

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPLICATION NO. 26040 OF 2023

GRACE ZAKAYO SANGA..... APPLICANT

VERSUS

ELIMU DAUDI SANGA..... 1ST RESPONDENT

EQUITY BANK TANZANIA LIMITED.....2ND RESPONDENT

AMIYE ELISHA SANGA.....3RD RESPONDENT

MBUZAX AUCTION MART AND

COMPANY LIMITED.....4TH RESPONDENT

RULING

13th February 2024 & 28th March 2024.

L. HEMED, J.

On 25th September 2023, Misc. Land Application No.621 of 2023 was called for hearing. Mr. Deogratus Mahinyila, learned advocate appeared to represent the Applicant holding brief of Mr. Fred Kalonga, learned advocate, with instructions to proceed. Having called to address the Court, Mr. Mahinyila informed the Court that he was not prepared for hearing.



Having considered the fact that the said application was filed under certificate of urgency, and the fact that the same advocate had appeared on 27th September, 2023 when an order for hearing was made, found the applicants to be not serious in prosecuting the application hence the dismissal of the said application with costs.

Following such dismissal order the Applicant instituted the application at hand looking for the following orders:-

"1. That, this Court be pleased to set aside its Dismissal order which was issued on 24th October, 2023...which dismissed Misc. Land Application No 621/2023 for want of prosecution and restore the same so that it can be heard on merit.

2. Any other relief(s) this Honourable Court deems fit to grant."

The application has been taken at the instance of **NJULUMI AND COMPANY ADVOCATES** and supported by the affidavit of **Fred Peter Kalonga**, advocate of the Applicant. The 1st Respondent did not object the application that he could not file counter affidavit. The 2nd and 4th



respondents challenged the application vide the counter affidavit of Mwang'enza Mapembe, advocate representing the 2nd and 4th respondents.

Due to time constraint, it was approved by the court that the application be disposed of by way of written submissions. Parties complied with the filing scheduling order. The Applicant was **Mr. Fredy Kalonga**, learned Advocate while the 2nd and 3rd respondents enjoyed the service of **Mr. Mwang'enza Mapembe**, learned counsel.

I have gone through the rival affidavits and submissions and the question to be determined is whether good cause has been shown to warrant this court grant the prayer sought. I am holding so because this application has been lodged under Order IX Rule 6(1) of the Civil Procedure Code, [Cap.33 RE 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 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.”(Emphasis added)

The above provision envisages for the court to set-aside dismissal order upon having satisfied that **sufficient cause for the non-appearance appearance of the Applicant when the suit was called on for hearing** has been demonstrated.

According to the affidavit deposed by Fred Peter Kalonga, the learned counsel for the Applicant, at paragraph 16, the main cause of his non-appearance on the fateful date was, him being appearing in clean up session for backlog cases in Dodoma before Hon. E.Longopa,J and Hon. Sarwat,J. The same reason has been insisted in the submissions in support of the Application.

In response thereto, the advocate of the 2nd and 3rd respondents was of the view that the application has no merits at all because the reasons of the applicant’s advocate being attending clean up session in the High Court-Dodoma cannot hold water at this stage because the advocate sent to hold brief did not convey such information to the court. Since the counsel holding brief had submitted to have instruction to proceed and



later on his unpreparedness to proceed with hearing, then the court was justified so to dismiss the application.

Mr. Mapembe submitted further that, appearance before the court does not mean to be physically present before it but is all about being prepared and ready to proceed with the court's business on that particular date taking into account that the matter was instituted under certificate of urgency. He also insisted that, the learned advocate of the applicant was well aware of the matter being heard on 24th October 2023 but opted not to notify the court that he was to attend criminal clean up sessions before the High Court of Tanzania at Dodoma. In his opinion, the learned advocate for the Applicant was ready for the consequences of his failure to attend the matter on the fateful date. He put reliance on the decision of this Court in **Alex Msama Mwita v. The Commissioner for Lands and 3 others**, Misc. Land Application No.618 of 2023.

In rejoinder submission Mr. Kalonga submitted that Mr. deogratius Mahinyila had the instruction to pray for an order the matter to be heard by way of written submissions as the one ought to attend hearing of the same with readiness to proceed was him, Mr. Fredy Kalonga. Mr. Kalonga



averred further that Mr. Deogratius Mahinyila had informed the court on the absence of Mr. Fred Kalonga, and that on the material date the Applicant was present in person thus dismissal of her application without hearing her would prejudice the applicant's right.

He distinguished the decision of this court in **Alex Msama Mwita v. The Commissioner for Lands and 3 Others** (supra), that in the said case it was on the failure of the advocate to notify the court on his absence. While in the current application this court dismissed the application in the presence of the Applicant in person and Advocate Deogratius Mahinyila, holding brief of Applicant's advocates with limited instructions who informed the court that he was not ready to proceed with hearing.

Mr. Kalonga had the view that Mr. Mahinyila, the advocate holding his brief had no instruction from his client that he could not proceed with hearing. According to him, instructing an advocate to do something on behalf of client is in the exclusive domain of the client. He relied on the decision of this Court sitting at Morogoro in **Dotto Doffu v. Kulwa**



Lufwenga Kija, Civil Appeal No.37 of 2022; where my brother at the bench, Hon. Malata,J held thus:-

"...the instructed advocate has no command to transfer or delegate instructions to another advocate under what is called holding brief with full instruction to proceed unless consented by the such client..."

Let me state at the outset that, Misc. Land Application No.621 of 2023 was dismissed not on account of none appearance of the Applicant or her advocate, rather because the advocate who appeared to represent the Applicant with instructions to proceed, had refused so to do even after the court had ordered so. I have perused the proceedings of 24th October 2023, and found that **Mr. Deogratius Mahinyila**, after having reported about the status of service to the 3rd Respondent he submitted to have instructions to proceed. The said advocate did not inform the where about of Mr. Fredy Kalonga and when called to proceed he submitted to be not ready.



I have also perused the proceedings prior to the fateful date that is on 27th September 2023, and realized that, it is the same advocate **Mr. Deogratius Mahinyila**, who appeared for the Applicant holding brief of Mr. **Fredy Kalonga**, advocate where the order for the matter to be heard on 24th October 2024 at 9:00AM was made. This unequivocally showed that, **Mr. Mahinyila**, while receiving instruction to proceed was aware that the matter was to be heard on the fateful date. Holding brief of another advocate with instructions to proceed implies that, such advocate has to attend every business to be conducted by the court on the particular date. On the fateful date, the business scheduled was hearing, thus, instructions to proceed included hearing and not otherwise.

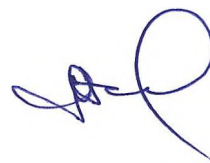
The Applicant's advocate relied on the decision of this Court, sitting at Morogoro, in **Dotto Dofu vs Kulwa Lufwega Kija**, Civil Appeal No.37 of 2022, in which my brother at the bench Hon. Malata, J who held that:-

*"...advocate holding brief of another advocate has no mandate to discharge substantive duties of the instructed advocate **unless the client in writing consented thereto.**" (Emphasis added)*



Let me expound a bit from what my brother Hon. Malata, J observed in respect of the consent of the client for an advocate-holding brief with instruction to proceed to deal with the substantive issues. In my view, it is not always a consent should be in writing, sometimes it can be implied. Among the circumstance where a party can be implied to have consented, is where a party attends court sessions together with the advocate-holding brief with instructions to proceed. In the instant case, the applicant attended the case with the advocate-holding brief.

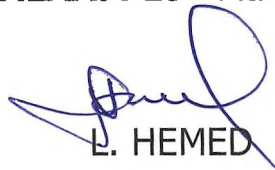
Besides, I have noted that the point that advocate who was sent to hold brief had no mandate to proceed with hearing of the application has been raised by Mr. Fredy Kalonga, the advocate who sent Mr. **Mr. Deogratius Mahinyila**, to hold his brief with instruction to proceed. That being the case, he is barred under the clean hands doctrine that *"he who comes into equity must come with clean hands."* The hands of Mr. Fredy Kalonga are so dirty to rely on the principle laid in **Dotto Dofu vs Kulwa Lufwega Kija** (supra). After all, the application was dismissed not on account of the absence of Mr. Fredy Kalonga.



In the upshot, I find no merits in the Application. It is thus dismissed with no orders as to costs.

DATED at DAR ES SALAAM 28th March 2024.




L. HEMED
JUDGE