IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 112 OF 2022

(Arising from High Court Land Division in Land Case No. 163 of 2021)

ESTHER JOSEPH OGUTU ..... APPLICANT

VERSUS

EQUITY BANK ..... 1ST RESPONDENT

COMRADE AUCTION MART COMPANY LTD..... 2ND RESPONDENT

RULING

Date of the last Order: 14.04.2022

Date of Ruling: 22.04.2022

A.Z. MGEYEKWA, J

This is an application for setting aside the dismissal order made by this court on 21st February, 2022 with respect to Land Case No.163 of 2021. The application is brought under Order IX Rule 9 of the Civil Procedure Code Cap 33 [R.E. 2019]. The application is supported by an affidavit of Esther Joseph Ogutu, the applicant. The applicant's application was

confronted on all fronts and with strenuous resistance from the respondents through a counter-affidavit sworn by Mr. Karoli Valeriant Tarimo, learned counsel for the respondents.

When the matter came up for orders on 14th April, 2022, the applicant was ably represented by Mr. Kefa Manase, learned counsel. The respondents had the noble legal service of Mr. Karoli Tarimo, learned counsel.

Mr. Kefa was the first one to kick the ball rolling. He urged this court to adopt the applicant's affidavit to form part of his submission. The learned counsel for the applicant contended that the applicant has adduced sufficient reasons for his nonappearance. To buttress his position Mr. Kefa cited the cases of Hassan **Nomari v Edmund Thomas Msebe & 3 others**, Misc. Land Application No. 351 od=f 2019, HC - Land Division at Dar es Salaam and **Nasibu Sungura v Peter Msecho**, Civil Appeal No. 24 of 2017. The learned counsel for the applicant submitted that the applicant's main reason for his nonappearance is that this Advocate who was engaged to prosecute his case, the late Mr. Charles was seriously sick and on the hearing date this Advocate was undergoing health treatments. He added that another Advocate, Samson Ombuga was appointed to prosecute the case but unfortunately, he was employed as a Magistrate hence he could not show appearance on the hearing date.

Mr. Kefa went on to submit that the applicant herself could not show appearance because she is residing and works in Sweden. He added that when the case was called for mention on 21st February, 2022, the applicant was abroad and she had no communication with his advocate who was seriously sick and later passed away. Another ground for non-appearance, Mr. Kefa submitted that Land Case No. 163 of 2021 was dismissed on the mentioned date instead of being dismissed on the hearing date. It was his submission that the principle is that the suit is not dismissed on the mentioned date. To support his submission he cited the cases of **Shengana Ltd v national Insurance Corporation & Another,** Civil Appeal No. 12 of 2021, **Oliva Kabakobwa v AKIBA Commercial Bank & another**, Land Appeal No. 12 of 2021, and **Mrs. Fakhria Shamji v The Registered Trustees of the Khoja Shia Ithnasheri (MZA) JMMAT**, Civil Appeal No. 143 of 2019.

On the strength of the above submission, he beckoned upon this court to set aside the dismissal order and determine the case on merit.

Mr. Karoli valiantly opposed the application. He started by raising objections. He contended that the applicant has lodged his application under Order IX Rule 9 (1) of the Civil Procedure Code Cap.33 [R.E 2019] which is not a proper provision to set aside a dismissal order. Mr. Karoli

submitted that the said Order is for setting aside an *exparte* decree. In his view, the proper provision to set aside a dismissal order for non-appearance is Order IX Rule 6 of the Civil Procedure Code Cap.33 [R.E 2019].

Submitting against the application, Mr. Karali submitted that the applicant in her affidavit did not show sufficient reasons for her delay. He claimed that the affidavit is full of hearsay and lies. To support his submission he referred this court to paragraphs 3 and 9 of the applicant's affidavit. To support his argument he cited the case of **Sebena Technics Dar Limited v Michael J. Luwunu**, Civil Application No. 451/18 of 2020 He argued that

Mr. Karoli continued to submit that saying that the application was dismissed on the mentioned date is not proper. He submitted that the cited cases are distinguishable in the sense that there is no such creature called mentioned in civil procedure. He added that even the allegation that the case was called for mention is not proved since the order which dismissed the case is not attached. He went on to submit that the matter for non-appearance of the applicant and her counsel. This, this court could not proceed to adjourn the matter. He added that the cited cases of rs Fakhria (supra) and Oliver (supra) are not applicable in the matter at hand and the same are not binding.

Mr. Karoli strenuously contended that saying that Samson Ombuya is employed as a Magistrate is a submission from the bar and saying that the applicant is residing in Sweden this fact is baseless because the applicant is duty-bound to make sure that her case is determined by this court. The learned counsel argued that the learned counsel Charles passed away after the institution of this case. Therefore it was his view that the allegations were supposed to be supported by his affidavit.

From the above submission and the cited authorities, Mr. Karoli beckoned upon this court to dismiss the applicant's application with costs.

In his rejoinder, Mr. Kefa reiterated his submission in chief. He submitted that the Order IX Rule 6 (1) of the Civil Procedure Code Cap. 33 was retrieved from tanzlii and they tried to cite the said Order but the same was rejected by the system. He valiantly submitted that the applicant is the one who deponed the affidavit therefore the statement contained in the affidavit is true to the best of the knowledge of the applicant.

In conclusion, Mr. Kefa beckoned upon this court to grant the applicant's application to do justice.

I have considered the learned counsel for the applicant and the respondent's arguments for and against the application. It is settled law that an applicant seeking to set aside a dismissal order of the court that dismissed a suit for want of prosecution, needs to furnish the court with sufficient reasons for non-appearance when the suit was called on for hearing.

Before going into the nitty-gritty of this matter, let me start by commenting on the provisions cited in support of the application and the preliminary objections raised by the learned counsel for the respondents. First of all, I have to say that, Mr. Karoli was required to raise the said objection prior to hearing the matter at hand. Therefore the procedure used by the learned counsel for the respondent is not proper. However, as long as the objection is a point of law, I find it necessary to address the same. For ease of reference, I reproduce Order IX Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019] as hereunder:

> *" 9. In any case in which a* ***decree is passed ex parte against a defendant****, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs,*

payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit." [Emphasis added].

Except for the bolded part, the cited Rule is irrelevant to the present application. The applicant in his chamber summons has used the phrase "any other enabling provisions of the law" in my view this phrase is meaningless, irrelevant, and unnecessary embellishment. In the case of **Janeth Mmari v International School of Tanganyika and Another**, Miscellaneous Civil Cause No. 50 of 2005, Mihayo, J. (as he then was) had this to say:-

"This song, 'any other enabling provisions of the law' is meaningless, outdated, and irrelevant. The court cannot be moved by unknown provisions of the law conferring that jurisdiction. That law must therefore be known. Blanket embellishments have no relevance to the law nor do they add any value to the prayers to the court".

Hon. Mihayo, J. (as he then was) had another opportunity to comment on the phrase in the case of Elizabeth Steven and Another v Attorney General, Miscellaneous Civil Cause No. 82 of 2005, in which His Lordship held:

"The phrase any other provision of law is now useless embellishment, the law is now settled."

This being the position of the law, and as I have endeavoured to demonstrate hereinabove, it follows that this Application stands only on a

very thin leg that the wrong citation of Rule 9 of the Civil Procedure Code Cap.33 [R.E 2019] can be cured by applying overriding principles. That is the reason why I have, apprehensively felt that I should not inject strict principles of the law in this respect, as by so doing, justice could be left crying. In my considered view, the Applicant ought to have made the application under the provisions of Order IX Rule 6 of the Civil Procedure Code Cap.33 [R.E 2019].

Having decided so, I allow the applicant to cancel Rule 9 (1) of the Civil Procedure Code Cap.33 appearing on chamber summons and replace the same with Rule 6 of the Civil Procedure Code Cap.33. The objection to the affidavit is been disregarded by this court.

I now turn to the gist of the Application. The issue which is the bone of contention in this Application, and on which the learned counsels for the parties have locked horns, is *whether the applicant has adduced sufficient reasons to warrant this court to allow her application.*

It has been held by this court and the Court of Appeal of Tanzania time and again that in applications of this nature, an applicant seeking to set aside a dismissal order of the court that dismissed a suit for want of prosecution needs 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 the applicant's failure to appear when the matter was called on for hearing as a result of his absence; that she thought that her advocate will show appearance but he did not because he was sick and hospitalized. The applicant's Advocate went on to state that the other advocate, Samson Ombuya who was appointed to work at that firm did not show appearance because he was appointed as a Magistrate.

One of the grounds to support his submission to set aside the dismissal order was that this court was wrong in dismissing the application at the mentioned stage. Had it been that the matter was called for mention only once or two times then the cited cases of **Olivia Kabakobwa** (supra) and **Mrs. Fakhria Shamji** (supra) are not relevant to the matter at hand since after issuing the injunction order, the matter was set for necessary orders three times from 16th December, 2021 to the time when this court dismissed the suit on 21st February, 2022 whereas neither the applicant nor her advocate appeared in court. The applicant in her own capacity was responsible to make a close follow-up on her case but that was not done. Therefore, this ground is demerit.

With respect to the ground of the applicant's sickness, I have weighed the arguments for and against the application as presented to me by both learned counsels. I think the applicant's counsel has sufficiently explained

the reason for the applicant's non-appearance in court when his case was dismissed for want of prosecution. I considered the fact that his Advocate who was entrusted by the applicant to handle her case was seriously sacked and later passed away.

Again, I have 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 Mc Cornel and another** [1966] EA 547.

In view of the above, on a balance of probabilities, I have to say that the applicant has provided sufficient cause why he did not enter an appearance when the case was called on for hearing.

In the upshot, Land Case No. 163 of 2021 is restored to the register for continuation from where it stopped when it was dismissed for want of prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order to costs.

Order accordingly.

DATED at Dar es Salaam this 22nd April, 2022.

A.Z.MGEYEKWA

JUDGE

22.04.2022

Ruling delivered on 22nd April, 2022 in the presence of Ms. Happines Karoli, learned counsel for the respondent and Mr. Kefa, learned counsel for the respondent was remotely present.

A.Z.MGEYEKWA

JUDGE

22.04.2022