

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

MISC.LAND APPLICATION No. 514 OF 2020

(Arising from Land Revision Number 17 of 2020)

HADIJA MUSA BAKARI (Administratrix

of the Estate of the Late Norbert N. Kiti).....APPLICANT

VERSUS

ALEX T. BURA.....RESPONDENTS

RULING

Date of last Order: 25/8/2021

Date of Judgment:18/10/2021

T. N. MWENEGOHA, J.

The Applicant Hadija Musa Bakari suing as an administratrix of the estate of the Late Norbert N. Kiti, filed this application under the provision of Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019 (herein after "The CPC"), seeking this Court to set a side the dismissal order for want of prosecution issued by this Court (Hon. Mgeta, J.) on the 12/08/2020 dismissing Land Revision No. 17 of 2020.

During the hearing of this application both parties were represented. While the applicant was represented by Mr. Leonard T. Manyama, Advocate. The respondent was represented by Ms. Flora Jacob, Advocate.

By an order of this court dated 03rd May, 2021 the application was disposed by way of written submissions.

Submitting in support of the Application Mr. Manyama started by praying the affidavits of Brian William Magoma and Patrick Seuya to be adopted as part of his submission.

Mr. Manyama continued to submit that Order IX Rule 3 of the C.P.C empowers the court to set aside the dismissal order upon the applicant being able to present before the Court sufficient cause for his non-appearance.

He continued to submit that Land Revision No. 17 of 2020 was scheduled for hearing on the 12th August 2020 at 12:00 noon but when Advocate Patrick Seuya attended for hearing on the scheduled date, he was informed that the Land Revision No. 17 of 2020 was called at 10:00 A.M and the same had been dismissed for want of prosecution. That non appearance of the advocate was due to the confusion as to what time exactly the said application for revision was set for hearing.

He continued to submit that the order dismissing the Land Revision No. 17 of 2020 was issued while the respondent had already filed the Notice of Appeal disputing the order of this court extending time for the applicant to file Revision as stated under paragraph 4 of advocate Brian William Magoma. Therefore, that it was not proper to dismiss the application for revision unless the appeal in the Court of Appeal is determined.

He said that it is a trite law that once the Notice of appeal is filed, the high court ceases to have powers over the said file unless the intended appeal is terminated thus even if the advocate for the applicant could have entered appearance on 12/08/2021 still the said application for revision could have not proceeded due to the pending appeal in the Court of Appeal.

When replying Ms. Flora Jacob totally disagreed with the submission of the applicant's advocate, that Mr. Manyama's arguments are totally misconceived, misleading and without merit. That the applicant's application for setting aside the dismissal order lacks sufficient reasons for the Court to exercise its discretionary to grant the relief sought, because the reasons advanced therein are frivolous and without merit.

Ms. Flora submitted that applicant and his advocate never appeared even a single session since Land Revision No.17 of 2020 was filed. That on the 17th June 2020 at 12:00 noon the application was scheduled for mention and they did not enter appearance hence the matter was adjourned to 6th July 2020 the applicant and his advocate did not enter appearance. Again, the matter was adjourned to 12th August 2020 but the applicant and his advocate did not enter appearance as well and hence the matter was dismissed for want of prosecution.

Ms. Flora, continued to submit that Mr. Manyama's submission that their non appearance was caused by the confusion as to what time exactly the case was set for hearing is untrue and fabricated. Also, that the averment in paragraph 6 of advocate Patrick Seuya's affidavit that on the 6th July 2020 he arrived at the court premises and proceeded to the 2nd floor at the advocate's waiting room as he was not sure as to which judge the matter was assigned; is untrue and an afterthought fact because the assigned judge was well known to the applicant and his advocate through the summons which was annexed to the affidavit of the said Patrick Seuya. Furthermore, that it is the duty of the advocate to exercise her/his due diligence, that the applicant's advocate ought to have made an inquiry to the time set for hearing of the application so as to circumvent

any possible inconveniences. Therefore, that the claim of misconception of time is not sufficient reason to set the dismissal order.

On the issue of the presence of the pending Notice of Appeal to the Court of Appeal, Ms. Flora submitted that it does not act as a bar for the Advocate to enter appearance in the High Court over his pending application.

Also, that this Court has not issued any order for staying the proceedings in Revision No.17 of 2020 pending determination of the intended appeal, nor did the parties address the Court to do the same in the said revision application. Therefore, the applicant's assumption that the matter would not proceed is a mere assumption which is unfounded and baseless and therefore, this argument also remains to be a lame argument rather than legal.

Ms. Flora added that it is a trite law that for the Court to grant an order setting aside the dismissal order, the applicant must advance sufficient cause for his non-appearance. To support her argument she cited Order IX R 3 of the C.P.C. Ms. Flora finalized her argument by praying for this court to dismiss this application with costs.

In rejoinder, Mr. Manyama reiterated what he submitted in his submission in chief and added that, since the respondent filed the Notice of Appeal intending to appeal against the order of this Court which granted extension of time to file an application for revision, the proceedings in the filed application for revision could not proceed unless the appeal is determined as the two matters could not co-exist. To support his argument, he cited the case of **Tanzania Telecommunication Company Ltd Vs. Tritele Communications Ltd (2006) 1 E.A 393.**

Having gone through the parties submission the main issue for determination is whether the applicant has adduced sufficient reasons to warrant this court to set aside the dismissal order.

In determining this application, I will be guided by the provision of order R3 of the C.P.C which read as follows;

"Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a for proceeding with the suit. "

In his submission Mr. Manyama's main argument as to why he did not enter appearance on the date that was scheduled for hearing of the application (Revision No17 of 2020) was what he termed as the confusion on the time within which the hearing of the application was supposed to be conducted. According to him the time scheduled for hearing was 12:00 noon and that the advocate who was responsible/ handling the applicant's case by that time arrived early (round 11:50 am) to the vicinity of the court but to his surprise the matter was already dismissed, and when he made inquiry to the court clerk Monica Mrikaria, he was informed that the matter was called early at 10:00 am. When replying Ms. Flora submitted that the applicant and his advocate have never entered appearance since the application was filed in Court. Therefore, that the applicant's advocate argument concerning the time fixed for hearing the application is untrue and fabricated. That it is the duty of the advocate to exercise her/ his due diligence.

Having gone through the records of this application, I have discovered that from the first date of mention of Revision application No. 17 of 2020 which was on the 1st June 2020, another mention on the 17th June 2020, another mention date on the 6th July 2020 up to the date when it was dismissed on the 12/8/2020 neither the applicant nor his advocate entered appearance before the court. On those dates mentioned above, with the exception of the first date of mention that is on 1st June 2020, the respondent's advocate appeared before the Court.

Also, I have discovered that on the last date of mention that is on the 6th July 2020 the matter was adjourned for hearing on the 12th August 2020 at 10:00 am and not at 12:00 as it was averred in paragraph 3 of the affidavit of Patrick Seuya and submitted by the applicant's advocate.

Therefore, I am in agreement with the argument of the respondent's advocate, that the submission of the applicant's advocate is untrue and fabricated. I am forced to believe that It is an afterthought which came into the applicant's mind after the dismissal of his application. That the applicant is not serious with his application but he only intends to deny the respondent the right to peacefully enjoy his property.

Also, I am in agreement with the respondent's argument that this Court has not issued any order for staying the proceedings in Revision No.17 of 2020 pending determination of the intended appeal, nor did the parties address the court to do the same in the said revision application. Therefore, parties were obliged to appear before the Court and notify the Court on the presence of the intended appeal for the Court to take the necessary step instead of abandoning the application unattended.

Basing on the above findings, it is clear that the applicant has failed to adduce sufficient reasons for her non-appearance to satisfy this Court to set aside the dismissal order. Therefore, this application is dismissed with costs.

It is so ordered.

Dated at Dar es salaam this 18th day of October, 2021.




T. N. MWENEGOHA.
JUDGE