

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

**AT DAR ES SALAAM**

**MISC.LAND APPLICATION NO. 92 OF 2023**

(Arising From Misc. Land Application No.701 of 2022)

**AMANA BANK LIMITED.....APPLICANT**

**VERSUS**

**CLEMENCE DEOGRATUS MUTABINGWA** (*Administrator of  
the estate of the late DEOGRATIUS*

**RUKIZA MUTABINGWA).....1<sup>ST</sup> RESPONDENT**

**MARY THOMAS MUTABINGWA.....2<sup>ND</sup> RESPONDENT**

**VIOLETH ANNAEL MOSHA.....3<sup>RD</sup> RESPONDENT**

**RULING**

*16<sup>th</sup> May 2023 & 20<sup>th</sup> June 2023*

**L.HEMED, J.**

Previously, the applicant herein, **AMANA BANK LIMITED** had filed Misc. Land Case Application No.701 of 2022 seeking for leave to appeal to the Court of Appeal against the Judgment and Decree of this Court in land Appeal No.57 of 2022. However, because of none appearance of the applicant on 7<sup>th</sup> February, 2023, the said application was dismissed with costs for want of prosecution.

Following such dismissal order, on 28<sup>th</sup> February 2023, the applicant presented the instant application under Order IX Rule 3 of the Civil Procedure Code [Cap 33 RE 2019] seeking for the following orders:

*"a). That this Honourable Court be pleased grant(sic) an order setting aside the dismissal order with costs delivered on the 07<sup>th</sup> day of February 2023...*

*b) Any other relief that this Honourable Court deems just and fit to grant"*

The application was supported by the affidavit deponed by one **HAJI SOFI SAMA**, learned advocate for the Applicant. The 1<sup>st</sup> and the 2<sup>nd</sup> respondents challenged the application *vide* the counter affidavits deponed by **MR. LUTUFYO MVUMBAGU** and **MS. MARY THOMAS MUTABINGWA**. The 3<sup>rd</sup> respondent never appeared despite several efforts to serve her including substituted service by publication effected in Mwananchi News pater dated 3<sup>rd</sup> April, 2023.

On 16<sup>th</sup> May 2023 this Court directed the matter to be argued by way of written submissions. **Mr. Haji Sofi Sama**, learned advocate, argued for the applicant while **Mr. Lutufyo Mvumbagu**, presented submissions on behalf of the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent who was appearing in person could not file submissions as per the directed schedule. The

applicant filed submissions in chief on 30<sup>th</sup> May, 2023, while the 1<sup>st</sup> respondent replied on 6<sup>th</sup> June, 2023. The applicant concluded by filing rejoinder submissions on 13<sup>th</sup> June, 2023.

It was submitted by the applicant that the reasons which requires this court to set aside the dismissal order are found in paragraphs 1, 2, 3, 4,5,6,7, 8 and 9 of the applicant's affidavit. In paragraph 8 of the affidavit deponed by **Haji Sofi Sama**, it has been averred that on the eve of 7<sup>th</sup> day of February, 2023 to the morning thereon, Mr. Haji Sofi Sama could not sleep as he experienced terrible and severe back pains, thus had to stop at the nearest hospital and thus upon checkup and examination conducted by the medical doctor he was observed to have vertebral column in the lumberage region thus dislocation of the lumberage region. To support his assertions, he cited the decision in **Pimak Profesyonel Mutfak Limited Sirket vs Pimak Tanzania Limited and Farha Abdul Noor**, Misc. Commercial Application No.55 of 2018.

Mr. Sama who is the advocate of the applicant stated further in paragraph 9 of his affidavit that the medical doctor recommended that he should be excused from duty for two (02) days. Upon feeling a reduction/decrease of the back pains, on the 10<sup>th</sup> February, 2023, he

rushed to court to make a follow up of what transpired on the 07<sup>th</sup> day of February, 2023 only to find that Misc. Land Case Application 701 of 2022 was dismissed with costs for want of prosecution.

It was also asserted that, at all material time the applicant has had an interest to prosecute the application. He has never lost interest in prosecuting the said Application and has never failed to enter in appearance in court. The failure to appear on 7<sup>th</sup> February, 2023 was not a result of negligence and/or disrespect of the court order but due to the reason beyond his control.

It was further submitted that prior to the dismissal order, the applicant's counsel had been attending all sessions without fail except on the date when Misc. Land Application No.701 of 2022 (on 7<sup>th</sup> February, 2023) was dismissed for want of prosecution. To fortify his argument, he cited the decision of this Court in **Sandru Mangalji vs Abdul Aziz Lalani, Amin Ramji & Mehboob Ramji**, Misc. Commercial Application No.126 of 2016, (Commercial Division).

In reply thereof, Mr. Lutufyo contended that Misc. Land Application No.701 of 2022 was dismissed on 7<sup>th</sup> February, 2023 following the non-

appearance of the applicant on the particular day. He submitted to agree partly with the applicant's advocate's submissions that sickness can be one of the sufficient reason in setting aside dismissal order. He however asserted that the reason of sickness has to be accompanied with other facts material to the application in cumulative, which show there was no any element of negligence or in action on the part of the Applicant.

It was submitted by the counsel for the 1<sup>st</sup> respondent that since the applicant is an institution then someone from the applicant's office would have appeared on behalf of the advocate who was sick for purposes of proceeding with hearing or to adjourn the matter. To substantiate his assertions he cited the decision of this Court in **M/S Gem Properties Limited vs Msindika Stores Limited & 8 others**, Misc. Land Application No.347 of 2022.

In rejoinder submission, the applicant's advocate had nothing new to state as he reiterated his submissions in chief.

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 3 of the Civil Procedure Code (*supra*) which provides thus:

*" Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if **he satisfies the court that there was good cause for his non-appearance**, the court shall set aside the dismissal order 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 that there was good cause for his non- appearance. What amounts to sufficient cause has not been defined in the law. Categories of factors for determining sufficient or good cause to set aside dismissal order are never closed. They differ from one case to another depending on the circumstance of the particular case. Some of the factors may include, the reasons as to the applicant's absence; whether it was not possible for the applicant to notify the court about his/her absence; and whether or not the absence was deliberate.

The main cause for the none appearance of the applicant on the material date (on 7<sup>th</sup> February, 2023) has been stated to be the sickness

of the advocate of the applicant, one **HAJI SOFI SAMA**. The question is whether such ground is sufficient and is a good cause to warrant this Court exercise its discretion powers to grant the application. I am at one with the learned advocate for the applicant that health matters, in most cases, are not the choice of human being and thus no one can be blamed for being sick. However, the question to ask is whether the sickness of the advocate prevented the applicant from entering appearance on the date the application was dismissed.

The applicant in the instant matter is an artificial person (institution) which cannot get sick. It has a number of employees where in the absence of one advocate another employee can take charge. I have gone through the affidavit supporting the application, I could not find facts being stated to express why an officer from the applicant failed to attend the matter on the material date. The applicant being a company would have been expected to send another officer to appear and notify the court about the sickness of the advocate so that the matter would have been adjourned.

The affidavit deponed by the advocate of the applicant shows that he started feeling unwell just prior to 07<sup>th</sup> of February 2023, he had time to inform the applicant or his head of legal department to appear on the

material date. The fact that the applicant opted not to inform the court, it is presumed to have desired the consequences thereof.

In paragraph 8 of the affidavit in support of the application, the applicant's advocate averred to fall sick on the eve of 07<sup>th</sup> February, 2023. That being the case, I am of the firm view that the advocate had ample time to communicate with his fellow work mates or the head of legal services of the Applicants so that another advocate would have been appointed to take over the matter. In alternative, any other official from the applicant would have appeared to inform the court about the sickness of the advocate so that it would have been adjourned.

From the foregoing, I find the applicant to be negligent in attending Misc. Land Case Application No.701 of 2022 on the 7<sup>th</sup> February, 2023, when it was dismissed. Indeed, no good cause 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 20<sup>th</sup> June, 2023

  
L. HEMED  
**JUDGE**

