

**THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC.LAND CASE APPLICATION NO. 224 OF 2021**

(Arising from Misc. Land Application No. 642 of 2019 by this Honourable  
Court)

**MARTIN NICAS MANYA ..... APPLICANT**

**VERSUS**

**STIVIN GATI MWITA ..... 1<sup>ST</sup> RESPONDENT**

**MATINDE INKAIN** (Administrator of the estate

of the late MAMA AKIDA ..... **2<sup>ND</sup> RESPONDENT**

**RULING**

*Date of last Order Ruling: 17.03.2022*

*Date of the Judgment: 22.03.2022*

**A.Z.MGEYEKWA, J**

This is an application for setting aside the dismissal order made by this court made on 21<sup>st</sup> April, 2021 in Misc. Land Case Application No. 642 of 2019 which was before Hon. Maige, J (as he then was) delivered on 21<sup>st</sup>

April, 2021. The application is as been preferred under the provisions of Order IX Rule 6 (1) of the Civil Procedure Code Act, Cap.33 [R.E 2019]. The application is supported by an affidavit sworn by Martin Nicas Many, the applicant in which grounds on which extension of time is sought are set out. The main ground advanced as the basis for this application is that he fall sick and ended up in the hospital.

The respondents have stoutly opposed the application. Through their joint counter-affidavits. Refuting the applicant's contention that this application is meritorious, they urged the Court to dismiss the application.

When the matter was called for hearing before this court on 28<sup>th</sup> February, 2022 the applicant and 1<sup>st</sup> respondent appeared in person, unrepresented. The 1<sup>st</sup> respondent urged this court to argue the application by way of written submission. By the consent of this court, the parties argued the application by way of written submissions whereas, the applicant filed the submission in chief on 7<sup>th</sup> march, 2022, and the respondents their reply on 13<sup>th</sup> March, 2022 and the applicant filed his rejoinder on 17<sup>th</sup> March, 2022.

In his written submission, the applicant urged this court to adopt his affidavit and form part of his submission. He submitted that the application for setting aside the dismissal order is entirely in the direction of the court to grant or refuse. To support his submission he referred this court to

Order IX Rule (6),(1) of the Civil Procedure Code Cap 33 [R.E. 2019] which state that:-

*"Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit."*

The applicant submitted that, he has established sufficient good cause to set aside the dismissal Order of this court in Misc. Application No. 642 of 2019 which was dismissed for want of prosecution. The applicant referred this court to paragraph 5 of his affidavit and submitted that he was sick and was admitted to Muhimbili National Hospital from 21<sup>st</sup> April, 2021 to 24<sup>th</sup> April, 2021. To support his contention he attached the hospital chic. It was his submission that his non-attendance on the hearing date resulted in the dismissal of Misc. Application No. 642 of 2019 and costs to follow the event.

He invited this court to borrow the wisdom of the decision of this court in **Hassan Hamis Nzomari vs Edmund Thomas Lusebe and Others,**

Misc. Land Application No. 351 of 2019 (unreported) where this court held that:-

*"The applicant has successfully demonstrated sufficient cause for his non-appearance on the date of the dismissal. The application is therefore granted."*

On the strength of the above submission, the applicant beckoned upon this court to set aside the dismissal order and restore the Misc. Application No. 642 of 2019.

In their rebuttal submission, the respondents took a swipe at the applicant's submission. They urged this court to adopt the contents of the respondents' counter-affidavit and form part of their submissions. They urged this court not to restore the Misc. Land Application No. 642 of 2019 for the reasons that the applicant's grounds are baseless and lack merit. They went on to submit that the applicant has many times repeated to raise the reason for being unwell and that he was attending medical treatment at Muhimili National Hospital.

They argued that the purported copies save for the date of examination bear the same handwriting and the same person who appended his signatures. They strenuously argued that the integrity of the said document is highly questionable. They urged this court to put no weight on the applicant's affidavit. They submitted that litigation must come to an

end but the applicant is doing backpedaling exercise which aims to circumvent the decision of the District Land and Housing Tribunal.

On the strength of the above submission, they urged this court to dismiss the applicant's application with costs.

In rejoinder, the applicant had nothing new to rejoin. He reiterated what was in submission in chief.

Having gone through the submission of both sides for and against the application. The issue which is the bone of contention in this Application, and on which the parties have locked horns, is *whether the applicant has adduced sufficient reasons to warrant this court to allow her application.*

I feel inclined to state at the outset of the determination of this matter that it is trite that in applications for restoration which is made under Order IX Rule 4 of the Civil Procedure Code, Cap.33 [R.E 2019], what is relevant is for the applicant to show sufficient cause for his non-appearance.

Encapsulated in the applicant submission and per the applicant's affidavit, the ground for non-appearance is sickness. The applicant has tried to move this court by attaching documents to prove his sickness. The applicant in paragraphs 5 and 6 repeatedly stated that he failed to attend the hearing before Hon. Maige, J (as he then was) because he was attending treatment at Muhimbil National Hospital.

I am cognizant of the position of law that sickness is a good cause for in case a party has failed to appear in court. In the case of **Emanuel R. Maira v The District Executive Director of Bunda**, Civil Application No. 66 of 2010 (unreported) the court held that:-

*"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."*

Equally, the principle of law is that a person who alleges the existence of certain facts is required to prove the same. Therefore, where sickness is pleaded as a ground for failure to take the required action, it must be proved by medical proof. In our case, the applicant wanted to show that he was admitted to the hospital on 21<sup>st</sup> April, 2021, and discharged on 24<sup>th</sup> April, 2021. However, the applicant did not tender any authenticity documents to prove his sickness. The purported attached documents from Muhimbili National Hospital are just copies, they lack signatures of the authorized person and office stamp. In absence of original documents or certified copies, office stamp and signatures means there is no proof of endorsement. I have considered the fact that the respondents' contested the alleged sickness of the applicant.

The onus of proof was upon the applicant to prove that on the date of hearing the case before this court, he was hospitalized. In the instant proof

of this relevant is wanting. This being the case, the applicant's affidavit and his submission in chief remains just an assertion that is devoid of proof which this court cannot act on.

In the upshot, I find that the applicant has failed to state sufficient cause for his failure to appear in court when Misc. Land Application No.642 of 2019 was called for a hearing on 21<sup>st</sup> April, 2021. Consequently, I hereby dismiss this application with costs.

Order accordingly.

Dated at Dar es Salaam this date 15<sup>th</sup> March, 2022.



  
A.Z.MGEYEKWA  
**JUDGE**  
22.03.2022

Ruling delivered on 22<sup>nd</sup> March, 2022 in the presence of the applicant and respondents.



  
A.Z.MGEYEKWA  
**JUDGE**  
22.03.2022