

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

MISC. LAND APPLICATION NO. 232 OF 2023

(Originating from Land Case No. 173 of 2022)

EVOD AUGUSTI MALLYA PLAINTIFF

VERSUS

1. SHEDRAC KALINGA
2. JOHN RAULENCE NGOLO
3. FATUMA JUMA
4. SUNDAY JAISON
5. ASHIMU MUSHI
6. JAFARY MOHAMED KITANGAMATA
7. JOHN BAKUNDU NGUNGA
8. BARAKA KWAY
9. EMMILY MAYA
10. ANDREW HASANI
11. MIRAJI ISSA
12. HILDA KISAKA
13. FABIOLA KISAKA
14. ATHUMAN SALEHE TUWANO
15. JUDITH MBKENGE
16. RAJABU ATHUMAN
17. OBLEN ROBSON
18. JOHN PHILEMON MWITA
19. OSIMUNDA BANDA
20. JOSEPH LWIMBIZA
21. RASHID KALINGA
22. ANAKLETI MARSEL MASSAWE
23. EZRA ELISHILIA NKYA
24. ROLA YAYA MANGULIJA
25. GODFREY LOBULU
26. CASBERT AMANI
27. KASSIM ALLY

..... **DEFENDANTS**

RULING

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Date of last Order: 18/8/2023

Date of Ruling: 24/8/2023

A. MSAFIRI, J.

The applicant Evod Augusti Malya has brought this application under Order IX Rule 6(1) of the Civil Procedure Code, Cap 33 R.E 2019, (herein the CPC). He is moving this Court to make an order setting aside its dismissal order dated 29th March 2023 in Land Case No. 173 of 2022. The application is made by way of chamber summons supported with an affidavit of Gordian Isaya Njaala, learned advocate.

The respondents also filed their counter affidavits, contesting the application. Before the application was set for hearing, the 1st and 9th respondents raised preliminary objection to the effect that the chamber application is unattainable at law as it is supported with defective affidavit. They argued that the applicant's affidavit was defective in paragraphs 7, 8, 9, 10, 11 and 12 for containing arguments, hearsay, opinions and extraneous matters impeaching the credibility of a judicial officer contrary to Regulation 96(4) of the Advocates Profession (Conduct and Etiquette) Regulations, 2018.

After hearing both rival sides, the Court sustained the preliminary objection and expunged from the affidavit, the impugned paragraphs i.e. 7,8,9,10,11 and 12. The Court found that the remaining paragraphs

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1,2,3,4, 5 and 6, can stand and support the application at hand. The Court ordered for the hearing of this application to proceed on merit basing on the remaining paragraphs.

At the hearing of application on merit which was oral, the applicant was represented by Mr. Steven Mhando, learned advocate, while Mr. Jonathan Kessy, learned advocate appeared for the 1st, 9th, 21st and 22nd respondents. Mr. Mukhtar Hassan, learned advocate represented the 2nd, 5th, 6th, 7th, 10th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 24th and 27th respondents.

Mr. Willingtone Rwabinyasi, who all along has been representing the 23rd and 25th respondents, did not enter appearance on the hearing date, neither did the 23rd and 25th respondents. They did not inform the Court on their absence and the reasons forthwith, hence since they were present when the Court set the hearing date, the Court ordered for hearing to proceed on their absence. Furthermore, the Court observed that, the 3rd, 4th, 8th, and 19th respondents for the reasons known to themselves, have not entered appearance in Court nor filed their counter affidavits. This Court ordered that the hearing of this application shall also proceed in their absence.

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In his submissions in support of the application, Mr. Mhando started by praying to adopt the affidavit of Mr. Gordian Njaala as part of his submissions. He said that the application is brought under Order IX Rule 6(1) of the CPC. That, this Order requires the applicant to have sufficient reason which caused his non attendance in Court on the date set for hearing.

He submitted further that the affidavit of advocate Gordian Njaala which supports the application, at paragraph 6 it shows that on 29/3/2023, advocate Njaala who was representing the plaintiff fell sick and went for treatment at Sinza Palestina Hospital. That, that was the reason which caused the said advocate to fail to attend the Court on 29/3/2023. To bolster his point, he cited the case of **Lugandu Magida vs. Gwanchele Gibaka & Another**, Land Appeal No. 50 of 2020, HC at Shinyanga, (unreported), where it was held that sickness is sufficient ground for non-appearance.

Mr. Mhando submitted on the other ground for dismissal which was failure to serve the amended plaint to the 5th 6th, 10th, 12th, 13th, 16th and 18th defendants through their advocate one Mr. Nkuba within the time ordered by the Court. He said that, the records and pleadings shows that, at the time, the said defendants were represented by advocate Gabriel Masinga, and this is proved by the written statement of defence and

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counter claim which was filed on 12/9/2022 by advocate Masinga. But later Mr. Nkuba entered the appearance.

He said further that on 20/2/2023 when order of amendment was issued, Mr. Nkuba was not in Court and that he has not served the plaintiff with any document which shows the address of his office. He argued that, failure to get address of Mr. Nkuba made the plaintiff/ applicant unable to serve him the necessary documents on time. Mr. Mhando stated that if Mr. Nkuba has disengaged himself from presenting defendants in the case, he had a duty to file a Notice of Withdrawal and the Notice (copy) should be served on the other party. That, this is as per Regulation 67 (1) of the Advocates Professional Conducts and Etiquette Regulations, 2018.

Mr. Mhando, submitted another reason for not serving on time is the delay of getting summons on time. That, while the Court ordered the service to be done before 01/3/2023, the summons were issued by the Court on 14/3/2023. He prayed for the Court to grant the application.

Mr. Kessy for the 1st, 9th, 21st and 22nd respondents replying, prayed to adopt the counter affidavit of the above said respondents. He said that on 20/3/2023, the case was set for necessary orders. The advocate Mr. Njaala and the plaintiff did not appear in Court. The Court adjourned the

Alls.

matter and set for another date i.e. on 29/3/2023. But the plaintiff (applicant) did not appear or his advocate Mr. Njaala.

On the reason of sickness, Mr. Kessy submitted that the medical form attached to the affidavit shows that the advocate was admitted at 13.00 hrs. noon of 29/3/2023. Hence, it was his view that, the advocate Mr. Njaala could have taken necessary steps since the morning of that date by either writing a letter to notify the Court of his absence or send an advocate to hold his brief. The advocate did none of these.

He added that, the plaintiff could have attended the Court in absence of his advocate. On the issue of Notice of withdrawal from legal services, Mr. Kessy submitted that Mr. Masinga wrote to the Court by a letter of 20/2/2023 informing that he is withdrawing from the instructions and the defendants had to look for another advocate to represent them.

He argued that the application lacks merit, hence it should be dismissed with costs.

Mr. Hassan, started his submissions by praying to adopt the counter affidavits of the 2nd, 5th, 6th, 7th, 10th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, 24th, 26th, and 27th respondents.

He submitted that, the applicant have failed to show how he acted reasonably to show that he is diligent in prosecuting his case. *Alles-*

That, the applicant/plaintiff failed to comply with the Court's order, by failing to do due diligence in serving the defendants hence he has no sufficient cause to move this Court to set aside the prayers in the application at hand.

On the reason for dismissal for want of prosecution, Mr. Hassan stated that the applicant (plaintiff) and his advocate both failed to appear or give a notice of absence. He argued that, the reason by the counsel for the applicant that the plaintiff was not served with notice of withdrawal of the legal service by Mr. Masinga is not part of the pleadings but rather a submission from the bar, and hence the Court should disregard it. To cement his points, he cited the case of **James Funke Gwagilo vs. Attorney General** (2004) TLR 161. He prayed for the dismissal of the suit with costs.

In rejoinder, Mr. Mhando reiterated his submissions in chief and prayers. He added that the applicant has done due diligence and has given valid reasons on his non appearance in Court. That the sufficient reason is the fact that the advocate Mr. Njaala was sick and unable to appear in Court.

He averred that the applicant has a right to be heard and that is their prayers to the Court. *Alls-*

Having heard the submissions from parties to the application vide their advocates, I also read the principle set in the case of **Nasibu Sungura vs. Peter Machumu** (1998) TLR 501. The case was referred to me by the counsel for the applicant where it was held inter alia that;

*"in application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, **but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed**"* (emphasis added).

The above case was cited with approval by my learned sister Hon. Mkwizu, J in the case of **Lugandu Magida vs. Gwanchele Gibaka & Another (supra)**.

Further it is trite law that restoration of the case is in discretion of the Court to grant or refuse it. This discretion however has to be exercised judiciously and overriding consideration is that there must be sufficient cause to move this Court to grant the order of setting aside dismissal order. (See the case of **Regina Thobias Mihiga vs. Rachel Antony**, Misc. Labour Application No. 555 of 2020).

Alls.

Guided by the above principle, then the issue for my determination is whether the applicant has advanced good or sufficient cause to enable this Court to grant the prayers being sought.

According to the affidavit sworn by Mr. Njaala, it was stated at paragraph 6 that on 20th March 2023 when the Land Case No. 173 of 2022 was scheduled for mention, Mr. Njaala was sick and had to attend treatment at Sinza Hospital whereby he was treated and advised to return for check up on 29th March 2023. The medical inpatient form is attached as part of the affidavit. The medical inpatient form shows that indeed Mr. Gordian Njaala attended and was given treatment on 29/3/2023 at 13:20 p.m. at Sinza Hospital.

I agree with Mr. Mhando that, sickness has been stated to be sufficient reason for either extension of time or setting aside dismissal order. However the major controversy here is the conducts of Mr. Njaala whether they show that the counsel acted diligently on his part as the officer of the Court.

The affidavit shows that Mr. Njaala fell sick on 20/3/2023 and had to attend the hospital on that date. On the same date he was attending hospital, the case was also scheduled for mention before the Court for necessary orders. Mr. Njaala, could have acted diligently and sent the

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plaintiff in person or another advocate to inform the Court about his absence. Mr. Njaala did none of these.

On the said date i.e. on 20/3/2023, Mr. Njaala was asked to return back to the hospital for check up on 29/3/20213, which was also the date on which the suit was scheduled before the Court.

Mr. Njaala, acting diligently, should have informed the Court previously on his absence on the set date i.e. on 29/3/2023 as he knew that he will be attending the hospital for checkup. It is the practice and procedure that the officers of the Court always wrote a formal letter to Court, notifying the Court on their absence and the reasons forthwith. Mr. Njaala did not do that. He could not even sent the plaintiff in person to inform the Court on the absence of his advocate. Mr. Njaala just did not show up not even the plaintiff. The conducts of Mr. Njaala shows the lack of diligence on his part.

Mr. Mhando, has referred this Court to the case of **Lugandu Magida (supra)** where this Court was satisfied that sickness is sufficient cause. However, I find that the cited case is distinguishable from the circumstances in the present application. In the cited case, the appellant who claimed that he was sick took a step of informing the Tribunal about his sickness on the hearing date. In the application at hand, the Court was

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never made aware of the counsel's sickness which caused his non-appearance. It is only in this application that the Counsel has pleaded that he was sick.

It is my finding that the counsel Mr. Njaala should have shown diligence in the conducts of his case, but has not done so. Hence, the applicant has not advanced sufficient cause along with diligence on his part.

On the reason of failure of the advocate Mr. Nkuba to file Notice of withdrawal from the legal services as per the provisions of the Advocates Professional Conducts and Etiquette Regulations, 2018, I agree with Mr. Hassan that this reason was not pleaded in the affidavit hence it is a submission from the bar and I disregard it.

In upshot and foregoing reasons, this application lacks merits and it is hereby dismissed in its entirety with costs.



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A. MSAFIRI
JUDGE
24/8/2023

