

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

MISC. LAND APPLICATION NO. 739 OF 2022

(Originating from the Order of the High Court of Tanzania Land Division in Misc.
Land Application No. 521 of 2022)

EDWARD PASTORY MAGETA KALENDERO..... APPLICANT

VERSUS

CHRISTINA THOMAS ITENDA

(As Administratrix of the Estate of Itenda Jimmy

Itenda).....1st RESPONDENT

TEMEKE MUNICIPAL COUNCIL.....2nd RESPONDENT

R U L I N G

Date of last Order:03/05/2023

Date of Ruling: 02/062023

K. D. MHINA, J.

By a chamber summons taken under Order IX Rule 6 (1) and Section 95-of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), the applicant, **Edward Pastory Mageta Kalendero**, instituted this application against the respondents, **Christina Thomas Itenda** (As Administratrix of the Estate of Itenda Jimmy Itenda) and **Temeke Municipal Council**.

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

- i. That this Court may be pleased to set aside the dismissal order of 17 November 2022 and instead restore Misc. Land Application No. 521 of 2022.*
- ii. Costs of this application be provided.*

The grounds for the application were expounded in the affidavit, which Edward Pastory Mageta Kalendero, the applicant, swore in support of the application.

He raised the following grounds in his affidavit;

One, his advocate Alexander Kyaruzi was on safari.

Two, that day, he had a matter fixed to start at 09:00 hours at the District Land and Housing Tribunal for Temeke.

Three, he was late because of the traffic jam caused by the construction of a flyover at the junction of Keko and Nyerere Roads when he was from DLHT for Temeke.

Four, he was late for 20 minutes. The matter was fixed to start at 11:00 hours, but he arrived at 11:00 hours.

The hearing proceeded by way of written submissions. The applicant was represented by Mr. Alexander Kyaruzi, advocate, while Mr. Alphonse Katemi, represented the 1st respondent. The 2nd respondent was absent despite being duly served with the notice of hearing they received on 17 March 2023.

In supporting the application, Mr. Kyaruzi submitted that on 17 November 2022, on the date which Misc. Land Application No. 521 of 2022 was dismissed; the applicant had attended Execution Application No. 260 of 2022 between the same parties, at the DLHT for Temeke fixed at 09:00 hours. He further submitted that the matter was not attended to on time.

When the applicant decided to leave to attend the dismissed matter at the High Court, which was fixed at 11:00 hours, he found the case was already called at 11:20 hours as he met with Mr. Katemi, Advocate and the 1st respondent at the stairs.

Therefore, he submitted that the delay was due to the traffic jam at the junction of Keko and Nyerere Roads on his way from the Tribunal to this Court.

Mr. Kyaruzi also submitted that the applicant was alone that day; he was on a safari.

He concluded by submitting that after the dismissal, immediately on the following day, they lodged this application for restoration.

In response, Mr. Katemi submitted that there were no proceedings at the DLHT for Temeke on the material day. The attached proceedings of DLHT for Temeke showed that the proceedings were dated 7 February 2023. Therefore, there was no proof that the applicant attended the Tribunal on the material date.

He further submitted that the allegations of traffic jam at the flyover and road construction were not backed by any proof.

Regarding the issue that the applicant was late for 20 minutes and he met him at the stairs, he submitted that the allegations were not even contained in the affidavit.

Further, he submitted that the allegation that the advocate was on safari lacked merits because nothing in the affidavit showed or proved that issue. Additionally, the advocate did not swear the affidavit to substantiate that

fact. Therefore, without the affidavit, the application remained incompetent and without merits.

The applicant's counsel filed the rejoinder, reiterating what was submitted in the submission in chief; therefore, I don't see the reason to produce what was contained in the rejoinder submission.

Having heard the parties and based on pleadings and the submissions advanced by the learned counsel for the parties herein, the main issue for determination is whether the applicant has shown sufficient cause for this court to grant his application for restoration.

In the determination of the application, I will start by quoting the order of this Court, which is sought to be set aside dated 17 November 2022;

"This morning, when the matter was called on for hearing, Ms. Kyando S.A for the 2nd respondent rose and addressed this Court that today the matter is for hearing and it is the last adjournment. Further, neither the applicant nor his advocate are present before this Court. Therefore, she prayed for the application to be dismissed with costs.

On his part, Mr. Katemi advocate for the 1st respondent also had the same prayer for the application to be dismissed with costs.

On my part, I accede to the prayer of dismissing the application for non-appearance.

On 8/11/2022, the applicant and his advocate were absent, and today also, they are absent without any notice.

The matter was scheduled for hearing to commence at about 11:00 hours, but now it is 11:24 hours, and the applicant is absent.

In the circumstances, I dismiss the application for non-appearance of the applicant with costs awarded to both respondents.

It is so ordered

Sgd

17/11/2022

Flowing from above, I will analyse both grounds as advanced by the applicant.

Regarding the issue that on the material date, the applicant had attended Execution Application No. 260 of 2022 between the same parties at the DLHT for Temeke, which was fixed at 09:00 hours, the ground failed to persuade me because; **one**, there is no proof of either summons or notice of hearing

to prove that fact there were proceeding before the Tribunal and **two**, even the attached proceedings which the applicant himself attached does not substantiate that allegation because the proceedings are dated 7 February 2023.

This ground goes "*part and parcel*" with the ground that the applicant was held by the traffic jam when he was from the Tribunal at Temeke. Since there is no proof that the applicant was at Tribunal, this ground suffers a "*natural death*".

On the ground that the advocate was on safari, having gone through the affidavit and the submission, it also lacks merits because, as rightly submitted by Mr. Katemi, there was no proof to substantiate that. The advocate failed even to swear the affidavit to prove that allegation. In fact, there is no any kind of proof to indicate that the advocate was on safari.

Regarding the issue that the applicant was late for 20 minutes and he, the 1st respondent, and her counsel at the stairs, I have the following observations; **one**, it is not true that he was late for 20 minutes; by looking at the order dated 17 November 2022, the application was dismissed at 11:24 hours. Two, on the issue that he met with the 1st respondent and his

counsel at the stairs, as rightly submitted by Mr. Katemi, that was the statement from the bar, as it was not contained in his affidavit. Therefore, as per the "rules of the game", I disregard this ground allegation. In fact, there is no proof that on 17 November 2022, the applicant was late to attend court proceedings for 20 minutes or came to this Court on that day.

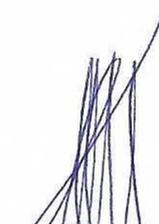
The last ground, that after the dismissal, they lodged this application for restoration immediately on the following day, should not detain me long. This is because the ground was not contained in the affidavit; therefore, it is a statement from the bar introduced during the submission. The remedy for this is to disregard the ground, which I do.

In totality, having gone through the pleadings and submissions, this application lacks merits.

Consequently, I dismiss this application with costs awarded to the first respondent.

I order accordingly.




K. D. MHINA

JUDGE

02/06/2023

