

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC. LAND CASE APPEAL NO.199 OF 2022**

*(Originating from the decision of the High Court of Tanzania Land Division in Land Case No. 61 of 2021 delivered on 15<sup>th</sup> December, 2021)*

**DOMINIC KITEGO KIFIGO**

(As Administrator of the Late **Simon Joseph**) ..... **APPLICANT**

**VERSUS**

**SADICK MSANGI** ..... **1<sup>ST</sup> RESPONDENT**

**HAJI SAID MBARAKA** ..... **2<sup>ND</sup> RESPONDENT**

**RULING**

Date of last Order: 26.05.2022

Date of Ruling: 16.06.2022

**A.Z. MGEYEKWA, J**

This is an application to restore Land Case No. 61 of 2021 which was delivered on 15<sup>th</sup> December, .2021. The Application was made under Order VIII Rule 30 (1) of the Civil Procedure Code Cap 33 [R.E. 2021] (sic), Order IX Rule 3 of the Civil Procedure Code Cap 33 [R.E. 2019], Section 95 of the Civil Procedure Code Cap 33 R.E. 2021 (sic) and any other enabling provision of the law.

The material background facts to the dispute are briefly as follows; the applicant had instituted Land Case No. 61 of 2021 before this court. The matter was scheduled for hearing and the court issued several adjournments on 15<sup>th</sup> December, 2021 the case was dismissed for want of prosecution. Dissatisfied, the applicant lodged the instant for an extension of time to file an application for restoration of Land Case No. 61 of 2021.

When the parties appeared before this court on 20<sup>th</sup> April, 2022, Mr. Peter Shapa, learned counsel appeared for the applicant and the respondent did not show appearance. After physical service of the process was impossible, it was ordered by the court that service be effected by substituted service by way of publication which was served through Mwananchi Newspaper dated 3<sup>rd</sup> June, 2022 yet still, the respondent did not appear and defend the application, consequently, the application was argued *ex parte*. The applicant was represented by Mr. Peter Philemon Shapa, learned Advocate.

In support of the application, Mr. Shapa urged this court to adopt the applicant's affidavit and form part of his submission. The applicant's counsel submitted that the applicant had instituted a Land Case No. 61 of 2021 but that the same was dismissed before this court on 15<sup>th</sup> December, 2021, for want of prosecution in the applicant's absence for some time.

Mr. Shapa went on to submit that the applicant's absence resulted from the applicant's sickness which that the applicant was suffering from Cancer where he underwent a serious postage operation on a prostate organ to the level of not being able to sit on the public transport. To bolster his argument Mr. Shapa referred this court to a hospital medical report.

He further submitted that the applicant hired an Advocate to represent him on the said case but that when the matter was called for mediation on 14<sup>th</sup> December, 2021 the applicant was sick and could not attend the mediation Before Hon. Mkapa, J. Mr. Chapa prayed for this court to grant the application and allow the applicant an opportunity to be heard on merit as per Article 13 of the Constitution of the United Republic of Tanzania of 1977. Supporting his submission, Mr. Chapa cited the case of **Sandro Mahangaji vs Abdul Aziz Lalani Amin Rajib and M. Ramji**, Misc. Commercial No. 6 of 2016 High Court Mwanza. He insisted that sickness is a sufficient good ground to set aside the dismissal order.

Having carefully considered the submissions made by the learned counsels in their oral submission and examined the affidavit and counter-affidavit, the issue for our determination is ***whether the application is meritorious.***

The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion

is judicial and so it must be exercised according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in a number of its decision, in the cases of **Regional Manager, TANROADS Kagera v Ruaha Concrete Company Ltd**, Civil Application No.96 of 2007, **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported). To mention a few.

I have keenly followed the application and the grounds deposed in the supporting applicant's affidavit and the respondent's counter-affidavit, I have shown the path navigated by the applicant and the backing he has encountered in trying to reverse the decision of this court. In his submission, the applicant's Advocate relied on the grounds of technical delay and sickness. Reading paragraphs 14 and 15 of the applicant's affidavit that on 13<sup>th</sup> December, 2021, the applicant made an application

for restoration of Land Case No. 61 of 2021 but the application was struck out and after court vacation and thereafter he fall sick. As amply submitted by Mr. Shapa, he has convinced this Court to find that the applicant's delay also falls under technical delay which is explicable and excusable as stated in the case of **Fortunatus Msha v William Shija and Another** [1997] TLR 154.

With respect to the ground of sickness, the applicant in paragraphs 5, 6, and 7 of his affidavit the applicant narrated how he fall sick stated that he fell sick, and in paragraphs 12, 13, 14, 16, and 17 the applicant stated that on 16<sup>th</sup> December, 2021, he realized that his application was dismissed. Thus he made some follow-ups and he engaged an Advocate who lodged an application for restoration on 31<sup>st</sup> December, 2021, however, the same was struck out by this court on 27<sup>th</sup> April, 2022 hence this application was lodged before this court on 29<sup>th</sup> April, 2022.

In my view the applicant has proved that he was sick for a long time, hence he did not manage to lodge his application for restoration within time. In the case of **John David Kashekya v The Attorney General**, Civil Application No. 107 of 2012 (unreported). The Court of Appeal of Tanzania held that: -

*"Sickness is a condition which is experienced by a person who is sick. It is not a shared experience. Except for children which are yet*

*in a position to express their feelings, it is the sick person who can express his/her conditions whether he/she has the strength to move, work and do whatever kind of work he or is required to do."*

Guided by the above authorities, it is clear that sickness is reasonable ground for a person who has failed to do a certain action at the required time. Thus, I want to believe that the appellant was not in good health to attend the matter at the tribunal on the following day due to his sickness.

Having said so, it is my respectful view that the appellant has adduced sufficient reasons for his delay to lodge the application for restoration. Therefore, the applicant's application is granted. The applicant is ordered to file his application for restoration within 30 days from the date of this ruling. No order as to the costs.

Order accordingly.

Dated at Dar es Salaam this date 16<sup>th</sup> June, 2022.



Z.MGEYEKWA

JUDGE

16.07.2022

Ruling delivered on 16<sup>th</sup> June, 2022 in the presence of Mr. Shapa, learned counsel for the applicant.



Z.MGEYEKWA

JUDGE

16.06.2022