

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 738 OF 2021

(From Land Case No. 101 of 2019 as per Mkapa J.)

NASORO HANZIRUNI SHAHA.....1st APPLICANT
*(Administrator of the Estate
of SHAHA MUSSA HANZURUNI)*

JOHA JUMA KILABUKA.....2nd APPLICANT
VERSUS

DCB COMMERCIAL BANK PLC.....1st RESPONDENT

MAJEMBE AUCTION MART.....2nd RESPONDENT

SILVA SYLVESTA BILEGEYA.....3rd RESPONDENT

RULING

08/09/2022 & 19/10/2022

Masoud, J.

This ruling relates to an application for setting aside dismissal order in Land Case No. 101 of 2019. The order dismissed the said matter for want of prosecution. The application was made under Order IX, rule 6(1) and section 95 of the Civil Procedure Code, cap. 33 R.E 2019. It was supported by an affidavit of Barnabas Lugua, Advocate for the applicants.

The application was opposed by the respondents. There were thus counter affidavits of the respondents against the application. The third respondent, through Mr Nehemia Nkoko, learned Advocate, also raised two points of preliminary objection that the application is incompetent for being moved under wrong provision of law, and that the matter was filed contrary to section 67 of the Land Registration, Act, Cap 334 R.E. 2019.

In the affidavit supporting the application, it was stated that he was in receipt of the summons notifying rescheduling of the hearing of the Land Case No. 101 of 2019 from 20/10/2021 to 27th and 28th September 2021 which summons was also annexed to the affidavit. However, whilst at Ikwiriri, he received a phone call from Mr Nehemia Nkoko, advocate for the third respondent to the effect that the matter was coming for hearing on 28th and 29th September 2021 of which the deponent accordingly diarized and annexed a copy of the said page from the diary to evidence the allegation.

It was the averment of the said deponent that on the 28/09/2021, he managed to come before the court and was joined with the second applicant only as he could not get the first applicant through his phone, he learnt from one Zena, a court clerk for Hon. Mkapa J. that the case was

called on the 27/09/2021 only to be dismissed for want of prosecution. The said dismissal order was annexed to the affidavit in support of the averment. He wrote a letter on the same day of 28/09/2021 requesting for the copy of the dismissal order. A copy of the said letter was also annexed to the affidavit.

The affidavits of the first and second applicants supported the averment by their counsel. As to the second respondent, she supported their learned counsel's averment as to the phone call, rescheduling of the hearing date and being informed by one Zena that the matter was dismissed for want of prosecution on 27/09/2021. As to the affidavit of the first applicant, he contended that he was not aware of the rescheduling of the hearing dates as he was not informed of the same by their advocate as his was not accessible.

The counter affidavits of the respondents opposing the application, disputed the reasons adduced in support of the application for restoration of the matter. The counter affidavits in all were to the effect that there was no good cause shown in support of the application. It was stated that since the counsel for the applicants acknowledged to have been served

with the summons indicating that hearing was rescheduled for 27-28/09/2021, he was obliged to appear before the court on the said dates.

At the hearing of the application, the preliminary points of objection which were raised against the application were withdrawn. The application was therefore heard on its merit. The rival oral submissions are on the record. They by and large reflect the respective rival averments in the affidavit and counter affidavits.

Of significance is the fact that Mr Lugua in his affidavit supporting the application acknowledged that he was served with the summons showing that the Land Case No. 101 of 2019 was rescheduled to 27-28/09/2021. He could not however enter appearance as per the said summons because he received a phone call from Mr Nehemiah Nkoko that the matter had been rescheduled to 28-29/09/2021. Pursuant to the said phone call, he appeared to the court on 28/09/2021 along with the second respondent and learnt from Zena, a court clerk to Hon. Mkapa J, that the case was called on 28/09/2021 and dismissed for want of prosecution.

There was however nothing to convince the court that the applicants' counsel was indeed called by Mr Nkoko and notified of the alleged

rescheduling. The phone numbers were not disclosed and the reason why the applicants' counsel acted in accordance with the alleged phone call whilst he was already in receipt of the summons. The allegation by the applicants' counsel as to the phone call, being serious as it was, it was disputed by the respondents.

There was nothing in the affidavit to support such allegation of phone call which imply gross misconduct on the part of Mr Nkoko. In the absence of proof to support such assertion, I am inclined not to buy the averment to find in favour of the applicants. The fact that the applicants' counsel was served with summons for hearing on 27-28/09/2021 tells it all that the learned counsel should have appeared on 27-28/09/2021 for hearing.

It is trite law that it is in the discretion of the court to set aside dismissal order, which discretion must be exercised judiciously based on materials availed. The materials availed must constitute good cause preventing the applicant from entering appearance when the matter was called on for hearing.

Considering the averments in the affidavits supporting the application and the rival submissions, I am persuaded that this is not a fit case to grant the sought order restoring the dismissed suit.

The applicants were duly served with the summons indicating the hearing dates. The allegation of failure to appear on the first hearing date (i.e 27/09/2021) set out in the summons because of the alleged phone call which was received from Mr Nkoko was not supported by any evidence. It could not thus constitute a sufficient cause in the circumstances.

As the applicants' counsel was served, the applicants cannot be heard complaining that they were never served with any summons rescheduling the hearing of the matter. Even if the applicants and their counsel appeared on 28/09/2021 after the dismissal of the suit on 27/09/2022, such appearance could not, in view of the said summons duly served to the learned counsel for the applicants, amount to good cause to warrant granting of the application.

In the result and for the foregoing reasons, I would dismiss the application as I hereby do so with costs. It is so ordered.

Dated at Dar es salaam this 19th October 2022.


B. S. Masoud
Judge

