

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPLICATION NO. 370 OF 2023

HENRY BARAKA MUKUNDI APPLICANT

VERSUS

NMB BANK PLC 1ST RESPONDENT

STEAM GENERATION LTD 2ND RESPONDENT

RULING

Date of last Order: 30/9/2023

Date of Ruling: 21/09/2023

A. MSAFIRI, J.

The applicant Henry Baraka Mukundi has filed this Application seeking for the Court's order to set aside its dismissal order issued on 06th June 2023 in Land Case No. 183 of 2021. The Application is filed under Order IX Rule 6(1) and Section 95 both of the Civil Procedure Code Cap 33 R.E 2019 (the CPC). It is supported by an affidavit and supplementary affidavit sworn by the applicant himself. The 1st respondent also through her officers filed a counter affidavit and reply to supplementary affidavit contending the Application. The 2nd respondent was ex-parte after she was served by publication and failed to appear in Court.

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The hearing of the Application was conducted by way of written submissions. Submitting in support of Application, Mr. Omari Kilwanda, learned advocate who was appearing for the applicant started by adopting the affidavit and supplementary affidavit of the applicant.

He said that the applicant engaged the legal services of one advocate Erick Magige to represent him in Land Case No. 183 of 2021 and everything concerned this case was legally handled by the said advocate. That during mediation, it was succeeded to the effect that, the parties intended to file a Deed Settlement and the 1st respondent drafted the same and tabled it for discussion whereby the applicant and his counsel agreed to reply to it. That the applicant and the 1st respondent agreed to prepare new repayment schedule for three years and both parties agreed to it and they further agreed that the repayment schedule will be shared to the Hon. Judge for final registration of the Deed of settlement.

Mr. Kilwanda stated further that, after that, the applicant travelled to Mwanza to attend his father and the rest of the family thereof and handled the matter to his counsel believing that he could do the needful but unfortunately the counsel did not do so.

That, the applicant did not do as supposed to do and as agreed on 11th day of April, 2023 before Hon. Hamza, the Mediator, the result of *Alls*

which Land Case No. 183 of 2021 was dismissed for want of prosecution after the applicant's counsel negligently and for reasons known to himself deserted the matter without the applicant's knowledge.

Mr. Kilwanda averred that the applicant has managed to outline the reasons in his affidavit and the supplementary affidavit, warranting the restoration of Land Case No. 183 of 2021.

He added that the said Land Case No. 183 of 2021 was not dismissed for want of prosecution due to the applicant's negligence but it was dismissed without the applicant's knowledge as he has entrusted his advocate. That, the applicant ought not to be blamed or punished for negligence acts of his lawyer.

To cement his point, he cited the case of **Judith Emmanuel Lusohoka vs. Pastory Binyura Mlekule and 2 others**, Misc. Land Application No. 74 of 2018, HC at Tabora (unreported), and the case of **Mohamed Suleiman Ghona vs. Mahmoud Mwemus Chotikungu** Civil Reference No. 7 of 2021, CAT at DSM (unreported).

He concluded that the applicant has advanced sufficient reasons and prayed for the Application to be granted as prayed. *Alls.*

In reply, Ms. Eunice Msami, learned advocate was the one who drew and filed the 1st respondent's written submissions. She started by adopting the counter affidavit and supplementary counter affidavit affirmed by Sharifa Karanda, an officer of the 1st respondent.

She submitted that, the affidavit and supplementary affidavit in support of the Application are full of contradictions and lies that incurably affect their credibility which renders the whole Application incompetent. She pointed some of the contradictions that, while at paragraph 4 of the affidavit, the applicant states under oath that his counsel Eric Magige fell sick on a day when the case was dismissed, the same person states under oath at paragraph 3 of the supplementary affidavit that he did not know the whereabouts of his advocate.

She pointed that, these contradictions manifests falsehood and fabricated story in the affidavits which are calculated to influence the decision of the Court. She contended that the affidavit containing contradictory statement or false information should not be acted upon.

Ms. Msami stated further that, the allegations on advocate's negligence and incompetence is a statement from the bar as it does not feature anywhere in the applicant's affidavits. That this is a new ground to the Application because in his two affidavits, the applicant is alleging

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advocates sickness as a reason for non-appearance. That, allowing this new ground will be against the principle of parties to be bound by their pleadings. The counsel urged the Court to disregard the said ground and confine itself to the applicant's affidavit and supplementary affidavit.

Ms. Msami added that, the Court of Appeal has on numerous occasions decide that the advocate's inaction, negligence or omission does not amount to a good cause for restoration of cases. To bolster her point, she cited the case of **Elias Masija Nyang'oro and 2 others vs. Mwananchi Insurance Civil**, Appeal No. 278 of 2019, CAT (Unreported).

The counsel submitted further that the case which is sought to be restored was dismissed on hearing dates, the days which actually required the presence of the applicant as witness. Hence, failure of the applicant to attend to his case on the two dates set for hearing amounts to failure to prosecute his case and therefore the Court was justified to dismiss the matter.

The counsel pointed that, the submissions by the applicant that he is paying the debt and that there was a settlement agreement between the parties are not grounds to set aside dismissal order. *Alle*

The counsel submitted that, the applicant has not adduced sufficient reasons to warrant the grant of this Application. She prayed that the application be dismissed with costs.

In rejoinder, the counsel for the applicant mainly reiterated his submission in chief, and insisted that this Application has merit for the best interest of justice due to the grounds stated in his affidavit, supplementary affidavit and the submission and that there is no contradiction concerning the applicant's advocate. He reiterated his prayers.

It is trite law that restoration of the case is in discretion of the Court. This discretion however has to be exercised judiciously and overriding consideration is that there must be sufficient cause or reasons to move this Court to grant the prayer of setting aside the dismissal order.

In the case of **Nasibu Sungura vs. Peter Machumu** [1998] TLR 501, it was held inter alia thus;

*"In application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, **but whether the reasons furnished are sufficient to justify the applicant's non-appearance on***

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the date the suit was dismissed” [Emphasis supplied]

Guided by the above principle, the issue for determination in the current Application is whether the applicant has advanced sufficient reasons to enable this Court to grant the sought prayers.

In his affidavit, the applicant stated that, the main case was marked failed in the mediation and the matter was fixed for hearing on 05th June 2023. That despite fixing hearing date, the applicant intended to file Deed of Settlement by mutual agreement between the parties. That, the counsel for the applicant fell sick of malaria and was attended at Makongo Hospital. However, the referred medical receipt was unfortunately not attached among the documents attached and marked as SLC 1 collectively in the affidavit. Therefore, the Court remained in darkness as to when the applicant’s advocate fell sick and whether the said advocate was indeed sick on the dates the Land Case No. 183 of 2021 was set for hearing.

The applicant stated further in his affidavit that on 06th June 2023, he made follow up in the Court Registry on the status of the case where he was informed by the Court Clerk that the case was dismissed on the same date for want of prosecution. However, this claims by the applicant remains to be mere claims without any supporting evidence to prove

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them. The purported Court Clerk did not depone an affidavit which could have supported the applicant's allegations.

The applicant prayed for the leave to file a supplementary affidavit, and the leave was granted by this Court. The supplementary affidavit was filed on 31st July 2023. In the said supplementary affidavit, the applicant averred that, being a layman, he engaged Erick Magige, an advocate to represent him in Land Case No. 183 of 2021 before this Court. That, later on the said Erick Magige where about was unknown to the applicant as his number is unreachable to date.

In the same breath, the applicant at paragraph 6 of the supplementary affidavit stated that he was told that the matter was fixed for hearing on 5th and 6th June 2023 that he was informed by his colleagues at his office that his counsel was suffering from Malaria on those days and attended Makongo Hospital.

The applicant's story is confusing as at paragraph 3 of supplementary affidavit he states that his counsel whereabouts is unknown to him, while he also states that he was told that his counsel was sick on those days and attended the hospital. Again, those colleagues of the counsel for the applicant were not named neither did they depone affidavits to confirm and collaborate the applicant's claims. Furthermore,

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in absence of any medical form or chit to support the applicant's narration, this story is unbelievable.

In the supplementary affidavit, at paragraph 8, the applicant stated that he has never seen his counsel whom he trusted since the day he travelled to Mwanza. In the submission by Mr. Kilwanda, he stated that, the applicant travelled to Mwanza to attend his further and the rest of the family and handed the matter to the counsel. However, the Court was not told when did the applicant travelled to Mwanza, for how long he stayed there and when did he came back from Mwanza.

The applicant simply seems to materialize on 06th June 2023 in the Court Registry making follow up on the status of his case. The applicant has submitted vigorously on the fact of his readiness to repay the loan and the arrangements he had with the 1st respondent on loan repayment schedule. He has also told the Court on the parties' plan to enter Deed of Settlement. However, as correctly argued by the counsel for the 1st respondent, those plans cannot be considered as reasons for the applicant's non appearance on the date the matter was set for hearing. If there was those plans and or arrangements, they were between the parties, and it was still the duties of the parties to appear before the Court to attend the case. *Aelle*

Mr. Kilwanda has referred this Court to the case of **Judith Emmanuel Lusohoka vs Pastory Binyura Mlekule and 2 others (supra)**. However, I find the facts of the referred case to be distinguishable from the Application at hand. In the referred case, it was the applicant seeking for extension of time to file an appeal. That the applicant's advocate was negligent by failing to inform her about the fact that her appeal was dismissed for having been filed out of time.

In the present Application, the applicant was the plaintiff and the matter was set for hearing for two consecutive dates. It was the plaintiff's obligation to appear on the dates set for hearing date as he was expected to be the witness in his own case.

I find also the referred case of Court of Appeal of **Mohamed Sulemain Ghona vs. Mahmoud Mwemus Chotikungu, (Supra)**, to be distinguishable. The Court of Appeal in the said case did not outrightly held that negligence of an advocate should not be to the detriment of a party as the counsel for the applicant wishes this Court to believe. What the Court of Appeal observed was that;

*"Much as we agree that in some of our previous decisions, we have observed that negligence of an advocate should not be detriment of a party, that **is the case only in exceptional circumstances.**" (Emphasis mine).*

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According to the referred case herein above, the case of negligence of an advocate should be considered in exceptional circumstances. The Court of Appeal observed further that in the said case before them, the negligence of applicant's counsel was so glaring to amount to a gross professional misconduct and the Court of Appeal had to invoke the oxygen principle to grant the orders sought.

In the present Application, it is my finding that there is no such exceptional circumstances. The applicant has failed to show how his advocate was grossly negligent. What he claimed in his affidavit and supplementary affidavit is that his advocate was sick and attended Makongo Hospital. That, he had never seen his advocate since the day the applicant travelled to Mwanza to date. This, to my findings does not show how the advocate was negligent to the extent of making this Court to treat this matter as exceptional circumstances. In addition, the issue of advocate's negligence does not feature in the affidavit and supplementary affidavit but was very much banked by the Counsel for the applicant in his submission.

In his affidavit, supplementary affidavit and submissions, the applicant kept on pleading his ignorance of law and that he is a layman with no knowledge of legal procedure. However, the ignorance of law has

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never been regarded as a defence. The applicant was a plaintiff in the case he has willingly instituted and had obligation to attend to it. Since he was a plaintiff, I find that he was very much in control of his own suit.

For the foregoing reasons, I find that the applicant has failed to advance sufficient reasons for this Court to grant the orders sought. I hereby dismissed the Application with costs.

It is so ordered.



A. Msafiri

A. MSAFIRI
JUDGE
21/9/2023