

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS LAND CASE APPLICATION NO. 501 OF 2022

(Arising from Consolidated Land Cases Nos. 15 of 2021 and 233 of 2021)

**GENOVEVA KILIBA T/A DAGE SCHOOL OF
HAIR DRESSING AND DECORATION APPLICANT
VERSUS
ABDULLAH RASHID ABDULLAH RESPONDENT**

Date of Last Order: 15/03/2023

Date of Ruling: 25/04/2023

RULING

I. ARUFANI, J

The applicant filed in this court the instant application under Order IX Rule 9, Sections 68 (2) (e) and 95 of the Civil Procedure Code Cap 33 R.E 2019 (hereinafter referred in short as the CPC) beseeching the court to grant the Orders for: -

- a) Setting aside an Ex parte Judgment and decree dated 5th day of August, 2022 issued in Consolidated Land Cases Nos. 15 of 2021 and 233 of 2021;*
- b) Costs of the application to be in the due cause*
- c) Any other order/relief the court may deem fit and just to grant.*

The application is supported by an affidavit sworn by Mr. Alex Mashamba Balomi, advocate for the applicant and opposed by the counter

affidavit sworn by Ms. Mary Brown Francis, advocate for the respondent. By consent of the counsel for the parties the application was argued by way of written submissions.

The counsel for the applicant stated in his submission that, the application is made under the provisions of Order VIII Rule 20 (2), Order XI Rule 6 (1), Sections 68 (2) (e) and 95 of the CPC. He went on arguing that, prior to 18th July, 2022 when the Consolidated Land Cases Nos. 15 of 2021 and 233 of 2021 were fixed to be heard ex parte, on 22nd June, 2022 Hon. Dr. Nangela, J had fixed Commercial Case No. 23 of 2022 whereby the parties were **Mohamed Said Kiluwa** suing in the name of **Kiluwa Steel Group Company Limited V. Wang Shengju & Another** to come for hearing on the same date from 10:00 A.M.

He argued that, scheduling of the mentioned Consolidated Land Cases for hearing at 12:00 noon was done on anticipation that the prior fixed matter would have been ended before 12:00 noon after commencing at 10:00 A.M but it became impossible as the case before the Commercial court continued until 08:30 P.M. He argued that, after seeing the stated unpredicted situation, their Legal Officer one Paul Nsumbula undertook to write a letter to this court to notifying it about his failure to appear in the court on the scheduled date and sought for an adjournment of the matter until the first week of August, 2022.

He argued that, the stated letter notified the court about the absence of the applicant who together with her husband had urgently travelled to Arusha to attend a burial ceremony of their nearest relatives and to attend the applicant's husband mother who is of the oldest age. He submitted the stated circumstances caused the applicant to fail to appear in person in the court to seek for adjournment of the matter or give her testimony on the fixed date. He went on arguing that, he received the information of the absence of the applicant in a late manner and there was no alternative witness could be procured to give evidence as all the original documents to be relied upon on prosecution of their case were being kept by the applicant.

He argued that, the stated letter was lodged in the court on 18th July, 2022 when the matter was heard ex parte and its copy was supplied to the counsel for the respondent but he rejected the same and moved the court to proceed with hearing of the matter ex parte on the same date. He stated that, after finishing the commercial session at 08:30 PM he made an inquiry on the position of the matter and he was told by his legal officer that the hearing of the case had proceeded ex parte hence they were required to wait for delivery of an ex parte judgment on 5th August, 2022.

He submitted that, the counsel for the applicant waited for the applicant's arrival and further instruction from the applicant and after getting the instruction from the applicant he filed the present application in the court. He submitted further that their non-appearance in the court on the mentioned date was not deliberate but due to the afore stated reasons which amount to sufficient cause prevented their appearance in the matter. He argued that, if the ex parte order is not set aside the applicant will be condemned unheard and stated the applicant has a prima facie case to be entertained in the suit if is heard inter parte on merit. He prayed the application be granted with costs.

In her reply the counsel for the respondent prayed to adopt her counter affidavit to be part of her submission. She went on arguing that, she will not dwell or spend much time of the court on replying the claim of the applicant in Land Case No. 233 of 2021 because the application before the court is for setting aside the Land Case No. 15 of 2021 on the part of the respondent's counter claim and not restoration of the applicant's Land Case No. 233 of 2021 which was dismissed for want of prosecution.

She argued that, the application at hand was made under Order IX Rule 9 and Sections 68 (2) (e) and 95 of the CPC and the applicant is seeking for an order of setting aside the ex parte judgment and decree

dated 5th August, 2022 passed in the counterclaim filed by the respondent in Land case No. 15 of 2021. She stated that, the submission by the counsel for the applicant in support of the application for setting aside the ex parte judgement and decree shows the counsel for the applicant has cited in his submission the provisions of the law which are totally different from the provisions cited in the application filed in the court by the applicant.

She stated that the counsel for the applicant has introduced in his submission new provisions of Order VIII Rule 20 (2) and Order IX Rule 6 (1) of the CPC which were not pleaded in the chamber summons. She argued that, the cited provisions of the law are basically for setting aside dismissal order while the application before the court is not seeking for setting aside dismissal order but setting aside ex parte judgment and its decree.

She continued to submit that, the application before the court is devoid of merit because the counsel for the applicant has not advanced sufficient cause or reasons for himself and his client's failure to appear in the court on the date when the matter was scheduled to come for hearing on 18th July, 2022. She argued that, initially the matter was scheduled to come for hearing on consecutive dates on 15th and 18th July, 2022 and

the court ordered the parties to come with their witnesses as the case was on BRN session.

She stated that, on 15th July, 2022 the respondent and his counsel appeared in the court but the applicant and her counsel failed to appear in the court and no notice of justifiable reasons was given to the court to show why they failed to appear in the court on the mentioned date. She argued that, the court gave the applicant and her counsel benefit of doubt and adjourned the matter and fixed the same to come for hearing on 18th July, 2022. She submitted that, despite the effort made by the court clerk to inform the counsel for the applicant to appear in the court on 18th July, 2022 and said he would have appeared in the court but as usual the applicant and her counsel were absent in the court and without notice. She argued that the stated situation caused the counsel for the respondent to pray the applicant's Land Case No. 233 of 2021 be dismissed and the court be pleased to proceed ex parte to hear the counter claim raised by the respondent in the Land Case No. 15 of 2021 and the prayer was granted.

The counsel for the respondent argued that, the assertion by the counsel for the applicant that he was appearing at the High Court Commercial Division before Hon. Dr. Nangela, J in the case of **Mohamed Said Kiluwa** (supra) is an afterthought and the applicant cannot seek

refugee that he was appearing before the mentioned court. He stated they were expecting the counsel for the applicant could have attached a cause list or summons or even proceedings of the mentioned case in his affidavit to show on the date and time when the matter is seeking its ex parte judgment and decree to be set aside was coming for hearing he was truly appearing before the mentioned court. She stated that, to the contrary there is no such proof was attached in his affidavit and the court cannot act on mere words.

She submitted that, section 110 of the Evidence Act is very clear that onus of prove lies upon the applicant and not otherwise. She submitted further that, under the seniority of judges the judge presided over the matter is seeking its ex parte judgement and decree to be set aside is senior to the judge is mentioned he was presiding over the matter which is alleged was coming for hearing at the High Court Commercial Division. She submitted under that circumstances the counsel for the applicant was required to give notice to the judge of the High Court Commercial Division that he had another case before this court so that he can come to this court but he didn't do so.

She went on arguing that, the counsel for the applicant argued at paragraph 20 of his affidavit that on his letter of seeking adjournment of the matter was brought to the court when the respondent was adducing

his evidence and was written on 18th July, 2022. She argued that, it was stated in the said letter that the applicant was away to Arusha and stated at paragraph 21 of his affidavit that, even if he could have appeared in the court on the mentioned date the matter could have not proceeded for want of original documents which were in the custody of the applicant.

She submitted that they were expecting the counsel for the applicant to attach into his affidavit travelling ticket or applicant's affidavit to back up his story that the applicant travelled to Arusha but none of them was attached. She submits that create more doubts in relation to the assurance and truthiness of the facts. She referred the court to the case of **Elizabeth Paul & Another V. Brac Tanzania Finance Limited**, Labour Revision No. 60 of 2020, HC at Mwanza (unreported) where the court refused to set aside an ex parte judgment after finding the counsel for the applicant had not adduced any proof to support his reason for being absent in the court when the matter was coming for hearing.

The counsel for the respondent referred the court to the **Mulla: Code of Civil Procedure**, 16th Edition, Vol. 2, page 2071 where it was stated the court shall not set aside a decree passed ex parte on ground of irregularity in the service of summons if the court is satisfied the defendant had notice of the date of hearing and sufficient time to appear in the court and answer the claim of the plaintiff but failed to appear in

the court. She submitted that, the applicant was aware of the date of hearing of the matter and her husband one Payas Moremi was present in court when the ex parte judgment was delivered. At the end she prayed the application of the applicant be dismissed with costs for want of merit.

In his rejoinder the counsel for the applicant stated the counsel for the respondent has admitted the provisions to move the court to set aside the ex parte judgment and decree cited in the chamber summons are correct. He submitted that, citing of Order VIII Rule 20 (2) and Order IX Rule 6 (1) of the CPC in his submission is a slip as the application before the court is not for setting aside the dismissal order. He argued that, in order to dispense justice, the court is not required to address anything on a slip or erred provisions but the subject matter by restricting to the hearing of the dispute of the parties and determine the same on merit as that is the purpose of justice.

He referred the court to the case of **Erasto Kamala Mwambusi V. Jubilee Insurance Company Tanzania Limited and Another**, Civil Appeal No. 13 of 2020, HC at Mbeya and **Yusuph Nyabunya Nyatururya V. MEGA Speed Liner Ltd**, Civil Appeal No. 85 of 2019, CAT at Zanzibar (both unreported) where it was stated the essence of the principle of overriding objective is not to twist the intention of justice but to serve the end of justice. He submitted that, in order to meet the end

of justice, this is the opportune moment for the court to invoke the principle of overriding objective in the matter. He prayed the court to base on the cited authorities to set aside the ex parte judgment and decree.

He submitted that, the case of **Elizabeth Paul** (supra) and commentary by **Mulla** (supra) cited in the submission of the counsel for the respondent are distinguishable and are irrelevant to the present application. He stated that, according to the conflict which is in existence between the parties it is a denial if not repudiation of the respondent against the rule of natural justice to condemn the applicant unheard. He submitted that, his non-appearance in the court on the date when the matter was heard ex parte was not caused by sheer ignorance or fault on his part but was caused by the circumstances beyond his control.

He prayed the court to consider the principle of overriding objective provided under section 3A and 3B of the CPC to set aside the ex parte judgment and decree and proceed to hear the matter on merit. He submitted the applicant has sufficient cause for the application to be granted. He submitted further that, the applicant has disclosed facts in dispute against the respondent in the matter and prayed the court to grant the application and proceed to fix a date for hearing of the matter inter partes on merit and the costs to be in the due course.

Having carefully considered the rival submissions from the counsel for the parties the court has found pertinent to start with the observation made by the counsel for the respondent that the counsel for the applicant has cited in his submission the provisions of the law which were not cited in the application filed in the court by the applicant. The court has found as stated at the outset of this ruling the application was made under Order IX Rule 9, sections 68 (2) (e) and 95 of the CPC.

However, as rightly argued by the counsel for the respondent the counsel for the applicant cited in his submission Order VIII Rule 20 (2) and Order IX Rule 6 (1) of the CPC which were not cited in the application. The court has found the counsel for the applicant has not disputed the stated observation but he has stated in his rejoinder that is just a slip and as the applicant is not seeking for an order of setting aside the order of dismissing the suit but an order of setting aside the ex parte judgment, the stated slip or error should not be addressed by the court.

The court has been of the view that, although it is true that the court is required to base its decision on the provisions of the law cited in the chamber summons and not the provisions of the law cited in the submission in support of the application but for the purpose of putting the record of the matter proper it is proper to have a look on what is the effect

of citing the stated provisions of the law in the submission supporting the application.

First of all, the court has found as rightly argued by the counsel for the respondent the stated provisions of Order VIII Rule 20 (2) and Order IX Rule 6 (1) of the same law are not applicable in the matter at hand at all. That is because Order VIII Rule 20 (2) of the CPC provides for setting aside an order made by the court during pre-trial conference and not setting aside an ex parte judgment and decree.

As for Order IX Rule 6 (1) of the CPC the court has found the same provides for setting aside an order of dismissing a suit made by the court after the plaintiff failed to appear in the court and is not providing for setting aside an ex parte judgment which the applicant is seeking in the matter at hand. The court has also found that, even section 68 (2) (e) of the CPC cited in the chamber summons and submission of the counsel for the applicant is not in existence in the CPC. The provision available in the CPC is section 68 which has sub-paragraphs (a) to (e) and it has no any subsection.

The court has also found that, even if it would be said the applicant intended to cite section 68 (e) of the CPC but the stated provision of the law together with section 95 of the CPC cited in the application were superfluously cited in the application of the applicant as they cannot be

relied upon to move the court to entertain the application at hand. The stated finding is getting support from the case of **TANESCO V. IPTL and Two Others** [2000] TLR 324 where it was stated that, section 68 of the CPC does no more than to summarize the general powers of courts in regards to interlocutory proceedings, the details of which are contained in the first schedule of the CPC. It was also stated in the same case in relation to the applicability of section 95 of the CPC that, the same is intended to supplement the other provisions of the CPC and not to ignore them or to invest a new procedure according to individual sentiment.

Without prejudice to what I have stated hereinabove the court has found that, as the applicant is seeking for an order of setting aside the ex parte judgment and decree and the relevant provision of the law for seeking to set aside ex parte judgment and decree which is Order IX Rule 9 of the CPC is cited in the chamber summons, the court has found it is not barred to continue to determine the application on merit. In the premises the court will proceed to determine the application on merit notwithstanding the fact that there are some superfluous and inapplicable provisions of the law cited in the chamber summons and in the submission of the counsel for the applicant.

The court has found as the applicant is seeking for an order of setting aside the ex parte judgment and decree passed by the court on 5th August,

2022 in the counter claim raised by the respondent in the Land Case No. 15 of 2021 it is required to be satisfied the applicant and her advocate were prevented by sufficient cause from appearing in the court on the date when the matter was set to come for hearing. The court has come to the stated view after seeing that, as provided under Order IX Rule 9 of the CPC upon which the application is made that is what is required from the applicant.

The expression "sufficient cause" used under Order IX Rule 9 of the CPC is not defined in the mentioned law or any other law in our jurisdiction. The court has found the same position is in other jurisdiction like India where Justice C. K Takwani wrote in his book titled **Civil Procedure with Limitation Act, 1963**, 7th Edition, at page 281 that, it was stated in the case of **UCO Bank V. Iyengar Consultancy Services (P) Ltd**, 1994 Supp (2) SCC 399 that, the expression "sufficient cause" has not been defined anywhere in the Code. It is a question to be determined in the facts and circumstances of each case.

It was further stated in the same book that, the word "sufficient cause" must be liberally construed to enable the court to exercise powers *ex debito justitiae*. The position of the law stated in the above referred book is almost similar to the position of the law stated by the Court of

Appeal of Tanzania in the case of **Yusuph Same & Another V. Hadija**

Yusuph, Civil Application No. 1 of 2001 where it was stated that: -

"It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or cases which are outside the applicant's power to control or influence resulting in delay in taking any necessary step"

Although the above cited case was dealing with application for extension of time but the court has found it can borrow a leaf from the interpretation given therein and applied the same in the matter at hand where the applicant is seeking for an order of setting aside the ex parte judgment. While being guided by the stated position of the law the court has found that, the reason stated to have caused the counsel for the applicant to fail to appear in the court on 18th July, 2022 when the case is seeking its ex parte judgment and decree to be set aside was set for hearing as deposed in the affidavit supporting the application is that he was appearing in the High Court Commercial Division at Dar es Salaam in another case which was set to come for hearing on the same date.

The court has found the record of the matter is very clear that, before the matter being ordered to proceed ex parte on 18th July, 2022 it had been scheduled to come for hearing on 11th July, 2022. The court failed to proceed with hearing of the matter on the mentioned date because the

court was notified the applicant had travelled to Arusha to attend her sick mother. Although the matter was adjourned and fixed to come for hearing under BRN session on 15th July, 2022 in the presence of the counsel for the applicant but neither the applicant nor the counsel for the applicant appeared in the court on the mentioned date.

Sequel to that, there is no notice of absence or reason given to the court as to what prevented the applicant and her counsel to appear in the court on the mentioned date. As rightly argued by the counsel for the respondent, although on 15th July, 2022 the counsel for the respondent prayed hearing of the matter to proceed ex parte against the applicant but the court gave the applicant and her counsel benefit of doubt and adjourned the matter and fixed the same to come for hearing on 18th July, 2022 the date which the counsel for the applicant was dully notified by the court clerk.

After the applicant and her counsel failed to appear in the court for the second time on the mentioned date, the court failed to see any justifiable reason making it to refuse the prayer of the counsel for the respondent that the matter be allowed to proceed with hearing of the respondent's counter claims ex parte. The court has found the counsel for the applicant stated the reason for his failure to appear in the court on 18th July, 2022 when the matter was coming for hearing, he went to

attend another case which was coming for hearing at the High Court Commercial Division at Dar es Salaam which its hearing continued beyond the time which had been set for hearing the matter of this court.

The court has found that, as rightly argued by the counsel for the respondent, it is not only that the case before this court was coming for hearing under BRN session and it was supposed to be given priority than the one which was coming for normal hearing before the High Commercial Division but there is nothing material adduced in the court to prove the counsel for the applicant was appearing in the mentioned court on the date and time when the matter the applicant is praying its ex parte judgment and decree be set aside was coming for hearing. The requirement for the counsel for the applicant to prove he was appearing in the mentioned court as provided under section 110 of the Evidence Act was his duty and as rightly argued by the counsel for the respondent the counsel for the applicant not been discharged the same in the matter at hand.

The court has come to the stated finding after seeing that, as rightly argued by the counsel for the respondent there is no cause list, summons or copy of proceedings annexed in the affidavit of the counsel for the applicant to show he was appearing in the mentioned court on the date and time when the matter is seeking its ex parte judgment and decree to

be set aside was coming for hearing. The court has found as stated in the case of **Elizabeth Paul & Another** (supra) the counsel for the applicant was required to support his reason of failure to appear in the court with relevant documents like the one mentioned hereinabove. Lack of evidence to establish the counsel for the applicant was appearing in another court on the date and time when the matter was fixed for hearing before this court amount to nothing else than a sheer negligence.

The court has also found that, although the counsel for the applicant argued in his submission that the applicant failed to appear in the court when the matter was coming for hearing as she had rushed to Arusha with her husband to attend a burial ceremony of their near relative and attend the mother of her husband who is of the oldest age but again as rightly argued by the counsel for the respondent there is nothing material like a traveling ticket or even an affidavit from the applicant or any other person filed in the court to support what is deposed in the affidavit supporting the application.

The court has considered the argument by the counsel for the applicant that after seeing the case he was attending at the High Court Commercial Division has continued until 08:30 PM and the case of this court was coming for hearing at 12:00 noon, his legal officer brought a letter to the court seeking for adjournment of the matter but it was not

received by the counsel for the respondent and the counsel for the respondent prayed the matter to proceed ex parte against the applicant.

The court has found there is no evidence like an affidavit from the stated legal officer of the counsel for the applicant filed in the court to prove the alleged letter was brought to the court before the case being heard ex parte against the applicant and the counsel for the respondent refused to receive the same. As there is no such evidence filed in the court, the court has found as rightly argued by the counsel for the respondent that is an afterthought and the court cannot rely on the alleged letter to find the court was properly notified the applicant and her counsel were prevented by sufficient cause to appear in the court on the date when the matter was fixed to come for hearing on 18th July, 2022.

The court has considered another argument by the counsel for the applicant that, the applicant has a prima facie case to be entertained by the court and if the application will not be granted the applicant will be condemned unheard but find it cannot rely on the stated argument to set aside the ex parte judgment entered by this court. The court has come to the stated finding after seeing the counsel for the applicant has not stated which prima facie case the applicant has in relation to the respondent's counter claim to move the court to find there is a justifiable reason to set aside the ex parte judgment entered by the court against the applicant.

To the contrary the court has found it cannot set aside the ex parte judgment entered by the court against the applicant basing on the stated argument because the applicant and her counsel were required to appear in the court to defend whatever rights the applicant had in the matter but they failed to appear in the court without sufficient cause as demonstrated hereinabove. To set aside the ex parte judgment entered by the court after the applicant and her counsel failed to appear in the court without notice to the court and the respondent is to the view of this court to punish the respondent who has been appearing in the court all the dates the matter was scheduled to come for hearing without missing any date.

The court has found the counsel for the applicant prays the court to use the principle of overriding objective provided under sections 3A and 3B of the CPC to grant the application but find that, the Court of Appeal of Tanzania stated clearly in the case of **Mandorosi Village V. Tanzania Breweries Limited and others** Civil Application No. 66 of 2017, CAT at Arusha (unreported) that, the principle of overriding objective cannot be applied blindly against the mandatory procedural law which go to the very foundation of the case. To the view of this court failure to appear in the court without sufficient cause when the matter is coming for hearing is clear violation of mandatory procedural law requiring parties to appear in

their case without fail. Therefore, its violation cannot be remedied by invoking the principle of overriding objective.

In the strength of all what I have stated hereinabove the court has found the applicant and her counsel have not managed to satisfy it that they were prevented by sufficient cause to appear in the court on the date when the matter was ordered to proceed ex parte against the applicant. Consequently, the application of the applicant is hereby not granted and it is dismissed in its entirety for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 25th day of April, 2023



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

25/04/2023

Court:

Ruling delivered today 25th day of April, 2023 in the presence of Mr. Hussein Hitu, learned advocate for the applicant and in the presence of Ms. Mary Brown, learned advocate for the respondent. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

25/04/2023