

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 141 OF 2023

*(Arising from Land Case No. 140/2014 and from the order of the court dated 16th
February 2023)*

TANZANIA ROAD HAULAGE (1980) LTD.....APPLICANT

VERSUS

MOHAMED MASOUD ABDALLAH1ST RESPONDENT

DAUDI ALFAYO NDIWABU.....2ND RESPONDENT

ATHUMANI SELEMANI MWINYIJUMA.....3RD RESPONDENT

MARIAM MSHAMU NANGULWA4TH RESPONDENT

SEIF SAID MWELENDU.....5TH RESPONDENT

SALUM SAID NGOMA.....6TH RESPONDENT

ASIA HASSAN ABDALLAH.....7TH RESPONDENT

LUCIA JOSEPH MAHUSHI as Administratrix

of Estate of the late NEHEMIA SYLIVANO MAHUSHI.....8TH RESPONDENT

YOHANA MBINILE SHULA.....9TH RESPONDENT

GLORIA EDWARD SHIGAZU.....10TH RESPONDENT

FIRIKI ISMAIL MWINYIMVUA.....11th RESPONDENT

SARAH JOEL MWENG'ENDE as an Administratrix

of Estate of the late JOEL MICHAEL MWANG'ENDE.....12TH RESPONDENT

ESTOM MWAKASAGULE KIFUKWE.....13TH RESPONDENT

TULINAGWE BENSON MWAKAKYOMA.....14TH RESPONDENT

NURU RAMADHANI ALFAN as Administrator

of estates of the late

ZENA ATHUMANI ABDALLAH.....15TH RESPONDENT

SALAMA HUSSEIN MZAINA as Administratrix

of Estate of the

late HASSAN A. MNYEMBETWANI16TH RESPONDENT

SUDI JUMA BAKARI.....	17TH RESPONDENT
HASSAN MOHAMED MGELA.....	18TH RESPONDENT
PETER KASSIAN LUMBANGAH.....	19TH RESPONDENT
WALIVYO PETER LUMBANGA.....	20TH RESPONDENT
IBRAHIM DAUDI MJEMA	21ST RESPONDENT
ZAITUNI SAID NGOMA	22ND RESPONDENT
SAID MOHAMED ABDALLAH as an administrator of Estate of the late MOHAMED ABDALLAH LIPUNGO.....	23RD RESPONDENT
KISAKA JOHN MNKENI	24TH RESPONDENT
ELKA PHILIPO NJANDA as an administratrix of estate of the late	
MICHAEL BULEGWA NYANDA.....	25TH RESPONDENT
RAJABU JUMA MGUMBA as as administrator of the late estates	
JUMA ATHUMANI AMGUMBA	26TH RESPONDENT
PROJIA MATHIAS SIMON as an administrator of estate of the late MATHIAS SIMON.....	27TH RESPONDENT
CATHERINE KACHINDA MKOMBOZI as Administratrix of estates of the late ANDREA IGNATIO MBELWA.....	28TH RESPONDENT
SAIDA M. OMARY.....	29TH RESPONDENT
AKAU S. SWAI.....	30TH RESPONDENT
DANIEL NYANDO.....	31ST RESPONDENT
CASMIR MAGESE KABADI.....	32ND RESPONDENT
ALLY M. MLINDO.....	33RD RESPONDENT
SAIDI KISOMA	34TH RESPONDENT
STEVEN DANIEL SANGA	35TH RESPONDENT
HAMISI BAKARI KINYONDO	36TH RESPONDENT
AZIZI NASSOR	37TH RESPONDENT
BAKARI CHUMU.....	38TH RESPONDENT

SAIDI M . MLINGO.....	39 TH RESPONDENT
KESSY JOHN MNKENI.....	40 TH RESPONDENT
LUPAKISYO BURTON MLAGA.....	41 ST RESPONDENT
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MOSES DANIEL MTENGWA as an Administrator of the estate of the late SHABAN NGURE MTEGWA.....	43 RD RESPONDENT
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ATTORNEY GENERAL.....	47 TH RESPONDENT

RULING

17th July & 21st August 2023

L. HEMED. J.

On 16th February 2023, it was the day fixed for commencement of the hearing of Land Case No. 140 of 2014. On the said date, the plaintiff was represented by **Mr. Benito Mandele**, learned advocate who was holding briefs of **Mr. Mashaka Ngole**, learned advocate. Mr. Mandele prayed for adjournment of the matter on the ground that Mr. Mashaka was on safari in Rwanda and was sick. The prayer was vehemently opposed by the learned counsels who were representing the defendants save for the one represented the 46th and 47th defendants.

Having found no good cause demonstrated for adjournment, the court ordered the matter to proceed for hearing. The learned counsel

who appeared for the plaintiff on the particular date reported to have no instructions to proceed and he had no witness. It was also found that there was no principal officer of the plaintiff and eventually, the suit got dismissed for want of prosecution.

Aggrieved by the order, the applicants presented the instant application under sections 3 A (1) &(2), 3 B (1) (a), 95 and Order IX Rule 6 (1) of the Civil Procedure Code [Cap 33 R:E 2019], in an attempt to make the suit restored. The application has the following prayers in particular:-

“ (a) That this Honourable Court be pleased to make an order setting aside dismissal order issued by this court on the 16th February 2023, in a Land Case No. 140 of 2014 and thereafter make an order for restoration of the same.

“ (b) Cost of this application to follow the events”

The application has been supported by the affidavits of Mr Mashaka Ngole, Benitto Mandele, Daudi Hamisi Mlezi, and supplementary affidavits deponed by **Mussa Daffa, Sabri Salehe, Beatrice Godfrey** and **Ahmed Mwita**. The application was contested

vide the joint counter-affidavits of the respondents. Only the 46th and 47th respondents who opted not to contest the application.

The application was argued by way of written submissions filed as per the schedule directed by the court. **Mr. Mashaka Ngole** learned counsel represented the applicant while **Mr. Mohamed Majaliwa** learned advocate represented the 2nd, 4th, 6th, 7th, 8th, 15th, 18th, 21st, 22nd, 23rd, 25th, 30th, 31st, 35th, and 38th respondents. The 5th, 10th, 11th, 13th, 16th, 17th, 26th, 27th, 28th, 32nd, 36th and 44th respondents were duly advocated by **Mr. Reginald Martin** learned counsel while the 1st, 3rd, 9th, 12th, 14th, 19th, 20th, 24th, 29th, 33rd, 34th, 37th, 39th, 40th, 41st, 42nd and 43rd respondents enjoyed the service of **Mr. Tazan Keneth Mwaiteleke**, learned advocate.

In arguing the application, **Mr. Ngole** adopted the contents of all affidavits deponed to support it. It was submitted that, on 16th February, 2023 he was sick while he was in Rwanda, he attached his passport and medical laboratory analysis report to substantiate his point.

It was also deponed by one Daudi Hamisi Mlezi, the principal officer of the applicant that on the same day he got sick and went for treatment at Tanzania Occupation Health Service. It was averred by the counsel for the applicant that sickness is beyond human anticipation and

forecasts and thus it amounts to sufficient cause for grant of the application. He relied in the case of **Bahati Matimba vs Jagro Enterprises Ltd**, Misc. Civil Application No 5 of 2022, where the court held that the applicant must show sufficient cause for his non-appearance for court to restore the dismissed case. He also cited the case of **Nyambura Makerere vs Leonadi Mwita Maro**, Misc. Civil Application No 68 of 2021, where it was held that sickness is a sufficient reason to set aside dismissal orders. He thus prayed for the application to be granted with cost.

On their part, the respondents through their advocates resisted the application through their counter affidavits. They disputed the applicant's averment and stated that the applicant's case was not dismissed for non-appearance of the advocate, but because there was no witness on the fateful date.

The respondents' counsels also stated that the applicant's advocate had the knowledge that the matter was scheduled for hearing but intentionally he travelled to Rwanda without any information to the court. It was added that even the principal officer who was the witness failed to enter appearance without notice. They further argued that even

the five advocates from Ngole & Associates Law Chamber failed to enter appearance in court.

They contended that reasons stated by the applicant are mere speculations and does not amount to sufficient cause warranting this court to set aside the dismissal order and restore Land Case No. 140 of 2014. It was argued further that, the advocate of the applicant did not act professionally and was not diligently enough in handling the matter as he ignored the court orders without sufficient reasons of doing so. Therefore, they prayed this application to be dismissed with cost.

In rejoinder submission, the applicant's advocate stated that, the principal officer fell sick on 16th February, 2023, at 5:00 am and proceeded to the hospital for treatment and failed to enter appearance on 16th February, 2023. Therefore, he insisted for restoration of the suit.

I have given careful deliberation to the rival arguments in support and against the application. The point for determination is whether the matter is meritorious. The power to set aside dismissal order is provided under Order IX Rule 6(1) of the Civil Procedure Code [Cap. 33 R.E 2019]. It states thus:-

" 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 non-appearance** 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 added)*

From the above quoted provision, it is plain that setting aside dismissal order is in the discretion power of the court. However, the applicant is bound to demonstrate sufficient cause that prevented him from attending the matter on the fateful date. The question is whether the applicant in the matter has provided sufficient cause for this court to exercise its discretion powers to grant the application.

The first cause stated by the applicant is the sickness of the advocate of the applicant/plaintiff. I must state at the outset that, on the fateful date, the question of sickness of Mr. Mashaka Ngole, advocate of the applicant was raised by Mr. Benito Mandele, learned advocate who appeared on the said date while praying for adjournment. The court found the reason of sickness of Mr. Mashaka

worthless to adjourn the matter. I find that, under the principle of *functus officio*, the court is precluded from re-determining the ground of sickness of Mr. Mashaka Ngole as it was considered during determination of the prayer for adjournment. I am holding so because, the principle of *functus officio* demands that once a court disposes of a matter or issue, it becomes powerless to re-determine it. This principle was echoed in **Bibi Kisoko Medard vs Minister for Lands Housing and Urban Developments and Another**, [1983] TLR 250, where the court held that:-

"A matter of judicial proceedings once a decision has been reached and made known to the parties, the adjudicating tribunal thereby becomes functus officio."

From the foregoing, the ground of sickness of Mr. Mashaka Ngole cannot be considered at this stage as it was rejected when determining the issue whether to adjourn hearing on 16th February, 2023.

Another ground raised by the applicant for restoration is that, at the beginning of the year 2023, Ngole & Associates Law Chambers had four Advocates working for the firm namely; Ms. Beatrice Godfrey Nyamaganda, Mr. Mussa Daffa, Ms. Sabry Salehe and Mr. Ahmed

Mwita, but due to the circumstances beyond control, since early January 2023, the managing partner remained with only Ms. Sabry Salehe. I have seen the affidavit of one Sabry Salehe, who has deponed that on the fateful day, she was attending the burial ceremony of her uncle, one Khalfan Lupande. I have noted the contents of her affidavit.

I have also noted the assertion in the affidavit of Ms. Beatrice Godfrey that her employment with Ngole and Associates Law Chamber was not confirmed as she was on probation. However, I have turned a doubting Thomas on the trustworthiness of the assertion because Ms. Beatrice Godfrey has continued to attend and handle some cases instituted by Ngole and Associates Law Chamber. I have managed to access the proceedings of the ongoing case of **Bahiyya A. Kibola vs Assistant Commissioner for Lands & 8 others**, Land Case No.155 of 2021, filed by Ngole & Associates Law Chamber. In the said case, Ms. Beatrice Godfrey has been attending the matter alongside with Mr. Mashaka Ngole. For instance, on 22nd February, 2023, she attended for 1st PTC and on 5th April, 2023 she attended for Mediation. On 14th and 17th July, 2023, she attended for hearing together with Mr. Mashaka Ngole. If Ms Beatrice Godfrey was able to attend Land Case No.155 of

2021 instituted by Ngole & Associates Law Chamber despite being terminated from employment, she could be able then to attend Land Case No.140 of 2014, which was pending in court for so long. In the circumstance, I find the reason for Ms. Beatrice Godfrey being ceased from working with the Ngole & Associates Law Chamber cannot be a valuable ground for grant of the application.

In their affidavits, Mr. Mohamed Mwita and Mr. Mussa Daffa learned advocates have deponed to the effect that they ceased to work with Ngole & Associates Law Chamber, after 31st December, 2023 and earlier January, 2023, respectively. I have seen annexure 'ML1', annexed to the affidavit of Ahmed Mwita, which is a letter appears to have been written on '**31st January 2023**' and Annexure D1, to the affidavit of Mussa Daffa, authored on 5th January, 2023 both being on the cessation of Ahmed Mwita and Mussa Daffa to work with Ngole & Associates Law Chamber. The author of the said two letters is Ngole & Associates Law Chamber. I doubt on the reliability of the two letters because there is no resignation letters of Mr. Ahmed Mwita and Mussa Daffa to warrant the Firm to respond *vide* Annexure 'ML-1. and 'D1.'

According to the annexures, Mr. Ahmed Mwita ceased to be a resident advocated after '31st December 2023'. The letter, annexure

'ML-1' supporting the assertion bears the future date of '31st December 2023.' The date in Annexure "ML-1" is concomitant to what is deponed in the affidavit of Ahmed Mwita in paragraph 3 thus:-

*"3. That **after 31st December 2023**, I ceased to be a resident Advocate at Ngole & Associates Law Chambers..."(Emphasis added)*

From the quoted paragraph above said, it is presumed that Mr. Ahmed Mwita is still working with Ngole & Associates Law Chamber as he will cease to work with the firm on '**31st December, 2023**'. Above all, the absence of the resignation letters from the two advocates implies that the two letters, annexure 'ML-1' and 'D1' were manufactured for purposes of the application at hand. They are unreliable!

I have also seen the affidavit deponed by one Daudi Hamis Mlezi, who averred to be the principal officer of the applicant/plaintiff and that on the fateful date he was sick. In paragraph 10 of the affidavit, he has stated thus:-

"10. That on the 16th February 2023, around 5:00 am, when I woke-up, I felt sick (pressure symptoms) and with pain in my bones and

consequently, I went to my employer to report and seek for sick leave, to wit; I was granted leave and proceeded to Tanzania occupational Health Service for examination and treatment..."

Let me consider that the above statement is true. I am aware that sickness of the applicant is one of the grounds for court to exercise its discretion powers to restore a suit. However, sickness can only 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 a notice of absence.

In the matter at hand, the applicant is a company which has many employees/officers. The applicant being a legal entity, sickness of one employee could not lead for it to fail to attend the matter. The deponent one Daudi Hamis Mlezi has stated in his affidavit as quoted hereinabove that, he reported his sickness to his employer (the applicant) and was granted sick leave. Having granted sick leave to the said employee/officer who was attending the matter, the applicant was duty bound to assign the matter to another officer to attend the matter. Failure so to do, the applicant acted negligently. It is thus my

considered view that sickness of Daudi Hamis Mlezi could not prevent the applicant from attending the matter on the fateful date through another officer. It is thus not a sufficient cause.

The applicant also raised the point that the matter could not proceed on the fateful date because the witness one Daudi Hamis Mlezi was sick. I have re-examined the proceedings of Land Case No. 140 of 2014 and found that when the matter came for 1st Pre-trial Conference on 8th November, 2022, the applicant's advocate submitted that the plaintiff/ Applicant would have four (4) witnesses. If at all one Daudi Hamis Mlezi was sick, then, the applicant would have called the other three (3) witnesses. Unfortunately, they were not in court on the material date. Since the applicant/plaintiff had 4 witnesses then the illness of one witness would not have prevented the matter to proceed for hearing on the fateful date. The ground of sickness of the witness is thus insufficient for purposes of granting the instant application.

Before I pen off, let me comment on the presence and capacity of Mr. Benito Mandele on the date which the suit was dismissed. On the said date, Mr. Mandele stated to have been holding brief of Mr. Mashaka Ngole who was not in court on the particular date. There is a possibility that on the said date, Mr. Mandele had instruction of the

applicant/plaintiff to proceed with the matter but for some reasons best known to himself, he used the absence of Mr. Mashaka as ground for adjournment. I am holding so because I have noted from the affidavit deposed by Mr. Mashaka Ngole that Mr. Mandele was engaged by the applicant to appear in court and represent the applicant/plaintiff in Land Case No. 140 of 2014 on the fateful date. This is evidenced in paragraph 8 of the affidavit deposed by Mashaka Ngole thus:

*"8. Further, as I knew I could not enter appearance before the trial Judge, I advised Daud Mlezi to look for another advocate who will appear for the applicant on that date. Later on, **I received phone call from Advocate Mandele who informed me that he was engaged by the Applicant to represent him in the Land Case No.140 of 2014**" (Emphasis added).*

From the above assertion, it is obvious that Mr. Benito Mandele was fully engaged to represent the applicant on the fateful date and not just to hold brief of Mr. Mashaka Ngole as he presented himself on the fateful date. It should also be noted that in the present application for restoration of the said dismissed suit, Mr. Mandele is among the

advocates of the applicant. It is my firm view that, his presence in this matter is *res ipsa loquitur* that Advocate Mandele was engaged by the applicant to represent it in Land Case No.140 of 2014 on 16th February, 2023.

Therefore, in the final analysis, I find no sufficient cause being demonstrated to warrant this court set aside the dismissal order. The applicants were negligent in pursuing the matter and thus desired the consequences thereof. In the circumstance, I dismiss the entire application with costs. It is ordered.

DATED at DAR ES SALAAM this 21st August, 2023.

