

TANZANIA / JUDGMENT

victoria mericha osaki and others vs sara iddy and others 2021 tzhclandd 260 14 june 2021

COURT
TANZLIIDECIDED
14 June 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM MISC LAND APPLICATION NO. 571 OF 2019 (Originating from Land Case No,87 of 2018)
VICTORIA MERICHA OSAKI (Suing under the Power of Attorney granted to Kalafunja Miang'a
Osaki)..... 1st a p p lic a n t/ p la in tiff NDEWINA KIZITO OSAKI (Suing under the Power of
Attorney granted to Kalafunja Miang'a O sa k i).. ■• 2nd a p p lic a n t/ p la in tiff LILIAN
TEMU OSAKI (Suing under the Power of Attorney granted to Kalafunja Miang'a O sa ki).. . >.....
3rd APPLICANT/PLAINTIFF KALAFUNJA MLANG'A OSAKI (Suing under the Power of Attorney
granted to Kalafunja Miang'a Osaki). ■., ... 4th APPLICANT/PLAINTIFF VERSUS 1.SARAH
IDDY..... - 2.RECHO JUMA..... 3.SHEBBY.....
4.NEEMA CHARLES..... . 5.JUMA ABDALLAH..... . 6.HAMZA DEFENDANTS 7.ZARIA
MIKONGO.... . 8.RUBAW A 9.MOHAMED ALLY.....
10.MOHAMED HASSAN..... AND 61 OTHERS Date of Last Order: 03.03.2021 Date of Ruling:
14.06.2021

RULING

V.L. MAKANI, J The applicants named above are seeking for the following orders:

1. That this Honourable Court be pleased to set aside its dismissal order given on 25/09/2019 and appoint a day for proceeding with the suit
2. Costs o f the cause. The application is made under Order IX Rule 8(1) and Section 95 of the Civil Procedure Code CAP 33 RE 2002 (the CPC) and is supported by the affidavits sworn by Mr. Deogratus Mwarabu, Advocate and Kalafunja Mlang'a Osaki. In response Mr. Claud Mambo, Advocate filed a counter affidavit on behalf of the respondents. The court ordered the application to be argued by way of written submissions. Mr. Deogratus Mwarabu drew and filed submissions on behalf of the applicants. The respondents did not file their submissions in reply. Therefore, the matter proceeded ex-parte against them. On the merit of this application, Mr. Mwarabu submitted that oh 25/09/2019, Land Case No.87 of 2018 was set for Final Pre-Trial Conference. He said he came late to the court on that day due to the

fact that he was attending hearing at the High Court Commercial Division in Commercial Case No.40 of 2012 between Jamal Abdallah Seleman and Amran Mohamed Talib & 2 Others before Madam Judge Fikirini (as she then was). He said that the best principle and practice directs and demands to respect the seniority 2 between trial Judges and therefore he first appeared before Madam Judge Fikirini (as she then was). He added that this did not mean that he was negligent or had lost interest with the applicant's case. He further said that the respondents' Counsel was ordered to effect service on the applicant upon the filing of the counter affidavit on the 4/11/2020 and rejoinder if any was supposed to be filed On the 30/11/2020 but this order was not complied with. He said the service of counter affidavit to the applicant was on 08/11/2020 after the order of filling written submissions and therefore the applicant was unable to file a rejoinder. Mr. Mwarabu further stated that from August 2019 South Law Chambers where he is a partner was being managed by a single Advocate as the one who used to appear had resigned. This, he said, was contrary to the respondent's claim in the counter affidavit that the firm had other advocates who had once appeared in the main suit. He further said that on 25/09/2019 when the suit was called for Pre-Trial conference one of the applicants Kalafunja Mlang'a Osaki had lost his father-in-law the late Manase Paul Temu therefore he was in Moshi Kilimanjaro attending the funeral. He insisted that those facts have been stated in paragraph 3 of the affidavit and has not been disputed by the Respondents counsel. He prayed for this application to be granted. 3 It is settled law that an applicant seeking to set aside a dismissal order of the court for non-appearance must furnish the court with sufficient reasons for his/her absence when the matter was set for hearing (see the case of Sadru Mangalji vs. Abdul Aziz Lalani & 2 others, Misc. Commercial Application No. 126 of 2016 (HC-Commercial Division, Mwanza (unreported)). I have gone through the affidavits and submission by the applicants' Counsel. The core issue for consideration is whether sufficient reasons have been advanced to warrant the setting aside of the dismissal order dated 25/09/2019. The main reason for the absence of learned Mr. Deogratius Mwarabu as he has submitted was that on the 25/09/2019 when the matter was set .for Final Pre-Trial Conference he was attending a case before Madam Judge Fikirini (as he then was) at the High Court Commercial Division in the Commercial Case No.40/2012. Indeed, a copy of the proceedings at High Court Commercial Division (Annexure SLC-2 to affidavit of Deogratius Mwarabu) shows that on the 25/09/2019, the applicant's Advocate, Mr. Deogratius Mwarabu appeared before 4 Madam Judge Fikirini. But the said proceedings are not signed by the Honourable Judge or certified by the Deputy Registrar. There is only a stamp of the High Court Commercial Division. And in the absence of a signature of either the Judge or the Deputy Registrar certifying the orders appearing in the proceedings, the genuineness of the contents therein is wanting. In other words, the proceedings are not owned by anybody and this makes it difficult for the court to rely upon the said proceedings. On the other hand, I agree that there is an issue of seniority and that practice demands that the matter before a senior Judge takes priority. But Mr. Mwarabu is a seasoned Advocate, and he knows that information to the court is of paramount importance. And the fact that he knew he was all alone in his Chambers he would have been more diligent to inform this court that he had two matters before two different courts and procedure requires him to

start at the Commercial Court. Failure to do so is an obvious act of negligence. The affidavit of the applicant Kalufunja Mlang'a Osaki clearly shows at paragraph 2 that Mr. Mwarabu told him two days before that the matter was set for Final Pre-trial Conference on 25/09/2019. It is 5 therefore apparent that he told him of his travel to Moshi. In that respect therefore, firstly. Mr. Mwarabu had two days to inform the court that he had another matter at the Commercial Court; and secondly, he was all alone in his chambers, and thirdly, his client was away for the funeral of his father-in-law (paragraph 3 of Kalufunja Osaki affidavit). In any case, if Mr. Mwarabu was unable to write a letter to the court, to have his client represented, he would have asked a colleague to hold his brief, as he knew that there was no likelihood of his client entering appearance on that day. Since no action was taken, then laxity on the part of learned Counsel cannot be escaped. Further the non-appearance of the applicants cannot be pegged on 25/09/2019 only. The applicants were also not in court on 23/07/2019 and there was no information whatsoever from them. And when the matter came for the Final Pre-Trial Conference on 25/09/2019 there were also absent without information. Their last appearance in court by representation of an Advocate was way back in 10/04/2019, and surely that is why there was an imminent presumption of loss of interest of the case by the applicants. In the result, the reasons advanced, that Mr. Mwarabu was in another court, he is alone in his 6 Chambers and further that the applicant was not in Dar es Salaam, are not good enough to convince the court to restore the suit. In view thereof, it is the finding of this court that no sufficient reasons have been advanced for this court to set aside its order for dismissal. The application is thus dismissed with costs for want of merit. It is so ordered.

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