

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO.166 OF 2022**

(Arising from the High Court of Tanzania, Land Division in Land Case  
No. 145 of 2020 by Hon. Mgeyekwa, J)

**LULUU GENERAL COMPANY LTD .....1<sup>ST</sup> APPLICANT**

**ISSA BADRU ALLY ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**TANZANIA POSTAL BANK ..... RESPONDENT**

**RULING**

Date of last Order: 19.05.2022

Date of Judgment: 19.05.2022

**A.Z.MGEYEKWA, J**

On 19<sup>th</sup> May, 2022, this court struck out Land Case No. 145 of 2020 for want of prosecution as the applicants did not enter appearance. The

applicant is now seeking the indulgence of this court to have his appeal restored. He has made an application under Order IX Rule 6 (1) of the Civil Procedure Code, Cap. 33 [R.E 2019] for restoration of Land Case No. 145 of 20220. The application has been supported by the affidavit deposed to by Mr. Issa Badru Ally, 2<sup>nd</sup> Defendant, and Ms. Zubeda Hollacky, the Director of the 1<sup>st</sup> applicant.

This application was argued before me on 19<sup>th</sup> May, 2022 during which the applicants appeared enjoyed the legal service of Ms. Ganjatuni Kilemile and the respondent had the legal service of Mr. Mwego, learned Advocate.

While seeking to adopt the contents of the affidavit affirmed support of the application, the applicants' counsel has ascribed the nonappearance on the day the applicants' case was dismissed to the fact that the 1<sup>st</sup> applicant's Director fall sick. She submitted that the 2<sup>nd</sup> applicant fell sick and hence failed to appear in court. In her view, sickness is a sufficient cause for the restoration of the applicants' case. She bolstered her submission by citing the cases of **Jumanne S/O Chakupewa Mchondo v Bahebe S/O Rutubisha & 4 Others**, Misc. Land Application No. 41

of 2021 and **Sadru Mangalji v Abdul Aziz Lalani & 2 Others**, Misc. Commercial Application No. 126 of 2016.

Ms. Kilemile urged this court not to be bound by technicalities on the administration of justice. It was her submission that this court relied on technicalities grounds to dismiss this case. To support her submission she referred this court to section 3A enacted in the Civil Procedure Code [Cap. 33 R. E. 2002] via the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2018 and the case of **Yacobo Magoiga Gichere v Peninah Yusuph**, Civil Appeal No. 55 of 2017.

On the strength of the above submission, Ms. Kilemile believed that the applicant has stated good cause for restoration, thus, she beckoned upon this court to restore Land Case No. 145 of 2020.

Mr. Mwego was equally strenuous in his opposition. Referring to the respondent's counter-affidavit, the learned counsel submitted that the applicants have failed to adduce good cause, especially on the date when the suit was dismissed on 17<sup>th</sup> March, 2022. He submitted that the suit involves two parties; Luluu General Company Ltd and Issa Badru All. He wondered between the two who fall sick. He argued that Badru in his

affidavit did not report that he was sick instead he stated that he was in Lindi and it is not clear if he fall sick.

The learned counsel for the respondent continued to argue that there is an attached document of one Zubeda Ally who stated that she was in Mbezi and was feeling unwell. He forcefully submitted that the applicant is not saying the truth. Insisted that Budra's reason that he was in Lindi is not a good reason for the restoration of the case. He distinguished the cited cases of **Abdul Aziz Lalani** (supra) from the current scenario; especially noting that in the cited case the litigants issued their documents to support their absenteeism.

The learned counsel for the respondent went on to distinguish the cited case of **Yacobo** (supra) by stating that in the case, this court did not dismiss the suit based on technicalities grounds, he added that the applicants' whereabouts were unknown and they did not appear in court. He stressed failure for them to show appearance the court could not proceed with hearing the case on merit.

In rejoinder, Mr. Kilemile reiterated her submission on chief. She added that the 1<sup>st</sup> applicant; Zubeda has locus in the matter at hand. To fortify her submission she referred this court to paragraph 1 of Zuber's affidavit,

she is a Director of the 1<sup>st</sup> applicant. She went on to submit that there is an attached document that proves that Zubeda was sick. She urged this court to grant the applicant's application.

The issue that can be extracted from the learned counsels' rival submissions is whether the application carries any merit that can justify the restoration of Land Case No. 145 of 2020. It is an established position, in our legal regime, that an application for restoration can only be granted where the applicant presents a credible case to warrant granting her/ his application. This is what is widely referred to as sufficient cause. The law also requires the applicant to act in an equitable manner.

I have weighed the arguments for the application as presented to me by the learned counsel for the applicants and I think the applicants' counsel has sufficiently explained why Zubeda Hollacky did not appear in court when his case was dismissed for want of prosecution. Reading the 1<sup>st</sup> applicant's Director affidavit specifically paragraph 4, she stated that she fall sick. To proof the same she attached a copy of the medical chip which shows that she was attending medical treatment on 15<sup>th</sup> March, 2022, and the Land Case No. 145 of 2020 was dismissed on 17<sup>th</sup> March,

2022. I tend to believe that when the case was dismissed on 17<sup>th</sup> March, 2022 the 1<sup>st</sup> applicant was still sick. However, I am in accord with the learned counsel for the respondent that the 2<sup>nd</sup> applicant did not show good cause to move this court to grant the application. I say so because there is no any proof that he travelled to Lindi.

In regard to the overriding principle, as rightly pointed out by the learned counsel for the respondent this principle is inapplicable in the case at hand. The land case was dismissed for the applicants' failure to move the court to proceed with hearing the case on merit, thus, its dismissal was not at all related to any technicalities.

Additionally, 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 Mc Cornel and another** [1966] EA 547. Given the above, and on the balance of probabilities, I think the 1<sup>st</sup> applicant has provided sufficient cause why the 1<sup>st</sup> applicant did not enter an appearance when the case was called on for hearing.

I hereby re-admit Land Case No. 145 of 2020 so that the same is heard on merits. In the upshot, I find substance in this application and allow it. As the Respondent is not to blame for the whole incident, I make no order as to cost.

Order accordingly.

Dated at Dar es Salaam this date 19<sup>th</sup> May, 2022.



  
A.Z.MGEYEKWA

**JUDGE**

19.05.2022

Ruling delivered on 19<sup>th</sup> May, 2022 in the presence Ms. Ganjatuni Kilemile, learned counsel for the applicants, and Mr. Mwego, learned counsel for the respondent.



  
A.Z.MGEYEKWA

**JUDGE**

19.05.2022