

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 16 OF 2023

(Originating from Misc. Land Application No. 702 of 2022)

SWALAHADIN TWAHA ISMAIL.....APPLICANT

VERSUS

AMRAN MASUDI KAYUMBA.....RESPONDENT

RULING

23/05/2023 & 26/05/2023

L. HEMED, J.

In this matter, the applicant is imploring this Court to set aside it's Order dated 13th December, 2022. The Application is broached in under Order IX, rule 5, 6(1) & (2), 8; Order XLIII, rule 2 of the Civil Procedure Code, [Cap 33 R.E 2019] 2022 and item 4 of Part III to the Schedule of the Law of Limitation Act, [Cap 89 R.E 2019]. The same is buoyed by the affidavit deponed by the applicant and contested through the

counter affidavit sworn by one **Lutufyo Mvumbagu**, learned advocate for the respondent.

On 3rd April, 2023 this Court ordered the Application to be disposed of by way of written submissions and the same was complied with. During prosecution of this suit, the applicant appeared in person whilst the respondent had enlisted the legal services of **Mr. Shaibu Changaluma**, learned counsel. In respect to this Ruling, let me state that, I am not aiming at reproducing the submissions as argued by the parties as the same will be referred in the course of addressing the matter at hand. Let it be known that, this Court had an ample time to analyse the said submissions.

In paragraph 3 of his affidavit, the applicant has deponed that on 13th December 2022, he worked up not feeling well. He went through the dispensary first to see the doctor and after that he came to Court and arrived about 20 minutes late only to find the application been called. He attached the medical chit to substantiate his assertions. Of course, it is a common ground that, illness is a common phenomenon of human life. Nevertheless, not every sickness incapacitates a human being to perform any duty or activity. Therefore, sickness can be a good ground to set aside dismissal order only when proved that it actually

prevented the applicant from appearing before the court on the material date; and that due to seriousness of such illness, he was unable to give notice of absence.

In the instant case, it appears that the applicant's sickness was not that much serious to prevent him from coming to court on the material date nor did it prevent him from notifying the court about his absence. I am holding so basing on the deposition made by the applicant in his affidavit that he went to hospital and later on came to Court. This fact shows that he was able to come to Court and pray for adjournment so that he could go for medical attention. Otherwise, he would have sent someone to notify the Court about his health condition so that the matter would have been adjourned.

I am at one with the counsel for the respondent that, since the Applicant was able to go to the dispensary and thereafter came to Court, entails that he was able to appear before this Court and apply for adjournment or file notice of adjournment before going to the dispensary. In the instant matter, the applicant opted not to appear before the Court nor did he file notice of absence. I am thus of the firm view that he so acted with the desired consequences. Therefore, the

applicant is precluded from moving the court to set aside what he desired.

Additionally, in paragraph 4 of his affidavit to support the application, he has asserted that the Court clerk (whose name was not stated), informed him about the dismissal of the application for want of prosecution. However, the assertion by the applicant has not been supported by the affidavit of such Court Clerk. It was lucidly stated by the Court of Appeal in **Jamal S. Mkumba & Abdallah Issa Namangu & 359 Others vs. The Attorney General**, Civil Application No. 240/01 of 2019, (CAT-DSM), (Unreported) at page 8 of the Ruling that: -

"...Worse still, he also did not procure any affidavit from the Court clerk or Deputy Registrar of the Court of Appeal who were in Court when he entered the Courtroom".

In the upshot, I find and hold that the applicant has neither shown sufficient cause for his non-appearance to persuade this Court to exercise its discretion to set aside its dismissal Order in Misc. Land Application No. 702 of 2022. In the end, I find this application with no iota of merit and hereby dismiss it without costs. It is so ordered.

Dated at Dar es salaam this 26th day of May, 2023.




L. HEMED
JUDGE
26/05/2023

COURT: Ruling is delivered this 26th May 2023 in the presence of both parties appearing in person. Right of appeal explained.




L. HEMED
JUDGE
26/05/2023