

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO.415 OF 2021

(Arising from Misc. Land Appeal No. 216 of 2020 by Hon. Mgeyekwa, J

Dated 19th July, 2021)

SALIM MBAROUK APPLICANT

VERSUS

MARIA MOMBA RESPONDENT

RULING

Date of last Order: 25.10.2021

Date of Ruling 27.10.2021

A.Z Mgeyekwa, J

This is an application for setting aside the dismissal order made by this court made on 19th July, 2021 in Misc. Land Appeal No. 216 of 2020. The application is brought under Order IX Rule 3 & 4 of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit of Bernard Massimba, learned Advocate, and contested by a counter affidavit of Maria Momba, the respondent.

When the matter came up for hearing on 05th October, 2021, the 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. The applicant was represented by Mr. Bernard Masimba, learned Advocate, while the respondent appeared in person unrepresented.

It was the applicant's Advocate who started to kick the ball rolling. He submitted that the applicant wants to move this court to set aside the decision of Hon. Mgeyejwa, J dated 19th July, 2021 and restore the Land Appeal No. 216 of 2020 for a continuation of hearing the case to its finality. Mr. Bernard urged this court to adopt the applicant's affidavit and form part of his submission. He submitted that the appeal was dismissed for non-appearance. He claimed that on the hearing date the applicant's lawyer was not present in court because he was hospitalized from 17th July, 2021 to 30th July, 2021. He went on to submit that the Advocate took efforts to conduct the applicant to inform him to attend the matter at court but he came to learn that the applicant was transferred to Dodoma.

Mr. Bernard continued to submit that the matter was dismissed while the tribunal records were yet to be brought at the High Court. It was his view that for there to be a competent appeal the court had to schedule hearing date. He added that in case this application will not be granted then the applicant will suffer irreparable loss because his property will be demolished since there is a pending execution before the tribunal. Mr. Bernard insisted that there is sufficient cause to set aside the impugned order. To support his submission he cited the Indian jurisprudence and practice as stated in Sarkar, Code of Civil Procedure 11th Edition Vol.1 Wadhwa and Company, New Dehli at page 127 and the case of **Mosoud Seleman Kikula v Jahuma General Supplies LTD**, Misc. Commercial Application No. 171 of 2017 (unreported).

On the strength of the above submission, the learned counsel for the applicant beckoned upon this court to allow the application.

In rebuttal, the respondent prayed for this court to adopt the counter affidavit and form part of his submission. The learned counsel for the respondent contended that the applicant was ought to provide sufficient reasons for his non-appearance during the hearing of the appeal. He submitted the court has discretion to grant or refuse to grant the applicant's prayers sought in the applicant's chamber summons and in

applying that discretion, courts of law are always mindful of the words of Lord Manfield (in *Rex v Wilkes* (1770) 4 Burr as cited by Sir Jocelyn. P in *Povey v Povey* (1971) WLR 381 AT 387.

The respondent went on to submit that in the application at hand the question to ask is whether the applicant has stated sufficient reasons warranting this court to restore the Land Appeal No. 216 of 2020. He contended that the only reason for nonappearance stated by the applicant is that the applicant was transferred to Dodoma and his Advocate was sick. It was his view that as per the court records there is no any notification to this court particularly on 18.05.2021, 24.05.2021, and 19.07.2021.

The respondent submitted that it is trite law that an applicant in the application for setting aside the dismissal order has to provide sufficient cause of his non-appearance. He must move the court to exercise its discretion to restore the appeal but the applicant has failed to elaborate his cause for nonappearance whenever the matter was scheduled for hearing. Fortifying his position, the respondent cited the case of **Amina Rashid v Mohinder Sigh and Another** (1986) TLR 192. She further claimed that the applicant said that he was transferred to Dodoma but the

same was communicated to him on 28.06.2021, hence it is clear that the applicant has failed to provide sufficient cause for his nonappearance. Stressing, she argued that the dismissal was caused by the applicant's negligence. To buttress his position he cited the case of **TT Investment Limited v Mar Kim Chemical Ltd**, Misc. Land Appeal No. 116 of 2020 [2021] TZHC Land D 396.

On the strength of the above submission, the applicant urged this court not to grant the applicant's application for restoration Land Appeal No. 216 of 2020 and dismiss the application entirely.

Submitting in his rejoinder, the learned counsel for the applicant reiterated his submission in chief. He urged this court to consider what transpired in court and the same should lead this court in determining the instant application. To fortify his submission, he referred this court to the case of **Bancorp LTD v Essa Hussein Summa**, Civil Application No. 63 of 2006 CAT (unreported). He denied the allegation that the applicant was absent in court for three days consecutively. Supporting his stand, the learned counsel for the applicant referred this court to the order of this court where the Judge was concerned by only two days of absence. In conclusion, he urged this court to allow the application.

I have considered the learned 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, one 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; that he fell sick and hospitalized.

Fortifying his submission, the learned counsel for the applicant has appended a medical slip showing that Mr. Bernard Masomba was treated at Mwanayamala Regional Referral Hospital on 17th July, 2021, and was discharged on 30th July, 2021. His client, the applicant claimed that he was in Dodoma since he is residing in Dodoma since 01st July, 2021. To support his submission he attached a transfer letter.

This court wants to make it clear that the court can dismiss an appeal for a failure of the applicant to move the court even when the matter is set for hearing and the records are yet to be brought. I am saying so because it was the responsibility of the applicant to move the court to determine his appeal therefore he cannot just opt not to appear in court

for the reasons that the tribunal file was not brought. Therefore this ground is unfounded.

I have weighed the submission of the applicant's Advocate, and I think the applicant's counsel has sufficiently explained the reason for not appearing in court when his case was dismissed for want of prosecution. I have reached that conclusion having considered; among 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 **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

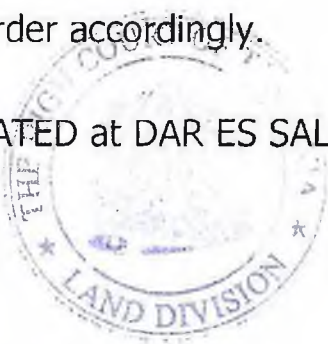
I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this application as it was held in the case **Jesse Kimani v McCornel & another** [1966] EA 547. Given the above, on a balance of probabilities, I think the

applicant's Advocate has provided sufficient cause why the applicant and his counsel did not enter appearance when the case was called on for hearing. I consider his excuse was genuine since they have attached documents to support their grounds for non-appearance.

In the upshot, the Misc. Land Appeal No. 216 of 2020 is restored to the register for continuation from where it stopped when it was dismissed for want of prosecution. The application is allowed. Each party to bear his/her own costs.

Order accordingly.

DATED at DAR ES SALAAM this 27th October, 2021




A.Z.MGEYEKWA

JUDGE

27.10.2021

Ruling delivered on 27th October, 2021 in the presence of Ms. Shiza, learned counsel holding brief for Mr. Bernard Massimba, learned counsel for the applicant and the respondent.




A.Z.MGEYEKWA

JUDGE

27.10.2021