

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISCELLANEOUS LAND APPLICATION NO. 38 OF 2020
(Originating from Misc. Land Application No. 185 of 2019)

**HENRY PETER MAINA.....APPLICANT
VERSUS**

CRDB BANK PLC, GEITA BRANCH..... RESPONDENT

RULING

Date of Last Order: 6/7/2021

Date of Ruling: 29/7/2021

F. K. MANYANDA, J.

This court is been moved under section 95 of the Civil Procedure Code, [Cap. 33 R. E. 2019] to grant order(s) setting aside a dismissal order dated 24/03/2020 and restore to hearing Misc. Land Application No. 185 of 2019.

In the said Misc. Land Application No. 185 of 2019, the Applicant was applying for leave to appeal to the Court of Appeal of Tanzania against the judgment and decree of this Court (Hon. Rumanyika, J.) in Land Appeal No. 21 of 2019 which was decided in his disfavor.

The application is made by way of a chamber summons and supported with an affidavit affirmed by Masoud Shaibu Mwanaupanga, supported with another affidavit sworn by his client Henry Peter Maina which together with the counter affidavit give the following background, in brief.

That the Applicant was present on 24/03/2020 at the Court premises waiting to be called in Court room for hearing of his application. However, while still waiting to be called, he was, to his astonishment, informed by a Court Clerk that his application was dismissed for want of prosecution. It is his averment that the Advocates room was over congested, hence to avoid contamination with the pandemic COVID-19 virus, they were compelled to stay in corridors of the Court. It was also the same to his client.

The averments by the Applicant is strongly contested by the Respondent in the counter affidavit averring that parties were dully called by a Court Clerk, well before hearing of the application started. That both the Applicant and his Counsel were not available in the Advocates waiting room.

At the hearing, the Applicant was represented by Mr. Mwanaupanga, learned Advocate and the Respondent enjoyed the services of Mr. Msechu, learned Advocate.

Mr. Mwanaupanga submitted in support of the application arguing after adopting the chamber summons and the affidavit, that since the Respondent did not file any counter affidavit against the affidavit by Henry Peter Maina they be taken to have conceded to the application. He cited the case of **Martin D. Kumaliya and 177 others vs Iron and Steel Ltd**, Civil Application No. 70/18 of 2018 (unreported) where at page 7 it was stated that failure to file affidavit in reply means the facts are uncontroverted.

Moreover, Mr. Mwanaupanga contended that though the Respondent has contested paragraph 2 of the affidavit, in the counter affidavit to the affidavit by Masoud Shaibu Mwanaupanga, they did not give anything to the opposite. They did not give their version. He cited the case of **East African Cables (T) Ltd vs Spenco Services Ltd**, Misc. Civil Application No. 61 of 2016 (unreported) where at pages 6 to 7 it was stated that a party who disputes a fact must give his version about that fact or else it amounts to uncontroverting that fact.



Mr. Mwanaupanga argued further that at paragraph 7 of his affidavit he gave reasons of his absence that there was a confusion due to scattering of parties to avoid over congestion in the Advocates Waiting Room due to COVID-19, which needs social distancing as one of measures against spread of the deadly disease. He added that they filed a precaution letter and request the Court not to punish them as they were implementing a policy in supporting regression of the disease spreading. He cited the case of **East Africa Cables (T) Ltd vs Spencon Service Ltd**, Commercial case No. 42 of 2016 (unreported) where at page 3 to 4 the Court stated that the object of a Court is to determine the rights of the parties not to punish them.

On their replying submissions, Mr. Msechu for the Respondent after adopting their counter affidavit sworn by Wenseslaus Mutabuzi Rwiza argued that the Respondent countered both affidavits as he filed two counter affidavits, one specifically for countering the affidavit sworn by Mwanaupanga and the other countering the affidavit filed by Henry Peter Maina. He challenged the averments in the two affidavits that the same is unreliable because they did not attach any document to support their contentions that they were in the Court premises when the case was called for hearing only that they did not hear the call. They didn't produce



any affidavit from the Court Clerk showing that they were directed to scatter in the corridors. He cited the case of **Tanga Cement Ltd vs Jumanne D. Masangwa and Another**, Civil Application No. 66 of 2001 (unreported) where it was held that the Court is required to look for sufficient cause for his absence in Court. He concluded that there is good cause established.

Mwanaupanga almost reiterated his submissions in chief in his rejoinder.

Having heard the Counsel submissions and going through the record, the issue is whether the Applicant has shown good cause for his absence in Court when the case was called for hearing.

In the first place I must state that the Respondent, as rightly submitted, both the affidavits by the Applicant Henry Peter Maina and his Advocate Masoud Shaibu Mwanaupanga, were dully countered. The Respondent Wenseslaus Mutabuzi Rwiza swore two counter affidavits one to each of the affidavits.

For that matter, both affidavits by the Applicant were countered by the Respondent.

The Applicant grounds for his absence is that he did not hear when this case was called to hearing. The reason is that both were not in the Advocates room. The Applicant kept social distance, so did his Counsel. The Respondent controverts this argument on grounds that the Applicants did not produce enough evidence to substantiate their averments. That they ought to have adduce an affidavit from the Court Clerk to support them in the averment that they were required to sit far apart to avoid congestion in the waiting rooms.

This Court finds it that the Respondent does not contest the fact that there is a single waiting room for the advocates and their clients in the premises of this Court.

Further, the said waiting room is an enclosed one. I also believe and as a matter of facts that the Counsel for the Respondent and the Appellant are aware that on the hearing date 24/03/2020, there were other cases before other judges and that not only this Court, but the whole of Mwanza Region and the Country at large was in alert and in high precaution that each individual and each institution was required to take whichever measure to avoid contamination of the deadly disease. The only issue the two counsel lock horns is whether the Applicant and his



Counsel didn't hear when the case was called to hearing regardless of the corner each was seated.

This Court also takes note that its premises are limited as such to avoid spread of the disease, it was imperative for each person to take all measures availed to him including keeping social distance. To achieve social distancing, it was inevitable for them to scatter in various corners of the Court premises including ladders. I may add that in this Court premises there are no public announcement facilities which a Court Clerk could use to announce, therefore, he or she had to announce loudly through mouth a call of cases to the parties. Now, in the same spirit of avoiding spread of the deceases, even Court Clerks wear mouth and nose masks. One wonders how their voices could spread to every corner of the Court premises while the mouth and nose are covered with masks.

I think the situation in this case is peculiar, it allows consideration to the parties who failed to appear in Court at "that particular time" when the case was called to hearing. I say it is a "particular time" because one may have been alert that on that day the case would be called, but, due to some confusions as averred by the Applicant in their affidavits, fails to hear the calling voice hence misses the case. Should the Court, in

circumstances like that, punish them? My answer is no, Courts should seek for dispensation of justice to parties rather than punishing them. I subscribe to the authority in the case of **East Africa Cables (T) Ltd vs Spencon Service Ltd**, (supra) by my Brother Mruma, J said at page 3 said:-

*"It is now.....law that procedural provisions contained in the Civil Procedure Code should not be construed in such a manner which will seriously by cause injustice to a party, thus, even if we assume that the plaint was not signed by the advocate for the plaintiff (which is not the case) yet the improper signing would amount to irregularity which would be liable under Rule 17 of Orders VI of the Civil Procedure Code which allows amendment of pleadings for ends of justice. **Courts do exist for doing justice between the parties and not for punishing them.**"* (Emphasis added).

The case of **East Africa Cables (T) Ltd vs Spencon Service Ltd**, (supra) followed an English case of **Cropper vs Smith** (1884) Ch.D. 700 (Bowern L.J) who said: -

"I think it is well established that the object of the Court is to decide the rights of the parties and not to punish them

for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights."

The said English case is applicable in Tanzania by virtue of the reception clause which require Courts in Tanzania to dispense justice and interpret laws in conformity with substance of common law, doctrine of equity and statute of general application as existed in England on 22nd July, 1920. The Court of Appeal of Tanzania adopted and restated the reception clause in various decisions including the case of **Dodhia vs National and Grindlays Bank Ltd and Another** [1970] EA 195, **Director of Public Prosecutions vs Peter Roland, Vogel** [1987] TLR 100 and **Issa Athuman Tojo vs Republic** [2003] TLR 119. In the latter case the Court of Appeal held interalia that:-

"Courts in this Country are empowered by section 2(2) of the Judicature and Application of Laws Ordinance to apply the common law as it existed in England on the 22nd July, 1920."

Basing on the strength of the authority in the **East Africa Cables (T) Ltd vs Spencon Service Ltd**, (supra) I agree with Mr. Mwanaupanga that the Applicant has established good cause for his

absence during the hearing of the case. The issue raised above is answered in affirmative.

In the upshot, and for reasons stated above, I find this application as meritorious. Consequently, I do hereby grant the orders prayed in the chamber summons and set aside the dismissal order of this Court dated 24/03/2020 by Hon. Tiganga, J.

Further, I do hereby restore Miscellaneous Land Application No. 185 of 2019 to hearing, the same to be placed before the Judge In-charge for re-assignment. Costs of this application to be borne by the Respondent. Order accordingly.




F. K. MANYANDA
JUDGE
29/07/2021