

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**MISC.LAND APPLICATION NO. 11 OF 2023**

(Arising From Misc. Land Application No.706 of 2022)

**CHARLES ALLY NKOBELWA** (The Administrator  
of the Estate of the late **ALLY WARIOBA NKOBERWA**).....**APPLICANT**

**VERSUS**

**GODFREY ELIAS NGULAI** (The Administrator  
of the Estate of the late **ELIAS NGULAI**).....**RESPONDENT**

**RULING**

*5<sup>th</sup> & 22<sup>ND</sup> June, 2023*

**L.HEMED, J.**

Previously, the applicant herein **CHARLES ALLY NKOBELWA** (Administrator of the estate of the late ALLY WARIOBA NKOBERWA) had instituted Misc. Land Application No.706 of 2022, looking for a Certificate on point of law for him to appeal to the Court of Appeal of Tanzania against the decision of this Court, Hon. M.J.Kidilu,J in Land Appeal No.289 of 2022, delivered on 6<sup>th</sup> day of October, 2022. The said application which was presented for filing on 4<sup>th</sup> October, 2022, was called before the trial Judge on 7<sup>th</sup> November,2022, on 24<sup>th</sup> November, 2022 and was to be heard on 7<sup>th</sup> December 2022. The fact that the applicant failed to appear on the hearing

date, that is on 7<sup>th</sup> December 2022 without notice, the Court decided to dismiss the said application with costs for want of prosecution.

Aggrieved by the said dismissal order, on 6<sup>th</sup> day of January 2023 the Applicant presented the instant application made under Order IX Rule 6 of the Civil Procedure Code, Cap.33 RE 2019 pleading for the Court to vacate its dismissal order in Misc. Land Application No.706 of 2022. Upon the prayer from the Applicant, the Court directed the application to be argued by way of written submissions as follows:

Submissions in chief on or before 12<sup>th</sup> May, 2023;

Reply submission by 26<sup>th</sup> May, 2023; and

Rejoinder submissions by 2<sup>nd</sup> June, 2023.

In arguing the application, **Mr. Barnaba Luguwa**, Advocate represented the applicant while **Ms.Maria G.Elfas** learned advocate acted for the respondent.

It was asserted by the applicant's advocate that on the fateful day he came to court and when the cases were called he entered into the chamber of the judge and introduced himself in a case which was not his. He alleged to be ordered to wait outside until his turn. He went to the waiting shade.

It was also alleged that a long wait he went up and entered the Judge's chamber while all cases were disposed off and his case was already called and because he did not show up, the same was dismissed for want of prosecution. The applicant also stated to have know the dismissal order through the court officer one Aisha. He argued the court to vacate the dismissal order as refusal to vacate the said dismissal order has the effect of blocking the legal rights of the applicant to the court of appeal.

In reply thereto, the counsel for the respondent contended that the present application was filed by the Applicant on 6<sup>th</sup> January 2023 seeking for setting aside the dismissal order dated 7<sup>th</sup> December, 2022 as the same was dismissed for want of prosecution. He propounded that the matter was dismissed was set for mention on 24<sup>th</sup> November 2022 whereby the Applicant and his advocate failed to enter appearance hence it was adjourned for hearing until 7<sup>th</sup> December 2022. Again and for unknown reasons, the Applicant and his advocate failed to enter appearance hence the court was left with no option rather than dismissing the matter for want of prosecution.

It was amplified by the counsel for the respondent that the Applicant lost interest to prosecute his case and he should know that court's business cannot be handled in such sloppy or careless manner since it has been the

demand for timely justice as well as the fact that litigation must come to an end.

The counsel for the respondent echoed Order IX Rule 6 of the Civil Procedure Code, Cap 33 that the applicant ought to have shown sufficient cause for his absence on the fateful date. In his opinion the applicant has shown no sufficient cause to warrant the court to exercise its discretion power to restore the application. It was the view of the counsel of the respondent that the applicant did not produce any proof that he came to court on the fateful date. The applicant also did mention Ms. Aisha, the court officer as the one who provided him with some information, but he could not procure an affidavit from her. He concluded by praying for the dismissal of the instant application with costs.

In his rejoinder, the learned counsel for the applicant reiterated his submissions in chief. He insisted that the application be granted and the dismissal order be vacated.

Having gone through the rival affidavits and the submissions made to support or oppose the application, my duty now is to determine whether the application is meritorious or not. The instant application has been made

under Order IX Rule 6 of the Civil Procedure Code (*supra*) which provides thus:

*" 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 nonappearance** 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 supplied)

According to the provision above-mentioned, in an application to set aside dismissal order like in the instant matter, the applicant has the duty to satisfy the court that there was **sufficient cause** for his non- appearance. What amounts to sufficient cause has not been defined in the law. Therefore, categories of factors for determining sufficient cause to set aside dismissal order are never closed. They differ from case to case depending on the circumstance of the particular case.

Some of the factors may include, the reasons as to the absence of applicant; whether it was not possible for the applicant to notify the court about his/her absence; and whether or not the absence was deliberate.

In the instant case, the applicant in his affidavit, at paragraph 3,5,and 6 as well as in his submission to support the application has alleged to be present in court on the fateful day. However, the applicant could not substantiate his allegations of his presence on the material date by presenting evidence thereof. I am aware that all official visitors of the Court, including parties do register themselves in the visitors' book available at the main gate before the security guards. Once registered, the visitor is given a special court's card. The visitors' book shows the date and the time on which the visitor/party reached the court premises. In the circumstances of this case the applicant ought to have presented evidence that he registered himself in the visitors' book to signify that he was in the court premises the particular day. In the absence of such proof, this Court draws inference against him that he did not come to court on the 7<sup>th</sup> December 2022.

I have also noted in the affidavit of the applicant that he has alleged against the Court Officer one Ms. Aisha that she is the one who informed him that the case had been called. However, the applicant did not procure affidavit from such officer to supplement his assertions. I am holding so because, when the affidavit mentions another person, that other person has to depone an affidavit, otherwise such assertion would hold no water. If the

person mentioned in the affidavit does not swear or affirm an affidavit the facts alleged to come from that other person would amount to hearsay. I have also noted that my brother at the bench, Hon.B.E.K.Mganga,J had held the same view while determining the case of **Deogratus Bakinahe & 2 others vs Shirika la Usafiri Dar es Salaam(UDA) & Another**, Misc. Application No. 361 of 2020 (HC.Labour Division).

I also took time to peruse the proceedings in Misc. Land Application No.706 of 2022 and found that apart from his none appearance on the fateful date, he had never attended the matter in the previous dates. This fact shows that the applicant was negligent in attending his case.

From the foregoing, I find the applicants to be negligent in attending Misc. Land Case Application No.706 of 2022. Indeed, no good cause has been shown to warrant this court exercise its discretion powers to grant the application. The entire application is thus dismissed with costs. It is so ordered.

**DATED at DAR ES SALAAM** this 22<sup>nd</sup> June 2023.



*L. NEMED*  
**L.NEMED  
JUDGE**