

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 347 OF 2022

M/S GEM PROPERTIES LIMITED.....APPLICANT

VERSUS

MSINDIKA STORES LIMITED.....1ST RESPONDENT

CHAMIKO LIMITED.....2ND RESPONDENT

SHAJI TRADERS LIMITED.....3RD RESPONDENT

Tanzania VIFAA LIMITED.....4TH RESPONDENT

MABATI PAINT HOUSE (1996) LIMITED.....5TH RESPONDENT

NUREEN'S DISPENSING CHEMISTS LIMITED.....6TH RESPONDENT

MAPENDO STORES LIMITED.....7TH RESPONDENT

NEW HARDWARE STORES LIMITED.....8TH RESPONDENT

NATIONAL HOUSING CORPORATION..... 9TH RESPONDENT

Date of last order: 10/10/2022

Date of ruling: 26/10/2022

RULING

A. MSAFIRI, J.

In this application the applicant is praying for the court to set aside the dismissal order in respect of Misc. Application No. 371 which was dismissed for want of prosecution on 15th June 2022. The application has been supported by an affidavit sworn by Mr. Harrison Lukosi learned advocate for the applicant. On 21st September 2022, this court ordered the application be disposed by way of written submission. The order was

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complied with in respect of the submission in chief and reply thereof. The rejoinder submission by the applicant should have been filed on or before 4th October 2022 but the same was filed on 7th October 2022 beyond the prescribed time and without leave of the Court hence the rejoinder submission will not be considered.

In this application the applicant had the services of Mr. Malik Seif learned advocate whereas the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents were represented by Mr. Thomas Mathias learned advocate. The 9th respondent did not enter appearance.

In a nutshell, the applicant's advocate has submitted that on the date when Application No. 371 of 2022 was fixed for hearing he was sick hence he could not enter appearance. He urged me to set aside the dismissal order and restore Application No. 371 of 2022 because sickness is a sufficient ground for this court to set aside the dismissal order.

To fortify his stance, the learned advocate for the applicant has referred to me several decisions such as **Mbogo & another v Shah** [1968] EALR 93, **Reginald Martin Mushi v Sijali Jafari & 22 others** Misc. Land Application No. 141 of 2017 (unreported) in which sickness was held to be a sufficient ground for setting aside the dismissal order.

On reply the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents vehemently resisted the application both in their counter affidavit as well as reply written submission contending that the applicant has not advanced any sufficient reason to have the court set aside the dismissal order in respect of Application No. 371 of 2021. It was further submitted that the

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court did not dismiss the application because of non appearance of the applicant on 15th June 2022 alone but also on 27th April 2022 in which the applicant did not enter appearance as well.

On the issue of sickness, the respondents have contended that as the applicant was excused from duty from 14th June 2022 he had ample time to inform his colleagues in the office or even the applicant about that predicament. So the applicant could have appeared in person and inform the court about sickness of his advocate. It is for those reasons the respondents prayed the application be dismissed with costs for lack of merits.

Having gone through the parties' submissions rival and in support of the application, the sole issue for my determination is whether the applicant has advanced sufficient reasons to have the court set aside the dismissal order dated 15th June 2022.

For applications like the present one, where the applicant is seeking for an order for setting aside dismissal order as a result of non appearance sufficient reason(s) must be shown on why the applicant did not enter appearance on the date the matter was fixed for hearing. In the instant matter, it is not in dispute that on 15th June 2022 neither the applicant nor his advocate entered appearance.

As stated earlier the applicant's advocate has maintained that he had medical complication caused by severe headache and therefore he was rushed to Msasani Peninsula where he usually attends for regular medical checkups. Medical document has been attached to the effect. I have gone

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through the said document it is indicated that the learned advocate was on 14th June 2022, excused from duty for three days.

There are a few aspects which the applicant was required to give explanation. It is clear that Application No. 371 of 2022 was dismissed for want of prosecution because of cumulative effect of non appearance by the applicant both on 27th April 2022 and 15th June 2022. The applicant has not said anything on why he did not enter appearance on 27th April 2022 when the matter was fixed for hearing.

On the other hand on 15th June 2022 both the applicant and his advocate were absent. The applicant's advocate claimed that he was sick on that date but nothing has been said about the applicant. I agree with the applicant that sickness is sufficient reason for the court to set aside dismissal order. I fully subscribe to the decisions he has referred above but what I am unable to agree with the learned advocate for the applicant is on his failure to inform his client that he could not enter appearance on 15th June 2022 so that the applicant could have let the court know that his advocate was sick and seek for an adjournment. There is no supplementary affidavit by the applicant on why he failed to enter appearance after his advocate was medically unfit.

I am at one with the respondents' contention that as the matter was fixed for hearing on 15th June 2022 while the applicant's advocate was excused from duty from 14th June 2022 there was ample time to inform the applicant to appear in person and let the Court know that his advocate was

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sick or even make any other arrangement for the court to be made aware of the predicament faced by the advocate.

Unfortunately the affidavit in support of the application is conspicuous silent on why the applicant could not appear in person and inform the court that his advocate was sick. That explanation was necessary because on 27th April 2022, the applicant did not enter appearance as well. Therefore the court was justified to dismiss the application on 15th June 2022 as it was second consecutive time the applicant had failed to enter appearance.

It is for those reasons the prayers sought by the applicant are not granted.

Consequently, I find that the application lacking in merits and it is hereby dismissed with costs.

It is ordered.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal dotted line.

A. MSAFIRI,

JUDGE

26/10/2022