

TANZANIA / JUDGMENT

MISC

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM MISC. LAND CASE APPLICATION NO.30282 OF 2024 (Originating from Land Case No. 68
of 2022) ANNA LEONARD SHANGO..... APPLICANT VERSUS EFC
TANZANIA LTD..... 1st RESPONDENT MEM AUCTION & GENERAL
BROKERS..... 2nd RESPONDENT TANZANIA QUALITY AUCTION MART
LTD..... 3rd RESPONDENT NGABANI PATRICK MTENGA..... 4th
RESPONDENT

RULING

19/2/2025 & 03/3/2025 GWAE, J This is an application for setting aside dismissal order dated 7th March 2023 made by this Court (Masoud, J as he then was now JA). The application has been preferred under Order IX Rule 9 of the Civil Procedure Code, Cap 33 Revised Edition, 2019 (herein the CPC) and has been taken out at the instance of an affidavit sworn by the applicant, Anna Leonard Shango. Order IX Rule 9 of the CPC provides that:- "9. In any case in which a decree is passed ex-parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if i he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also." The record reveals that, Land Case No. 68 of 2022 was dismissed for want of prosecution. The applicant was the 2nd plaintiff in the said dispute and no ex-parte order was issued to that effect. It therefore follows that, Order IX Rule 9 of the CPC cited by the applicant is a wrong provision of the law, but since non-citation and/ or wrong citation of the enabling provision is inconsequential, this court still have the jurisdiction to hear and determine the matter. This position has been stated in plentiful decisions of the Court of appeal. Among them is The Registered Trustees of Baraza Kuu la Jumuiya ya Waislamu Tanzania vs. Registered Trustees of the National Muslim Council of Tanzania (BAKWATA), Civil Application No. 480/08 of 2024, TZCA, where it was held that, the wrong citation of enabling provision or non - 2 citation is not fatal if the Court is vested with the power to grant the relief sought. Reverting to the instant application, the applicant in her affidavit states that, on 7th March, 2023, when the matter was called on for hearing, her advocate Ms. Catherine

Lyasenga was on maternity leave. Thus, she was unable to enter her appearance. The first plaintiff, Innocent Fode Mamoudou Shango appeared but refused to proceed with the matter alleged he did not instruct Ms. Catherine Lyasenga on the filing of the said matter. Consequently, the Court dismissed for want of prosecution. This application is opposed through the counter affidavit sworn by Mr. Cleoplace James, learned advocate, for the respondents, who vehemently contested the reason advanced by the applicant through her affidavit. He stated that, the said Innocent Fode Mamoudou Shango did not recognize Land Case No. 68 of 2022 as it was filed without his knowledge. He added that, the court considered it as the failure to prosecute the said case and proceeded to dismiss it. It was Mr. James's averment that, the applicant had failed to prosecute her case that is why it was dismissed. Hearing of the application proceeded orally. The applicant appeared in person, unrepresented and the respondents did not appear. 3 As it is evident that the respondents were served, that is why they filed their counter affidavit, the court ordered matter to proceed in their absence. The applicant had nothing to add to what it is stated in her sworn affidavit except that on the material date she was present before the court but her Advocate Ms. Catherine Assenga was on maternity leave and that she could not be able to instantly secure another advocate to represent her. After I have outlined what briefly transpired in Land Case No. 68 of 2022, through the applicant's affidavit, the counter affidavit and the oral submission of the applicant, I am now bound to determine, whether the applicant has given sufficient reason for setting aside the dismissal order. What amounts to "sufficient cause" is a question of fact. There is no clear definition, but it depends on the circumstance of each particular case. The applicant has advanced the reason that, on 07th March 2023 when the matter was called for hearing, she appeared in court but her advocate did not appear because she was on maternity leave. The 1st plaintiff, Innocent Fode Mamoudou Shango also appeared in court but refused to proceed with the matter on the reason that, he did not instruct Ms. Catherine Lyasenga on filing the said matter. Following the 4 said refusal by the applicant, the court dismissed the matter for want of prosecution. I have taken into account of the applicant's sworn affidavit and submissions she made before the Court and further gone through the proceedings dated 7/3/2023 and found that, on that particular date the applicant was present and two letters were presented before the court. The first letter was to the effect that, the first plaintiff, one Innocent Fode Mamoudou Shango was notifying the court that he does not recognise the case because it was filed without his knowledge while the second letter was written by the counsel for the plaintiffs praying for adjournment to 23rd March 2023 to allow the room for the learned advocate to address the court if she had withdrawn the plaintiffs' instruction. The applicant submitted before the court that, she could not understand the letter as she is not capable of seeing properly and her advocate was not in Court. I am inclined to find that, the applicant has advanced a sufficient cause for the grant of the application since the applicant was present in Court-house on that particular date and time and that it was not the applicant who had no interest on the case but the first plaintiff. I have also taken the stance that, the right to be heard or fair hearing goes 5 together with the right to representation in terms of Article 13 (6) (a) of our Constitution, 1977 provides

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- (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:
- (a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned
- (b) NR (See also the judicial jurisprudence in Hassan Kingama vs. Republic (2000) TLR 200) and Benedict Ajitu vs. Republic (1983) TLR. 190). In the premises, the application is hereby granted. The dismissal order made by this court on 7/3/2023 is set aside, and Land Case No. 68 of 2022 is restored accordingly. I make no orders to costs. It is so ordered. DATED at DAR ES SALAAM this 3rd day of March 2025 6
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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/anna-leonard-shango-Settingasideddismissal-tanzlii-2024--6a3ea52d3b1caa9129826b98

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