

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

MISC. LAND APPLICATION No. 19 OF 2023
(Originating Misc. Land Application No. 453 of 2022)

SOPHIA MATTAYO SIMBA.....APPLICANT

VERSUS

EQUITY BANK (T) LTD.....1ST RESPONDENT

TEGRA TRADING CO.LTD.....2ND RESPONDENT

COPS AUCTION MART AND

COURT BROKERS LTD.....3RD RESPONDENT

R U L I N G

Date of last Order:03/04/2023

Date of Ruling: 12/05/2023

K. D. MHINA, J.

By a chamber summons taken under Order IX Rule 3 and Section 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), the applicant, **Sophia Mattayo Simba**, instituted this application against the respondents, **Equity Bank (T) Ltd, Tegra Trading Co. Ltd and Cops Auction Mart and Court Brokers Ltd.**

The applicant, *inter-alia*, is seeking the following orders: -

- i. That this Court may be pleased to set aside the dismissal issued on 13 December 2022 and restore Misc. Land Application No. 453 of 2022 for hearing and determination on its merits.*

- ii. Costs of this application be provided for*
- iii. Any other order or incidental relief as it deems fit and just.*

The grounds for the application were expounded in the joint affidavit, which Mr. Ali Jamal and Ms. Christabella Madembwe, the counsel for the applicant, affirmed and swore in support of the application.

In response to the application, the 1st and 2nd respondents filed their respective counter-affidavits. The 3rd respondent, despite being duly served he did neither file the counter affidavit nor appeared before the court on the date fixed for the hearing.

A brief background of the matter is very essential. It started in 2021 as Land Case No. 79 of 2021, where the applicant was the plaintiff and the respondents were the defendants. That Land Case was dismissed for non-appearance. After that dismissal and when the applicant found herself to be out of time to seek setting aside the dismissal order and the restoration, she filed Misc. Land Application No. 453 of 2022 seeking for extension of time to file an application for restoration of Land Case No. 79 of 2021.

Again, that application was dismissed on 13 December 2022 for want of prosecution after the applicant failed to appear on the date fixed for the hearing.

Relentless, the applicant approached again this court, seeking to set aside that dismissal issued on 13 December 2022 and restore Misc. Land Application No. 453 of 2022 for hearing and determination on its merits based on two grounds; **one**, that it was a human error after they did not hear when the case was called and **two**; the applicant in person had traveled to South Africa to attend family matters.

At the hearing, the applicant was represented by Ally Jamal Advocate. On the other hand, Mr. Geoffrey Mapunda, Advocate appeared for the 1st respondent while on behalf of the 2nd respondent, Mr. Andrew Maziku, the Principal Officer, appeared.

In his submission to support the application, Mr. Jamal stated that on 13/12/2023 at about 08:50 hours, the applicants' counsel were at the court premises waiting for the application to be called. They were in the waiting room together with the Director of the 2nd respondent, Mr. Maziku.

Around 10:10 hours, he phoned Mr. Mapunda Advocate for the 1st respondent, to request him to hold his brief in case the application would be called and he left to attend to a family emergency. Around 11:00 hours

when they made a follow-up, he met with the Court Clerk, who informed them that the case was already called and it was dismissed.

He concluded by submitting that on the date when the case was dismissed, they were present, but they did not hear when the same was called on. Further, he stated that that was a human error and in law, is sufficient ground to grant the application. To bolster his argument, he cited the decisions in this Court in **Ramadhani Iyanja and another vs.**

Mwajabu Ramadhani Mboida, Misc. Land Application No. 17 of 2022

(HC-Dodoma), **Citibank (T) Ltd vs. Emma Mwenda and another**,

Misc. Labour Application No. 489 of 2020 (HC- Labour Division) and

Adinani Salehe and two others vs. Valence Justine Tesha, Land

Appeal No. 36 of 2021 (HC-Moshi)

In response Mr. Mapunda resisted the application by submitting that advocates are working by reports. On 13/12/2022 he did not attend to the Court because he got an emergency but his legal officer attended. The legal officer was at the court at 09:00 hours and when the matter was called on for hearing, that the legal officer entered into the judge's chamber and he witnessed when the matter was dismissed for non-appearance. After that he submitted the report to the office.

He further submitted that, the issue of human error that the counsel for the applicant and 2nd respondents did not hear when the case was called on, while the legal officer heard, is no merits. In this court all cases are announced in the public announcement system.

On the cited cases Mr. Mapunda submitted that both were the decisions of the High Court which do not bind this court as they are persuasive.

He concluded by submitting that it is true that courts are not supposed to punish litigants, but the circumstances of this case indicated that there was negligence of part of the applicant.

When invited to submit Mr. Andrew Muhoja Maziku, the Principal Officer of the 2nd Respondent supported the application by submitting that he arrived at the Court premises on 08:30 hours but he did not hear when the case was called on.

In a brief rejoinder Mr. Jamal submitted that, the issue that the counsel received a report from the legal office is of no merit because there is no any affidavit of that legal officer. Therefore, without the affidavit that issue remains a hearsay.

Further, even if that legal officer heard when the matter was called on, but the circumstances on how he heard were not narrated.

He concluded by submitting that, the cited case goes along with the circumstances of this matter.

Having considered the chamber summons and its supporting affidavit, the affidavit in reply, and the written submission made by the parties, the issue is *whether the applicant sufficiently advance a reasonable ground to invoke this Court to set aside the dismissal order.*

In the application at hand, the applicant raised two grounds to support her submission.

One, that on the date of the hearing, the advocates were at the Court, but they did not hear when the case was called by the clerk.

Two, the applicant in person was unable to attend in person because she had traveled to South Africa to attend to family matters.

In deliberation and determination of the application, I will start with the second ground, i.e., that the applicant in person was unable to attend in person because she had traveled to South Africa to attend to family matters,

which I think, should not detain me long. Having gone through the pleadings and submissions, I have three observations;

One, though the issue was raised in the affidavit under paragraph 10, but the counsel for the applicant failed to substantiate the same in his submission. In fact, he did not submit anything regarding this ground. Therefore, it remains unsubstantiated.

Two, even if I decide to consider the ground in its plain unsubstantiated appearance, but still, the ground is unmeritorious. The applicant was supposed to notify the Court prior to her travel and the date of the hearing and not after the date of the hearing.

Three, the applicant was represented by the advocates.

Therefore, this ground that the applicant in person was unable to attend in person because she had traveled to South Africa to attend to family matters is unmeritorious, and has no legs to stand.

On the first ground that on the date of the hearing, the advocates were at the Court, but they did not hear when the case was called by the clerk. I wish to deliberate as follows.

Having gone through the affidavit and the submission from the applicant's counsel, he narrated how he arrived at the Court around 08:50 hours and waited for the case to be called on at 09:00 hours. He submitted that he was in the Advocates' waiting room together with the 2nd respondent, Mr. Maziku. Later, around 11:00 hours, when they were making a follow-up, the Court Clerk informed them that the case was called at 09:00 hours, and it was dismissed.

The 2nd respondent, in his submission, "joined hands" with what was submitted by the counsel for the applicant. While the 1st respondent's counsel submitted that he was informed by his legal officer that the case was called at 09:00 hours, and it was dismissed for non-appearance.

The circumstances above led me to give the benefit of doubt to the applicant that the advocates were at the Court, but they did not hear when the case was called by the clerk. Therefore, I am persuaded by what they advanced to substantiate this ground of the application.

In the cited case of **Ramadhani Iyanja (Supra)**, this Court faced a similar situation where the applicant alleged that they were at the Court, but they did not hear when the case was called by the clerk. In its decision, the

Court was satisfied that the applicant did not hear when the case was called by the clerk, and it held that;

"Basing on my analysis, I agree with the applicants that they have advanced and presented sufficient reason for this Court to consider setting aside an order of dismissal..."

Flowing from above, I am satisfied that the applicant's 1st ground of the application sufficiently moves this court to invoke its discretionary powers in setting aside a dismissal order dated 13 December 2022 at 09:12 hours.

Consequently, I grant the application by ordering the restoration of Misc. Land Application No 453 of 2022. Each party is to bear his/her costs.

I order accordingly.




K. D. MHINA

JUDGE

12/04/2023