

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO.73 OF 2020

(Originating from Misc. Land Application No. 169 of 2020)

KAROLI SOKIA OBINGA APPLICANT

VERSUS

ADIKA ALILA RESPONDENT

RULING

Last Order: 21.10.2020

Ruling Date: 21.10.2020

A.Z.MGEYEKWA, J

The applicant application is brought under Order IX, Rule 3, and section 95 of the Civil Procedure Code Cap 33 RE 2019. The Order sought is for the restoration of Misc. Land Application No. 169 of 2013 which was dismissed for want of prosecution with the leave to refile. The application is supported by an affidavit deponed by Karoli Sokia Obinga the applicant.

Briefly, the applicant in this application was also the applicant in Misc. Land Application No. 169 of 2013 which was dismissed on 12.07.2013 for want of prosecution. The applicant did not see justice and pursued his right through Misc. Land Application No. 216 which was dismissed with leave to refile. The applicant then re filed Misc. Land Application No. 205 of 2018 and the court grant extension of time on 09.07.2020 to the applicant to file the application setting aside the impugned order dated 12.07.2016 which dismissed Misc. Land Application No. 169 of 2013 within 21 days. The applicant complied and on 28.07.2020 he filed this application.

In prosecuting this application both parties appeared in person unrepresented.

At the hearing, the applicant submitted that this application arises from Land Application No. 169 of 2013 and the matter originated from Land Application No. 62 of 2011. He went on that he has been attending different scheduled court dates from Daresalam to Mwanza until 01.06.2016. he went on to state that, the matter was scheduled 28.06.2016 before the DR and he prayed the court to change the hearing date which was fixed for hearing on 28.07.2016. he claimed that he arrived in Mwanza from Daresalam on 27.07.2016 to attend the hearing on 28.07.2016 as scheduled, but he was

informed that the matter was dismissed for want of prosecution and he realized that the date was not changed from 28.06.2016 to 28.07.2016.

He avers that he filed a complaint on 27.07.2016 as directed by the DR then Misc. Application No. 216 was registered on 27.09.2018 and the court noted some defects and the application was withdrawn with leave to refile. He went on pressing that this court granted his application for an extension of time to file this application to set aside application No. 169 of 2013. He finally prays this court to adopt his affidavit and grant this application.

Responding to, the respondent had not much to say that to pray this court to adopt his counter-affidavit.

Now, having summarized the contents of the affidavits and the arguments made by the parties, it is important to point out the governing principles in re-admission for the purposes of ascertaining whether or not the applicant's case should be restored.

The law is clear under Order IX Rule 3 of the Civil Procedure Code that;-

“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.”

It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, is duty-bound to furnish the court with sufficient reasons for non-appearance when the suit was called for hearing. I have considered the learned arguments for and against the application. It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, he has to furnish the court with sufficient reasons for non-appearance when the suit was called on for hearing.

It is evident from the affidavit supporting this application that counsel for the applicant's failure to appear when the matter was called on for hearing as a result of his absence; that was not under his control as he prayed for rescheduling the hearing and his prayer was granted by Deputy Registrar. To support his submission he has appended a letter explaining his concern that he knew the matter was adjourned and scheduled for hearing on 27th July, 2016, and Deputy Registrar confirmed and endorsed the letter.

I have weighed the arguments for and against the application as presented to me by both parties. I think the applicant has sufficiently

explained the reason for not appearing in court when his case was dismissed for want of prosecution. I have reached that conclusion having considered; among other things; the conduct before the dismissal order. In **Shocked & Another v Goldschmidt and Others** [1998] 1 All ER372 it was stated that the applicant's conduct before the alleged non-appearance should be taken into consideration in the application of this nature.

I have also considered the fact that it is in the interest of justice and the practice of this court that, unless there are special reasons to the contrary, applications are determined on merits as it was held in the case of **Fredrick Sc lenga & another v Agnes Masele** [1983] TLR 99 and **Mwanza Director MIS New Refrigeration Co. Ltd v Regional Manager of TANESCO Ltd & another** [2006] TLR 335.

I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this application as it was held in the case **Jesse Kimani v McCornel** and another [1966] EA 547. In view of the above, on a balance of probabilities, I think the applicant has provided sufficient cause why he did not enter appearance when the case was called on for hearing.

In the upshot, the present Miscellaneous Application No. 169 of 2013 is hereby restored to the register for continuation from where it stopped when it was dismissed for want of prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order to costs.

Order accordingly.

DATED at Mwanza this 21st October, 2020.




A.Z.MGEYEKWA

JUDGE

21.10.2020

Judgment delivered on this 21st October, 2020 in the presence of both parties.


A.Z.MGEYEKWA

JUDGE

21.10.2020