IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LILA, J.A., And MKUYE, J.A.)

CIVIL APPLICATION NO. 112/07 OF 2018

RAMATI MUSA HANISI MTOPA.....APPLICANT

VERSUS

SALUM RASHID.....RESPONDENT

(Application for Restoration of Civil Reference No. 15 of 2017 which was dismissed by the Court of Appeal of Tanzania.)

(Mjasiri, Mugasha and Lila, JJA.)

dated the 7th day of March, 2018
in
Civil Application No. 15 of 2017

RULING OF THE COURT

7th November, 2018 & 13th February, 2019

LILA, J.A.:

This is an application for restoration in which the applicant is seeking Civil Reference No. 15 of 2017 (the Reference) which was dismissed by the Court (Mjasiri, Mugasha and Lila, JJA) on 7/3/2018 for non-appearance of both parties be restored. The application is made under Rule 63(1) (3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is supported by the sworn affidavits of

Bahati Mussa Mtopa, the applicant, and Ms. Magdalena Rwebangira, the learned advocate.

When the application was called on for hearing before us on 7/11/2018, only Ms. Rwebangira, learned advocate for the applicant, entered appearance. None appeared for the respondent despite being duly served with the notice of hearing. On that account, Ms. Rwebangira, prayed, under Rule 63(2) of the Rules, the hearing of the application to proceed in the absence of the respondent. In the absence of any notice from the respondent explaining what had prevented him or his advocate from entering appearance, we granted the prayer and the hearing of the application proceeded in the absence of the respondent under Rule 63(2) of the Rules.

Amplifying on the grounds upon which the application is based, Ms. Rwebangira reiterated what she had earlier on submitted in the written submission in support of the application which she had filed in Court on 5/6/2018 and which she prayed to be adopted as part of her submissions. In the submissions she had contended that the

applicant should not be condemned for the mistake done by the advocate who inadvertently and mistakenly noted that the notice for hearing served to her to have indicated that the hearing of the application for reference would be at Mtwara where it was previously scheduled to be heard instead of Dar es Salaam. She stated that based on that understanding she relayed that information to her client (the applicant) and as a result the applicant travelled to Mtwara only to find that no Court session was in progress then thereat. She firmly, as she did in her affidavit in support of the application, contended that even herself was due to travel to Mtwara but for the TAWLA, which granted the applicant legal aid service, failure to facilitate her with the air ticket. She further argued that the applicant informed her the confusion that had arisen late on the material date for her to rush to the Court in Dar es Salaam and enter appearance. She further contended that the non-appearance on 7/3/2018 was not occasioned by negligence or lack of care of the applicant or her advocate but out of a human error committed by the advocate in reading the summons for hearing served on her. She accordingly

urged the Court to grant the application for, in doing so no injustice will be occasioned to the respondent. According to her, restoration of Civil Reference No. 15 of 2017 will facilitate substantive justice be done to the parties by according them opportunity to be heard.

We have given due consideration to Ms. Rwebangira's arguments in support of the application. It is also apparent that the applicant's application for reference was dismissed by the Court for want of appearance of both parties on 7/3/2018. And, as hinted above, the applicant is urging the Court to restore it. This application which is predicated under Rule 63(1) (3) (4) of the Rules which provides for only one major consideration for the grant or otherwise, that is, good cause be shown that prevented the applicant from appearing when the application was called on for hearing. That Rule states:

> *"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."

We will consider the merits of this application while guided by the above legal position. The main consideration in the present application is therefore whether or not the applicant has shown that he was prevented by any sufficient cause from entering appearance on 7/3/2018 when Civil Reference No. 15 of 2017 was called on for hearing.

We have gone through the entire application, written submission in support of the application and the oral submission by Ms. Rwebangira before us. The major and sole cause for non-appearance on the date the application was called on for hearing advanced to us by Ms. Rwebangira is that she inadvertently and guided by the earlier

experience that the parties' matters were being heard at Mtwara, she mistook the summons served to her to have indicated that the Reference was to be heard at Mtwara. As a result she misdirected the applicant to attend at Mtwara after her arrangement to travel to Mtwara had been turned down by TAWLA for want of requisite finance. As the applicant actually turned out at Mtwara, she in fact attributed the mistake to be a human error which should not be borne by the innocent applicant who acted on her instructions.

On the affidavital evidence by the applicant and Ms. Rwebangira and the arguments before us, the applicant and her advocate have shown the steps they took after being served with the notice of hearing and after realizing that the case was not scheduled for hearing at Mtwara. Neither of them stayed idle. The applicant travelled to Mtwara where the advocate had told her that the hearing would take place only to find there was no Court session thereat. On the other hand, the advocate struggled to secure means to travel to Mtwara but was unsuccessful and upon realizing so, wrote a letter to the applicant to personally enter appearance. On account of this

state of affairs, with respect, we can see and appreciate the force of argument in Ms. Rwebangira's submissions. We are firm that, like in application for extension of time, generally speaking, an error made by an advocate through negligence or lack of diligence is not a sufficient cause. There are however, exceptional circumstances surrounding the case where such an error can amount to sufficient cause. We find support in the Court's decision in the case of **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) where the Court stated that:

> *"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellants' advocate in his oral submission. But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the*

applicant's advocate as was held by a Single Judge of the Court (Mfalila JA as he then was) in ***Felix Tumbo Kisima v. TTC Limited and Another*** *– CAT Civil Application No. 1 of 1997 (unreported).*

It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence resulting in delay in taking any necessary step.

In the instant case the respondent had done all that she could, leaving the matter to the hands of her advocate who had been assigned to her on legal aid. In the circumstances, while accepting that there were some elements of negligence by her counsel, in the circumstances of the case, we join hand with our learned brother Mfalila JA in the case cited supra, and hold that the learned counsel's negligence constituted sufficient reason for

delaying in lodging the appeal between 1.8.1996 and 24.10.1996."

Like in the above cited case the applicant, as demonstrated above, upon being directed that the Reference will be heard by the Court at Mtwara by her advocate who was granted to her on legal aid, travelled to Mtwara to attend the hearing of the application for reference on the scheduled date only to find the Court had no sessions thereat. She informed her advocate so but as it was already late, the latter could not enter appearance in Dar es Salaam Registry where the application was set for hearing. We find it unjust to impute the advocate's mistake into the applicant. The applicant was wholly innocent. She cannot, in the peculiar circumstances of this case, be blamed for the non-appearance when the application for reference was called on for hearing in Dar es Salaam. We, instead, hold it that reason constituted sufficient cause.

We are of the view that, in situations like the one that obtained in this case, a distinction must be drawn between the negligence and mistakes committed by the party and those committed by his/her

advocate. In the instant case, the applicant exercised due diligence and did all that she was required to do. She was so innocent.

We now move to consider Ms. Rwebangira's contention that she was not negligent. In her firm view, the application used to be heard at Mtwara and when she read the notice of hearing served to her, she firmly believed that the application was to be heard at Mtwara and she duly informed her client, the applicant, and proceeded to make arrangement to travel to Mtwara. Given these circumstances and the efforts made by Ms. Rwebangira to secure air ticket to Mtwara, we are inclined to agree that she committed a human error in reading the notice of hearing. We borrow leaf from the persuasive decision of the Court of Appeal of Kenya at Nairobi, in **Githere v. Kimungu** [1976-1985] 1 EA 101 (CAK) which stated that:

> *"That where there has been a bona fide mistake, and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard;*

and, accordingly, a procedural error, or even a blunder on a point of law, on the part of an advocate (including that of his clerk), such as a failure to take prescribed procedural steps or to take them in due time, should be taken with a humane approach and not without sympathy for the parties, and, in a proper case, such mistake may be a ground to justify the court in exercising its discretion to rectify the mistake if the interests of justice so dictate, because, the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better, and there is nothing in the nature of such a mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the other side; but whether the matter shall be so treated must depend upon the facts of each individual case.

That the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and

that the court should not be so bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case, and this is a principle which a court must remember when judicially exercising its discretionary powers."

We, like in the above case, think that the error committed by the applicant's learned counsel was purely a human error. We think that if this application is granted no serious damage will be done to the respondent who, as the record loudly speaks out, was also not in attendance when the Reference was dismissed.

Given the above stated circumstances and guided by the spirit that there is need for achieving substantive justice which requires the parties be given opportunity to litigate their rights to a conclusive end [see **Zanzibar Shipping Corporation v. Mkunazini General Traders**, Civil Application No. 3 of 2011 (unreported)], we find that the application has merits. We accordingly hold that the applicant has

shown sufficient cause for non-appearance on 7/3/2018 when Civil Reference No. 15 of 2017 was called on for hearing.

For the aforegoing reasons, we grant the application and we hereby order that Civil Reference No. 15 of 2017 is hereby restored. Costs to abide the event in the main cause.

DATED at **DAR ES SALAAM** this 8th day of February,2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL