

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

MISCELLANEOUS CIVIL APPLICATION NO 09 OF 2017

(Arising from Misc. Civil Application no 59 of 2017, Origination from Civil Case No 35 of 2015)

LUCAS M. LILE.....APPLICANT

VERSUS

MWANDOI SACCOS1ST RESPONDENT

MAULID BUBONHE2ND RESPONDENT

ZAMDA LWAHO3RD RESPONDENT

RULING

05.11.2019 & 06.02.2020

RUMANYIKA, J.:

The application for setting aside, with respect to Mis. Application No. 59 of 2017 the dismissal order of 8/9/2017 is brought under Order ix Rule 4 and Section 95 of the Civil Procedure Code Cap 33 RE 2002. It is supported by affidavit of Lucas M. Lile, whose contents essentially Mr. Ng'wiguliLa learned counsel adopted during the hearing. Mr. R. Mainde learned counsel appeared for Mwandoi SACCOS (the 1st respondents).

When the application was called on 05.11.2019, it transpired in court that Maulid Bubonhe and Zamda Lwaho (the 2nd& 3rd respondents) were absent but by court order the 2nd respondent duly served through Nipashe Local Newspaper of 7.11.2018 and the other one much earlier. Pursuant

to my order of 5.11.2019 appearance of the last two respondents was dispensed with. Hence only with respect to them ex parte ruling.

Mr. Ng'wigulila learned counsel submitted that the reason for his nonappearance was that although on the fateful date it had been called on before the DR only for mention. But to their surprise the application was just dismissed according to records for nonappearance. That the purported nonappearance therefore wasn't their fault. Nor was the applicant to blame. The learned counsel further contended.

On his part, Mr. R. Mainde learned counsel submitted that the copy of cause list appended to the cause list notwithstanding, the applicant did not tell, if at all the matter was called before the DR when it was exactly. That the applicant's counsel was not diligent enough therefore no sufficient ground for restoration of the dismissed application. That is all.

The pivotal issue and it is trite law is whether the applicant has assigned good and sufficient ground for setting aside the dismissal order.

In order to appreciate all what gave rise to the instant application, its brief background is, according to court's records clear. It is reproduced as hereunder:-

Date 26/07/2017

Coram: Hon

Applicant: Present in person

Respondent: Manager Mwandoi Saccos one Luzee Nseti

Order: Hg 21/09/2017

DR
Sgd 26/7/2017

Date 21/09/2017

Coram: Hon. F.J. Kabwe - DR

Applicant: Mr. Chama Advocate H/B of Mr. Nyigulila advocate

Respondents: 1stMr.Remidius Mainde advocate for 2nd }
3rd } Absent

B/C: Ignas

Order: (1) Hg on 14/11/2017

DR
Sgd
21/9/2017

Date 14/11/2017

Coram: Hon. R.V. Makaramba, J

Applicant: Absent

Respondents: 1st }
2nd }
3rd } Absent

B/C: S. Isangi

CT: The last time the matter came before the DR, the applicant's counsel was present. Today neither the advocate nor the Applicant has appeared. That being the case let it be ordered as follows.

Order:- The application is hereby dismissed for nonappearance hence failure to prosecute.

Each party to bear own costs.

RV Makaramba, J

14/11/2017

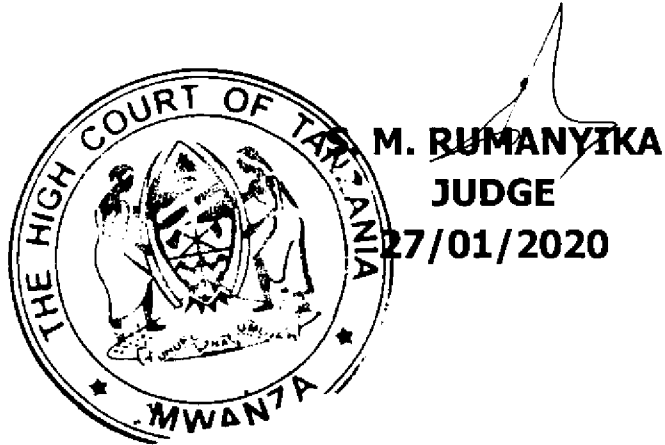
From the quotation above therefore, one will no doubt see and conclude that according to the 26/07/2017 records, although the application was called on 21/09/2017 for hearing, for obvious reasons (the Deputy Registrar wasn't the presiding judge) the matter did not take off. Again in their presence it was ordered and fixed, this time around for hearing on 14/11/2017. With greatest respect therefore the issue of the matter on the fateful date having been fixed for mention shouldn't have raised.

Contrary to expectations of Mr. Ng'wigulila advocate whose briefs were held by Mr. Chacha advocate, the latter may have not reported back what transpired before the DR on 21.09.2017 (which is not Mr. Ng'wigulila's complaint). Now that the applicant did not justify the nonappearance, the application runs short of merits. All the same it is trite law that court records one serious documents which by itself is considered as telling what actually happened in court. Court records cannot be impeached casually. Moreover, I will increasingly hold that whenever a court officer like advocate paused and was recorded as holding briefs of the fellow, the court is enjoined to take judicial notice that whatever one

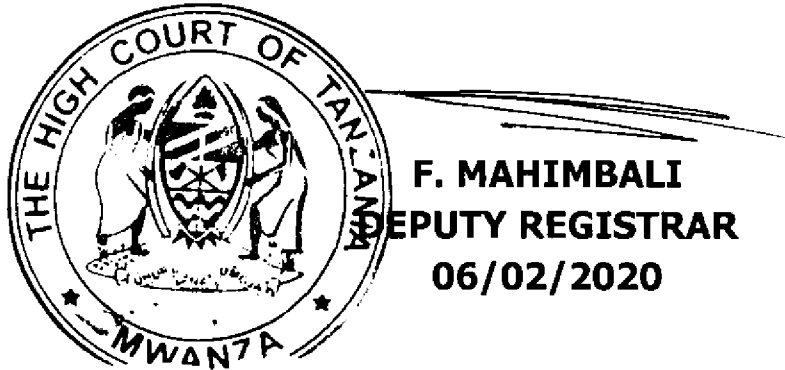
submitted in court holding briefs he did it duly instructed by the fellow and therefore the latter is stopped from denying the truth.

The application is dismissed with costs. It is ordered accordingly.

Right of appeal explained.



Delivered under my hand and seal of the court in chambers. This
06/02/2020 in the presence of Mr. Jackson Kiboga learned counsel holding
briefs for Ng'wigulila and Remigius learned counsel respectively.



F. MAHIMBALI
DEPUTY REGISTRAR
06/02/2020