

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

**MISC. LAND APPLICATION NO. 114 OF 2023**

*(Arising from Land Case No. 97 of 2018)*

**DR. RAMADHANI KITWANA DAU.....1<sup>ST</sup> APPLICANT**

**RAZEDA GROUP LIMITED.....2<sup>ND</sup> APPLICANT**

***VERSUS***

**AZANIA BANK LIMITED.....1<sup>ST</sup> RESPONDENT**

**L.J. INTERNATIONAL LIMITED.....2<sup>ND</sup> RESPONDENT**

**PLANE TREE CO. LTD.....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

*13<sup>th</sup> July, 2023 & 28<sup>th</sup> August, 2023*

**L. HEMED, J.**

The proceedings of **Land Case No. 97 of 2018** shows that, on 6<sup>th</sup> day of December 2022, the matter was called for final pre-trial conference. On the particular date, the plaintiffs (the applicants herein) **DR. RAMADHANI KITWANA DAU** and **RAZEDA GROUP LIMITED** were represented by **Mr. Edward Chuwa** and **Ms. Anna Lugendo**, learned advocates. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants (respondents herein) **AZANIA**



**BANK LIMITED, L. J INTERNATIONAL LIMITED** and **PLANE TREE CO. LIMITED**, respectively were represented by **Mr. Makaki Masatu**, learned advocate while the 4<sup>th</sup> defendant (respondent), **THE ATTORNEY GENERAL** enjoyed the service of **Ms. Grace Lupondo**, learned state attorney.

Final Pre-trial Conference could not be conducted on the 6<sup>th</sup> December, 2023, following the prayer for adjournment made by the counsel for the parties. One amongst the grounds for adjournment was that parties were in the process to settle the matter amicably. As the matter was under special session, the court granted the prayer for adjournment with an order of **"last adjournment."** It was also directed that the matter would proceed for final pre-trial conference and commencement of hearing on 28<sup>th</sup> February, 2023.

When the matter was called on 28<sup>th</sup> February, 2023, the plaintiffs (applicants herein), were found to be absent without notice. The court had no option other than dismissing the suit for want of prosecution. The applicants were aggrieved by the dismissal order hence the present application with the following prayers: -



*"1. That this honourable court may be pleased to set aside the dismissal order dated 28<sup>th</sup> February, 2023.....in Land Case No. 97 of 2018.*

*2. Cost for this Application to be provided for; and*

*3. Any other order(s) as the honourable court may deem fit and just to grant."*

The application has been supported by the affidavits of **Edward Peter Chuwa, Richard Karumuna Rweyongeza** and **Ahmed Ramadhani Dau**. The respondents challenged the application through the counter affidavits deponed by **Makaki Masatu, Denis Msafiri,** and **Grace Lupondo**. The application was argued by way of written submissions.

**Mr. Edward Chuwa**, learned advocate argued the application for the applicants. **Mr. Makaki Masatu** and **Mr. Denis Msafiri**, learned advocates, acted for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, while **Ms. Grace Lupondo**, learned state attorney, was for the 4<sup>th</sup> respondent. This being an application to set aside dismissal order, it is thus governed by Order IX Rule 6 (1) of the Civil Procedure Code [Cap. 33 R: E 2019] which provides 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 aside 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..."*(Emphasis added).

From the above provision, the Court can set aside dismissal order only upon the applicant having demonstrated sufficient cause for his non-appearance on the date when the suit was called for hearing. The issue for determination in this matter is thus, whether sufficient cause has been demonstrated by the applicants for their non-appearance on the 28<sup>th</sup> February, 2023, when Land Case No. 97 of was dismissed.

Having gone through the rival affidavits and submissions, I realized that the applicants relied on the following grounds in trying to persuade the court to grant the Application:-



1. Sickness of Mr. Edward Chuwa and Mr. Rweyongeza, advocates of the applicants
2. Cessation of employment of Ms. Anna Lugendo at Chuwa Advocates.
3. Failure of the court to issue summons to witness, to the 1<sup>st</sup> applicant in particular, who is a Tanzanian ambassador based in Kuala Lumpur, Malaysia.
4. Failure of the court to record the presence of the principal officer of the 2<sup>nd</sup> applicant.
5. The matter was for final pretrial conference and that it was wrong for the matter to be dismissed.

Let me start with the ground of sickness of the applicants' advocates. It has been presented in the affidavits in support of the application and in the submissions of the applicants that on the fateful date, Mr. Edward Chuwa and Mr. Richard Rweyongeza were sick, that they could not manage to attend the matter. To prove the assertions of illness for Mr. Edward Chuwa, a letter dated 28<sup>th</sup> February, 2023, Ref. No. MH/PR/100, with a title "RE: MEDICAL REPORT FOR EDWARD PETER CHUWA 56 YEARS MALE



REG. NO. 961852/2023", addressed to whom it may concern, was annexed to the Affidavit.

As regard to the illness of Mr. Richard Rweyongeza, a photocopy of the Medical Report from Muhimbili National Hospital was annexed. The said report was also in the form of a letter, dated 28<sup>th</sup> February, 2023 Ref. No. MNH/DIABETIC & CARDIAC) 358, titled "RE: MEDICAL REPORT FOR RICHARD K. RWEYONGEZA 74 YRS MALE REG. NO. 89-06-19." The respondents disputed the assertion and contended that Mr. Chuwa was not sick on the 28<sup>th</sup> February, 2023 rather he travelled to Moshi where on 1<sup>st</sup> March 2023, Mr. Edward Chuwa and Anna Lugendo appeared before Hon. Simfukwe, J, High Court – Moshi in Land Case No. 02 of 2021.

I do agree with the learned counsel for the applicants that sickness is one of the grounds for setting aside dismissal order. This was held in the case of **Hamis Macha Sando vs Joyce Bachubila**, Civil Application No. 487/17 of 2016 (CAT). However, for sickness to constitute a good cause to set aside dismissal order, it has to be proven that such illness actually prevented the applicant from attending the matter on the fateful date.



To start with the sickness of Mr. Richard Rweyongeza, learned advocate, the record of Land Case No. 97 of 2018 clearly show that he stopped representing the applicants after the 1<sup>st</sup> pre-trial conference. I am holding so because the proceedings of 6<sup>th</sup> December, 2022 clearly show that the applicants were represented by Mr. Edward Chuwa and Ms. Anna Lugendo, advocate. In that regard, sickness of Mr. Richard Rweyongeza could not in any way have effect to the progress of the case as he even did not attend the matter on 6<sup>th</sup> December 2022. Apart from not being attending the matter in previous dates, Mr. Richard Rweyongeza used a letter seemingly to be authored by Muhimbili National Hospital addressed to "whom it may concern". My understanding is that a person who attends hospital for medical attention is normally issued with a medical chit which shows how he was diagnosed and treated.

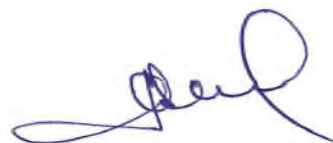
I am astonished, why Mr. Rweyongeza was issued with the letter instead of Medical chit. I am moved to believe that the said letter dated 28<sup>th</sup> February, 2023 was procured specifically for the matter at hand. There is no medical chit been annexed to the affidavit of Mr. Rweyongeza at least to prove his sickness. I find the reason of sickness of Mr. Richard Rweyongeza to hold no water on the ground that; in the first place he was



not attending the matter even prior to the fateful date. Another ground is such that, no medical chit has been shown in his affidavit to prove his illness that prevented him from attending the matter on the fateful date.

As regard to sickness of Mr. Edward Chuwa, in the first place he did not present the medical chit thereof, instead he presented a letter addressed to "whom it may concern". I am of the firm view that a mere letter, in the absence of medical chit cannot be a *prima facie* proof that the person relying on the same attended hospital and was medically attended. In the instant matter, Mr. Chuwa has relied much on a letter from Mwananyamala hospital which appears to have been composed on 28<sup>th</sup> February, 2023 to cater for the circumstances of this case. I do subscribe to what my learned fellow at the bench Hon. Fikirini, J. (as she then was) observed in **Mantrac Tanzania Limited vs Junior Construction Company Limited & 3 Others**, Commercial Case No. 10 of 2017 at page 17 thus:

*"Ordinarily, any hospital visit if it is for medical attention, the documentation is not in the form of the letter supplied to this court. ....There is a medical chit with diagnosis and prescription, without a "to*

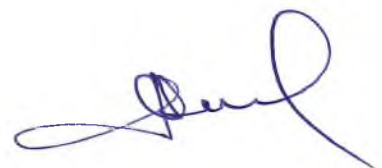




*whom it may concern" heading or "Ref..... what was supplied to court is a letter presumably following the medical attention and not diagnosis or prescription on chit. The letter in itself does not at all prove that the witness attended hospital."*

From the observation of the court herein above, the letters purporting to prove sickness of Mr. Edward Chuwa and Mr. Richard Rweyongeza, advocates are not prima facie proof that the said advocates were sick and medically attended. I am holding so because medical chit proves medical attention, diagnosis or prescription.

The respondents also deponed that Mr. Chuwa and Ms. Lugendo had attended another case at the High Court - Moshi on 1<sup>st</sup> March, 2023. This assertion could not be disputed by Mr. Chuwa. I managed to access the proceedings in Land Case No. 02 of 2021, High Court Moshi District Registry and found that, truly, on 1<sup>st</sup> March, 2023, Mr. Edward Chuwa and Ms. Anna Lugendo represented the defendants, before Hon. S.H. Simfukwe, J. in the said matter which was fixed for hearing of the preliminary objection. Being the case, it is quite obvious that Mr. Chuwa and Ms. Lugendo must have travelled on 28<sup>th</sup> February, 2023 to Moshi to



attend the said case. If Mr. Chuwa and Ms. Lugendo were able to travel to Moshi to attend Land Case No. 02 of 2021, it implies that, if at all Mr. Chuwa was sick on the 28<sup>th</sup> February, 2023, then the said sickness alleged was not that much serious to prevent him from attending the matter on the fateful date.

I must clearly state at this juncture that, in applications like the one at hand, whoever relies on the ground of sickness is duty bound, apart from establishing the illness, he/she has to prove that such illness prevented him/her from attending the matter. It should also be known that, proving illness as the cause of non-appearance is not enough, the person relying on sickness should be able to prove that it was impossible to notify the court about such illness for purposes of adjournment. In the present application, the applicants, apart from failing to prove existence of illness and seriousness of it, they have failed to establish that it was impossible to notify the court about illness of Mr. Chuwa and Mr. Rweyongeza. In that regard, the ground of sickness of Mr. Chuwa and Rweyongeza cannot be helpful to the applicants to persuade the court to set aside its dismissal order.



The applicants also relied on the ground that the court did not issue summons to the 1<sup>st</sup> applicant and witnesses to appear on 28<sup>th</sup> February, 2023. I have perused the proceedings of 6<sup>th</sup> December, 2022 in Land Case No. 97 of 2018 and found that on the particular date, the applicants were represented by Mr. Edward Chuwa and Ms. Anna Lugendo, advocates. Upon the prayer for adjournment, the matter was fixed to proceed for final pretrial conference and hearing on 28<sup>th</sup> February, 2023. It was also marked as last adjournment. Following such appearance, as a matter of law no summons would be required to notify the plaintiffs/applicants in person about the orders for appearance on 28<sup>th</sup> February 2023. The well established procedural law is that, when a date for future appearance before the court is fixed in the presence of the parties or their advocates, no summons is required to be issued to such parties who were present on the particular date. I am holding that because, summons is only issued to a party who was absent or to witness who are not themselves parties to the suit.

In the instantaneous application, the 1<sup>st</sup> Applicant was the 1<sup>st</sup> Plaintiff in the suit, that, the court was not obliged to issue summons to him to attend his own case. Additionally, it was the duty of the plaintiffs or their



advocates, if they so wished for issuance of summons, to apply to the court for such summons on 6<sup>th</sup> December, 2022. I am holding so based on the provisions of Order XVI Rule 1 of the Civil Procedure Code, [Cap 33 R.E 2019] which provides thus:

*"1. At any time after the suit is instituted, **the parties may obtain, on application to the court,** or to such officer as it appoints in his behalf, summonses to whose attendance is required either to give persons evidence or to produce document."*

[Emphasis added]

The fact that the applicants' advocates who were present on the 6<sup>th</sup> December, 2022 opted not to apply for issuance of summons to witness or to the 1<sup>st</sup> Applicant, then, they are precluded from levelling blames against the court for their own negligence/mistakes. The ground of summons to the 1<sup>st</sup> applicant cannot in any way hold water because the court had no duty to assume that personal attendance in court by the 1<sup>st</sup> applicant required permission from his permanent secretary as alleged. Besides, the applicants are the ones who instituted the said suit, it was therefore, their duty to follow – up and attend their case.



Let me turn to the ground of cessation of the employment of Ms. Anna Lugendo of working for Chuwa Advocates. This assertion is found in the affidavit deponed by Mr. Edward Chuwa, however, it was not supported by any other document to that effect. There was no resignation or termination letter for Ms. Anna Lugendo from working in the law firm of Chuwa Advocates. Additionally, the assertion has not been supported by the affidavit of Ms. Anna Lugendo perhaps to signify that she is no longer working for Chuwa advocate. In the absence of termination or resignation letter to proof cessation of employment of Ms. Lugendo in the law firm of Chuwa advocates, and in absence of the affidavit of Ms. Lugendo to support the assertion thereof, the ground is considered moot to be relied upon.

It was also asserted that the principal officer of the 2<sup>nd</sup> applicant appeared on the fateful date but the court could not record his presence. I am aware that the 2<sup>nd</sup> applicant is an artificial person (a company) whose attendance in court is through its principal officers or advocates. Where there is no advocate representing an artificial person, the principal officer is the one to be recorded to signify presence of such artificial person. The proceedings of 28<sup>th</sup> February, 2023 regarding Land Case No.97 of 2018



shows that, no one introduced himself as principal officer of the 2<sup>nd</sup> plaintiff/applicant. The Court ended up recording that, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were absence and eventually, dismissed the entire suit. I must point out clearly that, it is the duty of a party to any matter before the court to introduce himself for purposes of recording the presence. If such party fails to introduce himself/herself when the matter is called, he/she desires the consequences thereof.

It was further raised that the matter was for final pretrial conference and that it was wrong for the matter to be dismissed. I have noted from the proceedings of 06<sup>th</sup> December, 2023 regarding Land Case No.97 of 2018 that the matter was to come for final PTC and hearing on the same date. It was also marked as last adjournment. The fact that there was an order for final PTC and commencement of hearing, parties were bound to respect the order, as it is the matter of principle that court orders must be respected.

Beside, in assumption that the matter would have been fixed for final pretrial conference, would the matter survive in the absence of the plaintiffs/applicants on the fateful date? The answer is found under Order



VIII Rule 20(1)(a) of the Civil Procedure Code, [Cap.33 RE 2019] which provides thus:-

*"20.-(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may*

*(a) **dismiss the suit or proceedings if a defaulting party is the plaintiff; ...**"*

(Emphasis added)

In view of the above provision, even if we assume that the matter would have come for final PTC, the matter would not have survived as the plaintiffs were not present on the particular date. The ground that the matter was for final pretrial conference cannot also constitute as sufficient cause to warrant this court restore the dismissed suit.

In the final analysis, I find that all grounds raised for purposes of persuading this court to vacate the dismissal order in Land Case No. 97 of 2018 have failed. The applicants have shown no sufficient cause for restoration of the dismissed suit. In the upshot, I proceed to dismiss the entire application with costs. It is so ordered.



**DATED** at **DAR ES SALAAM** this 28<sup>th</sup> August 2023.



  
L. HEMED

**JUDGE**