

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

MISC. LAND APPLICATION No. 530 OF 2023

(Arising from Land Case 127/2022 and from the order of the court dated 14th August 2023)

**GEOGRE KAYOZI RUTINWA (Suing under Power of Attorney
on behalf of VICTORIA HERBERT
GONDWE.....APPLICANT**

VERSUS

**RAVJI VARSANI1ST RESPONDENT
COMMISSIONER FOR LANDS.....2ND RESPONDENT
THE HON. ATTORNEY GENERAL.....3RD RESPONDENT**

RULING

09th November, 2023 & 27th November, 2023.

L. HEMED, J.

On 14th August 2023 it was the date fixed for hearing of Land Case No. 127 of 2022. Unfortunately, the Plaintiff, **GEORGE KAYOZI RUTINWA** (the Applicant herein) together with his advocate, failed to appear without notice, hence the dismissal of the suit with costs. On the fateful date, **RAVJI VARSANI**, the 1st Defendant (1st Respondent herein) appeared through the service of Mr. Norbet Mlwale and Mr. Hemed Kaniki, learned advocates **COMMISSIONER FOR LANDS** and



THE HON. ATTORNEY GENERAL, the 2nd and 3rd Defendants (2nd and 3rd respondents herein) who were duly represented by Mr. Thomas Maushi, learned State Attorney, were ready to proceed for hearing.

The Plaintiff, who is the present Applicant, was aggrieved by the said dismissal order, hence this Application made under sections 3 (A) (1) & (2) 3B (1) (a), 95 and Order IX Rule 6 (1) of the Civil Procedure Code [Cap 33 R:E 2019]. It was presented for filing on 30th August, 2023 with the following bundle of prayers-

“(a) That this Honourable Court be pleased to make an order setting aside the dismissal order issued by this court ...on the 14th August 2023 in a Land Case No. 127 of 2021 and thereafter make an order for restoration of the same.

(b) Costs of this application to follow events.

(c) Any such other order(s) as this Honourable Court may deem fit and just to make.”

The application was supported by the affidavit of **Haji Mlosi** (advocate) with supplementary affidavits of **Victoria Gondwe** and **Omega Machume**. The respondents through the counter affidavits of

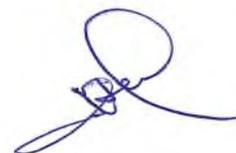


Norbert Mlwale (advocate) and **Thomas Mahushi** (State Attorney) contested the application.

Hearing of the application was by way of written submissions. **Mr. Haji Msosi** learned advocate represented the applicant. The 1st Respondent was duly represented by **Mr. Hemed Kaniki**, learned counsel, while the 2nd and 3rd respondents enjoyed the legal service of **Mr. Thomas Mahushi**, learned State Attorney. Submissions were duly presented and filed as per the schedule directed by the court.

This being an application to set aside a dismissal order, the proper provision is Order IX Rule 6(1) of the Civil Procedure Code, [Cap.33 R.E 2019] which provides thus-

*"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 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 quoted provision, the duty of the Applicant was or is to demonstrate “ **sufficient cause**” which preventing him and his advocate from appearing on 14th August 2023 when Land Case No. 127/2022 was called for hearing. The reasons advanced by the Applicant for failure to appear on the fateful date are two (2).

1. The advocate of the Applicant, Mr. Haji Mlosi being attending another matter, Land Case No.278 of 2022, **Salim Abdullah Nassor vs Gharib Abdullah Nassor** which was scheduled for mediation at Mediation Centre.
2. Sickness of one Victoria Herbert Gondwe, the witness who was to adduce evidence on the particular day.

The two points above have been amplified in the submissions made by Mr. Mlosi, advocate of the Applicant that, when the matter was called for hearing on the fateful date, he was attending Land Case No. 278 of 2022 at the Mediation Centre. According to the Applicant’s advocate, the said case was called earlier than Land Case No.127 of 2022.

It was also argued that on the same date one Victoria Herbert Gondwe (witness) who was present in court premises experienced



severe stomach ache which resulted into suddenly entering into menstruation period. She went outside the Court premises to look for medication and when she returned, only to learn from the court clerk that the said case was called up and dismissed for non-appearance. The learned counsel for the Applicant relied on the decision of this court in **Bahati Matimba vs Jagro Enterprises Ltd**, Misc. Civil Application No.5 of 2022 to substantiate that sufficient cause has been demonstrated.

In reply thereof, the respondents contended that the applicant has shown no sufficient cause for this court to grant the application at hand. It was further stated that, on the fateful date, Mr Haji Mlosi failed to inform his fellow counsels so that they could hold his brief or pray for short adjournment. They also submitted that on 12th July 2023 when the date for hearing was fixed, Mr Haji Mlosi did not object or inform the court that on the said date he had another matter to attend at Mediation Centre.

With regard to the ground of sickness, they were of the view that one Victoria Herbert Gondwe was not a party to the suit as she had donated her powers to one George Kayozi Rutinwa under the power of attorney. According to the counsel for the respondents, her physical



presence in the court was not necessary. As regard to the decision of this court in **Bahati Matimba vs Jagro Enterprises Ltd**, (supra) , they were of the view that it is irrelevant to the matter at hand.

In rejoinder, the counsel for the applicant reiterated his submission in chief. He prayed the court to set aside the dismissal order.

Having heard the rival submissions from the parties, it is now apt to determine on whether the Applicant has demonstrated sufficient cause worth to warrant the court to set aside the dismissal order. The 1st ground relied upon by the applicant, is the advocate of the applicant being attending another case at the Mediation Centre.

I have perused the proceedings of Land Case No.127 of 2022 and found that hearing date was set on 12th day of July 2023 in the presence of the Applicant's advocate, one Haji Mlosi. The said advocate did not inform the court that he had another matter to attend on the same date. Even on the fateful day, the learned counsel for the Applicant opted not to take initiatives to notify the court of him being attending another matter. Practice is that when an advocate is caught with another matter, he may either write a formal letter to the court to request for adjournment or sent another advocate to hold his brief and or inform the court about his fate through his client who is a party to a suit.



The advocate who deliberately fails to notify the court about his absence on the date fixed, he desires the consequences of his non-appearance. If the court dismisses the case on the ground of non-appearance, apart from demonstrating the causes of his failure to appear on the fateful date, he will be obliged to show cause of non-informing the court about his absence.

In the instant matter, Mr. Mlosi who was advocating for the Plaintiff/Applicant found not important to inform the court that he was to attend another matter at the Mediation Centre. He also failed to ask his fellow advocates who were in the advocates room to hold his brief let alone, the counsel for the respondents. In my view, the learned counsel for the applicant desired the consequences.

While trying to persuade this court to grant the application, the learned counsel for the Applicant tried to rely in the decision of this court in **Bahati Matimba v. Jagro Enterprises Ltd**, Misc. Civil Application No.42 of 2022. I have gone through the said decision and found that in **Bahati Matimba's** case the applicant's advocate was given the wrong date by the advocate who held his brief. I am of the firm view that the said decision is not relevant to the matter at hand. The irrelevance of the said decision is because in the instant case, the



applicant's advocate was present personally on 12th July 2023 when the date for hearing was set.

Additionally, records of Land Case No.127 of 2022 show that the Applicant was also represented by Mashaka Ngole, advocate from Ngole & Associates Law Chambers who also drafted the Plaint. From the proceedings of the said Land Case, on 27th February 2023, Mashaka Ngole and Mussa Daffa, advocates, appeared for the Plaintiff to address the concerns raised by the court on the accrual of the cause of action. However, going through the affidavits deponed to support the application, nothing has been said as to why Mr. Mashaka or Mr. Daffa, advocates did not appear to represent the Applicant if Mr. Haji Mlosi was to attend another matter.

As regard to the ground of the sickness of one Victoria Herbet Gondwe, I find that her physical presence in court was not necessary. I am holding so because, the said suit was instituted by one GEORGE KAYOZI RUTINWA under power of attorney. In my firm view, the person whose presence was necessary in the circumstance of the said suit was George Kayozi Rutinwa. Nevertheless, in all affidavits deponed to support the application nothing has been stated as to why the Applicant (George Kayozi Rutinwa) failed to enter appearance on the fateful date.



In the final analysis, I find pertinent to conclude with the observation of the Court of Appeal of Tanzania made in **Brazafic Enterprises Ltd vs Kaderes Peasant Development (PLC)**, Civil Application No.421 of 2021 that, good causes are important factors which need attention of the court. However, in the instant case, nothing has demonstrated to call for the attention of this court to set aside the dismissal order.

The entire application is dismissed with costs. It is so ordered.

DATED at DAR ES SALAAM this 27th day of November, 2023.




L. HEMED
JUDGE