

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**[LAND DIVISION]  
AT ARUSHA**

**MISC. LAND APPLICATION NO. 16 OF 2020**

*(C/F the High Court of the United Republic of Tanzania, Misc. Land Application No. 64 of 2019,  
Originating from Land Appeal No. 15 of 2018)*

**CHRISTINER KAMILI ..... APPLICANT**

*Versus*

**ERASTUS MTEMWA ..... 1<sup>ST</sup> RESPONDENT**

**REWARD ELINAZI ..... 2<sup>ND</sup> RESPONDENT**

**LUMAUZA COURT BROKERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*8<sup>th</sup> July & 27<sup>th</sup> August, 2021*

**Masara, J.**

The Applicant has preferred this application under Order IX Rule 3 of the Civil Procedure Code, Cap. 33 [R.E 2002] as amended by section 7 of the Civil Procedure Code (Amendment of the First Schedule) G.N No. 381/2019. She is seeking to restore Misc. Land Application No. 64 of 2019 which was dismissed by this Court for want of prosecution on 5/2/2020. The application is supported by affidavit of the Applicant. The first Respondent opposed the application in a counter affidavit deponed by Mr. Duncan Joel Oola, his advocate. The other Respondents did not enter appearances. They also did not file any affidavits.

The facts leading to this Application run as follows: the Applicant was the Appellant in Land Appeal No. 15 of 2018 in this Court. That appeal was dismissed on 22/8/2019 for wat of prosecution. On 6/9/2019, the Applicant filed Misc. Land Application No. 64 of 2019, seeking to set aside the dismissal order in Land Appeal No. 15 of 2018. The Application was scheduled for hearing on 5/2/2020, but on that day neither the Applicant nor her advocate entered appearance. The advocate for the first Respondent movéd the Court to dismiss the Application since the Applicant failed to prosecute her case. Following that

prayer, the Application was dismissed with costs for want of prosecution. On 6/3/2020, the Applicant filed the instant application.

At the hearing of the application, the Applicant was represented by Mr. Ephraim Koisenge, learned advocate, while the first Respondent was represented by Mr. Duncan Joel Oola, learned advocate. The application was heard through filing written submissions.

Submitting in support of the application, Mr. Koisenge asserted that on 5/2/2020 when Misc. Land Application No. 64 of 2019 was scheduled for hearing, the Applicant failed to enter appearance as she had travelled to Hedaru-Kilimanjaro to attend the funeral of one Abdi Mshana. On that day, her former advocate, Godfrey Mushi, who had travelled to Mwanza, was stuck at Mwanza and could not come back on time. He had expected to catch a morning flight on the hearing day, that is 5/2/2020, but he failed. Coincidentally, the Applicant sent her daughter (Mary Elinazi) to notify the Court on their absence. Unfortunately, the said Mary Elinazi could not reach the Court premises on time. When she arrived, she was informed that the Application had been dismissed. The Applicant had no other option than filing the instant application. The said Elinazi also made an affidavit.

Mr. Koisenge submitted that this Court has discretion to grant the application for restoration upon good grounds been given. He fortified that in the event the application is granted, there is no prejudice the Respondents shall suffer. He concluded by urging the Court to allow the application praying costs to be in the main cause.

Contesting the application, Mr. Oola contended that the Applicant's argument that she went to Hedaru for funeral and that her advocate was in Mwanza, are without any supporting proof. He fortified that there was negligence on the part of the Applicant's advocate because knowing that he would be in Mwanza, he

ought to have arranged his timetable to accommodate him well. According to Mr. Oola, it was upon the advocate for the Applicant to request another advocate to hold his brief something he did not bother to do. The learned advocate amplified that it was expected for the Applicant and her advocate to attach tickets that they had travelled. He maintained that the Applicant has not discharged his burden of proof.

Mr. Oola also faulted the application for being preferred under a wrong provision of the law. He asserted that Order IX Rule 3 of the Civil Procedure Code, Cap. 33 [R.E 2019] is applicable in a suit dismissed for non-appearance of both parties. He argued that in the instant application, the 1<sup>st</sup> Respondent appeared on the day the application was dismissed. He insisted that the Applicant cannot move the Court to restore the dismissed application under the cited provision. In supporting his argument, he cited the case of ***China Henan International Co-operation Group Vs. Salvand K. Rwegasira*** [2006] TLR 220. He amplified that improper citation of the law renders the application nugatory.

According to Mr. Oola, the Applicant is playing a delaying technique because she had filed numerous cases which were dismissed either for want of prosecution or for lacking merits. He maintained that the delay tactic has hindered the 1<sup>st</sup> Respondent from enjoying the fruits of his victory in Civil Case No. 9 of 2011. Mr. Oola urged the Court to dismiss the application with costs.

Having outlined the submissions by the counsel for the parties, the question calling for determination is whether the Application has merits.

Before dealing with the merits of the application, I take note of the concern raised by Mr. Oola that Order IX Rule 3 which the Applicant's advocate has prefaced his application is not the proper provision of the law. I have gone through the said provision, I am satisfied that the provision is proper, and the

Court is properly moved. There is no other provision upon which the application could be premised, since Rule 3 of Order IX is specifically for setting aside the dismissal order notwithstanding what transpired in the dismissal. Furthermore, Mr. Oola as an officer of the Court ought to have assisted by citing a proper provision. I therefore dismiss this complaint.

Regarding the merits of the application, as already stated, I have to determine whether the applicant has advanced sufficient reasons that will move the Court to exercise its discretion and restore Misc. Land Application No. 64 of 2019 that was dismissed for non-appearance.

Order IX Rule 3 of the Civil Procedure Code, Cap. 33 [R.E 2019] that the Applicant premised his application provides:

*"3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that **there was good cause for his non-appearance**, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit."*(Emphasis added)

In the application under scrutiny, it is therefore upon the Applicant to show good cause for her non-appearance. In the case of ***Pangea Minerals Ltd Vs. Petrofuel (T) Limited and 2 Others***, Civil Appeal No. 96 of 2015 (unreported), the Court of Appeal held:

*"On the basis of the above provision and authorities, it is settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had **sufficient cause for his absence**, the appropriate remedy for him is to file an application to that effect in the court which entered the judgment."*(Emphasis added)

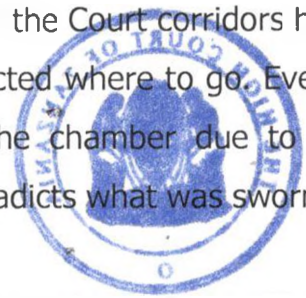
The question is whether the Applicant had sufficient reasons for failure to enter appearance in Court on 5/2/2020 when the Application was set for hearing. In paragraphs 4, 5, 6, and 7 of the affidavit in support of the application, the Applicant state that she had attended a funeral at Hedaru in Kilimanjaro. and her advocate was in Mwanza. As rightly submitted by Mr. Oola, the Applicant

has not attached any proof to support the assertions therein. Further, the counsel for the Applicant did not make any efforts to inform the Court of his absence. He ought to have sought assistance from any other advocate who could hold his brief. His inaction implies that he did not bother.

I should also point out that appearances of the Applicant in Court in the previous dates were wanting. Since the filing of Misc. Land Application No. 64 of 2019, the Applicant never entered appearance to the date it was dismissed. On 21/10/2019, neither the Applicant nor her advocate entered appearance in Court. On 20/11/2019, her advocate entered appearance whereby the application was set for hearing on 5/2/2020. Thus, the Applicant's advocate had knowledge that the application was set for hearing on that date. Duty to prosecute one's case lies with that party and not the advocate. The advocate is merely engaged to facilitate and assist on technical and cumbersome legal procedures that are unknown to litigants.

In the first place, Misc. Land Application No. 64 of 2019, was filed moving the Court to set aside the dismissal order in respect of Land Appeal No. 15 of 2018 that was as well dismissed for non-appearance of the Applicant, who was by then the Appellant. It was expected that the Applicant would have been more diligent to prosecute the application to have his appeal restored. However, as above stated, she did not deem it necessary to enter appearance in Court.

I take note that the Applicant's daughter, one Mary Elinazi, presented a sworn affidavit stating that she attended the Court and that she could not trace the chamber where the application was to be heard. In this Court, cases are called on a microphone and litigants who are unfamiliar with the Court corridors have been seeking assistance from those familiar and directed where to go. Even if I was to assume that she was unable to enter the chamber due to her unfamiliarity with the environment, her affidavit contradicts what was sworn by

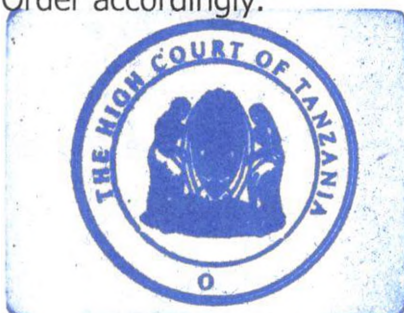


the Applicant. Under paragraph 8 of the Applicant's affidavit, she deponed that Mary Elinazi reached in Court late only to find the case has already been dismissed. But in her affidavit, Mary Elinazi stated that she arrived at the Court premises but that she could not trace the chamber in which the case was called. The Applicant did not ask the Court clerk to also depone an affidavit nor did she deem it fit to even mention her name. I would have accorded the affidavit weight if the Applicant had previously made appearance. I am not convinced that she sent the said Mary on that occasion.

It is also apparent that even after noting that her application had been dismissed, the Applicant took more than a month to file this application. This shows laxity and lack of seriousness on the part of the Applicant. A party who wishes to set aside a dismissal order, must act promptly. In this application there was no promptness on the part of the Applicant. Considering the nature of the application and the orders sought, if I allow the application, I will be condoning ineptitude which I am not prepared to. It is in the public interest that litigation must come to an end.

For the above reasons, the Applicant has failed to adduce sufficient reasons to move the Court to restore the dismissed Misc. Land Application No. 64 of 2019. The Application is accordingly dismissed for lack of merits. The first Respondent shall have costs for this application.

Order accordingly.



*Y. B. Masara*  
Y. B. Masara  
**JUDGE**

27<sup>th</sup> August, 2021