

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

(CORAM: MKUYE, J.A., WAMBALI, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 141/01 OF 2017

MOHAMED IQBALAPPLICANT

VERSUS

ESROM M. MARYOGORESPONDENT

**[Application for an order of restoration of Civil Appeal No.56 of 2010
which was dismissed for want of prosecution by the Court of Appeal
of Tanzania at Dar es Salaam]**

(Luanda, J.A., Mussa, J.A. And Mugasha, J.A.)

Dated the 16th day of February, 2017

in

Civil Appeal No.56 of 2010

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RULING OF THE COURT

14th August & 23rd October, 2020

WAMBALI, J.A.:

The applicant, Mohamed Iqbal was the defendant in Civil Case No.426 of 2002 which was instituted at the High Court of Tanzania by the respondent, Esrom M. Maryogo. At the conclusion of the trial, the High Court entered judgment for the respondent with costs. Aggrieved, the applicant lodged Civil Appeal No.56 of 2010 before the Court to challenge the judgment and decree of the trial High Court.

It is noteworthy to state that on 16th February, 2017 when the said appeal was placed before the Court for hearing, the applicant defaulted appearance. In the circumstances, the counsel for the respondent prayed the Court to dismiss the appeal under Rule 112 (1) of the Tanzania Court

of Appeal Rules, 2009 (the Rules). Consequently, the Court granted the prayer and dismissed the appeal with costs.

After the applicant learnt of the dismissal of the said appeal, he lodged the present application through the services of Mr. Charles Kibaja Semgalawe, learned advocate seeking an order of restoration of Civil Appeal No. 56 of 2010 for hearing. The application has been preferred through a notice of motion supported by the affidavit deposed by Mr. Charles Kibaja Semgalawe the then applicant's advocate. The application is strongly contested by Esrom Magesa Maryogo, the respondent through an affidavit in reply which was duly lodged in Court through the services of Mrs. Nakzael Lukio Tenga learned advocate.

At the hearing of the application, Mr. Jerome Msemwa, learned advocate appeared to represent the applicant after he was duly instructed hardly one day before the hearing date. Mr. Msemwa informed the Court that he was compelled to appear in Court despite the short notice from the applicant because Mr. Semgalawe learned advocate who deposed the affidavit and intended to represent the applicant passed away sometime in the year 2019. On the other side, Mrs. Nakzael Lukio Tenga, learned advocate appeared to represent the respondent.

It is noted, that before we commenced the hearing, in terms of the provisions of Rule 48 (1) of the Rules, we ordered the applicant to

substitute Rule 63 (3) indicated in the notice of motion with Rule 112 (3) of the Rules. We did so in the interest of justice as Rule 63 (3) of the Rules which was wrongly referred by the applicant as the bases of moving the Court to grant the present application seeking restoration of an appeal is inapplicable. Besides, the Court dismissed the appeal under Rule 112 (1) of the Rules.

For the purpose of determining this application, we deem it appropriate to reproduce the relevant paragraphs of the late Charles Kibaja Semgalawe's affidavit in support of the applicant's reasons for non-appearance are as hereunder: -

"3. When the said Appeal was called for hearing, I was not present in Court as I was sick and I had to rest due to the fact that I was suffering from diabetes and High Blood Pressure which disease have the tendency to strike anytime. This state of being sick continued until 17th day of February, 2017 when I had another matter before this Honourable Court. Here is annexed a copy of sick sheet marked "A".

4. I instructed my chamber clerk one Jesca Semgalawe to inform the Registrar about my absence and she did so by letting Hon. Bampikya Deputy Registrar, who in reply told my clerk to ask for any of the Advocate present to hold my brief but

in vain as non was ready to do so and the appeal was dismissed. Here is annexed a copy of the order marked "B".

5. I also failed to inform my client one Mohamed Iqbal to attend because of communication breakdown."

On the adversary side, the respondent strongly countered the contention contained in the above reproduced paragraphs of Mr. Semgalawe's affidavit as follows: -

"4. That the content of paragraph (sic) 3 and 4 of the applicant's affidavit is contested. It is stated that the document attached as Annexure A in the Affidavit is not a sick sheet as claimed as it does not contain the name and signature of the Doctor who examined Charles Kibaja Semgalawe as required. It is further stated that I was informed by my Advocate Nakzael Lukio Tenga, the information I believe to be true, that, it is true that the clerk of Advocate Charles Semgalawe, One Jesca Semgalawe requested my Advocate to hold brief for Advocate Semgalawe, but the reasons given for his failure to be in Court was not sickness, Jesca informed my Advocate and the Court that Charles Semgalawe while on his way to the Court, has experienced mechanical breakdown of his car and for that he has

failed to reach the Court in time. It is further stated that no communication was made to the Court or the opposite party with regard to the illness of Charles Semgalawe since 14th February, 2017 when Charles Semgalawe was examined by the Doctor, and no reason was given for that failure.

5. That the content of paragraph 5 is denied as the claimed communication breakdown is not substantiated.”

We have purposely reproduced in full the relevant paragraphs of the parties' affidavits because at the hearing both counsel firmly adopted and relied on the respective affidavits in support of their respective positions for and against the application. Indeed, they briefly responded to the clarification which was requested by the Court in regard to the contents of their respective affidavits.

Having heard the counsel for the parties and considered the affidavits and the record of the application, the issue for our determination is whether in terms of Rule 112 (3) of the Rules, the applicant has demonstrated sufficient cause for restoration of the dismissed appeal.

It is acknowledged that the meaning of the term sufficient cause depends on the circumstances of each case. From the reproduced

paragraphs of the respondent's affidavit in reply, we note that his opposition to the applicant's prayer for the restoration of the dismissed appeal is premised on three main arguments. One, that the purported sick sheet attached to the affidavit of the applicant's counsel is invalid as it does not contain the name and signature of the doctor who attended the then applicant's advocate, the late Semgalawe. Two, that the reason given by Mr. Semgalawe's clerk, one Jesca Semgalawe for his alleged failure to appear in Court on 16th February, 2017 was that his car developed mechanical defects on his way to the Court and not sickness as averred in his affidavit. Three, that Mr. Semgalawe's alleged sickness from 14th February, 2017 was not communicated to his client, the respondent and the Court.

It is most unfortunate that the deponent in support of the applicant's application, Mr. Semgalawe is dead and cannot be summoned to appear to be cross-examined on the assertions in the affidavit concerning his sickness as the cause of his failure to appear in Court on 16th February, 2017. Nevertheless, at the hearing, it was agreed by the counsel for the parties and the Court with regard to the authenticity of the sick sheet attached to the affidavit in support of the application that, what is missing in the said sick sheet is the signature of the doctor and not his name. It was not disputed that after close scrutiny of the sick

sheet it was apparent that the name of the doctor is vividly indicated on the appropriate place as "Dr. Francis."

Our further scrutiny indicates that the said Medical Form No. A005 (the Medical Form) belongs to Muhimbili National Hospital as confirmed by its logo, the postal address and the telephone number. It also contains the Hospital Registration Number, the name of the patient and the doctor's findings. It is further not disputed that the respective Medical Form was issued on 14th February, 2017. In addition, it is evident that apart from prescribing the medicine, the doctor also directed the patient (Mr. Semgalawe) to have bed rest for three (3) days from 14th – 16th February, 2017. However, according to paragraph 3 of the late Semgalawe's affidavit, his sickness continued up to 17th February, 2017 when he still had another case to attend before the Court but he failed to appear on the reason that he was still sick.

From what we have stated above concerning the contents of the Medical Form, we are of the settled opinion that lack of the doctors' signature cannot invalidate the said Medical Form as the omission might have been caused by a human error. Thus, in the present application, we think that in the absence of the affidavit of Jesca Semgalawe to confirm the assertion of the respondent that he informed his counsel that the late Semgalawe's failure to appear on the date of hearing was due to the car

breakdown due to mechanical problem, the late Semgalawe's averment in the affidavit concerning the alleged sickness cannot be validly contested. Besides, in his affidavit, the respondent has not seriously disputed Mr. Semgalawe's averment in his affidavit that he regularly fell sick due to his being regularly attacked by diabetes and high blood pressure, a condition which necessitated his regular attendance to the hospital for treatment.

Indeed, it is most unfortunate that the respondent's counsel who was present in Court on that date did not lodge an affidavit to supplement the respondent's assertion on the story of Mr. Semgalawe's car breakdown as per the alleged information from Jesca Semgalawe. To this end, with profound respect to the learned counsel for the respondent, we wonder why, if she was really informed by Jesca Semgalawe on the real reason for the late Semgalawe's failure to appear in Court at the hearing on the respective date she did not inform the Court to that effect. On the contrary, according to the order of the Court, the learned advocate is recorded to have prayed that the appeal be dismissed with costs in terms of Rule 112 (1) of the Rules, for non-appearance of the appellant (the applicant). Consequently, the Court granted her prayer and dismissed the appeal with costs. However, the order of the Court does not indicate that the respondent's counsel informed the Court that she was reliably informed by Mr. Semgalawe's

clerk to hold his brief because he had failed to appear due to the breakdown of his car as alleged in the respondent's affidavit in reply.

At this juncture, we wish to pause and observe that being an officer of the Court, the learned counsel for the respondent, with respect, failed to inform the Court of the alleged information she received from Jesca Semgalawe as per the contents of paragraph 4 of the respondent's affidavit in reply. We think courteous dictates that she would have plainly informed the Court that on the particular day she was approached by Jesca Semgalawe who asked her to hold the late Semgalawe's brief on the reason that, his car had experienced mechanical problem on his way to the Court and thus, he was unable to appear for hearing. Unfortunately, though it is not stated in the affidavit in reply by the respondent that Jesca Semgalawe's request was declined by his counsel, paragraph 4 of the late Semgalawe's affidavit renders credence to the fact that the said clerk's efforts to get any advocate to hold his brief on that particular day was in vain.

Moreover, we venture to state that if the learned counsel for the respondent was aware of the real reason for the late Semgalawe's inability to appear at the hearing as per the information from Jesca Semgalawe, she would also had informed the Court not only concerning the story of the breakdown of his car, but also of the presence of the said

clerk in Court on that day. The said information was important to assist the Court to make a considered decision on the request of Mr. Sengalawe. To this end, we are of the opinion that if the Court would have been duly informed of the real reason for the applicant's counsel failure to appear, a consideration could have been made either to dismiss or adjourn the hearing of the appeal depending on the circumstances. On the contrary, the record of the application is silent concerning any information on the excuse of the applicant's counsel inability to appear for hearing on that date. It seems the Court was not duly informed concerning the communication between Jesca Sengalawe and the respondent's counsel which took place before the appeal was called for hearing. Thus what is stated by the respondent in paragraph 4 of his affidavit in reply cannot be totally relied upon as a basis of opposing the application.

In this regard, we wish to emphasize that a party or an advocate to the proceedings before the Court has a duty to assist the Court to make a fair decision by disclosing all relevant facts concerning the case to facilitate the just resolution of the dispute. This is consistent with the overriding objective of the Appellate Jurisdiction Act and the Rules of the Court which among others aim at just determination of proceedings.

Besides, the Court administers justice fairly and justly with the participation and assistance of parties and counsel.

We must emphasize that an advocate, in addition to being a professional, is also an officer of the Court and plays a vital role in the administration of justice. An advocate is therefore expected to assist the Court in an appropriate manner in the administration of justice. Indeed, one of the important characteristics of an advocate is openness in different ways to share to the court the relevant information or message which comes to his attention either from his client or his colleagues concerning the handling of the case regardless of whether he has been requested by the court to do so or not.

In the final analysis, in the light of the deliberation we have made with regard to the circumstances of the application, we are settled that the applicant has demonstrated sufficient cause to deserve restoration of the dismissed appeal. We are satisfied that the failure of the applicant's advocate who was duly instructed to appear on his behalf was not caused by negligence or willful conduct but because of his ill health condition.

In the result, the application is granted. Consequently, in terms of Rule 112 (3) of the Rules, we order that Civil Appeal No. 56 of 2010 be restored in the Court's Register. We further order that as the appeal has

been pending in Court for almost ten years, the Registrar should consider scheduling it for hearing in the immediate next sessions of the Court. Finally, we make no order as to costs.

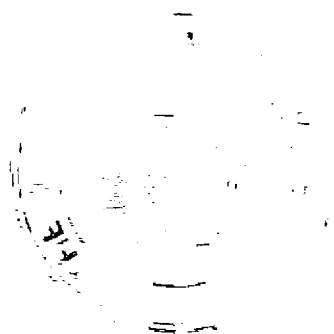
DATED at DAR ES SALAAM this 20th day of October, 2020

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of October, 2020 in the presence of Mr. Amon Ndunguru, learned counsel for the applicant and Mr. Hamisi Mfinanga, learned counsel for the respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL