

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

MISC. LAND APPLICATION NO. 732 OF 2020
(Arising from Land Case No. 12 of 2017)

PETER RICHARD MWARABU.....APPLICANT

VERSUS

SALMA SEIF ABDALLAH..... 1ST RESPONDENT

MATHIAS MASANJA GEFTA.....2ND RESPONDENT

COMMISSIONER FOR LANDS,

HOUSING AND HUMAN SETTLEMENT3RD RESPONDENT

ATTORNEY GENERAL4TH RESPONDENT

KIGAMBONI

MUNICIPAL COUNCIL5TH RESPONDENT

R U L I N G

Date of last order: 4/8/2021

Date of Ruling: 8/11/2021

T. N. MWENEGOHA, J.

The applicant has filed this application under the provision of Order IX Rules 3 and 9 and Section 95 of the Civil Procedure Code, Cap 33 R.E 2019 (herein after the C.P.C), Seeking for the following orders;

- 1. The court be pleased to set aside the dismissal order made by Hon. B. Massoud on the 24th of November 2020, and allow the applicant's Land Case No. 12 of 2017 to proceed;**

- 2. The court be pleased to set aside the ex parte judgment in the counter claim entered on the 3rd day of December 2020, by Hon. B. Masoud, J in Land Case No.12 OF 2017.**
- 3. Costs of this application;**
- 4. And any other orders as the court may deem fit and just to grant.**

The application has been supported by several affidavits including the applicant's affidavit, Cecilia Renatus Peter's affidavit and the affidavit of Adolph Wenceslaus Mahay all these dated 16th December 2020.

Hearing of this application proceeded by way of written submission, both parties were present in court except for the 2nd respondent who never entered appearance.

During the hearing of the instant application while the applicant appeared in person and unrepresented, the 1st respondent was represented by Advocate Abdul Aziz, the 3rd and 4th respondents were represented by Lukelo Samwel, the Principal State Attorney and the 5th respondent was represented by Emmanuel W. Mkwe the Senior State Attorney.

Submitting in support of the application, the applicant said that in the Land Case No.12 of 2017, the plaintiff (the applicant herein) and his advocate Adolph Wenceslaus Mahay used to attend to the court without any failure. That when the case was before Hon. Maghimbi, J. hearing was adjourned for four consecutive dates beginning from 08/02/2021 09/02/2021, 10/02/2021 and 11/02/2021.

He continued to submit that on 23rd November, 2020 the applicant while at Zanzibar preparing himself to fly to Dubai for treatment, fell seriously ill and was admitted to Mnazi mmoja Hospital Zanzibar from 23/11/2020

to 26/11/2020 as evidenced in the outpatient card attached to the Applicant's Affidavit. That he received the court summons with different dates to those prior scheduled while he was already in Zanzibar making final preparation for his trip to Dubai where he was going for medical treatment. That he decided to instruct his lawyer and his wife to appear and pray to the court to adjourn the case and if possible, to retain the same date as it was scheduled by Hon. Maghimbi, J. but the presiding Judge refused the prayer and on 25/11/2020 he dismissed the case for want of prosecution and proceeded to determine the counter claim ex parte. Consequently, the applicant decided to file this application.

Therefore that, the applicant's failure to enter appearance on the dates in question was not deliberately caused by his diligence but due to reasons beyond his control. That the illness of the Applicant is sufficient to constitute good cause. To support his arguments, he cited the case of **Jehangir Aziz Abdulrasul Versus Balozi Ibrahim Abubakar & Bibi Sophia Ibrahim, Civil Application No, 79 of 2016** Court of Appeal of Tanzania at Dar es Salaam (unreported), **Richard Mlagala and 9 others Versus Aikael Minja and 2 others**, Civil Application No. 272 of 2015 (Court of Appeal of Tanzania) at Dar es Salaam (unreported)

When replying the 1st, 3rd, 4th and the 5th respondents submitted separately but I am going to merge their submissions as their arguments are almost similar.

The respondents submitted that, when Land Case No. 12 of 2017 came for final Pre-Trial Conference before Hon. Maghimbi, J. it was fixed for hearing from 08th February, 2021 to 11th February, 2021, however, due to the practice of the High Court, the case was later fixed in a special

session whereby it was assigned before Hon. Masoud, J. and fixed for hearing on 24th November, 2020. That the records show that on 13th November, 2020 the applicant was served with the summons for the change of hearing date, as per applicant's annexure AA2 to the affidavit. The advocate appeared in 10 days later on the 23rd November, 2020 where he could have made formal excuses before the Court.

It was the respondent's contention that failure of the applicant to prosecute his case caused the same to be dismissed for want of prosecution and the court ordered to proceed with the Counter Claim raised by the 1st respondent (then 1st defendant).

He submitted that, the arguments that the applicant was denied the right of representation are totally unfounded. That the Plaintiff's suit was dismissed for want of prosecution as per the requirement of the law under the provision of **Order IX Rule 5** of the Civil Procedure Code Act, which provides that;

"Where the defendant appears and the plaintiff does not appear when the suit is called for hearing, the court shall make an order that the suit be dismissed"

The respondent further submitted that, after the dismissal of the plaintiff's case for want of prosecution, the trial court was moved by the 1st defendant (the plaintiff in the counter claim) for leave to proceed with ex-parte hearing of the counter claim which prayer was granted that on hearing date, the applicant was absent in court but had instead sent his wife to appear and make a prayer for and adjournment; however, she never did as requested by the applicant. The respondent further

contended that since there was no prayer from the defendant in counter claim proceedings, and no account given as to why the applicant did not appear to prosecute his case, the court proceeded to hear the matter ex-parte. The court nevertheless in the said ex-parte hearing of the counter claim subjected the plaintiff (1st defendant) to prove her case in the same standards required in civil litigation.

The respondent quoted the provisions of Order VIII Rule 14(1) of the Civil Procedure Code Act, on this aspect as herein produced that;

"Where any party required to file a written statement of defense fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and oral application by the plaintiff to proceed ex parte, fix date for hearing the plaintiff's evidence on the claim.

It was the respondent's further submission that, with the aforesaid, the argument raised by the applicant that the court proceeded with the hearing of the counter claim without issuing summons to him and that the court determined the counter claim basing on the evidence of a single witness is irrelevant, as principles of evidence requires no specific number of witnesses to testify in order to prove a case. He argued furthermore that, the procedures allow the court upon being moved orally and where proof of service is available to proceed with the hearing and giving orders on a matter before it against the party who failed to enter appearance. That, the decision of the trial court to proceed with ex-parte hearing has therefore not offended any principle of natural justice.

Respondent also submitted that looking at the case cited by the applicant, the case of **Richard Mlagala**, specifically the quote at page 5 of the applicant's submission, the Court of Appeal observed that,

"...if well backed by concrete reasons can amount to sufficient cause or good ground..."

That, in the present application, the applicant failed to show good cause for the court to grant orders sought as his advocate was present in court and he just made simple excuses without any proof, and he did not show good reasons for the failure to bring the rest of the witnesses on the following day as the court ordered, therefore that, this court is in no way to grant the orders sought.

It was the respondent's further contention that at all time the applicant was well represented and after the withdrawal of the applicant's advocate in conduct of the case, the applicant's wife was present in court on the 25th November 2020 when the matter was dismissed and ex-parte hearing of counter claim proceeded and that she could have asked for an adjournment, but she didn't.

Respondent also submitted that illness if well pleaded and proved can constitute good cause for the court to consider the applicant's application. That, in the present application the applicant has attached annexure marked AA1 in trying to prove that he was seriously sick and that was diagnosed and admitted at Mnazi Mmoja Hospital in Zanzibar for treatment on the dates when hearing proceeded. However, the Applicant's defense was so fragile as he should have gone further and brought forth transport tickets for the alleged trip and payment receipt

for the medical services rendered at the said hospital.

They finalized their submission praying the court that the application be struck out with costs.

Having gone through the parties submissions and the records of this application, the main issue for determination is whether the applicant has adduced sufficient reasons, for this court to grant the orders sought.

In the case of **Nicodem s/o Damiano Ntigahela Vs Michael Yango & 2 Others, (DC) Criminal Appeal No. 66 of 2019**, High Court Kigoma District Registry, stated that *"The law is that a dismissed case can be restored if a sufficient cause for absence is disclosed"*.

The principle of sufficient cause was explained in the case of **Bahati Musa Hamissi Mtopa Vs. Salum Rashid**, Civil Application No. 112 of 2018, Court of Appeal at Dar es Salaam (Unreported), at page 8, the Court had this to say:

"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any step".

In **Sadru Mangalji Vs. Abdul Aziz Lalana & Others Misc. Commercial Application No.126 of 2016 TZHC COM D.34 (16TH NOV.2016)**, the Court granted the application after being satisfied that on the date set for hearing the Advocate for the Applicant was sick and the sickness was evidenced by a medical sheet which was appended with the application showing that he was suffering from *"Acute Gastro enteritis"* and that he was given an "Excuse Duty" by a doctor.

In the application before me the applicant submitted that he received the court summons concerning the court session which changed the court's schedule concerning the hearing of his case while he was already in Zanzibar preparing himself for his trip to Dubai where he was going for medical treatment, and that before leaving the country he fell sick and was admitted to Mnazimmoja Hospital in Zanzibar. The medical report reveals that he was admitted in that hospital. on the 23/11/2020 and discharged on the 26/11/2020. The report was never disputed.

The respondents submitted that the applicant's defense is so fragile, that the applicant should have gone further and brought forth transport tickets to prove his alleged trip to Dubai and the payment receipt for the medical services rendered at the said hospital.

The fact that the applicant failed to attach the tickets for his trip, and the receipts proving the payments of the medical bills does not change the fact that on the particular dates when the Land Case No.12 of 2017 was scheduled for the special session the applicant was sick and admitted to the hospital. Going through the affidavits supporting the application, I found out that the applicant instructed his wife and lawyer (before his withdrawal from representing the plaintiff) to pray the court adjourn the matter due to his illness. However, for their unknown reasons, they did not present the applicant's prayer. Hence the court dismissed the case for want of prosecution and proceeded to determine the counter claim ex parte. Had they made the court aware of the applicant's sickness, it would have arrived to a different decision.

In the upshot, the present application is allowed. The Land Case No.12 of 2017 shall be restored to the register for continuation from where it was stopped on the 24th of November 2020, when it was dismissed for want of prosecution. No orders as to costs.

It is so ordered.

Dated at Dar es salaam this **8th** day of **November, 2021.**




T. N. MWENEGOHA
JUDGE