

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 642 OF 2021

(Arising from Land Case No. 63 of 2020)

AMALY MEHTA.....1ST APPLICANT

AMALY INVESTMENT COMPANY LIMITED.....2ND APPLICANT

VERSUS

EQUITY BANK TANZANIA LIMITED.....RESPONDENT

21/4/2022 & 11/5/2022

RULING

A. MSAFIRI, J.

On the 18th day of November 2021, the applicants lodged an application in this Court by way of chamber summons under Order IX Rules 6 (1) and 9, Sections 68 (e) and 95 o. the Civil Procedure Code [CAP 33 R.E 2019], for the following orders;

- a. *That this Honourable Court be pleased to make and order to set aside the dismissal order for want of prosecution dated 29/10/2021 and the matter be heard on merits.* *Aelle*

- b. *That the Honourable Court be pleased to set aside ex-parte judgment on counter claim dated 5/11/2021 and the matter be heard on merits.*
- c. *Costs of this application be provided for.*
- d. *Any other relief(s) as Honourable Court may deem fit and just to grant.*

The application has been taken at the instance of the **HK LAW CHAMBERS ADVOCATES** and is supported with an affidavit affirmed by **AMALY MEHTA**, the first applicant who is also the Director of the 2nd applicant herein.

On 15th March 2022, this Court ordered the application be disposed of by way of written submissions, the order which was duly complied by the parties who lodged their submissions as scheduled.

Before going to the merits of the application, a brief background giving rise to the present application as gathered from the affidavit in support of the application as well as written submissions of the parties is apposite.

There was a credit facility agreement between the 2nd applicant and the respondent in which the latter advanced credit facility to the former to

Alb.

the tune of TZS 400,000,000/= which was repayable within 60 months at the equal monthly installments of TZS 10,579,554/=. The loan was secured by four securities one of them is a residential property located on Plot No. 55 Block D, Shariff Shamba area Dar es Salaam in the name of the 1st applicant.

The 2nd applicant defaulted in servicing the credit facility which prompted the respondent to issue a default notice on 27/5/2019 requiring the applicants to pay TZS 352,162,378.00 being outstanding amount within 60 days from the date of the notice otherwise the respondent would have exercised her right on the mortgaged property.

Following the said notice, the applicants instituted Land Case No. 63 of 2020 against the respondent seeking for reliefs *inter alia* declaration that the default notice issued to the applicants was premature and null and void.

On lodging its written statement of defence, the respondent raised a counter claim against the applicants for reliefs *inter alia* payment of TZS 352,162,378/= being the outstanding loan. *Atto.*

On 29/10/2021, when the matter was called on for hearing, neither the applicants nor their advocate entered appearance. Consequently the applicants' suit was dismissed for want of prosecution and the counter claim proceeded *ex-parte* whereby judgment and decree in the counter claim were entered against the applicants for payment of TZS 352,162,378.00/=.

Now back to the present application, in the affidavit and submission in support of the application, the applicants have advanced two reasons for failure to enter appearance on the date when the matter was fixed for hearing. One, on the part of the learned advocate for the applicants namely Mr. Henry Kishaluli was not feeling well and upon going for checkup, had high blood pressure hence he informed the 1st applicant to notify the court about his condition.

Two, the first applicant stated that on 29th October 2021, he left home and unfortunately he was stopped by the traffic jam and inspection of police which was going on at Ilala before reaching Kawawa/Uhuru Junction near the Regional Commissioner's Office so he reached the Court's premises almost 9.30 AM and found the matter was about to proceed with the hearing.

Alle.

The respondent's counter affidavit as well as written submission in reply, refute the applicants' reasons for non appearance when the matter was called on for hearing. Regarding the statement that the advocate was prevented by ill health, the respondent submits that the alleged medical sheet is not genuine as it neither bears the name of the doctor, nor his or her signature. Moreover it does not indicate whether the advocate was advised to have bed rest.

Regarding the claim that the 1st applicant was prevented by traffic jam, the respondent maintains that such explanation is short of justification and it is not even clear in the affidavit whether or not the 1st respondent was driving. The respondent prays therefore the application to be dismissed with costs.

Having gone through the respective submissions of the parties, rival and in support of the application, the sole issue calling for my determination is whether the applicants have shown sufficient cause to justify their application. In the case of **Mwanza Director M/S New Refrigeration Co. Ltd vs. Mwanza Regional Manager of TANESCO and Another** [2006] TLR 329), the term sufficient cause for non-

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appearance can be defined according to the peculiar circumstances of each case.

I propose to begin with the reason of ill health advanced by the learned counsel for the applicants. Sickness has been stated to be sufficient reason for either extension of time or like in the application at hand. However to constitute sufficient reason it must be established that sickness had a bearing either in the delay or failure to enter appearance like in the present matter.

For instance in the decision of the Court of Appeal of Tanzania in **Sabena Technics Limited vs. Michael J. Luwungu**, Civil Application No. 451/18 of 2020, the Court reiterated its stance holding that to amount to a good cause for the delay, there must be evidence that sickness had a bearing on the delay. Although in the referred decision was about extension of time, likewise in the present application as sickness has been advanced as reason for failure of the applicants' advocate to enter appearance on the date the matter was fixed for hearing, the guiding factors will be same. *Atle*

I have carefully gone through the affidavit by the learned advocate for the applicants, I found difficulties regarding the medical sheet attached thereto in which the learned advocate claims to have attended medical checkup. The space on which ought to have been filled with the name of the doctor has been left blank. Similarly the space in which the doctor was supposed to append his/her signature has been also left blank. Admittedly those omissions pertaining to the medical sheet cast grave doubts as to whether the said advocate truly attended medical checkup.

On the contention that the said advocate was advised to have two or three days rest as stated on paragraph 12 of the affidavit in support of the application, rightly as submitted by the respondent nowhere in the said sick sheet the advocate was advised to have any rest. Hence the ground for illness is hereby rejected.

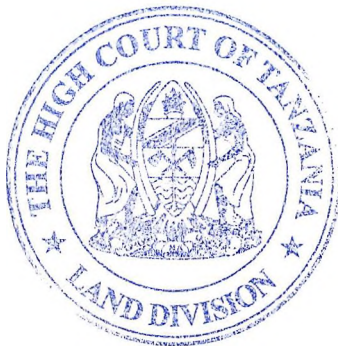
As to the second reason of traffic jam, as contended by the applicants, the Court of Appeal of Tanzania in **Phares Wambura and 15 others versus Tanzania Electric Supply Company Limited** Application No. 186 of 2016 CAT at Dar es salaam (Unreported) held that; *Alles.*

"Traffic jam is not and has not been made a special circumstance justifying non-appearance of parties before the Court".

See also the decision of this Court in the case of **Teresia Marwa Fransis vs. Fransis Mussa Chacha** (Misc. Civil Application 22 of 2021) High Court of Tanzania at Kigoma, in which the Court rejected similar application in which traffic jam was advanced as a reason for failure to enter appearance when the matter was fixed for hearing.

As rightly submitted by the respondent, in the present matter there is no proof that indeed the 1st applicant was caught up on traffic jam and it has not been established the mode of transport the 1st applicant used on the material date. Consequently the second reason is hereby rejected.

In upshot and for the foregoing reasons, the application lacks merits and I hereby dismiss it in its entirety with costs.



A. Msafiri

**A. MSAFIRI,
JUDGE
11/5/2022**