

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 79 OF 2023

(Arising from Land Case No. 146 of 2022)

SAID SELEMAN MAMOJA APPLICANT

VERSUS

COMMISSIONER FOR LANDS 1ST RESPONDENT

DIRECTOR OF SURVEYS AND MAPPING 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

17/5/2023 & 25/5/2023

A. MSAFIRI, J

This is an application to set aside the dismissal of the Land Case No. 146 of 2022 made by this Court on 17.02.2023. The said Land Case was dismissed for non-appearance upon the plaintiff's failure to appear before this Court when the matter was scheduled for hearing on 17.02.2023 upon which the Applicant herein was the plaintiff.

The application was made under Section 95, and Order IX Rule 6(1) of the Civil Procedure Code, Cap 33 [R.E. 2019] (the CPC), by way of chamber summons supported by three affidavits of three people namely Said Seleman Mamoja (the applicant), Salum Said Mamoja (Son of the applicant) and Daimu Halfan (an Advocate of the Applicant).



The applicant was under the legal service of Ms. Loveness Denis and Mr Daimu Halfan learned Advocates, while the respondents enjoyed the legal service of Ms. Lucy Kimaryo, learned State Attorney.

The hearing of the application was by way of written submission. The submission in chief by the applicant was drawn and filed by Mr Daimu. He adopted the three affidavits to form part of the submissions, and stated that the Land Case No. 146 of 2023 was dismissed on 17.02.2023 upon the applicant's failure to appear before the Hon. Judge on the scheduled time for hearing at 08:00am. He stated that the applicant and his sons attended to this Court and although they were late, they were within the Court premises at 08:29am but did not hear their case called until 15:15Pm when it was revealed that the case was dismissed.

Mr Daimu added that, failure to appear at 08.30 when the case was called on for hearing was neither intentional, deliberate nor out of negligence. That there was a delay at arriving at the Court which led to non-appearance before Hon. Judge when the case was called.

According to the applicant's affidavit, on 17/2/2023, he and his sons who live at Kigamboni, board a ferry to Magogoni to attend the case. That they arrived at the Court at 08.29 together with his advocate Mr Daimu. That the court clerk in the presence of the applicant, informed the applicant's Advocate that the Land Case No. 146 of 2022 had been dismissed in the morning.

However, according to the Advocate's affidavit in paragraph 5, it states that at 15:14hrs the Advocate was informed by Lucy Kimaryo (the respondent's State Attorney) that the Land Case No. 146 of 2022 had been dismissed.

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Mr Daimu submitted further that the applicant, and his Advocates have a good history of attending court sessions, except on 17.02.2023 when they did not appear before the Honourable Madam Judge. The advocate cited several cases to bolster his arguments.

The submission in response by the respondents was drawn and filed by Ms Kimaryo, who adopted the counter affidavit and contended that both the applicant and the respondents had agreed and consented the scheduled time for hearing to be on 17.02.2023 at 08:00am.

But on the set time and date, the applicant and his advocate were absent, and that the Court waited for other 30 minutes, still, the applicant was not present. She added that if the applicant was present at 08:29am, as alleged, he could have heard the case when it was called for the second time, but neither the applicant nor the applicant's advocate was present when the matter was called.

She submitted further that, besides the applicant's Advocate arriving late at the Court premises, he could have made efforts to know the status of the said case rather than staying hopelessly for the whole day until 15:15hrs. To buttress her points, she cited the case of **Anyambile Mwakisale vs Abdallah Katoto**, Civil Application No. 553/01 of 2017 CAT Dar es Salaam (Unreported).

She concluded that neither the Applicant nor his Advocate have given sufficient reasons for their non-appearance on 17.02.2023 when the matter was dismissed for non-appearance. She prayed that this application be dismissed with costs for want of merit.

Adls.

In rejoinder, counsel for the applicant reiterated what was submitted in chief and further added that there was no total absence looking at attendance history in the previous sessions.

Having gone through the submission of the parties, and also read the authorities cited along with the said submissions, it is clear that the Applicant admits that the Land Case No. 146 of 2022 was dismissed for non-appearance on 17.02.2023 on his absence. This is clearly seen in the contents of the affidavits and the submission in support of the application.

I have noted the contradiction between the applicant and his Advocate on how they acquired information of the dismissal of the Land case No. 146 of 2022 on 17.02.2023, whereas, the applicant stated to have seen his Advocate obtaining information from the Court Clerk, while the Advocate stated to have obtained such information from the respondents' counsel.

Order IX Rule 5 and 6 of the CPC provides as follows;

*'5. Where the defendant appears and **the plaintiff does not appear** when the suit is called on **for hearing**, the court shall make an order that **the suit be dismissed** unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.*

*6.-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set the dismissal aside and, **if he satisfies the court that there was sufficient cause for his non-appearance** when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. (Emphasis added)*

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The pertinent issue here is whether the applicant and his advocate have demonstrated sufficient reasons for this Court to grant the sought prayers. As far as Rule 6 herein above is concerned, the applicant has failed to demonstrate sufficient good cause for his non-appearance on 17.02.2023 when the Land Case No.146 of 2022 was dismissed.

What the applicant and his advocate has done is to give narration of what happened on that day and that indeed, they arrived late at the Court contrary to the scheduled time. The applicant has not advanced reasons which were beyond his control, because delay for reason of boarding a ferry at 08.10 hours cannot be regarded as good reason for the party's absence in Court. The parties uses all kinds of transport all the time and the Court have never regarded it as reason for delay to arrive at the hearing on scheduled time.

On 09/02/2023 the counsel for the applicant was present when the matter was set for hearing on 17/02/2023 at 08.00 a.m. The parties agreed to the scheduled date and time hence the applicant and his advocate cannot use the time to justify the applicant's non-appearance in Court on that day.

The applicant has stated that he, his sons and his advocate were at the Court premises on the date the matter was scheduled for hearing. That although they were late, they were available at the premises until 15.15 hours. However it is my view that being available on the Court corridors/premises does not amount to appearance. In the case of **Phares Wambura and 15 Others Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016, Levira J.A ruled among other things that:-

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'Parties to a case must always remember that, a Judge or Magistrate does not deal with everybody who hangs around the court's corridors, but specific parties as per his or her assignment. Therefore, mere presence of a party and/or his counsel in court premises without physically appearing or being virtually linked with a presiding Judge or Magistrate on a hearing date and time amounts to non-appearance'. (emphasis added)

See also Order IX Rule 1 of the CPC which provides that parties shall be in attendance at the day fixed for hearing in person or by their respective recognized agents or advocate. In the current matter, neither the applicant nor his Advocate physically appeared before the Hon. Judge on 17.02.2023, on the specified time which led to the dismissal of the matter.

Since the applicant have failed to advance good reasons of his absence but the story of what emerged on that date, then this application cannot stand.

It is my finding therefore, that this application has no merit and it hereby dismissed with costs.

It is so ordered.


A. MSAFIRI
JUDGE
25/5/2023

