

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 126 OF 2021

HALDINA SALIM KADAR APPLICANT

VERSUS

MFUKO WA PEMBEJEO TANZANIA (AGITF) 1ST RESPONDENT

ADILI AUCTION MART LIMITED 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

Date of the last Order: 22.08.2022

Date of Ruling: 26.08.2022

A.Z. MGEYEKWA, J

This is an application for setting aside the dismissal order made by this court made on 17th March, 2019 with respect to Misc. Land Application No. 651 of 2021. The application is brought under Order IX Rule 8 and 9 (1) of the Civil Procedure Code Cap 33 [R.E. 2019]. The application is

supported by an affidavit of Haldina Salim Kadar, the applicant, and contested by a counter affidavit of Pauline Mdendemi, learned State Attorney.

When the matter came up for orders on 22nd July, 2022, the applicant appeared in person, unrepresented and the 1st and 3rd respondents had the legal service of Mr. Edwin and Ms. Doreen, learned State Attorney. The applicant urged this court to allow them to argue by way of written submission. This Court acceded to the parties' proposal to have the matter disposed of by way of written submissions. Pursuant thereto, a schedule for filing the submissions was duly conformed to save for the applicant who filed his rejoinder out of time and prayed for this court to admit his rejoinder which was filed out of time. This court granted his prayer.

The applicant submitted that he is seeking leave of this court to grant his prayer of setting aside the Misc. Land Application No. 651 of 2022 due to an unexpected nonappearance of the applicant. He stated that on 19th November, 2021, he filed a Misc. Land Application No. 651 of 2021 praying for a temporary injunction against the respondents restraining them to sale the premises located at Gongolamboto. He added that the said application was dismissed by this court on 17th March, 2022 after the

applicant appeared at the court but unfortunately, and due to his hearing problems failed to hear when his case was called for hearing.

The applicant went on to submit that he appeared in court on 17th March, 2022 at 9:00 a.m, and at 11:50 p.m he decided to find the court clerk for assistance unfortunately, the clerk told him that the matter was called a long time ago. He went on to submit that Order IX Rule 9 (1) of the Civil Procedure Code Cap, 33 [R.E 2019] provides that where a suit is wholly or partly dismissed under Rule 8, the Plaintiff/Applicant shall be precluded from bringing a fresh suit in respect to the same cause of action, but he may apply for an order to set aside the said dismissal order. For that reason, the applicant believes that this court has the power to grant the applicant's prayers and though proceed with the matter until its finality to determine in favour of the applicant's prayer.

On the strength of the above, the applicant beckoned upon this court to set aside its dismissal order and restore the same to proceed with hearing the application on merit.

In reply, the learned State Attorney's confutation was strenuous. Ms. Doreen urged this court to adopt the 1st and 3rd respondents' counter affidavit to form part of her submission.

Before going on the merit of the application, Ms. Doreen addressed the competence of the instant application. She stated that the applicant wants to restore the application for an injunction in Misc. Land Application No. 651 of 2022 dated 17th Marc, 2022. However, in her view pursuant to Order XXXVII Rule 1 of Civil Procedure Code Cap. 33, the application for an injunction can only exist where there is a pending suit.

Ms. Doreen contended that the date when the application intended to be restored was dismissed, and the main suit; Land Case No. 271 of 2021 was also dismissed by this court. She added that the said suit is yet to be restored by the applicant as such if the Honourable Court grants this application and restores Misc. Application No. 651 of 2021, will have no legal legs to stand as the main suit No. 271 of 2021 is not yet restored. It was her submission that this application be dismissed.

Submitting on the application at hand, Ms. Doreen contended that the applicant is seeking to challenge the dismissal order of this Court in Misc. Land Application No. 651 of 2022 dated 17th March, 2021. She added that the said application was dismissed for non-appearance of the applicant and his advocate, thus, this court reached a decision since there was no prior notice from the applicant or his advocate for their non-appearance. It was her submission that in setting aside the dismissal order the court

has to consider whether the applicant has shown sufficient reasons or good cause.

It was her further submission that the applicant in the matter at hand has not submitted sufficient cause to support his application to set aside the dismissal order as stipulated under Order IX Rule 9 of the Civil Procedure Code Cap. 33. To buttress her contention she cited the case of *John Pius Tsoxho v Herman Paulo Awe*, Misc. Application No. 54 of 2019. She referred this court to paragraph 2 of the applicant's affidavit whereby the applicant argued that he entered an appearance in court on the particular date and due to ears challenges he failed to hear when the case was called. She added that it's with no shade of doubt that the applicant is not sick since there is no medical proof to show that the applicant is suffering from ear problems. She added that there is no any proof or affidavit sworn by the clerk.

The learned State Attorney went on to state that time without numbers the Court has held that where an affidavit mentions another person, then that person must also swear an affidavit otherwise the same cannot be acted upon because it is hearsay. Fortifying her position she cited the case **Sabena Technics Dar Limited v Michael J. Luwunzu**, Civil Application No. 451/18 of 2020, the court cited with approval the case of

NBC Ltd v Superdoll Trailer Manufacturing Company Ltd, Civil Application No. 13 of 2002 (both unreported). In the case of **NBC Ltd** (supra), the Court held that:-

" an affidavit which mentions another person is hearsay unless that other person swears as well."

The learned State Attorney did not end there, she contended that the applicant has not attached the affidavit of the clerk mentioned in the affidavit, thus it was her submission that those facts cannot be acted upon by this court.

Ms. Doreen went on to argue that the applicant has alleged that on the date when the matter was dismissed for want of prosecution his advocate had another matter at the High Court at Moshi Registry before Hon. Simfukwe, J, however, the allegations are not supported by any summons or proceedings and she added that this ground is not sufficient reason for non-appearance due to the obvious reason that Hon. Mgeyekwa, J is senior to Hon. Simfukwe, J thus, it was her view that the advocate was required to manage his own diary as expounded by this court in the case of **Elizabeth Paul and Another v Brac Tanzania Finance Limited** Labour Revision No. 60 of 2020.

On the strength of the above submission, the learned State Attorney for the 1st and 3rd respondents beckoned upon this court to dismiss the application with costs.

In his rejoinder, the applicant reiterated his submission in chief. He stressed that he has adduced sufficient reasons to move this court to grant his application. Ending, he urged this court to grant his application.

I have considered the applicant's and the State Attorney'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 when the suit was called for hearing.

Before I respond to the application at hand, I find it apposite to respond to the point of law raised by Ms. Doreen regarding the competence of the application. As rightly pointed out by Ms. Doreen, the competence of the application is questionable because of the nature of the Misc. Land Application No. 651 of 2021 which was dismissed by this court on 17th August, 2022. The said application was related to temporary Injunction. Had it been that Land Case No 271 of 2021 was pending before this court then this court could have been moved to determine the application at

hand. But as long as there is no pending suit before this court then restoring the application for a temporary injunction will be useless.

I now turn to the gist of the Application. The issue which is the bone of contention in this Application is whether the applicant has adduced sufficient reasons to move this court to restore the Misc. Land Application No. 651 of 2021. It is evident from the affidavit supporting this application that the applicant's failure to appear when the matter was called for hearing is because of his absence; that he did not hear when the matter was called for hearing. However, the applicant's allegations are mere words.

I fully subscribe to the submission of Ms. Doreen that the applicant in his affidavit and written submission did not attach any document or medical chic to prove that he had ear challenges. Neither did the applicant file the court clerk affidavit to support his allegation that he was on the court premises on the day when the application was dismissed for want of prosecution. The same position was discussed by the Court of Appeal of Tanzania in the case of **Phares Wambura and 15 others v Tanzania Electric Supply Company Limited**, Civil Application No. 22 of 2016 at page 10 last paragraph, it held that:-

".. a mere fact that applicants and their Advocate were in court premises on the hearing date does not amount to appearance."

Therefore, I have weighed the arguments for and against the application as presented to me by the applicant and the learned State Attorney. I am satisfied that the applicant has not sufficiently explained the reason for his non-appearance in court when his application was dismissed for want of prosecution.

In the upshot, I proceed to dismiss the applicant's application without costs.

Order accordingly.

DATED at Dar Es Salaam this 26th August, 2022.




A.Z.MGEYEKWA

JUDGE

26.08.2022

Ruling delivered on 26th August, 2022 via video conferencing whereas the applicant and Ms. Doreen Mhina, learned State Attorney were remotely present.




A.Z.MGEYEKWA

JUDGE

26.08.2022