification and that he is not aware as to how the respondent received the information of the case without being summoned by this court. It was his submission that lack of service of summons on the date of hearing or mention of the case is a sufficient ground for non-appearance of a party in court. Fortifying his submission, he cited the case of **Pavisa Enterprises v The Minister for Labour and Youths Development and sports & another**, Misc. Cause No. 63 of 2003 (Unreported) HC. at page 2 and 4 whereas this court held that:-

“Having considered the contents of the affidavit in support of the application and the written submission by Mr. Rutabingwa, *I ‘am*

satisfied that the applicant's failure to appear and to file the written submission on the preliminary objection to the application for leave to apply prerogative orders was due to lack of notification. As it was stated in the case of Ramadhan Amiri v Yusufu Rajab [1995] TLR 26, lack of evidence of service is sufficient reason for non-appearance.”

The learned counsel for the applicant also cited the case of **Sunit Sher Singh Varma v Sunil Suryakant Raval**, Misc. Application No. 219 of 2016 (Unreported) HC. Mr. Masinde further contended that, for the interest of justice cases are filed to be determined on merit and that the grant of this application will not prejudice the respondent, instead, it will allow both parties to be heard on the appeal. Supporting his argument, he cited the case of **Karoli Sokia Obinga vs Adika Alila**, Misc. Land Application No. 73 of 2020 (unreported) whereas Mgeyekwa, J. held that:-

*“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 **Frederick Selanga and Another vs Agness Masele** [1983] TLR 99 and **Mwanza Director MIS News Refrigeration Co. Ltd vs Regional Manager TANESCO Ltd and Another** [2006] TLR 335.”*

Furthermore, he cited the case of **Bahati Musa Hamis Mtopa vs Salum Rashid**, Civil Application No. 112/07 of 2018 (Unreported) Court of Appeal held that; -

“Given the above stated circumstances and guided by the spirit that there is a need for achieving substantial justice which requires the parties be given an opportunity to litigate their rights to the conclusive General Traders, Civil Application No.3 of 2011 (unreported). We find that the application has merit.”

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to grant the applicant’s application and set aside the dismissal order and restore the Misc. Land Appeal No. 93 of 2021 and be heard on merit.

In reply thereto, the respondent had not much to say, she contended that the applicant's failure to appear in court and prosecute his case, as a result, his case was dismissed was due to the applicant's negligence. She argued that it was the applicant's duty to make follow-ups, to know the proceedings of his case in court. The respondent went on to argue that the applicant lodged his appeal on 24th May, 2021 but astonishingly he started to make follow-ups on 14th September, 2021, as a result, he found himself out of time. The respondent further acknowledged that she was not served with any court summons but she made her own efforts to get

the information about the case in which she decided to attend without any court summons.

I have considered the learned counsel for the applicant and the respondent's arguments for and against the application. It is settled law that an applicant seeking to set aside a dismissal order of the court that dismissed a suit for want of prosecution, needs 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 the applicant's failure to appear when the matter was called on for hearing as a result of his absence; that he was not aware that the matter was scheduled for necessary orders or hearing. I am in accord with the applicant's Advocate that the applicant was not aware that his appeal was not forwarded to this court, and he was not notified until 4th October, 2021. In that regard, I fully subscribe to the position of my learned Sister Hon. Opiyo, J. in the case of **Sunit Sher Singh** (supra), she held that:-

"From the circumstances of this case, as the records support the counsel's assertion that the court fixed a date for hearing and ordered the parties to be notified, the order which was however not fulfilled, in my view advanced reason for non-appearance on the date fixed for hearing constitutes a good cause."

I have weighed the arguments for and against the application as presented to me by both learned counsels. I think the applicant's counsel has sufficiently explained the reason for the applicant's non-appearance in court when his case was dismissed for want of prosecution. I am convinced that the applicant was not notified that his case was before this court as a result, he could not prosecute his case.

I have reached that conclusion having considered; among other things; the conduct of the applicant before the dismissal order. In **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER372, the court held that the applicant's conduct before the alleged non-appearance should be taken into consideration in the application of this nature.

Again, I have 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, on a balance of probabilities, I have to say that the applicant has provided sufficient cause why he did not enter appearance when the case was called on for hearing.

In the upshot, the Miscellaneous Land Appeal No.93 of 2021 is 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 25th January, 2022.




A.Z.MGEYEKWA

JUDGE

25.01.2022

Ruling delivered on 25th January, 2022 in the presence of Mr. Kenneth holding brief for Mr. Masinde Chisumo, learned counsel for the applicant and the respondent.




A.Z.MGEYEKWA

JUDGE

25.01.2022