

TANZANIA / JUDGMENT

dr ramadhani kitwana dau another vs azania bank ltd 3 others 2023 tzhclandd 17220 13 december 2023

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Page 1 of 12 IN THE HIGH COURT OF TANZANIA LAND DIVISION AT DAR ES SALAAM MISC.
LAND APPLICATION No. 734 OF 2023 (Arising From Misc. Land Application No. 114 of 2023)
BETWEEN DR. RAMADHANI KITWANA DAU..... 1st APPLICANT RAZEDA GROUP
LIMITED..... 2nd APPLICANT VERSUS AZANIA BANK
LTD..... 1st RESPONDENT LJ INTERNATIONAL
LTD..... 2nd RESPONDENT PLANE TREE CO.
LTD..... 3rd RESPONDENT THE ATTORNEY
GENERAL..... 4th RESPONDENT

RULING

Date of last Order: 20/10/2023 Date of Ruling: 13/12/2023 K. D. MHINA, J. This is an application for leave to appeal to the Court of Appeal whereby applicants Dr. Ramadhani Kitwana Dau and Razeda Group Limited were the plaintiffs in Land Appeal No. 97 of 2018 before this Court against the respondents who were the defendants. Page 2 of 12 On 28 February 2023, when the suit was fixed for the final pre-trial conference and hearing as the last adjournment, the applicants and their advocates were absent. Therefore, this Court (Hemed. J) dismissed the suit for want of prosecution. Discontented, the applicants challenged that dismissal order by filing Misc. Land Application No. 114 of 2023. They prayed for the set aside of the dismissal order based on the following reasons;

1. Sickness of Mr. Edward Chuwa and Mr. Rweyongeza, advocates of the applicants
2. Cessation of employment of Ms. Anna Lugendo at Chuwa Advocates.
3. Failure of the court to issue summons to witness, to the 1st applicant in particular, a Tanzanian ambassador based in Kuala Lumpur, Malaysia.
4. Failure of the court to record the presence of the principal officer of the 2nd applicant.

5. The matter was for final pretrial conference, and that it was wrong for the matter to be dismissed. Having heard the application, this Court dismissed the application for want of merits. To determine this application, it is essential to paraphrase the reasons given by this Court when dismissing the Misc. Land Application No. 114 of
2023. The reasons were as follows; On the first ground regarding sickness, it was held that, I quote from pages 7 and 8 of the impugned ruling; Page 3 of 12 "There is no medical chit been annexed to the affidavit of Mr. Rweyongeza at least to prove his sickness. I find the reason of sickness of Mr. Richard Rweyongeza to hold no water on the ground that; in the first place he was not attending the matter even prior to the fateful date. Another ground is such that, no medical chit has been shown in his affidavit to prove his illness that prevented him from attending the matter on the fateful date. As regard to sickness of Mr. Edward Chuwa, in the first place he did not present the medical chit thereof, instead he presented a letter addressed to "whom it may concern I am of the firm view that a mere letter, in the absence of medical chit cannot be a prima facie proof that the person relying on the same attended hospital and was medically attended. The respondents also deponed that Mr. Chuwa and Ms. Lugendo had attended another case at the High Court - Moshi on 1st March
2023. This assertion could not be disputed by Mr. Chuwa. I managed to access the proceedings in Land Case No. 02 of 2021, High Court Moshi District Registry and found that, truly, on 1st March, 2023, Mr. Edward Chuwa and Ms. Anna Lugendo represented the defendants, before Hon. S.H. Simfukwe, J. in the said matter which was fixed for hearing of the preliminary objection. Being the case, it is quite obvious that Mr. Chuwa and Ms. Lugendo must have travelled on 28th February, 2023 to Moshi to attend the said case. If Mr. Chuwa and Ms. Lugendo were able to travel to Moshi to attend Land Case No. 02 of 2021, it implies that, if at all Mr. Chuwa was sick on the 28th February, 2023, then the said sickness alleged was not that much serious to prevent him from attending the matter on the fateful date". On the second ground regarding the cessation of employment of Ms. Anna Lugendo advocate, it was held that; Page 4 of 12 "This assertion is found in the affidavit deponed by Mr. Edward Chuwa; however, it was not supported by any other document to that effect. There was no resignation or termination letter for Ms. Anna Lugendo from working in the law firm of Chuwa Advocates. Additionally, the assertion has not been supported by the affidavit of Ms. Anna Lugendo perhaps to signify that she is no longer working for Chuwa advocate. In the absence of termination or resignation letter to proof cessation of employment of Ms. Lugendo in the law firm of Chuwa advocates, and in absence of the affidavit of Ms. Lugendo to support the assertion thereof, the ground is considered moot to be relied upon,". On the third ground regarding failure to issue summons to the 1st applicant, it was held that; "I have perused the proceedings of 6th December 2022 in Land Case No. 97 of 2018 and found that on the particular date, the applicants were represented by Mr. Edward Chuwa and Ms. Anna Lugendo, advocates. Upon the prayer for adjournment, the matter was fixed to proceed for final pretrial conference and hearing on 28th February, 2023. It was also marked as last adjournment. Following such appearance,

as a matter of law no summons would be required to notify the plaintiffs/applicants in person about the orders for appearance on 28h February, 2023. The well-established procedural law is that when a date for a future appearance before the court is fixed in the presence of the parties or their advocates, no summons is required to be issued to such parties who were present on the particular date. I am holding that because, summons is only issued to a party who was absent or to witness who are not themselves parties to the suit". The holding for the fourth ground in the application was; Page 5 of 12 "The proceedings of 28th February 2023 regarding Land Case No.97 of 2018 shows that, no one introduced himself as principal officer of the 2nd plaintiff/applicant. The Court ended up recording that, the 1st and 2nd plaintiffs were absent and eventually, dismissed the entire suit. I must point out clearly that, it is the duty of a party to any matter before the court to introduce himself for purposes of recording the presence. If such party fails to introduce himself/herself when the matter is called, he/she desires the consequences thereof". And, in the last ground, the holding was; "I have noted from the proceedings of 06th December, 2023 regarding Land Case No.97 of 2018 that the matter was to come for final PTC and hearing on the same date. It was also marked as last adjournment. The fact that there was an order for final PTC and commencement of hearing, parties were bound to respect the order, as it is the matter of principle that court orders must be respected. Beside, in assumption that the matter would have been fixed for final pretrial conference, would the matter survive in the absence of the plaintiffs/applicants on the fateful date? The answer is found under Order 14 VIII Rule 20(!)(a) of the Civil Procedure Code, [Cap.33 RE2019] which provides thus:- "20. -(I) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may

- (a) dismiss the suit or proceedings if a defaulting party is the plaintiff. In view of the above provision, even if we assume that the matter would have come for final PTC, the matter would not have survived as the plaintiffs were not present on the particular date". Page 6 of 12 Undaunted, the applicants are now approaching this Court again with this application, which was brought by way of a Chamber summons made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap 141, seeking the following orders against the respondents:
- (a) The Honourable Court may be pleased to grant the applicant leave to appeal to the Court of Appeal against the Ruling and Drawn Order of this Court delivered by Hon Hemed, J. in Misc. Land Application No. 114 of 2023 dated 28 August 2023.
- (b) Cost of the application and
- (b) Any other order the Court may deem fit to grant. The grounds for the application were expounded in the supporting affidavit, which Mr. Edward Peter Chuwa, the counsel for the applicant, swore in support of the application. Relevant to this application is paragraph 11(1) - (6) of the affidavit, containing the grounds for which the application will seek the attention of the Court of Appeal if leave would be granted. The grounds are as follows;

1. That whether the High Court Judge was right to hold that the sickness for the applicants' counsels was not a sufficient ground for adjournment and that the said counsel had a duty to notify the court of the sickness.
2. That in the alternative to the ground of sickness as a sufficient cause for setting aside the dismissal order, whether the High Court Judge was right to fix the case for both Final PTC and hearing of the suit on the same day and proceeded to dismiss the suit on the ground of failure to prosecute while the applicants had the and an option of prosecuting the case by way of witness statements, the right that was not accorded to them. Page 7 of 12
3. That whether the High Court Judge was right to dismiss the suit in the absence of the respondent who represents the Government's interest and in the circumstance that the Court had already held that the case had a public interest to be addressed and still, the suit was dismissed without hearing the public interest that was alleged to exist through the ruling in Misc. Land Application No. 361 of 2021.
4. That whether the High Court Judge was right in dismissing the suit while the Principal Officer of the 2nd applicant, Ahmed Ramadhani Dau was present in court, the fact which is admitted by Counsel Makaki Masatu, counsel for the 1st, 2nd and 3rd respondent who was present in court on the material date, though his counter affidavit against Misc. Land Application No. 114 of 2023.
5. That whether the High Court Judge was right in refusing to set aside the dismissal order based on the whereabouts of counsel Edward Peter Chuwa on the 1st March, 2023, which was an irrelevant fact because the hearing of Land Case No. 97 of 2018 was scheduled on 23rd February, 2023 and not the 1st of March, 2023.
6. Whether the High Court Judge was right to dismiss the application on the ground that the 1st applicant was not prevented by sufficient cause from appearing on the date scheduled for hearing. The application proceeded by way of written submissions. Mr. Edward Peter Chuwa, learned advocate, represented the applicant, while Mr. Kasuka Japhet, also a learned advocate, represented the 1st, 2nd and 3rd respondents. The 4th respondent was represented by Ms. Grace Lupondo, learned State Attorney. Page 8 of 12 On careful reading and scrutiny of the application, affidavit, affidavits in reply and submissions from both parties, the issue that has to be resolved is: "Whether or not there is the existence or otherwise of points of law worth to be considered by the Court of Appeal." In deliberation and determination of the issue, first, it should be noted that granting leave to appeal is not automatic rather than the Court's discretion. This is because the Court must scrutinize, ascertain and satisfy itself if the points raised by the applicant (s) are worth of being considered by the Court of Appeal before granting or refusing leave. While doing that scrutiny, the Court of Appeal has cautioned this Court that when dealing with applications of this nature, it is important to carefully scrutinize the applications. In *Dorina N. Mkumwa vs. Edwin David Hamis*, Civil Appeal No. 53 of 2017 (Tanzania), the Court of Appeal held that it is not expected for this Court to act as an uncritical conduit to allow whatsoever the intending

appellant proposes to be perfunctorily forwarded to the Court of Appeal. Further, that scrutiny must be done cautiously to avoid falling into the "trap" of determining the merits or demerits of the grounds of intended appeal. See *Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority*, Civil Application No. 154 of 2016 (Tanzlii), where the Court of Appeal held that; "...a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on substantive issues before the appeal itself is heard..." Page 9 of 12

Flowing from above, while balancing the scrutiny of the application and avoiding falling into the trap of determining the merits or demerits of the intended grounds of appeals, there are essential issues to be considered in granting or refusing leave to appeal. The issues are as follows; One, the Court must ascertain if there is a legal point worth being considered by the Court of Appeal. See *Marcus Kindole Vs. Burton Mdinge*, Civil Application No. 137/13 of 2020[COA] (Tanzlii). Two, the Applicant must demonstrate that the intended appeal raises issues of general importance or novel point of law. See *HTT In Franco Limited vs. Julianio Charles Mkongomi*, M\sc. Civil Application, No 24 of 2020 [HC] (Tanzlii) Three, there must be prime facie grounds meriting an appeal. *Erasto Daima Sanga Vs, Peter Mwonga*, Misc. Land Application No. 66 of 2019 [HC] (Tanzlii) Four, if the matters are of public importance and raise serious issues of misdirection or non-direction, it results in a failure of justice. See *Erasto Daima Sanga* (Supra) Five, there must be serious and contentious issues of law or fact fit for consideration by the Court of Appeal. Therefore, at this stage, this Court will confine itself to whether the proposed grounds pass the test of the factors to be considered before granting leave. As alluded to earlier, this application was triggered by the decision of this Court to refuse to set aside a dismissal order. The law is clear that; Page 10 of 12 One, in applications for restoration of dismissal orders, the applicant must adduce sufficient cause for the non-appearance. This is according to Order IX Rule 6(1) of the Civil Procedure Code [Cap. 33 R: E 2019] which provides "Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he may apply for an order to set aside the dismissal and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit." Two, in *Jama! S. Mkumba and another vs. The Attorney General*, Civil Application No. 240/01 of 2019 (Tanzlii), the decision dated 15 February 2023 ("recent decision"), the Court of Appeal introduced a new doctrine in applications for restoration of dismissed suits. It borrowed what is in the applications for an extension of time that a ground of illegality is sufficient ground also to set aside dismissal orders. The above were the reasons available, and if proven, they suffice to restore the dismissed suit or application. Failure to satisfy the court on the above two will cause the application not to succeed. Having gone through the impugned ruling, in my view, the complaints raised by the applicants in the instant application do not raise any point of law worth being considered by the Court of Appeal. Page 11 of 12 Thus, I am not persuaded by the applicants' submissions that the grounds raised in paragraph 11 of the affidavit demonstrated that the intended appeal raises issues of general importance or novel point of law. In Misc. Land

Application No. 114 of 2023, what was important was for the applicants to satisfy the Court with the reasons for their non-attendance on the date fixed for the hearing. The applicants advanced their reasons, but the Court was not satisfied and dismissed the application. In addition to that, since the issue was for the applicants to satisfy this Court on the reasons for non-attendance, then it is clear that issues such as to whether the joinder of the 4th respondent and that the matter was of public interest or not are immaterial concerning the issue of the dismissal of the plaintiffs' suit and refusal of setting aside dismissal order. Therefore, by the reasons advanced in the impugned ruling, I do not find if there are prima facie grounds meriting an appeal in both intended grounds of appeal. To avoid falling into the trap of determining the merits and demerits of the application, I shall end here. But what happened as per the grounds of the intended appeal is the dissatisfaction of the applicants with the decision in Misc. Land Application No. 114 of 2023. And on this, the law provides that if a person is refused an application for setting aside dismissal order and the fact that this Court did not agree with his/her grounds of setting aside a dismissal order could not constitute the grounds for leave to appeal. The reason for the above is that leave to appeal should not be based on the dissatisfaction of a party who intends to appeal; it should be based on the existence of points of law worth being considered by the Court of Appeal. There must be serious issues of misdirection or non-direction, Page 12 of 12 resulting in miscarriage of justice and legal points worth being considered by the Court of Appeal. In the upshot, the grounds raised in the application are not worth considering in granting the application for leave to appeal to the Court of Appeal. Consequently, the application lacks merit, and I dismiss it with costs. It is so ordered. 'i / •• \ • I

- / -fc . K.D. MHINA
- i V. . ' I: . ; JUDGE 13/12/2023

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