

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., NGWEMBE, J.A., AND MOHAMED, J.A.)

CIVIL APPEAL NO. 589 OF 2024

FARIDA RASHID.....APPELLANT

VERSUS

HONEST MARANDURESPONDENT

**(Appeal from the Decision and Order of the High Court of Tanzania,
Land Division at Dar es Salaam)**

(Luvanda, J.)

dated the 5th day of October, 2023

in

**Misc. Land Application No. 528 of 2023
(Arising from Land Case No. 121 of 2023)**

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JUDGMENT OF THE COURT

19TH & 27th August, 2026

MWANDAMBO, J.A.:

This appeal raises a crucial question regarding the exercise of judicial discretion by lower courts and the circumstances under which an appellate court will step in to interfere with such exercise.

The facts giving rise to this appeal are straightforward. The appellant, Farida Rashid, instituted Land Case No. 121 of 2023 in the High Court of Tanzania (Land Division) at Dar es Salaam against the respondent, Honest Marandu, regarding land ownership of Plot No. 896, Msasani Beach, Mwai

Kibaki Road, Mikocheni, Dar es Salaam City. The respondent filed his defence raising a counterclaim, to which the appellant filed her reply in answer.

On 21 August 2023, the suit came up before the High Court for its First Pre-Trial Conference (FPTC). Neither the appellant nor her advocate appeared. Consequently, the High Court (Luvanda, J.) dismissed the main suit for non-appearance and struck out the reply to the counterclaim.

In her quest to set aside those default orders, the appellant filed Misc. Land Application No. 528 of 2023 under Order VIII Rule 20 (2) of the Civil Procedure Code (the CPC), praying to set aside the dismissal and striking-out orders, and to reschedule the pre-trial conference. The application was supported by two affidavits sworn by Messrs. Jeremiah Mtobesya and Deogratius Cosmas Mahinyila, learned advocates.

In his affidavit, Mr. Mtobesya deposed that the non-appearance was caused by an inadvertent, *bona fide* human error. Specifically, Mr. Mahinyila, an associate assigned to handle the file, had travelled to Dodoma for personal matters; the law firm mistakenly recorded the scheduled court date as 24 August 2023 instead of 21 August 2023; and a typographical error in the phone number recorded on the pleadings hindered communication.

The respondent filed a counter-affidavit to resist the application, but by an order dated 19 September 2023, the High Court struck it out for being filed out of time. As a result, the averments in the supporting affidavits remained unrefuted on record.

After considering the counsel's rival written submissions, the High Court delivered its ruling on 5 October 2023, dismissing the application for lack of sufficient cause. The learned Judge held that the advocate's travel to Dodoma was uncorroborated by travel tickets or leave records, no physical or electronic court diary was produced to prove the recording error, and court records showed a prior default of appearance on 27 June 2023. Aggrieved by that decision, the appellant lodged the present appeal.

At the hearing, Mr. Jeremiah Mtobesya, learned counsel, appeared for the appellant, while Mr. Wilson Mukebezi together with Ms. Kavola Semu, learned counsel, represented the respondent. Ms. Semu addressed the Court on behalf of the respondent. Consolidating the grounds of appeal into a single issue, Mr. Mtobesya submitted that the trial court erred in failing to consider the unrefuted grounds for setting aside the dismissal order. He argued that since the counter-affidavit was struck out, the facts deposed in the

supporting affidavits stood uncontroverted, proving the application on a balance of probabilities.

Mr. Mtobesya contended that the learned Judge applied an excessively high standard of proof by demanding strict documentary evidence of internal leave approvals, travel itineraries, and physical diary entries. Relying on **Rashid Abiki Ngua v. Ramadhani Hassan Kuteya & Another** [2021] TZCA 616, he argued that courts consistently condone honest human errors and diary slips made in good faith by counsel. He added that under Order VIII Rule 20 (1) of the CPC, the court's power to dismiss is discretionary, and urged the Court to allow the appeal, quash the dismissal order, and restore the suit.

Resisting the appeal, Ms. Semu submitted that the High Court properly evaluated the affidavit evidence. She argued that even where a counter-affidavit is struck out, an applicant is not relieved of the legal burden to establish sufficient cause, citing **Bright Technical System & General Supplies Ltd v. Institute of Finance Management** [2023] TZCA 412. Ms. Semu distinguished **Rashid Abiki Ngua** (supra) on the ground that proof of travel existed in that case, whereas no corroborative evidence was

offered here. Placing reliance on the Court's decision in **Rosemary Stella Chambo Jairo v. David Kitundu Jairo** [2018] TZCA 356, counsel contended that the learned Judge did not rely on irrelevant matters and that under Order VIII Rule 20 (3) of the CPC, dismissal of the suit was mandatory upon default. She prayed that the appeal be dismissed with costs.

Rejoining, Mr. Mtobesya reiterated that any variance in the affidavit averments constituted mere semantics rather than material contradictions. He maintained that the primary cause of default was an unrefuted diary mistake, and prayed as previously submitted.

We have carefully considered the record of appeal, the submissions of learned counsel, and the governing authorities. The single issue for our determination is whether the learned High Court Judge properly exercised his judicial discretion in evaluating sufficient cause, and whether this Court should interfere with that decision. An appellate court will not lightly interfere with the exercise of discretion by a trial judge simply because it might have reached a different conclusion. The guidance governing appellate review of discretionary orders is found in the classic decision of **Mbogo & Another v. Shah** [1968] EA 93, affirmed by this Court in **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textiles Ltd & Others**

[2021] TZCA 451. In **Mbogo v. Shah** (supra), it was held that an appellate court will not interfere with the exercise of discretion unless satisfied that the judge misdirected himself in law or fact, arrived at a clearly wrong decision, or caused a manifest injustice.

In civil proceedings, the standard of proof is on a balance of probabilities. While we agree with **Bright Technical System** (supra) that the absence of a counter-affidavit does not automatically discharge an applicant's burden of proof, an uncontroverted affidavit deposed by an Officer of the Court regarding an administrative mistake carries significant weight, unless patently absurd or demonstrably false.

Here, the respondent's counter-affidavit was struck out. Mr. Mtobesya's sworn statement that his associate mistakenly recorded 24 August 2023 instead of 21 August 2023 stood unrefuted. A *bona fide* mistake as to hearing dates is a recognized example of human error. As noted in Mulla's *The Code of Civil Procedure* (18th Ed., Vol. 2, p. 2018) and affirmed in **Rashid Abiki Ngua** (supra), inadvertent mistakes of dates made in good faith by counsel constitute sufficient cause to set aside a default dismissal.

In our considered view, the learned trial Judge erred in law by subjecting the application to an excessively high standard of proof. Demanding formal leave applications, travel itineraries, and physical cause lists or electronic logs misapprehends the practical realities of legal practice. To insist on strict documentary verification for internal office interactions amounted to elevating the standard of proof beyond balance of probabilities. Where an advocate deposes an affidavit to a genuine administrative oversight, and that evidence stands uncontradicted, it meets the requirement of reasonable cause.

Furthermore, while compliance with timelines is essential, procedural rules are designed to facilitate justice rather than obstruct it. Procedural frameworks ought not to be applied so rigidly as to penalize a party for the inadvertent oversight of counsel where no prejudice is caused that cannot be remedied by costs.

Finally, the discretionary power under Order VIII Rule 20(1) of the CPC must be exercised judiciously and proportionately. Dismissal of a suit for non-appearance is a severe sanction reserved primarily for contumacious conduct, persistent default, or gross apathy. Where default arises from an

isolated administrative error in recording dates, dismissing the suit without reaching the merits is disproportionate. As reaffirmed in **Elias Masija Nyang'oro & Others v. Mwananchi Insurance Company Limited** [2022] TZCA 648 (citing **Shah v. Mbogo** [1967] EA 116), discretion to set aside default orders exists to prevent injustice resulting from inadvertence or excusable mistake, absent contumacious delay or deliberate obstruction.

Ms. Semu's reliance on **Rosemary Stella Chambo Jairo** to contend that dismissal was mandatory under Order VIII Rule 20 is, with tremendous respect, misplaced; rule 20 (1) vests discretionary power in the court, which must be exercised flexibly and proportionately to achieve substantive justice. The learned Judge failed to consider less drastic measures, such as an adjournment on terms as to costs.

By failing to evaluate the unrefuted nature of the supporting affidavits, demanding an unwarranted standard of proof, and imposing an overly punitive sanction dismissing the appellant's suit and striking out her reply to the respondent's counter-claim, the learned trial Judge misdirected himself in the exercise of his judicial discretion, justifying our intervention under the principles in **Mbogo v. Shah**.

In the result, we find merit in this appeal and hereby allow it. We set aside the ruling and order of the High Court. The record is hereby remitted to the High Court for continuation of the FPTC and subsequent steps in accordance with the law, before another judge. Each party shall bear their own costs.

DATED at DAR ES SALAAM this 27th day of August 2026.

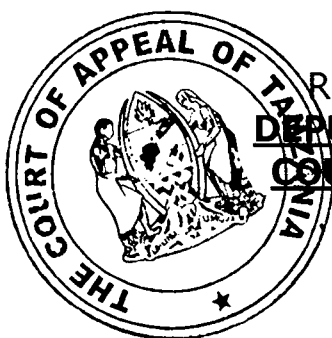
L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

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R. H. MOHAMED
JUSTICE OF APPEAL

Judgment delivered this 27th day of August, 2026 in the presence of Mr. Jeremia Mtobesya, learned counsel for the Appellant, Ms. Kavola Semu, learned counsel for the Respondent and Mr. Anwari Msigala, Court clerk, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL