

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 387 OF 2022

(Arising from High Court Land Division in Land Case No. 80 of 2022)

MBAROUK OMAR MOHAMED APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED 1ST RESPONDENT

JOSHUA MWTTUKA t/s FOSTER AUCTION MART ... 2ND RESPONDENT

FABIAN JOHN FIMBO 3RD RESPONDENT

RULING

Date of the last Order: 12.08.2022

Date of Ruling: 18.08.2022

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.80 of 2022. The application is brought under Section 95 of Civil Procedure Code Cap.33

[R.E. 2019]. The application is supported by an affidavit of Julius Lazaro Manjeka, 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. Edmund Aaron Mwasaga, Principal Officer for the 1st respondent, and Mr. Fabian John Fimbo, the 3rd respondent.

When the matter came up for orders on 15th August, 2022, the applicant was represented by Mr. Manjeka, learned counsel. The 1st and 2nd respondents had the noble legal service of Mr. Mnyele, learned counsel, and the 3rd respondent had the legal service of Mr. Malimi, learned counsel.

Mr. Manjeka 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 started to complain that the respondents' counsel in their prayers to dismiss the suit cited section 95 of the Civil Procedure Code Cap.33 which in his view the cited provision of the law was improper. In his view, the proper provision in dismissing a suit is Order IX Rule 5 of the Civil Procedure Code Cap. 33. To buttress his contention he cited the cases of **Shafu Othman Juma v Attorney General & Others** (2000) TLR 49 and **Tanzania Electric Supply Company v IPTL &Others** (2000) TLR 324.

The learned counsel went on to submit that they did not appear in court only on the day when the suit was dismissed. It was his submission on 20th June, 2022 they appeared in court but they did not know where the hearing took place.

Mr. Manjeka went on to submit that they have not lost interest to pursue the case instead they have encountered some problems. He stated that the applicant had a funeral therefore he could not appear in court and the counsel's child and maid fall sick. To support his allegations, the counsel attached medical sheets. It was his submission that sickness is a good ground for extension of time. The counsel for the applicant tried to convince this court that he is the only counsel in the legal firm and thus tried to appear in court within time without success.

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

Mr. Mnyele, counsel for the 1st and 2nd respondents valiantly opposed the application. He submitted that the applicant has not shown sufficient reasons to move this court to restore the suit which was dismissed on 6th July, 2022. He urged for this court to adopt the 1st and 2nd respondents' counter affidavit to form part of his submission. Mr. Mnyele stated that it is

trite law that in setting aside a dismissal order, the applicant must state good reasons. He valiantly contended that the counsel's submission that section 95 of the Civil Procedure Code is not a proper provision in dismissing a suit is not a good ground because he is touching on the merit of this court, the proper remedy was to file an appeal. It was his submission that Order IX Rule 5 of the Civil Procedure Code Cap.33 applies only when the suit is scheduled for hearing and the Plaintiff fails to show appearance, thus, the court applies section 95 of the Civil Procedure Code Cap.33.

The learned counsel for the 1st and 2nd respondents continued to submit that the applicant has demonstrated two reasons that he was attending his sick son and maid but it is the obligation of everyone and the said obligations need to be separated. He went on to submit that the applicant did not swear an affidavit while in paragraph 6 the counsel has mentioned one Shaibu in absence of his affidavit to substantiate the instant application. It was his view that the counsel was required to file Shaibu's affidavit to support his allegations. He contended that in case this court will restore the application then the 1st and 3rd respondents will be prejudiced.

On the strength of the above submission, he urged this court to dismiss the applicant's application with costs.

On his side Mr. Malimi associated himself with the submission made by his fellow counsel. He added that the 3rd respondent is the purchaser of the property sold in execution by the 1st and 2nd respondents and the transfer is ongoing. Mr. Malimi submitted that the suit was dismissed after several non-appearance and adjournments. The learned counsel for the 3rd counsel went on to argue that saying that the applicant has lost his relative is assentation as the applicant has not filed his affidavit to prove his position. He added that the court clerk was also required to file an affidavit to support the counsel's assertions. Mr. Malimi strenuously contended that the grounds of sickness are doubtful if the same were abrupt. Fortifying his submission Mr. Malimi cited the case of **Badugu Ginning Company Ltd v Silwani Galati Mwantembe & 3 Others**, Commercial Case No. 76 of 2007.

Mr. Malimi urged this court to be guided by the court records which show that the applicant did not show appearance and today the counsel is appearing for the first time in court. He insisted that the applicant has not shown good cause to move this court to restore the suit. To buttress his submission he cited the **Sambaru Mining Group Co. Ltd v Wang Seng Lim & 3 Others**, Misc. Civil Application No. 185 of 2021. The learned counsel claimed that the applicant is looking for sympathy and the court has to look at the law, not sympathy. The counsel contended that the applicant's counsel in his application has also cited section 95 of the Civil

Procedure Code while he contended that the said section was improperly used in dismissing the suit.

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

In his rejoinder, the learned counsel for the applicant reiterated his submission in chief. Insisted that the ground of sickness is a good ground to move the court to set aside the dismissal order. He claimed that he had an emergency thus he could not send anyone to court. He distinguished the cited case of **Sambaru** and the case at hand that in the cited case there was a communication breakdown while in the case at hand the counsel had an emergency as two people in his house fall sick. He submitted that the 3rd respondent will be prejudiced and touches on the merit of the case while in the matter at hand the applicant is required to state only good cause. Ending, the counsel for the applicant beckoned upon this court to grant the applicant's application.

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.

The counsel for the applicant contended that section 95 of the Civil Procedure Code Cap. 33 is improper to move this court to dismiss the suit is unfounded as rightly pointed out by Mr. Mnyele this is not a good ground for setting aside the dismissal order considering the fact that the applicant's counsel has also cited section 95 of the Civil Procedure Code Cap.33. in case the counsel had any concern then he was supposed to file an appeal against this court order not raising the same before the same court which issued the said order.

It is evident from the affidavit supporting this application that it was the applicant and applicant's counsel's failure to appear in court when the matter was called on for hearing preliminary objection as a result of their absence the matter was dismissed. The counsel for the applicant in his affidavit stated that this court has dismissed the Land Case No. 80 of 2020 because the Plaintiff's counsel was absent while the court made it clear that the suit was dismissed for non-appearance of the Plaintiff and the learned counsel for the Plaintiff whose name is appearing in the Plaint never showed appearance before this court.

Moreover, the records reveal that, the Plaintiff is the one who appeared in court on 25th May, 2022 while the counsel did not appear at all. The counsel for the applicant on paragraph 5 of his affidavit claimed that the Plaintiff was

attending court session all the time except on 6th July, 2022. However, the reading paragraph 6 of the affidavit, shows clear that the applicant did not show appearance on 20th June, 2022 and on 6th July, 2022. Thus, claiming that the applicant did not shows appearance in court only once is not true the court records shows clearly that the Plaintiff did not appear in court on 20th June, 2022 and 6th July, 2022. That means the counsel for the applicant was not even following his client's case.

Furthermore, on paragraph 5 the applicant's counsel claimed that the Plaintiff could not appear in court because he was bereaved, his brother passed away. As rightly submitted by both counsels for the respondents that the applicant's counsel argument was supposed to be supported by the applicant's affidavit. Unfortunately, the applicant's affidavit was not filed in court. The applicant is the one who was appearing in court, therefore, he was in better position to defend his absence. In that regard, the above learned counsel allegations are not supported by any cogent evidence.

After missing the first appearance, the records shows that the Plaintiff was well informed that the matter was scheduled for hearing. The same is stated by Mr. Julius on his affidavit paragraph 6 that on 20th June, 2022 when the Plaintiff appeared in court premises for mention he was informed by one Shaibu Kanyochole that the matter was scheduled for hearing on 6th July,

2022. That means the Plaintiff was well informed that the matter was scheduled on 20th June, 2022 but he opted not to show appearance or notify the court on his absence.

The record reveal that Mr. Manjeka in his affidavit verified that what is stated under paragraph 6 is on his knowledge while in reality, the paragraph contains information. The law is settled that source of information must be disclosed. However, the source of information in paragraph 6 that the plaintiff appeared in court on 20th June, 2022 was not disclosed. In the case of **Standard Goods Corporation Ltd. v Harakchand Nathu & Co [1950]** EACA 99, the Court held that:-

“ It is well settled that where an affidavit is made on information, it should not be acted unless the source of information is specified.”

Applying the above authority, it is vivid that as long as the applicant did not file his affidavit then the information contained in paragraph 6 is disregarded.

As I have endeavoured to demonstrate hereinabove, it follows that this Application stands only on a very thin leg, the counsel in trying to prove his absence in his affidavit specifically paragraph 3 attached a hospital chic dated 4th July, 2022 while the matter was scheduled for hearing preliminary objection on 6th July, 2022. There is another hospital chic dated 5th July,

2022 and the matter was scheduled for hearing on 6th July, 2022. In my considered view, Mr. Manjeka allegations cannot be a good ground for non-appearance since on 6th July, 2022 his son was not brought to the hospital.

I have weighed the arguments for and against the application as presented to me by both learned counsels. In my findings, I have noted that the applicant's counsel stated only one sufficient cause that his maid was unwell and he has attached a medical certificate dated 6th July, 2022, the date when the matter was scheduled for hearing preliminary objection. I have also considered the fact that sickness is reasonable ground for a person who has failed to do a certain action at the required time. See the case of **John David Kashekya v The Attorney General**, Civil Application No. 107 of 2012 (unreported).

For the above findings and on a balance of probabilities, I have to say that the applicant's counsel has provided only one sufficient cause why he did not enter an appearance when the case was called on for hearing on 6th July, 2022.

In the upshot, Land Case No. 80 of 2022 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 18th August, 2022.



A.Z.MGEYEKWA
JUDGE
18.08.2022

Ruling delivered on 18.08.2022 through video conferencing whereas Mr. Julius Manjika, counsel for the applicant and Mr. Lucas Mwula, counsel for the 1st and 2nd respondents also holding brief for Mr. Malimi, counsel for the 3rd respondent were remotely present.



A.Z.MGEYEKWA
JUDGE
18.08.2022