

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISCELLENEOUS LAND CASE NO. 322 OF 2019

(Arising from Misc. Land Application No. 861 of 2018)

ABDALLAH IDDI MWAKILANDU.....APPLICANT

VERSUS

OMARI MGAYA.....RESPONDENT

RULING

I. MAIGE, J

This is an application for setting aside the order of this Court as per His Lordship Mallaba dismissing the Miscellaneous Land Application No. 861 of 2018. The application is supported by the affidavit of LINAH STEPHEN, learned advocate. The reason why the applicant did not enter appearance on the date of the dismissal is sickness on the part of his advocate. It is deposed that, on the date of the dismissal, the deponent of the affidavit, while preparing herself to come to the Court, she suddenly fell sick. She had therefore to rush to hospital where she was found with malaria. She has attached, which is marked annexure L-1, a laboratory diagnostic form suggesting as such.

The respondent filed a document purporting to be a counter affidavit. It combines a notice of preliminary objection and factual denial of the contents of the affidavit. In a notice of preliminary objection, the respondent attacks the affidavit to be defective for containing prayers.

On 21st day of April 2020 when this matter came for hearing, neither of the parties could enter appearance because of the COVID-19. My predecessor in office, Judge Manyanda directed that the preliminary objection be argued by way of written submissions. The respondent who was unrepresented, filed his written submissions in person. Advocate Linah filed the same for and on behalf of the applicant.

In his submissions, I have observed, the respondent addressed both the preliminary point and the main application. On the preliminary objection, it was his submissions that for containing prayers, the affidavit was incurably defective. On the substance of the application, he condemns the applicant for failure to justify his absence on the date of the dismissal. In so doing, he submits, the applicant disobeyed the Court order. Citing the authority in **TBL vs. Edson Dhobe, Misc. Application No. 96 of 2016, High Court, Unreported**, the respondent contends that any order setting aside the dismissal order might put into place a bad precedent. Commenting on the medical laboratory form attached in the affidavit, it is his submissions that, the same was incredible because it was not approved by a medical doctor.

On her part, Miss Linah submits only in respect to the preliminary objection. She cannot be blamed because the order directing the parties to file written submissions was limited to preliminary objection. In consideration of the delay to dispose of the application occasioned by **COVID-19** and for obvious reason as shall be apparent herein after, I find that it is for the interest of justice to consider both the legality and substantiality of the application.

On the legal issue, I agree with the respondent that, paragraph 9 of the affidavit is defective for containing a prayer. It is accordingly struck off. The striking off of the respective paragraph however does not affect the substance of the affidavit. I will therefore proceed with consideration of the merit or otherwise of the application.

In his counter affidavit, the respondent has doubted the validity of the medical laboratory form attached in the affidavit on account that it is issued by a dispensary and not hospital. He has not cited any law which prohibits dispensaries from taking care of sick persons. As a matter of common sense, not all deceases are treated by hospitals. Uncomplicated deceases such as malaria can be treated by dispensary as well. In this case, the deponent of the affidavit claims that she was prevented by malaria from attending Court on the date of the dismissal. Her claim is not merely verbal. It is supported by a laboratory form from SPRF Dispensary, Yombo Vituka. The respondent suggests in his counter affidavit that the same has been forged. He has assumed the forgery from the fact that the laboratory form is issued by a dispensary. I cannot agree with him. Forgery is one the serious allegations. It cannot be proved by mere assumption of fact. In the circumstance, I cannot rely on mere assumption to doubt the authenticity of the documentary evidence in laboratory form. I will hold as a point of fact that the applicant was prevent by sickness from entering appearance on the date of dismissal.

For those reasons therefore, the application is hereby granted. The order dismissing the Misc. Land Application No. 861 of 2018 is set

aside and the application restored. In the circumstance of the case I will not give an order as to costs.

It is so ordered.

A handwritten signature in black ink, appearing to read 'I. Maige', with a large, stylized initial 'I'.

I. Maige

JUDGE

30/10/2020

Date: 30/10/2020

Coram: Hon. I. Maige, J

For the Applicant: Lina Steven, Advocate

For the Respondent: Present

RMA: Bukuku

COURT: Ruling delivered application granted.



I. Maige

JUDGE

30/10/2020