

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

**MISC. LAND APPLICATION NO. 99 OF 2023**

*(Originating from Misc. Land Application No. 745 of 2022 originated from Misc. Land Application No. 174 of 2021)*

**MANJIT GURMUKH SINGH.....1<sup>ST</sup> APPLICANT**

**MOHINDER GURMUKH SINGH.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**MARIAM SEIF MATAMBO.....RESPONDENT**

**R U L I N G**

*Date of Last Order: 11/9/2023*

*Date of Ruling: 13/12/2023*

**K.D. MHINA, J.**

By a chamber summons taken under Order IX Rule 6 (1) and Section 95 of the Civil Procedure Code, [Cap 33 RE: 2019] ("the CPC), the applicants, Manjit Gurmukh Sing and another, instituted this application against the respondent, Mariam Seif Matambo.

The Applicant, Inter-alia, is seeking the following orders: -

- 1. That this Honourable Court be pleased to set aside the dismissal order dated 14<sup>th</sup> February 2023 in Miscellaneous Land Application No. 745 of 2022, which dismissed the application for*

*non-appearance of the applicants and that this Honourable Court restore the application for continuation of hearing.*

*2. Costs of this application be provided for.*

The grounds for the application were expounded in the affidavit, which Evodius Rutabingwa, the advocate of the applicant, swore in support of the application.

In response to the application, the respondent countered it through the affidavit in reply sworn by Mariam Seif Matambo, the respondent.

By consent, the application was argued by way of written submissions, whereas the applicants filed their submission through Mr. Evodius Rutabingwa, learned advocate, while the Defendant submitted through the service of Richard Mathias Kinawari, also learned advocate.

Briefly, this application emanates from Miscellaneous Land Application No.745 of 2022, in which the applicant applied for an extension of time to file the notice of appeal to the Court of Appeal of Tanzania against the ruling and drawn order of this Court in Misc. Land Application No. 174 of 2021.

To support the application, Mr. Rutabingwa submitted that on 14 February 2023, he and the rest of his colleagues at their law firm were involved in a series of Court of Appeal sessions scheduled to commence at 9:00 AM. Therefore, what transpired at the Court of Appeal made it impossible for them to arrive in time at the High Court of Tanzania (Land Division) when Misc. Land Application No. 745 of 2022 was scheduled for the hearing.

The applicant at paragraphs 7,8 and 9 of the affidavits, elaborated as to the whereabouts of other members of his law firm and attached the

affidavit of Ida Rugakingira, Joseph Rutabingwa, Thomas Brash, and Erick Simon, both learned advocates, to verify that they were in Court of Appeal session that is why they failed to assist the applicant to appear in Misc. Land Application No. 745 of 2022.

The applicant further submitted that the applicants, through their advocates, had never missed a single session in respect of Misc. Land Application No.745 of 2022 from when the application was filed and mentioned in court.

He further submitted that it is a settled principle that Courts should encourage matters to be determined on merit unless, under exceptional circumstances, they cannot. This position was maintained by the Court of Appeal of Tanzania in the case of ***Mount Meru Flowers Tanzania Limited Vs Box Board Tanzania Limited Civil Appeal No.260 of 2018.***

Furthermore, the Court of Appeal of Tanzania in ***Gurmit Singh vs Meet Singh and Arjan Construction Ltd Civil***, Appeal No.256 of 2018 cited its own decisions in the case of ***Independent Power Tanzania Limited vs Standard Chartered Bank (Hong Kong) Limited***, Civil Revision No. 1 of 2009 (unreported) and the case of ***Nyanza Road Works Ltd Vs Giovanni Guidon***, Civil Appeal No.75 of 2020, emphasized on the principle that 'justice is better than speed'.

In response, Mr. Kinawari submitted that the fact that on 14<sup>th</sup> February 2023, the allegations that the Advocates for the Applicants failed to appear before this court to prosecute Misc Land Application No 745 of 2022 because they were summoned to appear at the Court of Appeal, was not true because

the Court of Appeal did not issue summons to Advocate Erick Simon, Ida Rugakingira and Evodius Rutabingwa who alleged to have been assigned to prosecute Misc. Land Application No 745 of 2022.

The attached summons to the Affidavit were served on the 16<sup>th</sup> day of January 2023 to advocate Thomas Brash and Joseph Rutabingwa only as indicated in annexure MI of the Affidavit.

He further submitted that Misc Land Application No. 745 of 2022 was dismissed because neither the Applicants nor their advocates were present on the hearing date.

Neither the Affidavit supporting the Application nor the Joint Affidavit sworn by alleged Advocates for the Applicants have stressed or explained why the Applicants (two Applicants) failed to appear in person before the Court as required by law.

The law dictates that parties should not dump their case on their advocates. To support his submission, he cited **Lim Han Yung and Another vs Lucy Treseas Kristensen**, Civil Appeal No. 219 Of 2019, where the Court of Appeal of Tanzania held that: -

*" .... that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case."*

He further submitted that the Applicants did not even bring the Affidavit to support this Application.

He concluded by submitting that ***Order IX Rule 6 (1) of the CPC*** requires the Applicant to show sufficient reason to satisfy the court to exercise its discretionary powers, but in this application, the applicants did not do so.

In a brief rejoinder, Mr. Evodius Rutabingwa reiterated what he had earlier submitted in his submission in chief and added that the allegation that the Court of Appeal summons attached to the applicants' affidavit only contained the names of advocate Thomas Brash and Joseph Rutabingwa was true as those were the Senior Counsel and Managing Partners of the Firm. Since it is the firm's practise that some matters at the Court of Appeal of Tanzania require the attendance of two advocates assisting each other, based on the stated summons, all the counsels at Rutabingwa & Co. Advocates were engaged before the Court of Appeal of Tanzania in the matters indicated on the attached summons.

He further submitted that the non-appearance of the applicant's advocates was not deliberate as justified in the affidavits supporting the application. Since

He further argued that Misc. Land Application no.745 of 2022 was filed by the applicants through their advocates; therefore, based on the nature of the application, the personal presence of the applicants' advocate was sufficient when the same was scheduled for hearing.

I have considered the rival submissions by the counsel for both parties. There is only one issue calling for this court's determination: whether the applicants have shown sufficient cause to trigger this court to exercise its

discretion to restore the Misc. Land Application No. 745 of 2022, which was dismissed on 14 February 2023 for non-appearance

The entry point is **Order IX Rule 6 (1) of the Civil Procedure Code [Cap. 33 RE 2019]**, which provides

*"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."*

There is a plethora of authorities on the applicability of cited provision of law. Such as **Wasward Wilson Mapande vs. First National Bank Tanzania Ltd**, Civil Application No. 216/16 of 2017 (Tanzlii), where the Court of Appeal held that;

*"In an application to restore an application dismissed for non-appearance, the important question to be considered is whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the application was dismissed. The burden to show sufficient cause is on the applicant, who must exhibit no element of inaction, laxity or negligence."*

From the above-cited case, it means that the applicant who applies for restoration of the dismissed application for want of prosecution must show sufficient cause for non-appearance on the hearing date.

The term sufficient cause for non-appearance can be defined according to the peculiar circumstances of each case. See **Mwanza Director M/S**

***New Refrigeration Co. Ltd vs. Mwanza Regional Manager of TANESCO and Another [2006] TLR 329).***

In the current application, the reason(s) for the non-appearance of the applicants on the hearing date, as per Mr. Evodius Rutabingwa, are;

One, Mr. Joseph Tutabingwa, was summoned to attend the Court of Appeal session together with his colleague from the same chamber, Mr. Brash, on the same date the dismissed application was set for hearing. He annexed the summons, Annexure M1, collectively to that effect.

Two, as per the affidavit, he stated that other advocates in their chambers were also attending the Court of Appeal session. To clarify this, in the submission, he stated that their firm's practice was that since some matters at the Court of Appeal of Tanzania require the attendance of two advocates assisting each other, based on the stated summons, all the counsels at Rutabingwa & Co. Advocates were engaged before the Court of Appeal of Tanzania in the matters indicated on the attached summons.

From above, I have the following;

**One**, the summons/ notice of hearing issued by the Court of Appeal were received by the advocates, Thomas Brash and Joseph Rutabingwa, on 16 January, 2023 and 17 January, 2023, while the dismissed application was scheduled for hearing on 14 February 2023. Therefore, the advocates had ample time to notify this Court regarding the Court of Appeal session; thus, another advocate from their chamber could proceed with the hearing or request an adjournment of the matter.

But in the dismissed application, the advocate decided not to notify the court and to appear before the Court.

It is common ground that when the superior court summons an advocate or a party while he/ she has a case in the courts below on the same date, that advocate or party must attend the case at the superior court. But in doing so, a party must notify that particular court below the superior court.

Therefore, the ground advanced by Mr. Evodius Rutabingwa is sufficient in requesting an adjournment of the matter. It is not a sufficient ground at all in applying for setting aside a dismissal order, especially in the circumstances of this matter where the advocates were not summoned under urgency by the Court of Appeal. Since 16 January, 2023 and 17 January, 2023, they knew about the session at the Court of Appeal but chose to remain silent regarding the dismissed application. Therefore, they are to blame themselves for what happened.

**Two**, regarding the other advocates in their chamber assisting them at the Court of Appeal, this should not detain me long because, one, there is no evidence at all that learned advocates Evodius Rutabingwa, Ida Rugakingira and Eric Simon attended the Court of Appeal session. Two, they still had the duty of notifying this Court regarding the cases at the Court of Appeal.

**Three**, the going further, I agree with the case cited by Mr. Rurabingwa of **Gurmit Singh (Supra)**, where it was held that;

*"..... there must be a balance between expeditiousness and justice to both parties to the case. This is where the old maxims we made*




*reference to earlier on would converge and boil down to; Speed is good, but justice is better."*

But that is not the spirit of that holding. I think its intention is not to "shield" the parties who decide not to attend the Courts on the date fixed for the hearing or any other action without notifying the relevant Court.

For the reasons stated above, I find the applicants have failed to show that they were prevented by sufficient cause from appearing when Misc. Land Application No. 745 of 2022 was called on for hearing on 14 February 2023.

Consequently, I hereby dismiss this application with costs.



  
**K.D. MHINA**  
**JUDGE**  
**13/12/2023**