

TANZANIA / JUDGMENT

shashisha e mafuwe vs ruben meshack

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM MISCELLANEOUS LAND APPLICATION NO. 671 OF 2023 (Arising from Land Revision
No. 43 of 2023) SHASHISHA E. MAFUWE.....APPLICANT
VERSUS RUBEN MESHACK..... RESPONDENT

RULING

13 & 28/2/2024 GWAE, J. On 6th October, 2023, Land Revision No.43 of 2023 was called for hearing. On that particular day, the applicant failed to appear in court and the matter was dismissed for non-appearance. On the same day, the applicant being aggrieved by the said order filed this application Under Order IX Rule 3 and Section 68 (e) of the Civil Procedure Code, seeking for an order to set aside the dismissal order in Land Revision No.43 of 2023. i The application was by way of a chamber summons supported by the affidavit of Mr. Harry A. Mwakalasya, the learned advocate of the applicant. It is worth noting that, vide Land Revision No.43 of 2023, the applicant herein applied before this court for revision of Miscellaneous Application No.31 of 2023, originating from the District Land and Housing Tribunal for Temeke District. However, on 6th October 2023, when the application was called on for hearing before Hon. Luvanda, J, the counsel for the applicant did not enter appearance and consequently the said matter ended up being dismissed for non-appearance. Hence, the applicant's current application. , ? At the hearing of this application, Mr. Harry Mwakalasya and Mr. Lutufyo Mtumbalu, both the learned advocates who entered appearance representing the applicant and respondent respectively,, Mr. Harry adopted the contents of his affidavit as part of his oral submission and stated that, the dismissal of the Revision Application was out of his control. He invited this court to the case of Anyambilile Mwakisale vs. Abdallah Katoto, Civil Application No. 553/01 of 2017 (Unreported), where the Court of Appeal of Tanzania emphasized that, the reasons should be given for what prevented a party to appear. It was his view, that, the reason given in their affidavit is sufficient to justify the court to grant this application. Mr. Lutufyo in reply, challenged the applicant's application and stated that, the applicant's advocate and his client were negligent. He submitted that, there is no proof that the applicant's advocate was along the court's corridor though he saw him on the material date after the lapse of half an hour while at the chamber of the then presiding judge. He concluded that, the applicant's advocate has failed to explain as to why he moved to another place

where the speaker is not available. He concluded that, the applicant's reason lacks merit and prayed that this application be dismissed for want of sufficient cause. By way of rejoinder, the counsel for the applicant stated that, the arguments by the respondent's counsel are baseless since he has plainly accepted the applicant's assertion that, his advocate was around the court's premise. I have respectfully gone through the parties' affidavits and their advocates' oral submissions in support and against the application and find that, issue for the court's determination is whether the applicant has demonstrated sufficient reasons for this court to grant the application. 3 Order IX Rule 6 of the Civil Procedure Code, Cap 33 Revised Edition, 2019 provides that:- "Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit". (Emphasis added). The above provision entails that, the applicant in an application for setting aside a dismissal order has- to give sufficient reason (s) for his non-appearance on the hearing date. In the present application, the counsel for the applicant has tried to establish that, he was present in court's premises when the matter was called on for hearing. Therefore, according to him, he has sufficient reasons for his non-appearance as can be seen on the paragraphs of his affidavit as quoted below:- "2..... the application was scheduled for hearing on 6th October, 2023 at 9:00 am before honourable Luvanda, J.

3. That, the matter was called for the parties to enter into the courtroom at around 9:15 and the Respondent managed to enter the courtroom.
4. That, I was present at the court premise waiting for the call at that particular time, but unfortunately for 4 moment less than two minutes when I stepped along the court corridor, where the court speakers are not vowing voices I didn't manage to hear the call, and the other parties moved silently without my knowledge and was reluctant to notify me".
5. It is unfortunately that, the Respondent's side counsel moved the court for orders to dismiss the application without considering option of giving, me a signal and or notifying me so that we can enter together.
6. That, upon realizing that the respondent entered the courtroom, I quickly moved to the courtroom number three but I met the Respondents with his advocate at the court door coming out, gjppn asking for information they was not ready to tell me what transpired in the courtroom and moved away. .
7. I decided to enter in the courtroom and explained to his Lordship Luvanda J, over what transpired and the reason to dismiss the appearance but it was not helpful since the order was already made to dismiss the application basing on the Respondent request and requirement of the law". Guided by the position of the Court of Appeal of Tanzania in Anyambile Mwakisale vs. Abdallah Katoto, (Supra), for the application to set aside a dismissal order to be granted, the applicant has to show sufficient reasons for his non-appearance. As clearly stated on the paragraphs above, the applicant has demonstrated

sufficient reasons for his non-appearance in the courtroom on 6th day of October 2023, when Land Revision No.43 of 2023 was dismissed for want of appearance. I hold so for the following reasons:- Firstly, that, the counsel for the applicant has sufficiently proved that on 6th October 2023, at or about, 09:00 himself, was in the court's premises when the matter was called on for hearing of the application. Secondly, the respondent's counsel has admitted to have seen the applicant's counsel in the court's premises on the material date, it was therefore, in my considered view, prudent for him to reveal such fact before the presiding judge. Thirdly, the fact that, the applicant's advocate was present on the material date has also been supported by a sworn affidavit of one Katarina Mseke, the Court who lucidly stated that, she saw the applicant's advocate by her eyes entering the chamber No. 3 immediately after the dismissal order has been entered by the court (Luvanda, J). However, I am alive of the principle that an adjudicator is not supposed to deal with any litigant who hangs around the court's premises when a case is called on for hearing except for parties to the proceedings who should physically or virtually enter their necessary appearance before such adjudicator as argued by the respondent's 6 counsel. This position was correctly stressed in Phares Wambura and 15 Others vs. Tanzania Electric Supply Company Limited, Civil Application No. 186, of 2016) [2020] TZCA 1742 (19 August 2020) Where justice Levira, J.A had this to say:- "Parties to a case must always remember that, a Judge or Magistrate does not deal with everybody who hangs around the court's corridors, but specific parties as per his or her assignment. Therefore,, mere presence of a party and/ or his counsel in court premises without physically appearing or being virtually linked with a presiding Judge or Magistrate on hearing date and time amounts to non - appearance". In the instant application, given the circumstances of the case, I hold the different view from that in the case of Phares (supra) simply because of the undisputable fact that, the applicant's advocate who is also now representing him immediately after the court had issued the dismissal order entered into the judge's chamber. In view of what I have demonstrated above, I find the applicant to have sufficiently advanced good reasons for his non-appearance on the 6th October day of 2023 when Land Revision No.43 was called for hearing. 7 In the upshot, I find the application not devoid of merit, Land Revision No. 43 of 2023 is hereby restored. Costs of this application shall be in the course. It is so ordered. DATED at DAR ES SALAAM this 28th day of February, 2024. 8

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