

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

MISC. LAND APPLICATION NO. 528 OF 2023
(Arising from Land Case No. 121/2023 Land Division)

FARIDA RASHID.....APPLICANT

VERSUS

HONEST MARANDU.....RESPONDENT

RULING

03/10/2023 to 05/10/2023

E.B. LUVANDA, J

Farida Rashid the Applicant therein is praying for the following orders; One, this Court be pleased to set aside its order dated 21/08/2023, dismissing Applicant's suit, in Land Case No. 121/2023 for non appearance for the scheduled first pre trial conference; Two, this Court be pleased to set aside its order dated 21/08/2023, striking out the Applicant's reply to a counter claim in Land Case No. 121/2023, for non appearance for the scheduled first pre – trial conference; Three, this Court be pleased to order and direct parties to attend pre trial conference on the date and time to be set by the Court.

In the affidavit in support which was deposed by Mr. Jeremiah Mtobesya learned Counsel for the Applicant, explained reasons for non appearance to be due to the fact that Mr. Mahinyila learned Counsel who was assigned to handle the matter travelled to Dodoma to attend some personal matters; Two, in advertent and human error when jotting down the date of the case recorded on 24/08/2023 instead of 21/08/2023; Three, lecturing law students at the Law School of Tanzania and wrong number written in the plaintiff's written statement of defence to the counter claim. He stated that the Plaintiff (Applicant herein) has never defaulted appearance.

In submission in Chief, the learned Counsel for Applicant submitted that non appearance on 21/08/2023 was actuated by a bonafide mistake as to the date of court appearance, where Mr. Mtobesya learned Senior Counsel was under mistaken belief that the case was scheduled on 24/08/2023. He submitted that in some instance courts have accepted bonafide mistake of dates and human error as sufficient cause to warrant setting aside an *ex parte* order or extending time which the Applicant should take action. He cited Sir D.F. Mulla, **Mulla the Code of Civil Procedure**, 18th Edition, Vol2, at page 2018, for a proposition that bonafide mistake as to date of hearing is sufficient cause to set aside an *ex parte* order. Also cited the case of **Rashidi Abiki Nguwa vs. Ramadhani Hassan Kuteya & Another**, Civil

Application No. 431/2012 CAT at Dodoma. He argued the court to give effect to the overriding objective, allow the application and let parties resolve their dispute in Land Case No. 121/2023 inter parties by restoring the Applicant's main suit and her reply to the Respondent's counter claim, citing section 3A(2) and Order VIII Rule 20(2) Civil Procedure Code, Cap 33 R.E. 2019. He pleaded that the Applicant has never defaulted appearance and argued that the court find that non appearance on 21/08/2023 as a bonafide mistake of the dates occasioned by human error.

In reply, David Mganga Chillo learned Counsel for the Respondent submitted that failure to record the hearing date properly to his view is not a sufficient reasons for setting aside the dismissal order. He submitted that the Applicant did not swear an affidavit as to why she did not attend the hearing personally, argued no reasons shown as to why the Applicant herself could not appear on the material date. He cited the case of **Kamala Rwiza Stephano vs. Tanzania Women's Bank PLC**, Misc. Civil Application No. 109/2023, HC Dar es Salaam. He submitted that the Applicant had a duty to make follow up her case and notify the court on the absence of her advocates. he cited the case of **Lian Han Yung & Another vs. Lucy Treseas Kristenses**, Civil Appeal No. 219/2019, CAT. He argued the Court to disregard the ground that Mr. Deogratius Cosmas Mahinyila learned

Advocate failed to appear because he travelled to Dodoma to attend personal issues, for reasons that it is neither supported with leave form nor travelling documents, to substantiate that he was absent from Dar es Salaam on that day; Two, the alleged human error to record dates was not supported with proof of the records "Counsel court diary" nor firm causelist was attached. He submitted that the affidavit have miserably failed to account for Counsels non appearance to enable this court to grant the orders sought in the chamber summons. He cited the case of **Flomi Hotel Limited vs. Equity Bank Tanzania Limited**, Civil Case No. 163/2017, HC.

In rejoinder, the Learned Counsel for Applicant argued this Court to disregard the reply submission by the Respondent, for reasons that it contravened this court order dated 19/09/2023 when his counter affidavit was struck out and was given a chance to respond on matters of law only but his submission the Respondent attacked the reasons stated in the affidavit, including a fact that the affidavit did not show the whereabouts of the Applicant herself on the date at issue.

He argued the Court to ignore the authorities cited as well, for reasons that they contravened the directives of this court dated 19/09/2023, which debarred the Respondent to submit on matters of facts.

The Learned Counsel reiterated his plea that non action was attributed to human error, argued the Court to find that non appearance was caused by nothing but human error, which was caused by bonafide mistake of the court's date.

For that matter, the arguments (submission) of the Learned Counsel for Respondent, is disregarded and discarded.

In this application, the Applicant pleaded two errors; One, what he called in advertently recording the wrong date on 24/08/2023 instead of 21/08/2023, which the Counsel termed it as human error; Two, a cellular phone number appearing at the credentials and address of the Applicant's written statement of defence to the Counter Claim recorded 0717 745182 instead o a correct one 0717 745 812 pertaining to Mr. Mtobesya Learned Senior Counsel And Managing Partner of Ms. Iuris Peritis (Advocates). One may ask out of curiosity, if the Land Case was No. 121/2023 was assigned to Mr. Deogratus Cosmas Mahinyila learned Advocate to handle it, why the subsequent pleadings like written statement of defence to the counter claim could not reflect contact of the assigned partner or Counsel as well, along the contact of the Managing Partner, for easy communication in the situation like this. Regarding the error in recording the date 24/08/2023 instead of 21/08/2023, the Counsel for Applicant was not particular as to which equipment, device

or gadget was used to record it, whether counsel's diary or firm cause list or electronic gadget. No any document was attached to support the one week leave sought by Mr. Mahinyila learned Counsel and granted by the managing Partner of the Law Firm Mr. Mtobesya Senior Counsel. The alleged "personal matters" remained in blanket. No any travelling schedule or itinerary was attached to support a fact that indeed Mr. Mahinyila learned Counsel travelled to Dodoma on the 18/08/2023. It was not disclosed whether he travelled on private transport, public transport, bus, train or flight. In short, everything was unsubstantiated. On the alleged 23/08/2023, while the Senior Counsel allege he received a call from Mr. Mahinyila Advocate asking whether Mr. Mtobesya learned Counsel had attended Land Case on 21/08/2023, meanwhile Mr. Mahinyila learned Counsel in his affidavit stated that he contacted Mr. Mtobesya learned Counsel to get clarification as to why the case was subjected for hearing on 30/08/2023 while the matter was subjected for first pre trial conference on 21/08/2023 and the next stage expected was mediation and not hearing. To my point of view, asking whether one attended and to get clarification, portray a different message. The learned Counsel for Applicant bragged that they never missed attended even a single session, but the records reflect that on 27/06/2023 they defaulted to appear.

To put in a nutshell, the learned Advocates for the Applicant failed to demonstrate good and sufficient cause which prevented them to appear on 21/08/2023 for the first pre trial conference.

The applicant is dismissed with costs.



E.B. LUVANDA
JUDGE
05/10/2023

Ruling delivered through virtual court attended by Mr. Deogratius Mahinyila learned Counsel for Applicant and Mr. Method Nestory learned Counsel for Respondent.



E.B. LUVANDA
JUDGE
05/10/2023