

TANZANIA / JUDGMENT

HUSSEIN KATO RULING

COURT
TANZLII

DECIDED
29 November 2024

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IN THE HIGH COURT OF TANZANIA (MWANZA SUB-REGISTRY) AT MWANZA MISCELLANEOUS
LAND APPLICATION NO. 21112 OF 2024 (Arising from Land Case No. 21 of 2023 in the High Court-
Mwanza Sub-Registry) HUSSEIN KATO.....APPLICANT
VERSUS SAMWEL MUSA LEVI (The Administrator of the Estate of the Late Makoye Bungu
@Mussa Levi Magwaja).....1ST RESPONDENT NEWSMASTER
CORPORATION LTD.....2ND RESPONDENT AMRANI HERI
BATENGA.....3RD RESPONDENT TANZANIA COMMERCIAL BANK
PLC.....4TH RESPONDENT COMMISSIONER FOR
LANDS.....5TH RESPONDENT REGISTRAR OF
TITLES.....6TH RESPONDENT ATTORNEY
GENERAL.....7TH RESPONDENT

RULING

20th & 29th November, 2024 KAMANA, J. In this application, Mr. Hussein Kato, the applicant, moved this court under Order IX Rule 4 and sections 68 and 95 of the Civil Procedure Code, Cap. 89 [RE.2019] for an order to set aside the order 1 to proceed with Land Case No. 21 of 2023 in his absence. The application is supported by his affidavit. Briefly, on 15th August, 2024 when Land Case No. 21 of 2023 was called on for a hearing, the applicant being the third defendant, did not enter an appearance. The court decided to proceed in his absence. Following the court’s decision, the applicant filed this application citing the urge to collect his spectacles from his car as a reason for delaying to enter an appearance although he was in court premises. The application was opposed by the rest of the respondents except the first respondent. Amrani Heri Batenga, the third defendant, swore a counter-affidavit on his and the second respondent’s behalf. Mr. Felician Daniel swore a counter affidavit on behalf of the 4th to 7th respondents. The application was argued for and against by way of written

submissions.

Submitting, Mr. William Muyumbu, learned Counsel for the applicant, contended that on the day set for a hearing, the applicant was present in the court premises waiting to be called. He asserted that after a long wait, the applicant went to the court’s parking lot to collect his spectacles from his car. He amplified that when the applicant returned from the parking lot, he

discovered that the case was already called and commenced in the judge's chambers. He added that the applicant was later informed by the judge that the matter was ordered to proceed ex parte against him. Mr. Muyugu contended that the absence of the applicant was precipitated by a good cause. He amplified that the good cause is exhibited by the fact that he was in court premises before the matter was called for a hearing and he went to the judge's chambers where the hearing was ongoing. He supported his arguments by citing the case of *Elias Masija Nyang'oro and 2 Others v. Mwananchi Insurance Company Limited*, Civil Appeal No. 278 of 2019-CAT (Unreported). Mr. Muyumbu went on to argue that the applicant is entitled to be given an opportunity to defend his case regardless of his non-appearance. He asserted the order to set aside the expert would not prejudice any party. Responding, Mr. Felician Daniel, learned State attorney for the 4th to 7th respondents premised his submission by contending that Order IX Rule 4 of the Code provides for the procedure when the case is adjourned for exparte hearing against the defendant. He contended that under that Rule, the court may, before the exparte hearing, set aside the order to proceed ex parte against the defendant if such defendant shows good cause for his previous non-appearance. Relating the Rule to the facts, the learned State Attorney held the view that the Rule is inapplicable in the circumstances of this case as the court did not adjourn the exparte hearing as it commenced to hear the evidence on the same date. He asserted that according to Order IX Rule 8, where one of the defendants fails to appear on the date scheduled for the hearing, the recourse is to proceed. He buttressed his view by citing the case of *Mendrad Okota v. Cosmas Chuwa*, Civil Appeal No. 31 of 2022-HC (unreported). Concerning the reason advanced by the applicant for non-appearance, Mr. Daniel took it as devoid of merits. Amplifying, the learned State Attorney contended that it was necessary for the applicant to notify the court or other parties that he was about to take his glass from his car. In the absence of that, Mr. Daniel held the view that the applicant's assertion remains a mere statement. He bolstered his argument by citing the case of *Cats Net Limited v. Tanzania Communication Regulatory Authority*, Civil Application No. 526 of 2020-CAT (Unreported). Mr. Godfrey Basasingoe, learned Counsel for the second and third respondents, did not substantially differ from the arguments advanced by the learned State Attorney. I have given a thorough thought to the pleadings, submissions of the parties including the rejoinder which I did not see a reason to summarise its contents and the cited cases. The issue for my determination is whether the application is meritorious. In this regard, it is apposite to reproduce the provisions of Order IX Rule 4 of the Code as follows: '4. Where the court has adjourned the hearing of the suit exparte and the defendant at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the court may direct as to cost or otherwise, be heard in answer to the suit as if he had appeared on the date fixed for his appearance.' From the provisions of Order IX Rule 4, it is clear that when the court adjourns the ex parte hearing of the case, the defendant against whom the order to proceed exparte was issued may seek the setting aside of the order. According to the provisions, the defendant must assign a good cause for his non-appearance before or at the date set for the exparte hearing. That being the case, Order IX Rule 4 is inapplicable as the court did not adjourn the case for an exparte hearing against the applicant. As a matter of fact, this court proceeded to hear the case against the other defendants who were present on the date set for the commencement of the hearing. It is worth noting that

Order IX Rule 4 is applicable when there is one defendant, contrary to this case, where there is more than one defendant. Given that, this court asked itself whether it was appropriate to consider the application which was made under the wrong provisions. The established principle is that an application cannot be defeated simply because the same was made under the wrong provisions unless the prayed reliefs are not within the powers of the court to grant. See: Naushad Ahmed Siwji v. Akber Ahmed Siwji, Misc. Civil Application No. 178 of 2022-HC (Unreported); and Dangote Cement Limited v. NSK Oil and Gas Limited, Misc. Commercial Application No. 8 of 2020-HC (Unreported). In the circumstances of this matter where there is more than one defendant, the proper provisions that ought to guide this court are Order 6 IX Rule 8 of the Code which provides that in a suit with more than one defendant and when one or more of them appears and others do not appear on the date set for a hearing the court is constrained to proceed with the hearing of the case against the present defendants and in the said course, the court can issue orders against the defendants who did not appear. The Rule reads: 'Where there are more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed and the court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.' My understanding of Rule 8 is that in a case involving more than one defendant and one or some of them opted not to appear on the date scheduled for a hearing, the trial court has no option other than proceeding to hear the suit. Further, the trial court is required to issue orders as it thinks fit with respect to the defendants who did not appear. The said orders are issued at the time of pronouncing the judgment. That being the case, this court asked itself whether a defendant who did not appear before the court for a hearing in a matter involving 7 more than one defendant can file an application to be allowed to appear in the ongoing hearing of the case. I admit that my research did not lead me to any decision by our courts that decided on the question. However, it has been stated by Indian courts that a defendant may apply for being allowed to appear in the ongoing hearing of the case when Order IX Rule 11 of the Indian Civil Procedure Code, 1908 which is parimateria with Order IX Rule 8 of the Code has been put into motion. In the case of Rajni Kumar v. Suresh Kumar Malhotra and Another, Appeal (Civil) 2538 of 2003, the Indian Supreme Court noted: 'In an application under Order 9 Rule 11, if a defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte.' However, I am not persuaded by that position. To follow that position means that this court should recall witnesses who have testified after the order to proceed against him in his absence was issued. In my view, the provisions of Order IX Rule 8 were meant to allow the court to proceed with the matter and issue orders at thinks fit with respect to the absentee defendant when pronouncing its judgment. They were not meant to allow applications for appearing in the ongoing 8 hearing when the matter was already proceeded against the defendant in his absentia. The fit orders contemplated under Order IX Rule 8, in my opinion, depend on the outcome of the case that proceeded under such rule so far as the absent defendant is concerned. One, the court may pronounce that the judgment and the decree are ex parte against the defendant who did not appear. This occurs when the interests of the defendants who appeared in the hearing are opposite to the interests of the defendants who did not appear and the plaintiff proved the case against all defendants including the defendant who did not appear. Such an order would be issued

in recognition that the defendants who appeared defended only their interests which conflicts with the interests of the defendants who did not appear. Two, the court may pronounce an order that the judgment and the decree issued cover both defendants who appeared and those who did not appear. This occurs when both defendants, whether appeared or not, have the same interest. In this regard, it is taken that those who appeared also defended the interests of those who did not appear. When the court orders that the judgment and decree are ex parte against the defendant who did not appear, such defendant had two 9 options. One, to make an application for setting aside ex parte judgment and decree under Order IX Rule 9 where he is put under the obligation to advance sufficient reasons for his non-appearance. Two, to file an appeal challenging the merits of the judgment and decree. In the circumstances in which the court ordered that the judgment and decree cover both defendants who appeared and those who did not appear, the only recourse for the defendants who did not appear is to appeal against the merits of the judgment and the decree. For those reasons, it is my view that when there is more than one defendant and the court proceeds to hear the suit in the absence of the other defendant, it is not open for the defendant who did not appear to join the ongoing hearing. Given that, the application is prematurely instituted. I strike it out. No order as to costs. DATED at MWANZA this 29th November, 2024. KS KAMANA JUDGE 10

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