

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 803 OF 2022

(Arising from Misc. Land Case No. 177 of 2022)

ANDREW ANTHONY SINDABAHA APPLICANT

VERSUS

AKIBA COMMERCIAL BANK RESPONDENT

RULING

Date of the last Order: 22.03.2023

Date of Ruling: 22.03.2023

A.Z. MGEYEKWA, J

This is an application for setting aside the dismissal order made by this court on 20th November 2022 concerning Land Case No. 177 of 2022. The application is brought under Order IX Rule 3 and Order XLIII Rule 2 of the Civil Procedure Code Cap 33 [R.E. 2019]. The application is supported by an affidavit of Ms. Regina Herman, the applicant's Advocate sworn on 30th November 2022. The respondent's counsel opposed the application

through a counter-affidavit sworn on 14th February 2023 by Mr. David Mwasonga, Head of Litigation for the respondent.

During the hearing of this Application on 22nd March. 2023, the applicant was ably represented by Ms. Regina Herman, learned counsel. The respondent had the noble legal service of Mr. Mahembega Elias, learned counsel.

It was Ms. Regina, learned counsel for the applicant was brief and focused. Having adopted the affidavit supporting the application the learned counsel submitted that they had filed their application regarding the dismissal order of this Court in respect to Land Case No.117 of 2022 dated 29th November 2022. She stated that she has raised the grounds for setting aside the dismissal in paragraph 5 of her affidavit.

Ms. Regina submitted that on the material date, she was present in the court premises, it is, unfortunately, she did not hear her case being called by the court clerk. She disputed the fact stated by the respondent in paragraph 4 of his counter affidavit. To support her submissions, Ms. Regina she cited the case of **Hassan Hamis Nzomari v Edmund Thomas Lusebe**, Misc. Land Application No. 351 of 2019, and **Jamal S. Mkumba & Abdallah Mkumba v AG**, Civil Application No. 240 / 01 of 2019.

On the strength of the above submission, she urged this Court to allow their application and restore Land Case No.177 of 2022.

In rebuttal, Mr. Mahembega urged this Court to adopt the counter affidavit sworn by David Wasonga filed on 15th February 2023 to form part of his submission. He came out forcefully and argued that the court records reveal that the applicant's counsel did not tell the truth because on 28th September 2022, she did not appear. He contended that the applicant's affidavit contains false information thus, he urged this Court to disregard it. Fortifying his submission, he cited the case of **Ignazio Messina v Willo Investment SPRL**, Civil Application No. 21 of 2001.

The learned counsel for the respondent went on to argue that the applicant did prove that she was on the court premises of the court. To support his submission he referred this Court to paragraph 5 of the applicant's affidavit. The learned counsel for the respondent contended that the applicant's counsel in her affidavit stated that she communicated with the court clerk but she did not attach any supporting affidavit of the said court clerk affidavit. To bolster his submission he cited the case of **Sabena Technic Dar Ltd v Mitchell J. Luhunzu**, Civil Application No. 451/1 of 2020 the Court of Appeal of Tanzania at page 11 referred to the case of **NBC Ltd v Superdoll Trailer Manufacturing Company Ltd**, , Civil Appeal No 13 of 2002.

He valiantly argued that as long as the applicant's counsel has not attached any document to prove that she was present in court premises then this Court should disregard her application. He insisted that the law required the applicant in an application of this nature to adduce sufficient cause. He contended that the mere fact that the applicant and his counsel were in court premises does not amount to appearance. To fortify his submission he referred this Court to the case of **Haldina Saliu Madali v Mfuko wa Pembojeo Tanzania AGITF & 2 others**, Misc. Land Application No. 126 of 2021, whereas this Court referred to the case of **Phares Wambura & 15 others v Tanzania Electric Supply Company Limited**, Civil Application No. 22 of 2016.

On the strength of the above submission, the learned counsel for the respondent beckoned upon this Court to dismiss the application with costs.

In a short rejoinder, Ms. Regina reiterated her submission in chief. She insisted that on the material date, she was in the court premises and tried to appear before the Hon. Judge but their efforts were fruitless. She stressed that they have adduced sufficient reasons to move this Court to grant their application.

I have weighed the arguments for and against the application as presented to me by both learned counsels. I think the applicant's counsel

has sufficiently explained the reason for not appearing in court when their case was dismissed for want of prosecution. I have reached that conclusion having considered; among other things; the conduct before the dismissal order. In **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER372 it was stated that the applicant's conduct before the alleged non-appearance should be taken into consideration in an application of this nature. I have also considered the fact that after the dismissal order which was issued on 20th November 2023, the applicant's counsel promptly lodged the instant application on 30th November 2023. In the case of **Hassan Hamis Nzomari** (supra) Hon. Maige, J (as he then was) held that:-

“ The dismissal order was on 18th June 2019. This application was filed on 25th June 2019. It is just within 6 days from the date of dismissal. This exhibit how prompt the applicant was in addressing the anomaly upon discovery...”

The above authority applies squarely in the application at hand. Ms. Regina and his client who was present in Court today have shown their interest to pursue their case. I have also considered the fact that it is in the interest of justice and the practice of this court that, unless there are special reasons to the contrary, applications are determined on merits as it was held in the case of **Fredrick Sclenga & another v Agnes Masele**

[1983] TLR 99 and **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this application the same was held in the case **Jesse Kimani v McCornel and another** [1966] EA 547. Given the above, on a balance of probabilities, I think the applicant had provided sufficient cause for why counsel did not enter an appearance when the case was called on for hearing. I consider his excuse genuine. Had it been that the applicant's counsel was negligent, then the cited case of **Jamal S. Mkumba** (supra) cited by Mr. Mahembega Elias could be a fit authority to move this Court to dismiss the application. But that is not the case.

In the upshot, Land Case No. 177 of 2022 be 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 22nd day of March 2023.



A.Z.MGEYEKWA
JUDGE
22.03.2023

Ruling delivered in the chamber this 22nd day of March 2023 in the presence of Ms. Regina Herman assisted by Ms. Deodia Jonas, learned counsels for the applicant, and Mr. Mahembega Elias, counsel for the respondent.




A.Z.MGEYEKWA
JUDGE
22.03.2023