

IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISCELLANEOUS LAND APPLICATION NO. 79 OF 2022

*(Originating from the decision of the High Court of Dodoma in Land
Appeal No. 78 of 2020)*

RICHARD KITUNDU.....1ST APPLICANT

HAMISI SHIPU.....2ND APPLICANT

VERSUS

BARTHOLOMEO BENJAMIN *(Administrator of the*

Estate of The Late Benjamin K. Mpopo) RESPONDENT

RULING

15th November, 2023

HASSAN, J.

The applicant has filed this chamber application made under Order XXXIX Rule 19 of the Civil Procedure Code, Cap 33 [R. E 2019] praying the court to set aside its dismissal order which was delivered on the 20th day of April, 2021 in Land Appeal Case No. 78 of 2020 and order re-admission of the appeal and proceed with the suit.

This application was supported by affidavit sworn by the applicants which was fervidly countered by the affidavit sworn by ONESMO DAVID MARTIN ISSIAH, the respondent's legal counsel.

When the application came for hearing, the applicants were represented by Mr. Samwel Mcharo, Learned Counsel whereas the respondent had the service of Mr. Onesmo David, Learned Counsel. Parties herein prayed to proceed by way of written submissions. The Parties complied to the order of preference in filing their written submissions.

The applicants submitted in support of the application that they were appellants in Land Appeal No. 78 of 2020 before the court. On the 8th day of December, 2021 when the appeal was called before the honourable Deputy Registrar in absence of all the parties the matter was scheduled for mention on the 20th day of April, 2021 thus on that day when the matter was called for mention, the respondent was present while the applicants were absent. That, the respondent lamented to have incurred costs then the appeal was dismissed.

The applicants went on submitting that on the 31st day of May, 2021 the applicants made follow up of their appeal and were served with a copy of proceedings showing that the appeal was dismissed for non-appearance on the 20th day of April, 2021. Having discovered the fact that the appeal was dismissed on the date set for mention and that there were out of time, the applicants successfully filed an application for extension

of time vide Miscellaneous Land Application No. 40 of 2021. The applicants submitted that, there are two grounds in the chamber application; *first*, there is illegality in the said dismissal order and *second*, the matter was dismissed on mention date.

Regarding illegality on the said order, the applicants submitted that it is a settled law that denial of right to be heard amounts to illegality. That, the appeal was only set for mention and the parties were never summoned to appear and being given the right to be heard. The applicants cited **Mbeya Rukwa Autoparts v Jestina George Mwakyoma [2003] TLR 153** and **Fabian Munraha v Rukaya Munraha [1996] TLR 150, 151** to cement their submission.

On the second ground that the matter was dismissed on mention date, the applicants submitted that, it is a principle of law that the matter cannot be dismissed on mention date. The applicants cited **Mrs. Fakhria Shamji v Registered Trustees of Khoja Shia Ithnasheri (MZA) Jamaat**, Civil Appeal No. 143 of 2019 which cited with approval the case of **Mr. Lembrice Israel Kivuyo v M/S DHL Worldwide Express, DHL Tanzania Limited**, Civil Appeal No. 83 of 2008 (both unreported) to cement his submission.

The applicants finalised their submissions by arguing that the reason for their non appearance was due to the fact that they were sick and thus afraid of being contaminated of the COVID – 19 pandemic in town. And that, the applicants being old aged, they forgot the case dates. That, after they got a little relief they made follow up and filed an application for extension of time. The applicants prayed the court to allow this application for if it will not be allowed the applicants will suffer an irreparable loss of their basic right of being heard.

On his part, the respondent contested the application by adopting his counter affidavit and submitting in addition that, there is no date of the 8th day of December, 2021 in the record of proceedings which shows the matter was coming for mention or hearing thus the applicants misdirected themselves. The respondent went on submitting that the land appeal was dismissed for non-appearance of the appellants who had knowledge of the case since he was the one who filed the appeal in court. That, the sickness alleged by the applicants is not clear on what kind of sickness were they suffering from. That, it does not come to his mind how come the two appellants felt sick at the same time and forgot the date of the case at the same time. The respondent cited **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 at

page 6 (unreported) to support his submission. The respondent distinguished the cited case of **Mbeya Rukwa Autoparts** (supra) from the instant case.

The respondent finalised his submission by arguing that there is no any sufficient grounds advanced by the applicant in order to warrant this honourable court to grant this application. He prayed the court to dismiss the application with costs.

That is what was shared by the parties in support of and against the application in the court.

Indeed, on the 8th day of April, 2021 not the 8th day of December, 2021 (as alleged by the applicants) where the matter was scheduled for mention on the 20th day of April, 2021, and on that date, the applicants were absent while the respondent was present, thus the court dismissed the land appeal for non-appearance of the applicants.

The provision of law guiding dismissal of suit for non-appearance of parties is Order IX Rule 5 of the Civil Procedure Code Act, Cap 33 [R. E 2019] which provides, thus:

"Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the

defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

The court has also interpreted the position of law in **Shengena Ltd v National Insurance Corporation and Another**, Civil Appeal No 9 of 2008 (unreported) the court held;

"... It is therefore, a practice before courts of law whereby parties to a case appear before the court to ascertain the state of pleadings or stage reached in the trial and then proceed to make necessary orders. It is not the practice of courts in our jurisdiction to dismiss or make other orders that substantially bring a case to finality on a day fixed for Mention. In our considered view, therefore a case can be dismissed for various, legally recognized grounds when it comes up for hearing not Mention. In our present case, we find it improper for the trial judge to have dismissed the case when it came up for Mention."

The position of law is therefore clear that the matter can only be dismissed on a hearing date and not mention date as it was the situation in the instant case. Thus, the dismissal of the suit was improper.

That said, the meritorious application is hereby granted. The dismissal order of the court in Land Appeal No. 78 of 2020 is here by set aside, and the appeal is readmitted. No order as to costs.

It is so ordered.

DATED at **DODOMA** this 15th day of November, 2023.


S. H. Hassan
JUDGE

COURT

Ruling read over in the presence of the advocate for the respondent who also hold brief for advocate Mcharo with instruction to proceed. Ruling delivered through Video Conferencing by linking the party to the Court from IJC- Dodoma to Kondoa District Court.


S. H. Hassan
JUDGE