

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 517/01/2016

ROSEMARY STELLA CHAMBE JAIRO APPLICANT

VERSUS

DAVID KITUNDU JAIRO RESPONDENT

(Application for restoration of Civil Application No. 162 of 2016 dismissed
vide the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Juma, J.A., as he then was)

dated the 21st day of November, 2016

in

Civil Application No. 162 of 2016

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RULING

20th April & 8th June 2018

NDIKA, J.A.:

The applicant had applied to this Court vide Civil Application No. 162 of 2016 for extension of time within which to serve the respondent with a copy of the notice of appeal and a copy of the letter to the Registrar of the High Court by which she applied for a copy of the proceedings, judgment and decree in Civil Appeal No. 79 of 2013. On 21st November 2016, the Court (Juma, J.A., as he then was) dismissed the aforesaid application under Rule 63 (1) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") on account of the applicant's non-appearance. Desirous of having the aforesaid application restored for hearing and determination on the merits, the applicant duly lodged this application on

15th December 2016 by way of a notice of motion under Rule 63 (3) of the Rules. Her quest is supported by an affidavit deposed by Ms. Crescencia B. Rwechungura, the advocate she retained to represent her in her intended appeal. The respondent filed no affidavit in reply.

The legal position of an application of this nature is provided for by Rule 63 (3) of the Rules, cited by the applicant as enabling provisions, as follows:

*"Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to **restore the application for hearing or to re-hear it**, as the case may be, **if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.**"* [Emphasis added]

I have bolded the text above to lay emphasis on the point that the Court is vested with discretion under Rule 63 (3) of the Rules to restore an application that was dismissed under Rule 63 (1) of the Rules (or one that was allowed under Rule 63 (2) of the Rules) if the applicant proves that his or her non-appearance at the hearing of the application sought to be restored was due to a sufficient cause.

The main justification for the applicant's non-appearance at the hearing on 21st November 2016, as shown on both the notice of motion and the supporting

affidavit in this matter, is that Ms. Rwechungura, the applicant's advocate having the conduct of the application, was oblivious that the hearing of the aforesaid application had been brought forward to 21st November 2016 at 8.45 a.m. from the initially scheduled date of 25th November 2016 at 8.45 a.m.

At the hearing of this application before me, Ms. Rwechungura, learned counsel, appeared for the applicant whereas Dr. Masumbuko R.M. Lamwai, learned counsel, represented the respondent.

Having adopted the supporting affidavit and written submissions she had filed, Ms. Rwechungura contended as follows: that she was all along aware that the application that is the subject of this matter (i.e., Civil Application No. 162 of 2016) had been set to come up for hearing on 25th November 2016; that on 11th November 2016 she left Dar es Salaam in a private car for Mafinga to attend a burial of a close of family friend and that throughout her stay there she was unreachable by cellphone because there were no facilities for charging cellphones; that she returned to Dar es Salaam by bus on Friday 18th November 2016 very late, tired and stricken with flu and that she remained indoors throughout the weekend so as to recover from her illness and fatigue; and that on Monday 21st November 2016 she went to the High Court, Commercial Division in Dar es Salaam to attend to a matter and that while there, around 11.00 a.m., she bumped into Dr. Lamwai from whom she learnt, rather startlingly, that Civil

Application No. 162 of 2016 had, earlier in the morning, been called for hearing before Juma, J.A. (as he then was) and that it had been dismissed for the applicant's non-appearance.

Ms. Rwechungura contended further that following a subsequent inquiry from this Court's Registry, she learnt that the hearing of the application before Juma, J.A. (as he then was) had been brought forward to 21st November 2016 at 8.45 a.m. from the initial date of 25th November 2016 at 8.45 a.m. In Paragraph 10 of her affidavit, Ms. Rwechungura acknowledges that the notice of the change of the date of hearing was served on 15th November 2016 at her chambers upon her secretary. At this point, I find it instructive to reproduce in full the said averment thus:

"Though the summons changing the hearing date of the Civil Application No. 162/2016 was received by my Secretary on the 15th of November 2016 while I was in Mafinga she could not make arrangement for another advocate to appear in court on my behalf on the 21st of November 2016 because she has (sic) recently been employed and she is not yet conversant of (sic) making arrangements for another advocate to hold my brief in cases I am unable to appear."

The learned counsel further claimed that the applicant could not appear in person in court on the material day because she was in South Africa where she relocated in 2015.

Replying, Dr. Lamwai refused to buy the applicant's explanation and urged the Court to hold that the application discloses no sufficient cause for the applicant's non-appearance in Court on the fateful day of hearing. He reasoned that there was insufficient evidence that Ms. Rwechungura travelled to Mafinga as the supporting affidavit does not disclose certain key details such as the name of the friend in whose car she travelled to Mafinga as well as the name of the deceased whose burial she attended in Mafinga. He added that Ms. Rwechungura would have been more credible if she had disclosed the said names. As regards Ms. Rwechungura's alleged trip back to Dar es Salaam, Dr. Lamwai contended that the bus ticket annexed to the supporting affidavit as proof of the said trip was incomplete and unreliable. The ticket, he said, contains no key details in respect of the bus she travelled in such as the registration number of the bus, seat number, boarding time, departure time, name and signature of the issuing officer. It was his view that the purported ticket was a piece of paper that might have been picked from anywhere.

Dr. Lamwai argued further that it was without doubt that Ms. Rwechungura's Secretary was, on 15th November 2016, served with the notice on the rescheduling of the hearing of Civil Application No. 162 of 2016 from 25th November 2016 to 21st November 2016 and that the said service was legally sufficient. In the circumstances, it was his view that when Ms. Rwechungura

arrived back in Dar es Salaam on 18th November 2016 she had three clear days in which to seek and obtain the notice. He submitted further that there was no proof that she was sick on the weekend she arrived back.

Rejoining, Ms. Rwechungura played down the fact that she did not disclose in the supporting affidavit the names of the driver who took her to Mafinga as well as that of the deceased whose burial she attended. In her view, the said disclosure was unnecessary. As regards the missing details on the bus ticket, she claimed that she just boarded the bus on the material day and got issued with that ticket without noticing that it missed certain details. Finally, she maintained that she was actually sick on the weekend she arrived back in Dar es Salaam and that she could not produce any documentary proof of her illness because she did not go to any hospital for treatment.

I have keenly examined the notice of motion and the supporting affidavit along with its annexures in the light of the competing learned submissions of the parties. It now behooves the Court to determine whether the applicant has successfully established sufficient cause for her non-appearance at the hearing of Civil Application No. 162 of 2016 on 21st November 2016.

It is common cause that the hearing of the aforesaid application was brought forward to 21st November 2016 at 8.45 a.m. from the initially scheduled date of 25th November 2016 at 8.45 a.m. Moreover, it is undisputed that the

notice of the rescheduled hearing was served on the applicant by way of delivery to the secretary of Ms. Rwechungura at her chambers on 15th November 2016. I find it significant that Ms. Rwechungura did not suggest to the Court that the service was legally insufficient. Indeed, in terms of rule 22 (4) of the Rules the said service was, in effect, sufficient and, accordingly it ought to be deemed as service of the notice on Ms. Rwechungura as the applicant's advocate.

Looking at Ms. Rwechungura's tale at its face value, that she was away from her offices from 11th November 2016 because she had travelled to Mafinga, it can be conveniently summed up as a contention that even though the notice of hearing was served through her secretary at her chambers she actually received no notification of it until after she learnt from Dr. Lamwai of the dismissal of the application. With respect, I reject this line of argument. It would be most injudicious and utterly inimical to the proper administration of justice that an advocate, having been served with a court process through his or her offices, was allowed to deny, negate or repudiate the service on the ground that he or she had no actual knowledge of it. Once a court process is served in strict compliance with the law, it cannot be disowned or repudiated by the party on whom the service was made.

Even if it were assumed *arguendo* that Ms. Rwechungura's professed "lack of knowledge" of the rescheduled hearing could be a factor in determining this

matter, the applicant's quest is obviously not helped by Ms. Rwechungura's tale. For that tale is, in my view, plainly laden with significant doubt in, at least, two respects. First, I agree with Dr. Lamwai that the bus ticket annexed to the supporting affidavit as proof of the return trip by Ms. Rwechungura is manifestly suspect and, as a result, unreliable due to the omission of the key details he mentioned. The absence of the registration number of the bus she allegedly travelled in, the seat number, the boarding time, the departure time, the name and signature of the issuing officer is, in my understanding, mostly unusual. It implies that the purported ticket is unauthentic and should not be acted upon. As a result, there is no proof that she returned to Dar es Salaam on 18th November 2016 if at all it is true that she had travelled to Mafinga on 11th November 2016. Secondly, I find it weighty that no explanation was given to the Court on how Ms. Rwechungura's secretary handled the notice after she received it on 15th November 2016. Objectively, one would have expected the secretary to lodge an affidavit to substantiate her handling of the notice. Sadly, none was filed. Several questions remain unanswered such as whether the secretary attempted to reach Ms. Rwechungura on the phone to notify her of the change of date and whether he/she left a voice message or an sms on her cellphone if she was unreachable. Instead, Ms. Rwechungura claims in Paragraph 10 of her affidavit to effect that the secretary could not arrange for another advocate to hold her brief in court on 21st November 2016 because, being newly employed, she was unfamiliar with

the niceties of engaging a substitute advocate. This claim is mostly premised upon hearsay; it deserves no consideration. I reject it wholly.

In the final analysis, I decline to exercise my discretion in favour of the applicant as no sufficient cause has been shown. Accordingly, I dismiss this matter with costs.

DATED at **DAR ES SALAAM** this 7th day of June 2018.

G. A. M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original


(B. A. MPEPO)
DEPUTY REGISTRAR
COURT OF APPEAL