

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**MISCELLANEOUS LAND APPLICATION No. 22 OF 2020**

(Arising from Misc. Land Appeal No. 31/2019)

**RAMADHANI KASASE.....APPLICANT**

**VERSUS**

**TABU RAMADHANI .....RESPONDENT**

**RULING**

23<sup>rd</sup> June & 21<sup>st</sup> July, 2020

**TIGANGA, J.**

On 06/02/2020 Miscellaneous Land Case Appeal No 31/2019 was dismissed for want of prosecution following the non appearance of the appellant on the date when the appeal was called for hearing.

Following that order, the applicant in this application Ramadhani Kasase filed this application under Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 RE. 2019].

In the chamber summons instituted for that purpose two orders namely that:-

- a) That the court be pleased to set aside its order made on 06<sup>th</sup> day of February, 2020 dismissing Land Appeal No 31/2019 for want of prosecution and re- admit it for hearing.

b) That the costs to be in the course.

The chamber summons was supported by an affidavit of one Pauline Michael, who introduced himself as an Advocate of the High Court of Tanzania and court subordinate thereto save the Primary Court.

In that affidavit the deponent deposed that the applicant has been diligently prosecuting his all cases and all stages by using the service of Membar Law Attorneys Advocates until on 6<sup>th</sup> day of February 2020 when the appeal was dismissed for want of prosecution.

That on the date when the application was dismissed, the Advocate for the applicant one Pauline Michael was not present in Mwanza as he was attending and supervising other matters on the law day event as he is an incumbent TLS Chairperson in Geita Region. He attached the invitation letter with the affidavit and asked the same to form part of the application.

It was also deposed that the applicant himself being as old as he is he could not personally attend because he is suffering from back borne ache therefore he cannot travel a long distance specifically by car.

That it was for that reason the applicant and his Advocate could not appear. He also deposed that, while aware that the case was for mention as the respondent had not yet replied to the petition of appeal and or saved her reply, they thought the case would be adjourned.

Further to that, he deposed that if the application will not be granted, the applicant's land will be deprived of from him and taken by the respondent who is his daughter without justification and justifiable reason, as she has no right of inheritance while her father is still alive.

The application was countered by the respondent, who filed the counter affidavit sworn by Mathias Mashauri, an Advocate who represents the respondent. Most of facts deposed in the affidavit were disputed in the counter affidavit. In addition the counsel for the respondent deposed that the reason for the absence of the parties on the date when the matter was set for hearing was unfounded. He therefore asked the application to be dismissed.

By the leave of this court, the hearing of the application was by way of written submissions, which were filed as ordered.

In the submission in chief filed by counsel for the applicant, he submitted that, the applicant is the old man of 88 years, who is always in constant complaint of backache and so cannot travel by bus. He used to instruct his Advocate in this appeal to appear and represent him. According to him, that fact is evidenced by the proceedings of 14/08/2019, 18/09/2019 and 27/11/2019, when the case was called for mention; it was the advocate who appeared representing the applicant.

It is his submission that on 06/02/2020, it was a Law Day. That day was preceded by a law week in which all advocates in Geita Region participated in providing legal education to the general public. Himself being a chairperson of Tanganyika Law Society Geita Region, he had the duty to organize the participation of the advocates in that event. That duty was finalized by a speech he prepared and delivered on the climax of the Law Day. With that important duty he failed travel to Mwanza for attending the case. It is on that reason that the counsel was unable to travel. He submitted that the absence or non appearance of the Advocate and

appellant was not due to negligence on the part of the applicant and his advocate but was due to incidental reasons. He submitted that the applicant was seriously prosecuting his appeal as he is very much aggrieved by the act of the respondent of selling his land without his consent. He prayed in the end that the application be granted, the appeal be readmitted in the interest of justice.

In reply to the submission in chief, the counsel for the respondent submitted that the applicant's reasons are in three folds, first, that counsel for the applicant was on the specific date on law day, second, that the applicant was sick, third, it was only a mention date.

The counsel submitted that in all those reasons there is no sufficient cause advanced to convince the court to grant the application. He submitted that these reasons do not fit the criteria of the law.

Regarding the first reason, the counsel submitted that, the learned counsel as an officer of the court ought to exercise diligence by notifying the court of what was expected to transpire. What is apparent is that the applicant took things for granted. According to the counsel for the respondent, that is negligence which cannot be good reason.

On the second reason that, the applicant was sick, that is merely an allegation which has not been substantiated by evidence of proof of sickness.

Regarding the last reason that it was a mention date, so it was proper for them not to appear, he submitted that, that is not true as the matter was scheduled for hearing. He submitted so because Civil Procedure

Code [Cap 33 R.E 2019] does not provide for mention, but for hearing. Even if the matter was fixed for mention, the attendance was paramount.

For that reason, he submitted that there was no sufficient reason to support the application; he asked the same so be dismissed with costs.

That being a comprehensive summary of the records in the case files, as well as the summary of the submissions, I find it imperative to start by pointing out the provisions of the law upon which this application has been preferred, that is Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 RE. 2019]. This provision empowers this court to readmit an appeal which was dismissed for want of prosecution upon application by the Appellant and upon showing sufficient cause which prevented him from appearing, when the appeal called for hearing and got dismissed due to the appellant's non appearance.

Now the issue before this court is whether the applicant in this application has shown sufficient cause which prevented him to appear on 06/02/2020 when the appeal was called for hearing and dismissed for non appearance of the appellant.

It is true that the reasons given are three folds, first, that the counsel for the applicant could not appear because he was attending Law Day ceremony in Geita where he was assigned to prepare and deliver speech for Tanganyika Law Society Geita Region. Also that he had a duty to organize his fellow advocates in the participation of the Law Day.

Secondly; that he could not send his client because he is old and sick, and thirdly that, the matter was fixed for mention.

In dealing with these issues I will start with the third one, that the law empowers this court to dismiss an appeal on the non appearance of the appellant on the day when the appeal is called for hearing. This is as per Order XXXIX Rule 17 of the CPC (supra).

The issue is whether this appeal was fixed for hearing or mention. With respect to the counsel for the applicant, the order of the day was that on 06/02/2020 at 09:00 hours the appeal was to be called for hearing. That being the position of the records then the third ground has no merits.

Regarding the 1<sup>st</sup> and 2<sup>nd</sup> issue / ground, I find that the applicant's counsel was duty bound to inform the court of his absence, due to the reasons given. However, he did not do so and did not send his client whom he said is old and sick, without proving that his client was sick.

I agree with the counsel for the respondent that the applicant's counsel as an officer of the court had a duty to notify the court which he did not do. However, the law requires the applicant to show sufficient cause which prevented him from appearing on 06/02/2020.

The reason he has given is that he was, as a chairperson of Tanganyika Law Society in Geita Region, assigned a duty to prepare and deliver speech on the occasion.

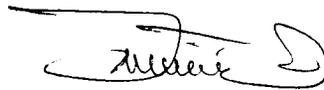
That fact has not been disputed, it has not been disputed either that on 06/02/2020 was a Law Day.

Having these two factors or reasons uncontroverted, I take them to be sufficient reasons for his failure to appear on 06/02/2020 when the case was called for hearing. That being my findings I grant the application, as

prayed in the first item. Miscellaneous Land Appeal No. 31/2019 is hereby re- admitted. The costs of this application to be in due course.

It is so ordered.

**DATED** at **MWANZA**, this 21<sup>st</sup> day of July, 2020



J.C. Tiganga

Judge

21/07/2020

Ruling delivered in the presence on line of the counsel for the parties.



J.C. Tiganga

Judge

21/07/2020