

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 157 OF 2023

(Originating from the Order of the High Court of Tanzania Land Division Dar es Salaam in Land Case No. 224 of 2021)

AMANA BANK LIMITED.....APPLICANT

VERSUS

AISHA KHALFAN SOUD.....1st RESPONDENT

NCHAMBIS TRANSPORTERS LIMITED.....2nd RESPONDENT

SULEIMAN MASOUD SULEIMAN.....3rd RESPONDENT

YAHYA MASOUD SULEIMAN.....4th RESPONDENT

RULING

31st October & 12th December, 2023

MHINA, J.

By a chamber summons taken under Order IX Rule 6 and section 95 of the Civil Procedure Code, Cap 33 R: E 2019 ("the CPC"), the applicant Amana Bank Limited instituted this application against the respondents, Aisha Khalfan Soud and three others, *inter-alia*, are seeking the following orders:-

- 1. The court be pleased to set aside the dismissal order made on 27 February 2023 and restore the applicant's Counterclaim in*

the Land Case No. 224 of 2023 to proceed and be heard on merits.

2. That the costs of this application to be borne by the Respondents.

3. Any other relief(s) be granted as this Honourable Court may deem fit to grant.

The grounds for the application were expounded in the affidavit, which Augustine Rutakolezibwa, advocates for the applicant, swore in support of the application. Supported by the supplementary affidavit of Yesse Rugaiya, also learned advocate.

Briefly, as a background of the matter, the applicant was the defendant in Land Case No. 224 of 2021 before the Court. Also, he was the claimant in the same case after he filed the counter-claim against the respondents in the instant application.

The Land Case No. 224 of 2021 was scheduled in a backlog clearance session and slated for the final pre-trial conference and commencement of hearing on 27 February 2023 and 28 February 2023.

When that case was called on for final PTC and hearing on 27 February 2023, both parties to the main suit and counter-claim were absent despite being duly served with the notice of hearing.

Therefore, this Court dismissed both the main suit and the counter-claim for non-appearance.

At the oral hearing, the applicant was represented by Mr. Augustine Rutakolezibwa, learned advocate. The respondents were absent. The efforts to secure their attendance proved futile even after service by substituting by

publication in the Citizen newspaper dated 20 September 2023 and Mwananchi newspaper dated 20 September 2023. Therefore, the application proceeded ex parte against the respondents.

At the hearing, Mr. Rutakolezibwa had nothing to add apart from what was averred in the affidavits.

Having gone through the affidavit, he stated that on the date of the hearing, while he was on his way to court, he suddenly fell sick and was rushed to nearby Kawe Dispensary, and he was diagnosed and found with Hyperparathyroidism (HPT), which caused fever, coughing and difficulty in breathing. He was admitted to medication under the Emergency Department (ED) for two days. That was why he was unable to attend the court session. (The applicant's counsel attached a copy of the diagnosis and treatment card).

Further, he stated that on the same date, while at the Dispensary, he sent a message to his fellow advocate Yesse Rugaiya, who appeared before Hon. Nkwabi in Civil case No. 97/2022 between Lekuni Enterprises Ltd Vs. Tanzania Breweries Public Limited Company. When Mr. Rugaiya appeared at the court at about 10:15, he found the matter had already been dismissed for the non-appearance of both parties.

On his part, Mr. Rugaiya, as per paragraphs 4 and 5 of his affidavit, stated that while he was attending the matter before Hon. Nkwabi, J, and at around 9:45 hours, he got a message via his mobile phone from senior counsel Augustine Rutakolezibwa, that he had suddenly fallen sick while on the way to attend the Land case No.224 of 2021 between ***Aisha Khalfan Soud Vs.***

Amana Bank & Others, which was scheduled for a session hearing before Hon. Mhina, Judge.

He further stated that after he got out of the judge's chamber, he went to the land division at about 10:15 hours to inquire about that case, and he learned that the same had been dismissed for non-appearance of both parties.

Reverting to Mr. Rutakolezibwa's affidavit in paragraphs 11, 12 and 13, he stated that before the hearing date, parties had agreed on a deed of settlement, and the respondents were being waited to sign the same and file in court as a compromise suit.

However, upon dismissal of the counterclaim, the applicant would be unable to enforce such settlement after the respondents heard of the dismissal of the suit; they neglected to sign the intended deed of settlement.

Ultimately, he contended that the applicant would suffer irreparable loss and the respondents would suffer nothing if the prayer to settle aside the dismissal order would not granted.

Having heard the counsel for the applicant and scrutinize the affidavit, the main issue for determination is whether the applicant has shown sufficient cause for this court to grant his application for restoration.

On this, the relevant provision of law is ***Order IX rule 6 of the Civil Procedure Code Cap. 33***, which reads: -

6.-(1) 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 nonappearance 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.

The provision of the law above gave power to this court to set aside a dismissal order for the matter to proceed on its determination on merit upon good cause being shown.

The question is whether there is good cause for setting aside the dismissal order in the instant application.

What is **"good cause"** is a question of fact as it depends on the circumstance of each case, for there are no hard and fast rules laid down as to what constitutes or does not constitute a good cause.

This should not detain me long because, having gone through the applicants' affidavit, I find it quite clear that the counsel demonstrated the reasons for his failure to prosecute the case. In his affidavit, para 7 to 10, he stated that he was aware that the case was scheduled for a special session, but he got sick on the way to court and was sent to Kawe Dispensary, where he was diagnosed with Hyperparathyroidism (HPT) and was admitted to medication under Emergency Department (ED) for two days.

He went on that, while at the Dispensary, he asked his fellow advocate through a text message to take on but informed him that when he attended the court at about 10.45, the matter had already been dismissed.

On the part of Mr. Yesse Rugaiya, in his supplementary affidavit, he also acknowledged having received a text message at around 9.45 while prosecuting a case before Hon. Nkwabi in Civil Case No. 97 of 2022 instructing him to appear before Hon. Mhina J. in Land Case No. 224 of 2021 and upon reaching at the court, he noticed that the case was already dismissed for non-appearance of either part.

From the above, I have the following;

One, it is quite clear, as per the affidavit, that the counsel for the applicant acted diligently to make a follow-up on his case on that material date. After he fell sick, he requested his colleague, Mr. Rugaiya, who was attending another case, to make a follow-up of the dismissed suit. The same was proved by the affidavit duly sworn by Mr. Rugaiya, who arrived at the Court at 10:15 but found the main suit and the counter claim had already been dismissed for non-appearance of both parties.

Two, the Court of Appeal in *Emmanuel Maira vs. The District Executive Director Bunda District Council*, Civil Application No. 66 Of 2010 (unreported) held that;

"... health matters, in most cases, are not the choice of human being, cannot be shelved and nor can anyone be held to blame when they strike..."

Therefore, since the counsel for the claimant in the counter-claim was prevented by the sickness which struck him on the hearing date, in my opinion, under such circumstances, the applicant deserves to be granted the orders he sought in the chamber summons.

Flowing from the above discussion, as a matter of general principle, whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court, which must be exercised according to the rules of reason and justice. Therefore, for the reasons stated, I find that the application has merit.

Consequently, I grant the application by setting aside the dismissal order dated 27 February 2023 and ordering the restoration of the counter claim in Land Case No. 224 of 2021. No orders to the costs.

It is so ordered.



K. D. MHINA

JUDGE

12/12/2023