

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 186 OF 2016

PHARES WAMBURA AND 15 OTHERS APPLICANTS

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED..... RESPONDENT

**(Application for Restoration of Civil Application No. 22 of 2016 from the
decision of the Single Justice of the Court of Appeal of Tanzania
at Dar es Salaam)**

(Mwarija, J.A.)

**Dated the 20th day of May, 2016
in
Civil Application No. 22 of 2016**

RULING

10th & 19th August, 2020

LEVIRA, J.A.:

The applicants herein seek for an order setting aside the dismissal order by a Single Justice of the Court (Hon. Mwarija, J. A.) of 20th May, 2016 in Civil Application No. 22 of 2016 and restoration of the said application in terms of Rule 63(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Notice of Motion is supported by the affidavits of Methuselah Boaz Mafwele, Phares Wambura, Jacklin Nsimba and Tecla Kajanja, the applicants' counsel and three of the applicants respectively.

It is worth noting that, vide Civil Application No. 22 of 2016 the applicants herein had applied for extension of time within which to serve the respondent with a notice of appeal against the decision of the High Court of Tanzania, Land Division (Nchimbi, J.) delivered on 30th November, 2015 and copy of a letter to the Registrar of the High Court requesting for copies of proceedings, judgment and decree. However, on 20th May, 2016 when their application was called on for hearing before the Single Justice of this Court, parties for both sides did not enter appearance despite the fact that they were duly served. Consequently, the application was dismissed for non-appearance and hence the applicants' current application.

At the hearing of this application, the applicants were represented by Mr. Wilson Ogunde, learned advocate, whereas the respondent (TANESCO) had the services of Mr. Howa Msefya, also learned advocate.

Mr. Ogunde adopted the contents of supporting affidavits as part of his oral submission and stated that the applicants were prevented by sufficient cause to appear before the Court on the hearing date. As a result, he said, their application was dismissed for want of prosecution. Elaborating on what he referred as sufficient cause, Mr. Ogunde stated

that, according to the affidavits in support of the application, the applicants and their advocate were around the Court premises on 20th May, 2016 when Civil Application No. 22 of 2016 was called on for hearing. However, it was his assertion that, on the material day there was a confusion allegedly caused by a Court clerk which made them to wait outside the chambers of Hon. Mussa, J.A. as stated in the affidavit of Methuselah Boaz Mafwele, the learned advocate who was representing the applicants. Specifically, he referred the Court to paragraph five of the said affidavit which indicated that the counsel for the applicants and the above stated three applicants (deponents) approached the Clerk for Hon. Justice Mussa, J.A. seeking the clarity on whether the other party was TANESCO, the fact which he confirmed. As a result, the applicants and their advocate proceeded to the chambers of Hon. Mussa, J.A. as stated above. However, after having spent considerable time there, they realized that they were supposed to appear before Hon. Mwarija, J.A. while it was already too late. They rushed to the chambers of Hon. Mwarija, J.A. only to find that, their application had already been dismissed for want of prosecution because at the time it was called on for hearing neither party appeared.

Mr. Ogunde argued further that, the applicants' failure to enter appearance before Hon. Mwarija, J.A. was not caused by negligence or

inaction on their part, but due to misleading information they received from the said Court clerk. As such, he said, had it not been such confusion, they would have entered appearance before Hon. Mwarija, J.A. as the applicants and their advocate were within the Court premises.

According to Mr. Ogunde, the reason for non-appearance demonstrated above amounts to sufficient cause. Therefore, he urged me to set aside the dismissal order in respect of Civil Application No. 22 of 2016 and restore the same.

In reply, Mr. Msefya opposed this application on account that the applicants have failed to show sufficient cause to justify their application. He fortified his contention by the fact that, on 20th May, 2016, the applicants were represented by an advocate, Methuselah Boaz Mafwele who is very senior and conversant to Court procedures but failed to adhere to the same. He submitted further that, it is trite law that all cases which are scheduled for hearing are clearly manifested on the cause list. The said cause list is affixed in the Court's notice board for everyone, including the parties and their advocates to see it so as to be aware of the date(s), assigned judge and time set for hearing of the case.

Mr. Msefya faulted the assertion in paragraph five of the supporting affidavit of the counsel for the applicants referred by Mr. Ogunde. He argued that, it might be true that there was respondent's case before Hon. Mussa, J.A., but that was not enough for the advocate for the applicants and his clients to follow Justice Mussa's clerk because the cause list was their guide to show them before whom they were supposed to appear.

Further to that, Mr. Msefya argued that the applicants should have lodged in Court a supporting affidavit of Justice Mussa's clerk whom they claimed misled them to support what they stated in their respective affidavits, but that was not done. He thus urged me to find that, the applicants have failed to show sufficient cause for non-appearance as required under Rules 63(3) of the Rules and dismiss this application with costs.

In a brief rejoinder, Mr. Ogunde reiterated his submission in chief. He also added that, the applicants were served with summons which did not indicate the name of Justice who was assigned their application. He insisted that the applicants and their counsel appeared before the Court only that confusion had occurred, which he said, was a human error and

not negligence on their party. Therefore, he prayed for the application to be granted.

I have respectfully considered submissions by the counsel for the parties and the record of the application. The sole issue calling for my determination is whether the applicants have shown sufficient cause to justify their application. Rule 63 (3) of the Rules under which this application is made provides that:

*"(3). 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 rehear 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].

The above provision requires the applicant who applies for restoration of the dismissed application for want of prosecution to show sufficient cause for non-appearance on the hearing date. The term sufficient cause for non-appearance can be defined according to the peculiar circumstances of each case (see **Mwanza Director M/S New Refrigeration Co. Ltd**

v. Mwanza Regional Manager of TANESCO and Another [2006] TLR 329). In the current application, the reason(s) for non-appearance of the said applicants on the hearing date are stated in various paragraphs of the supporting affidavits as follows:

Mr. Mafwele, learned advocate who represented the applicants stated under paragraphs three, four, five and eight of the supporting affidavit as follows:

3. *"That, on that material date, I together with three of the applicants herein namely, Phares Wambura, Tecla Kajanja and Jackiine Nsimba appeared in Court premises and later on in chambers purposely to proceed with hearing of an application as scheduled by the Court.*
4. *That, the application was called for hearing for the first time, and neither I nor the three Applicants had ever appeared for the said application therefore **we were not enlightened** on the Hon. Justice of Appeal before whom we were supposed to appear, as such were supposed to appear, as such we had to wait for the case to be called by the Court Clerk. [Emphasis added].*

5. *That, when Court Clerks called cases pending before Hon. Justices of Appeal on that material date, Application No. 22/2016 inclusive, I and the said Applicants approached the **Court Clerk for Hon. Mussa, J.A. seeking clarity on whether the other party is TANESCO**, the fact which he confirmed as such we headed to Hon. Mussa, J.A. chambers awaiting for our matter to be called, but all ended in vain. [Emphasis added].*

8. *That, non-appearance as depicted in the preceding paragraphs above was not in any way occasioned by any sort of negligence or recklessness on our part because **we were helplessly misinformed and ended up waiting outside Hon. Mussa, J.A. chambers, believing that the matter was before him**, the fact which turned out otherwise.” [Emphasis added].*

I have also thoroughly gone through other supporting affidavits of other three deponents as well. My observation is that, in essence, there is no material difference between what they stated and what was stated by their advocate. The only difference is found under paragraph six of Tecla

Kajanja's affidavit who gave a different reason for non-appearance as she stated:

6. *"That, the failure for not appearing on time was not intentional, **it was due to traffic jam** and I was certain that Mrs. Jackline Nsimba and Phares Wambura would have attended to represent us all."*[Emphasis added].

With respect, I wish to observe at the outset that in the light of the deponents' affidavits the reasons for non-appearance on the hearing date advanced by the applicants and their counsel are not palatable. I shall give reasons.

One, as stated by the counsel for the respondent, all matters scheduled by the Registrar for hearing are cause listed. The cause list among other things provides for a place of hearing, date, time and the name of presiding Justice. Besides, the cause list is posted in the Court's notice board or available electronically in the website. This is done purposely to inform the parties and other stakeholders about their cases filed in Court and who is (are) going to preside over. The deponents argued that on the hearing date they were in Court's premises with the intention of entering appearance before the presiding Justice over their

matter (Civil Application No. 22 of 2016) but they were not enlightened on the respective Justice of Appeal before whom they were supposed to appear. It is in this regard that, this averment was opposed by the counsel for the respondent, who rightly in my considered opinion stated that parties are guided by the cause list.

The applicants in the application subject of the application at hand were represented by the learned advocate as plainly stated in the supporting affidavits. It is unexpected by almost everyone to hear a complaint from an advocate that he/she was "***not enlightened***" before whom he is supposed to appear after being made aware that the matter he is handling is cause listed for hearing. In my considered opinion, a mere fact that the deponents were in Court's premises on the hearing date is a proof that they were aware of the cause list which in essence contains all the necessary information, including the name(s) of presiding Justice(s). Therefore, I find that the issue of being enlightened or not on the presiding Justice of Appeal by the Court clerk does not arise. It would be different if the said enlightenment was about the location of the respective justice's chamber, which is not the case. Besides, a mere fact that applicants and their advocate were in Court premises on the hearing date does not amount to "appearance" in terms of Rule 63 of the Rules because they did

not appear before the responsible Justice who was dealing with their matter. 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 a hearing date and time amounts to non-appearance.

Second, the applicants' counsel claim that they were misled by the Court clerk whom they approached to seek clarity whether the other party was TANESCO, the fact which was confirmed by the said clerk is unfounded. This is due to the fact that, the deponents' depositions show that when they approached the said "*unknown*" clerk, the clarity which they sought from him was "not on who the presiding Justice" was, but whether TANESCO was the respondent in that application which they allegedly heard being called by him/her before they proceeded to go to the Hon. Mussa, J.A.'s chambers. Besides, in the light of the averment in paragraph five of the applicants counsel's affidavit, if they really heard Civil Application No. 22 of 2016 being called, they had no need to inquire if TANESCO was involved and if they had arrived at the Court premises knowing the respondent. I agree with the counsel for the respondent that,

it could be true that there was another matter before Hon. Mussa, J.A. where the respondent herein was also appearing as a respondent. However, the counsel and the three deponents must have come knowing that the said application involved TANESCO and not other party. In the circumstances, I think it is unsafe to throw a blame on the said clerk.

Third, the applicants claim that they were not negligent but they were helplessly misinformed and thus ended up waiting outside Hon. Justice Mussa's chamber instead of going to Justice Mwarija's chamber is also unfounded. As such, it is so unfortunate that the said Court clerk who allegedly misled the applicants was not requested by the applicants to swear affidavit to that effect. Surprisingly, the deponents did not even attempt to mention the name of the said Court clerk or to show that after they noted that they had been misled by him/her they approached the Registrar to complain on same date if they were really within the Court premises as alleged. The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances, I agree with the counsel for the respondent that there was a need for the said Court clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits. As the Rules require that the application can be supported by other person(s) having knowledge of the facts, the affidavit

of the Court clerk could have been useful to substantiate the applicants assertions of his/her involvement in the matter.

Fourth, although the counsel for the applicants lumped together the reasons for non-appearance of all the applicants, the affidavit of the third deponent (Tecla Kajanja) proves otherwise. Her reason for non-appearance on the material date was due to traffic jam which delayed her and that upon arriving she was informed that the matter has been dismissed. However, just like other deponents, she did not disclose the name of a person who informed her that the matter had been dismissed. Be as it may, this reason is also insufficient. I wish to observe once that traffic jam is not and has not been made a special circumstance justifying non-appearance of parties before the Court. It is noteworthy that Kajanja's averments on traffic jam is a serious statement which renders credence to the fact that the averment of the learned counsel in paragraphs five of his affidavit that they were together on that date is not true.

From the above deponents' affidavital disposition, it is not even shown the time they arrived at the Court premises and the time they learnt that their application had been dismissed for want of prosecution before Hon. Mwarija, J.A. This would have demonstrated that they were within the

Court premises. Indeed, there is no indication that after they learned of the said dismissal they approached the clerks to the respective Justices concerning the dismissal on that date. It may be concluded thus there is no evidence that the deponents were within the Court premises on the material day.

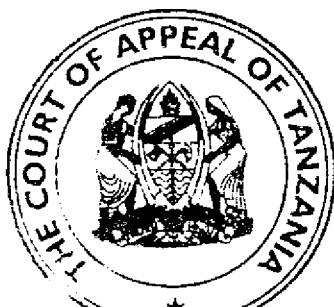
For the reasons stated above, I find that the applicants have failed to show that they were prevented by sufficient cause from appearing when Civil Application No. 22 of 2016 was called on for hearing on 20th May, 2016. Consequently, I hereby dismiss this application with costs.


Order accordingly.

DATED at DAR ES SALAAM this 19th day of August, 2020.

M. C. LEVIRA
JUSTICE OF APPEAL

Ruling delivered this 19th day of August, 2020 in the presence of Mr. Mr. Andrew Magai holding brief for Mr. Wilson Ogunde, counsel for the Applicant and Mr. Andrew Magai holding brief for Mr. Howa Hiro Msefya, learned advocate for Respondent, is hereby certified as a true copy of original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL