

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 763 OF 2023

(Originating from Land Case No.48 of 2023)

ZARMEENA IKBAL HAJI..... 1ST APPLICANT

FATMA IKBAL HAJI.....2ND APPLICANT

YAKUB MABRUK SALIM.....3RD APPLICANT

GULAM MUSTAFA ASHFAQ LAKHU.....4TH APPLICANT

KHADIJA HUZEIFA MAURICE WALLA.....5TH APPLICANT

IDEAL OFFICE SUPPLIES LIMITED.....6TH APPLICANT

VERSUS

COSMOS PROPERTIES LIMITED.....1ST RESPONDENT

EXIM BANK (TANZANIA)LIMITED.....2ND RESPONDENT

WALTER BUXTON CHIPETA as RECEIVER

& MANGAGER.....3RD RESPONDENT

YOGESH MANEK.....4TH RESPONDENT

HANIF JAFFER.....5TH RESPONDENT

PASCAL KAMUZORA.....6TH RESPONDENT
SHAFIN JAMAL.....7TH RESPONDENT
JUMA MWAPACHU.....8TH RESPONDENT
THOMAS WESCOUT.....9TH RESPONDENT
MOHAMMAD OWAIS PARDESI.....10TH RESPONDENT
MUHAMMAD JAVED.....11TH RESPONDENT
GULAM MAHUMMAD HASSAM.....12TH RESPONDENT
NURUL AMIN GULAM.....13TH RESPONDENT

RULING

25th March, 2024 & 15th April 2024

L. HEMED, J.

The applicants herein were the Plaintiffs in Land Case No.48 of 2023. They did not attend it on 10th and 18th days of April 2023 when the matter was called for final pretrial conference. Having found that the absence of the plaintiffs (Applicants) was without notice, my brother at the bench Hon. K. Mhina, J who presided over the matter decided to dismiss it "for non-attendance". The dismissal order was made on 18th October, 2023.



Aggrieved by the said dismissal Order, on 15th November 2023, the applicants presented the instant Application under section 95 and Order IX Rule 6(1) of the Civil Procedure Code, [Cap.33 R.E 2019] seeking for the following orders:-

- "1. That this honorable Court may be pleased to set aside the dismissal order dated 18th October, 2023, Honorable K.D. Mhina, J. in Land Case No. 48 of 2023;*
- 2. Cost for this Application to be provided for; and*
- 3. Any other Order(s) as the honorable court may deem fit and just to grant."*

The Application was supported by the affidavits deponed by **Mr. Edward Chuwa** and **Advocate Deogratiuous Lymo Kirita**. The same was challenged by the 2nd up to the 9th respondents through the Counter affidavit of **Mr. Elisa Abel Msuya**, their advocate.

The Application was argued by way of written submissions, which were promptly filed as directed by the Court. Nevertheless, in the course of composing the Ruling the court noted that the instant Application was presented for filing on 15th November, 2023 while the dismissal order was



made on the 18th October 2023. The Court invited parties to address the court on the following point of law:

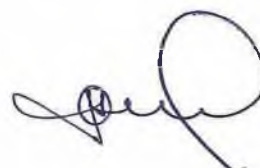
"In view of Order VIII Rule 20(2) of the Civil Procedure Code, [Cap.33 RE 2019], whether the application is time barred."

When the parties appeared on 23rd March 2024, the court directed them to address on the point by way of written submissions. The submissions were required to be filed by 2nd April 2024. However, by the time the file was placed before me to compose the ruling, I only found the submission of the respondents who argued to support the point raised by the court.

The reason for requiring parties to address the court as to whether the application is time barred is because Order VIII Rule 20(1)(a) and(2) of the Civil Procedure Code, (*supra*) provides as follows:-

*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;*



(b)...

(c) ...

(d)...

*(2) An order made by the court in the absence of a party concerned or affected by the order **may be set aside by the court, on the application of that party within fourteen days from the date of the order, on such terms as it considers just.** (Emphasis added)*

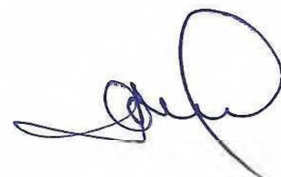
From the above provision, a party affected by the order made during pre-trial conference may apply to set it aside within fourteen (14) days from the date of the Order. The instant application was filed after 27 days from the day of the order. In view of Order VIII Rule 20(2) of the CPC the matter would be time barred.

It should be noted that Land Case No.48 of 2023 was dismissed on the date fixed for final pretrial conference. The question whether Order VIII Rule 20 of the CPC applies to whatever transpired in final pretrial conference? I have thoroughly gone through the entire Order VIII and found it been subdivided into four (4) parts. The said parts are as follows:-



1. Part 'A' is on **WRITTEN STATEMENT OF DEFENCE, SET-OFF AND COUNTERCLAIM**. It covers rules 1 up to 16;
2. Part 'B' is on **FIRST PRE-TRIAL SETTLEMENT AND SCHEDULING CONFERENCE**. It covers rules 17 up to 23;
3. Part 'C' is for **NEGOTIATION, CONCILIATION, MEDIATION AND ARBITRATION PROCEDURE**. It covers rules 24 up to 39;
4. Part 'D' is on **FINAL PRE-TRIAL SETTLEMENT AND SCHEDULING CONFERENCE**. The relevant provisions are Rules 40 up to 41.

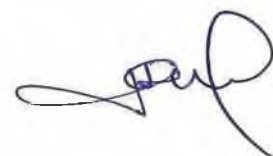
From the above division, Rule 20(2) of the CPC falls in part B of Order VIII of the CPC which governs first pretrial conferences. The provision would be relevant only if the matter could have been dismissed during 1st pretrial conference. In the circumstance of this case, I cannot hold the application to be time barred as the impugned order was made during the final pretrial conference.



Let me revert back to the merits of the application. In the present case, the duty of the applicants is to demonstrate sufficient cause that prevented them from entering appearance on the fateful date, that is on 18th October 2023. This is pursuant to Order IX Rule 6(1) of the Civil Procedure Code (supra) 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 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..." (Emphasis added)

From the above provision, the question is whether or not sufficient cause for the non-appearance of the applicants on the 18th October 2023 has been demonstrated. In the affidavit deposed by **Mr. Edward Chuwa** and advocate **Deogratius Lyimo Kiritta** the main reason for the non-appearance was that on the fateful date for which Land Case No.48 of 2023 was fixed for the final pre-trial conference, Mr. Edward Chuwa, advocate of the applicants was also appearing before Hon. Luvanda, J in



Land Case No.231 of 2022 which was set for hearing and the hearing began at 08:00 a.m.

It was averred that hearing before Hon. Luvanda, J commenced very early in the morning that he could not see the court clerk for Hon. Mhina, J nor the opposite parties' counsel so that he could inform them of his whereabouts. He added that the case before Hon. Luvanda, J was set for hearing from 08:00 a.m. to 09:00 a.m. Generally, the learned counsel for the applicant asserted that the reason for his non- appearance on the fateful date was due to his attendance in another case before another judge in the same court.

In response thereto, the counsel for the 2nd up to 9th respondent contended that the applicants were represented in the dismissed suit by more than one advocates. It was stated that Mr. Edward Chuwa was not the only advocate representing the applicants as he joined Mr. Crispin Mwaseba, advocate who drew and filed pleadings and application for injunction and Ms. Anna Lugendo, advocate. He added that the applicants and their advocates defaulted appearance for two consecutive sessions and without adducing reasons for their non-appearance. It was insisted that the

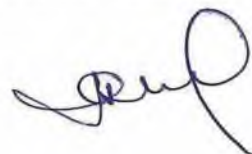


applicants have failed to account for the non-appearance of the other advocates from Mwaseba Law group.

The learned advocate of the respondents was of the view that Mr. Chuwa, advocate of the applicants who knows the cell-phone number of the advocate of the Respondent did not even dare to text him. According to the learned counsel for the respondents, Mr. Chuwa was negligent because he had an opportunity to pray for short adjournment so that he could take care of Land Case No.48 of 2023.

In his rejoinder, Mr. Chuwa reiterated what he stated in his submissions chief and contended further that he was the only advocate representing the applicants. Regarding the status of advocate Crispin Mwaseba, Mr. Chuwa submitted that the applicants withdrew instruction from Mr. Mwaseba. As to Ms. Anna Lugendo, advocate, Mr. Chuwa was of the submission that her appearance was for holding brief only as she had no instructions.

Is the application at hand meritorious? This is the question that needs to be answered in this matter. It is apparent on the face of the proceedings of Land Case No. 48 of 2023 that the Mediator returned the



case file to the trial Judge with an indorsement that parties to appear before the trial Judge on 10th October, 2024. However, when the matter was called on 10th October, 2023, the plaintiff did not attend and the matter was scheduled again, for final pre-trial settlement and scheduling conference on 18th October, 2023 at 9:30 hours; the applicants defaulted again hence the dismissal.

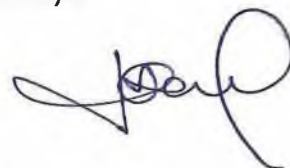
I have examined the affidavits deponed to support the application but I could not find anything being accounted as to why the applicants failed to appear on the 10th October 2023. The only ground that the applicants have relied upon is that of their advocate, Mr. Edward Peter Chuwa being attending another matter before Hon. Luvanda, J, on the 18th October, 2023, the matter which was commenced for hearing from 08:00 a.m up to 10:30 a.m.

According to the affidavit deponed by Mr. Edward Chuwa, it is unequivocally clear that he was aware that Land Case No.48 of 2023 was to be called at 9:30 a.m before Hon. Mhina, J nevertheless, he took no action of ensuring that Hon. Mhina, J is notified of him being attending another matter before Hon. Luvanda, J. In my view, Mr. Chuwa had the



option of praying before Hon. Luvanda, J for short adjournment for purpose of conveying information to the presiding Judge in Land Case No.48 of 2024. The learned counsel for the applicants chose to proceed with the hearing of the matter before Hon. Luvanda, J as if Land Case No.48 of 2024 was not scheduled to come on the same date.

In my view, the option of the learned advocate of not taking action to notify the presiding judge in Land Case No.48 of 2023 can be implied that he desired the consequences thereof. The reason of the advocate being attending a matter before another Judge would have been a good reason for adjourning Land Case No.48 of 2023. I am of the settled view that, if an advocate negligently fails to inform the court of any incident that may prevent him from attending a matter, and the same gets dismissed, such advocate will be precluded from using the incident as sufficient cause for restoration. I am holding so because there will be a presumption of such advocate to desire the consequences. In the instant case, Mr. Edward Chuwa was aware of Land Case No.48 of 2023 to be called before Hon. Mhina, J at 9:30 a.m. He had the opportunity to prevent the said case from being dismissed but he opted to waste such opportunity.

A handwritten signature in dark ink, appearing to be a stylized name, possibly 'Edward Chuwa', written in a cursive script.

Furthermore, the proceedings of Land Case No.48 of 2023 shows that **Mr. Edward Chuwa** was not the only advocate representing the applicants/plaintiffs. There was another advocate one **Ms. Anna Lugendo** from Chuwa & Co. Advocates who also attended the matter alongside with Mr. Chuwa. I have gone through the affidavits that support the application and could not find anywhere being averred as to why **Ms. Lugendo** did not attend the matter on the fateful date, if she had no instruction, just to hold brief of Mr. Chuwa and pray for adjournment.

Additionally, I have noted that Land Case No.48 of 2024 had six (6) plaintiffs. All of them never attended the matter on 10th and 18th October, 2023. No notice of absence from any of the plaintiffs was furnished to the court. It is settled principle that engagement of an advocate does not exonerate a party from the duty of attending and making follow-up of his case. In **Lim Han Yun and Another v. Lucy Theseas Kristensen**, Civil Appeal No.219 of 2019, the Court of Appeal of Tanzania held 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/her case from
time to time."*

In the affidavit of Mr. Edward Peter Chuwa and Advocate Deogratius Lyimo Kiritta nothing has been said as to why the plaintiffs failed to attend their case on the fateful date. I am aware that the dismissal order of Land Case No.48 of 2023 had an undesirable outcome to the applicants herein, however, despite the negative impact, they are precluded from complaining that they were not informed about the status and progress of their case. The duty of parties to follow up their cases is founded on the fact that cases belong to parties and not the advocates.

In the final analysis, I find no merits in the instant application. The applicants have failed to demonstrate good and sufficient cause for this court to exercise discretion powers to restore Land Case No.48 of 2023. I proceed to dismiss it with costs. Order accordingly.

DATED at DAR ES SALAAM this 15th April 2024.




**HEMED
JUDGE**