

TANZANIA / JUDGMENT

Elizabeth Matinde v Kohe Tanzlil

COURT
TANZLIIDECIDED
2 May 2024

Source: media.tanzlil.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MUSOMA SUB-REGISTRY AT MUSOMA MISCELLANEOUS CIVIL APPLICATION NO. 11324 /2024 CASE REFERENCE NO. 202405171000011324 ELIZABETH MATINDE.....APPLICANT
VERSUS KOHE DANIEL MWITA.....RESPONDENT RULING OF THE COURT 29/07/2024 & 26/08/2024 Kafanabo, J.: This is a ruling on an application for restoration of the application dismissed by this Court for, allegedly, want of prosecution. The application is made by the chamber summons and supported by an affidavit of the Applicant. The Applicant seeks the order that the honourable Court be pleased to re-admit Miscellaneous Land Application No. 000003699/2024 which was dismissed by this court on the 2nd day of May 2024. Moreover, for record purposes, it should be clear that it is true that on 2nd May 2024, the said Application No. 000003699/2024 was dismissed by this court. Nonetheless, it was not dismissed for want of prosecution as stated and averred by the Applicant, instead, the said application was dismissed for want of the Applicant's appearance under Order IX Rule 5 of the Civil Procedure Code, Cap. 33 R.E. 2019 (hereinafter the 'Civil Procedure Code'). It follows that even Order IX Rule 3 of the Civil Procedure Code cited in the submissions by the Applicant as a correct 1 enabling provision replacing Order XIX Rule 3 of the Civil Procedure Code cited in the chamber summons, is also irrelevant under the circumstances of the present application. However, that does not take away the jurisdiction of this court in hearing and determining the matter, and thus the non-citation and/or wrong citation of the enabling provision will be considered inconsequential, and given that the Respondent neither raised the matter nor will be prejudiced. The cases of Director General Lapf Pension Fund vs Pascal Ngalo (Civil Application No. 76 of 2018) [2020] TZCA 289 (10 June 2020), Amani Girls Home vs Isack Charles Kanela (Civil Application No. 325 of 2019) [2019] TZCA 458 (11 December 2019) and 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) [2024] TZCA 630 (24 July 2024) are relevant. Reverting to the application before this Court, the affidavit supporting the application makes it clear that Miscellaneous Application No. 000003699/2024 was set for hearing on 2nd May 2024 and was dismissed on that day. It is further averred that on the 2nd day of May 2024, the Applicant came to the court to attend the hearing of the matter which was scheduled for hearing at 10:00 a.m. However, she entered the court premises at 10:30 a.m. because of transport issues caused by the delay of the commuter bus she boarded from Musoma town to 'Maduka tisa' where she arrived at 10:00 a.m. 2 Thereafter, she spent a long time walking from Maduka tisa to the High Court

premises because of her old age, 87 years, and health problems which do not allow her to ride on a motorcycle. She attached a medical report dated 25/04/2024 to support her deposition. She further deponed that after arriving at the court premises at 10:30 a.m., she entered the waiting lobby of the Judge's chamber and waited for the court clerk to call her case. Unfortunately, at that moment the Respondent and his advocate came out from the Judge's chamber, and upon making a follow-up, she was informed that her case had been dismissed, but she was late because of her health problems and the kind of transport she used. The Respondent did not file any counter affidavit to controvert the facts averred by the Applicant. This means that the Applicant's facts go uncontroverted and submissions from the bar, if any, on the facts cannot be acted upon. See the cases of Transafrica Assurance Co. Ltd v. Cimbria (E.A.) Ltd (2002) E.A. 627 and of Finca Tanzania Limited vs Hassan Lolila (Civil Application 165 of 2021) [2022] TZCA 531 (31 August 2022). The court ordered that the application be disposed of by way of written submissions. The parties complied with the schedule of the court. The submissions in support of the appeal were prepared by Mr. Ostack Mligo, Advocate who was engaged for drawing only, and the Respondent was represented by Mr. Msafiri Henga, Advocate. In support of the application, the Applicant adopted her affidavit supporting the application and cited Order IX Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 as a relevant section. Apart from that the 3 Applicant's submissions reiterated the depositions of the Applicant's affidavit regarding her old age (87) years and her health problems which contributed to her late arrival, thirty minutes after the scheduled time. The Applicant also cited the case of Finca Tanzania Limited vs Hassan Lolila (Civil Application 165 of 2021) [2022] TZCA 531 (31 August 2022) in support of her submission. The Respondent's counsel submissions in opposition to the Appeal were brief. It was submitted that the Applicant was not diligent in prosecuting her application for reference citing the case of Dr. Ally Shabhay v. Tanga Bohora Jamaat (1997) TLR 305 and that the Applicant did not adduce sufficient reason to warrant restoration, and thus prayed for dismissal of the application. After reviewing the parties' submissions it is now opportune for this court to determine the application before the court, and the major issue being whether the Applicant has demonstrated sufficient reason for the court to set aside its dismissal order and readmit the dismissed application. The mandate to set aside the dismissal order and readmit the Application, given the circumstances under which the relevant application was dismissed, is found in Order IX Rule 6 of the Civil Procedure Code, Cap. 33 R.E. 2019 which provides that: 6.-(1) 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 the dismissal aside and, if he satisfies the court that there was sufficient cause for his nonappearance 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 and shall appoint a day for proceeding with the suit. Even though the above-cited rule does not state what amounts to sufficient cause, it is trite law that restoration being a matter within the Court's discretion, cannot be rested on any hard and fast rules but will be determined by reference to all the circumstances of each particular case. The observation in the case of Finca Tanzania Limited vs Hassan Lolila (supra) is relevant in that regard. Having referred to the law on restoration of a dismissed application, it follows that, in determining this application it is important to set out the undisputed facts as follows:

1. The application was set for hearing on 2nd May 2024 at 10:00 a.m., but the Applicant arrived at 10:30 a.m. and waited at the lobby of the judge's chamber.
2. The Respondent's counsel stepped out of the judge's chamber and found the Applicant waiting in the lobby.
3. The Applicant was informed right away that her application had been dismissed for want of her appearance.
4. The applicant is 87 years old and suffering from various diseases which, for privacy and dignity purposes, shall not be mentioned herein, but evidenced by annex ML1 to the affidavit in support 5 of the Application, and the said factors contributed to her delay until her application was dismissed. In light of the foregoing facts which were not controverted by the Respondent, this court is of the view that since the Applicant appeared in court on the day the matter was scheduled for hearing, but delayed in showing up in the Judge's chamber because of being sick and elderly, the court finds that the Applicant has demonstrated the sufficient reason for setting aside the dismissal order in Miscellaneous Land Application No. 000003699/2024 dated 02/05/2024. By so finding, this court follows the footsteps of the Court of Appeal in the case of Finca Tanzania Limited vs Hassan Lolila (supra) where it was held that: "It is common ground that, health matters, in most cases, are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike. The applicant's failure to appear on the date of the hearing of the application was prevented by sickness which in my view is sufficient cause in terms of rule 63 (3) of the Rules." Therefore, and in light of the foregoing, the dismissal order dated 02/05/2024 in Miscellaneous Land Application No. 000003699/2024 is hereby set aside, and the said application is hereby readmitted for hearing and determination according to law. 6 Given that this is an application to set aside a dismissal order for the The ruling was delivered today in the presence of Ms. Veronica Daniel, a donee of the power of attorney, representing the Applicant, and in the presence of Mr. Msafiri Henga, Advocate for the Respondent. K. I. Kafanabo Judge 26/08/2024 7

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://media.tanzlii.org/media/judgment/315791/source_file/bce66ccb7a25d1d9/Elizabeth_Matinde_v_Kohe_Tanzlii.pdf

CASE PAGE <https://chat.esheria.ai/case-law/tanzania/elizabeth-matinde-v-kohe-daniel-mwita-Restorationofdismissedapplication-tanzlii-2024--6a3ea5243b1caa9129819b41>

Prepared on 14 October 2026 · Esheria