

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 536 OF 2021

*(Arising from dismissal order of this Court in Appeal No. 273 of 2020 dated 8th
September 2021)*

RAJABU MYINGA APPLICANT

VERSUS

HARUNA MOLONGELA RESPONDENT

Date of last Order: 26/7/2022

Date of Ruling: 29/7/2022

RULING

A. MSAFIRI, J

On 04/10/2021, the applicant Rajabu Myinga filed this Application under the provisions of Order IX Rule 6(1), Section 76(2) and Section 95 of the Civil Procedure Code, Cap 33 R.E. 2019 (The CPC) praying for orders that this Honourable Court may be pleased to set aside an order of this Court issued in Land Appeal No. 273 of 2020 dated 08/09/2021, in which the said Land Appeal was dismissed for non-appearance. The Application was supported by an affidavit of Frank Massawe, who as per the said affidavit, is the personal assistant of advocate Hashim Mziray of Haki Associates Advocates, the law firm based in Dar es Salaam. The application was strong objected by the respondent who filed his counter affidavit in that respect.

Alle.

The application was argued orally whereby the applicant was represented by Mr. Hashim Mziray, advocate who prayed to adopt the affidavit in support of the application as part of his submissions.

He briefly submitted that, the main challenge which faced them (the advocate and his personal assistant) was that they believed the matter was before Hon. Kalunde, Judge. However, the same was changed and scheduled to the predecessor Judge without communicating the changes to them. That, the Court Registry did not inform them about the changes.

In reply, Mr. Kipeche, advocate for the respondent also prayed to adopt the counter affidavit of the applicant to form part of his reply submission. He submitted that, this Court is empowered to set aside the dismissal order of the suit if the applicant satisfies the Court that there was sufficient cause for his non appearance on the date the matter was called before the Court.

In his opinion, the applicant has shown no any sufficient cause neither from the affidavit nor the oral submission by the advocate of the applicant. Mr. Kipeche argued that, the applicant has not appeared in Court for three consecutive dates, that is on 25/5/2021, 30/7/2021, and 08/9/2021.

He said that, the issue of reassignment of the case from Hon. Kalunde, J. to Hon. Msafiri, J. is not ground for the applicant's non-appearance in Court because the appellant never appeared even before Hon. Kalunde, J. *Adle*

In rejoinder, Mr. Mziray, submitted that, he was representing the applicant at the dismissed appeal even during the trial. He prayed that for the interest of justice, the application be granted without costs.

As correctly put by the advocate for the respondent, the main issue is whether the applicant has demonstrated sufficient grounds for his absence on the date that the matter was called in for hearing.

As per the records, the Land Appeal No. 273 of 2020, subject of this application was dismissed on 08/09/2021 for the reason of non-appearance of the appellant. As per the contents of the affidavit, Mr. Frank Massawe who is introduced as personal assistant of Mr. Mziray stated that on 13/7/2021, he was given absence note by Mr. Hashim Mziray for his absence. That the matter was fixed for hearing on 08/9/2021. That on the said date, Mr. Massawe was assigned to go to the Court by Mr. Mziray for possible short adjournment, as Mr. Mziray has taken his children to school. He said that, there was no notification from the Court of change of a Judge and he thought the matter was before Hon. Kalunde, J.

Having read the contents of the affidavit, it is my observation that the deponent Mr. Massawe is mixing his facts and there is no coherence of his story. I say so because, at paragraph 5 of the affidavit, it is stated that advocate Hashim Mziray, assigned him to go to court and he could come for the hearing of the appeal later. This statement shows that Mr. Mziray was to appear in court for hearing of the appeal on that date. *Aelle.*

At paragraph 6 of the affidavit, the deponent stated that, he was assigned to go to Court for possible short adjournment of the matter on the 08/09/2021 through another advocate and Mr. Mziray has taken his little children to school.

I find this confusing and I agree that it could have been proper for the advocate Mr. Hashim Mziray also to swear affidavit on what actually happened on 08/09/2021.

Even if the Court could have agreed to Mr. Massawe's statements in the affidavit, I find that the handling of the dismissed appeal was surrounded by gross negligence by the applicant/appellant himself and his advocate Mr. Mziray. The dismissed appeal was filed by the appellant himself as per the Court records on 24/12/2020. The appeal was scheduled before Hon. Kalunde, J. and was set for mention before the Court for the first time on 04/1/2021. The parties were absent. Summons were issued and the matter was set for mention on 23/3/2021 before Hon. Deputy Registrar. Both parties were absent with notice. Again on 25/5/2021, the matter was for mention before Hon. Deputy Registrar, and the appellant was absent. The appeal was set for hearing on 13/7/2021 and the appellant was absent with apology. The hearing was adjourned to 08/09/2021, and again on the scheduled hearing date, the appellant was absent.

Alle.

According to the Court records, the appellant has never appeared in person since he filed his Memorandum of Appeal and the appeal was entered in Court's schedule.

Furthermore, there is nowhere in Court records which shows or indicate that the appellant was ever represented by any advocate let alone Mr. Mziray. Hence the averment by Mr. Massawe, the deponent that, he was not aware of the fact that the matter has been reassigned to another Judge, and that, this Court dismissed the appeal before the arrival of Advocate Mziray, cannot hold water. The Court was never been made aware of the fact that the appellant is being represented by Mr. Mziray, even so, Mr. Mziray himself has never appeared before the Court to represent the present applicant in the dismissed appeal.

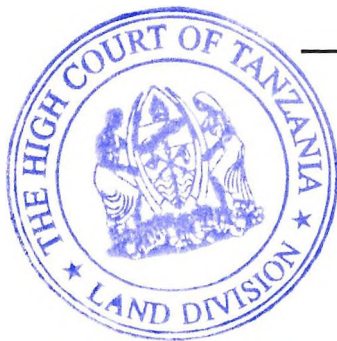
I agree with the counsel for the respondent that the fact that the dismissed appeal changed the hands of Hon. Presiding Judges can never be justification for non-attendance of the matter instituted before the Court. The appellant had an obligation to appear before the Court and attend his case since he was the one who has instituted the same. The Court records shows that he has never appeared even before Hon. Kalunde, J. with his advocate.

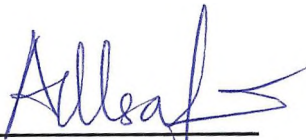
Mr. Mziray's contention that he has represented the applicant at the dismissed land appeal are not backed or supported by any proof since as I have said earlier, the Court records is clear that neither the appellant/applicant, nor Mr. Mziray has ever appeared before the Court since the dismissed appeal was instituted.

On representing the appellant/applicant during the trial, I wish to remind Mr. Mziray that, the trial before the District Tribunal is different altogether with the proceedings in this Court. If he had represented the applicant during the trial, and was assigned to continue with representation before this Court on appeal level, then it was on Mr. Mziray's part to fulfil his obligations by entering the appearance before the Court and attend the matter on behalf of his client.

Since negligence of the advocate has never been an excuse, I hereby find that the applicant has failed to demonstrate any sufficient grounds to move this Court to grant the prayers sought in this application.

The Application is dismissed with costs.




A. MSAFIRI,
JUDGE
29/7/2022