

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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**MISCELLANEOUS LAND APPLICATION NO. 10 OF 2023**

**ASHA RAMADHANI .....APPLICANT**

**VERSUS**

**JANETH NGODO..... RESPONDENT**

**RULING**

*9<sup>th</sup> & 31<sup>st</sup> March, 2023*

***Kahyoza, J.:***

**Asha Ramadhani** instituted an appeal against **Janeth Ngodo**, which this Court fixed for hearing on the 14<sup>th</sup> day of February, 2023. On the date the appeal was fixed for hearing, neither the appellant nor the respondent entered appearance. For that reason, the Court dismissed the appeal for want of prosecution. Aggrieved, Asha filed the application seeking this Court to admit the appeal.

There is only one issue for determination that is whether the application disclosed sufficient reason for the applicant and her advocate's non-appearance. Mr. Asubuhi John, the applicant's advocate filed an affidavit to support the application where he deposed that he was absent as he was summoned to appear before the Court of Appeal on the date he was

required to appear before this Court. He stated that he sent Mr. Dereck Andrew to hold his brief - who delayed to report to this Court as he got involved in the car break down. He deposed further that, Mr. Derrick notified him that he reported to the Court what he encountered and obtained a dismissal order.

**Janeth Ngodo**, the respondent, did not file a counter affidavit or appear to oppose the application. The respondent refused service. The village executive officer who served the respondent filed an affidavit attesting that the respondent refused to be served. Thence, the application will be determined on the strength of the grounds adduced in the affidavit.

Mr. Kyashama, the advocate who held Mr. Asubuhi's brief for the applicant had nothing to expound regarding the grounds to support the application. He prayed the application to be granted based on the averment and the annexures.

I examined the record, truly the applicant's advocate appeared was appealing before the Court of Appeal. The applicant's advocate proved by attaching a summons that he was appearing before the Court of Appeal on that day. Is that a sufficient reason for non-appearance?

Sub-rule (3) of rule 1 of Order XVII of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the **CPC**) provides grounds for adjournment. One of the grounds for adjournment is the absence of the advocate while appearing before the superior court. It states-

*(3) In every case under sub-rule (1), the court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:*

*Provided that-*

*(a) when the hearing of the suit has been commenced, it shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds that there are exceptional reasons to be recorded by the court requiring the adjournment of the hearing beyond the following day;*

*(b) no adjournment shall be granted at the request of a party, or parties except where the circumstances are beyond the control of the party or parties as the case may be;*

***(c) the fact that the advocate of a party is engaged in another court, shali not be a ground for unless that advocate is appearing before a superior court;***

*(d) where the illness of an advocate or his inability to conduct the case for any reason, other than his being engaged in another court, is put forward as a ground for adjournment, the court shall not grant adjournment unless it is satisfied that the party applying for*

*adjournment could not have engaged another advocate in time. (Emphasis added)*

In order for an advocate to take advantage of paragraph (c) of rule 3(3) of Order XVII of the CPC, he must adduce evidence that he is engaged in the superior court on the date fixed for hearing. The applicant's advocate averred that he sent Mr. Derrick to notify this Court who did not manage to attend the Court on the time scheduled. It is unfortunate that Mr. Derrick did not swear an affidavit to that effect. Since the application is unopposed and the applicant's advocate proved that he did not enter appearance because he was appearing before the Court of Appeal, I find it to be a good ground for his absence. However, this should serve as a warning, it is well established practice for the Court of Appeal to issue a course list is two months or at least a month before, hence, after the advocate got the course list he had a duty to notify this Court.

In the end, I set aside the dismissal order and re-admit appeal. I make no order as to costs, as the respondent did not appear. I was contemplating to order the applicant's advocate for costs for wasting this Court's time under rule 19 of Order XXXIX of the CPC which provides that **the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.**

I refrain from giving the order, but direct that the applicant's advocate shall ensure that on the date the re-admitted appeal is fixed for hearing, there will be no adjournment.

It is ordered accordingly.



**J. R. Kahyoza**  
**Judge**  
**31/3/2023**

Court: Ruling delivered in virtual presence of Mr. Mniko holding Mr. Asubuhi advocate for the Applicant. B/C Dora present.

**J. R. Kahyoza**  
**Judge**  
**31/3/2023**