

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: WAMBALI, J.A, KEREFU, J.A. And RUMANYIKA, J.A.)**

**CIVIL APPLICATION NO 606/01 OF 2021**

**SUZAN NG'ONDO .....APPLICANT**

**versus**

**ANNA SAMWEL URASSA .....RESPONDENT**

**(Application for setting aside an Order of the Court of Appeal of Tanzania at  
Dar es Salaam dismissing Application for Revision No. 83 of 2019**

**(Mkuye, Sehel, And Galeba, JJ.A.)**

**Dated the 1<sup>st</sup> day of November, 2021**

**in**

**Civil Application No. 83 of 2019**

**.....**

**RULING OF THE COURT**

9<sup>th</sup> & 22<sup>nd</sup> May, 2023

**RUMANYIKA, J.A.:**

The application is by way of notice of motion supported by an affidavit sworn by Raphael Balegele Kanyana (the deponent). It is made under Rule 63(3) and (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for restoration of Civil Application No. 83 of 2019 which the Court dismissed on 1<sup>st</sup> November, 2021 for non-appearance of the applicant.

The brief facts leading to the dismissal of the application, as averred in the supporting affidavit is that, the deponent holds powers of attorney issued to him by Suzan Ng'ondo (the applicant) in Civil Application No. 83 of 2019. He was thus duly served with the notice of the hearing of that application on 11<sup>th</sup> October, 2021 on behalf of the applicant. However, he did not enter appearance before the Court. He averred at paragraphs 3 to 7 of the supporting affidavit that, on that particular day and time he was in the Court corridors in attendance of the matter but he did not hear his application being called out. Further, he stated that, he kept waiting around until such time he became suspicious and made a physical follow up. That, as he knocked at the door to Court Room No. 1 in the High Court building, where a police man told him to sit on the bench in the main lobby waiting for his turn to come. He complied, only later on to learn that the application had been dismissed for non-appearance of the applicant. Additionally, he averred that, he immediately reported that unfortunate event to Ms. Dorini of the Registry office and later to Mr. E. G. Mrangu, the Deputy Registrar of the Court who had been in the Court room on that day and that he allegedly recognized him.

At the hearing of the application on 9<sup>th</sup> May, 2023, Mr. Raphael Balegele Kanyana, armed with the powers of attorney appeared for the applicant unrepresented. The respondent had the services of Mr. Raphael Lefi David, learned counsel.

Both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the application which they sought to adopt to form part of their oral submissions. However, it is very unfortunate that their written submissions are of no assistance to us because they have mainly dwelt on the merits of the dismissed application which is not the subject of the present application.

The reasons which prevented the applicant from appearing in Court on the material day are thus contained in paragraphs 3, 4, 5, 6, and 7 of the supporting affidavit. Basically, in his oral submission, Mr. Kanyana emphasized his averments contained in the said paragraphs whose contents we have briefly stated above. In the end, he attributed his inability to attend the Court session for hearing of the application to the poor reception by the Court officers and lack of proper guidance. He was thus prompted to file the present application on 29<sup>th</sup> November, 2021, to restore the dismissed application as stated above.

On the adversary side, Mr. David adopted also the affidavit in reply contending that, the applicant has not shown good cause for non-appearance on the material date, as stated in that affidavit in reply, particularly at paragraphs 4, 5, 6, 7 and 8. The respondent therefore, prayed that the application be dismissed with costs.

At the very outset, we wish to state that, the grant or refusal by the Court to restore the matter which has been dismissed for no-appearance of the applicant depends on the discretion of the Court, as provided under rule 63(3) of the Rules. It reads thus:

***"(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 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).

From the above quoted provision, the Court has discretion and powers to restore the dismissed application if sufficient cause is shown by the applicant depending on the peculiar circumstances of each case. See-

**Mwanza Director M/s New Refrigeration Co. Ltd v. Mwanza Regional Manager TANESCO and Another [2006] T.L.R. 329.**

In the instant application, the reasons that prevented the applicant's holder of powers of attorney from appearing before the Court are basically that, though he was outside Court room No. 1 at the High Court, he was not called for the hearing, a matter which prompted him to follow up with the authorities, only to learn that, the application had been dismissed for non-appearance of the applicant, as stated above.

With respect, upon considering submissions of the applicant and Mr. David, the issue for our consideration is whether the applicant has shown good cause upon which to warrant the grant of the application and thereby restore the application which was dismissed by the Court. According to the applicant's averments in the supporting affidavit, it is not in dispute that the deponent (the holder of the powers of attorney) was duly notified on 11<sup>th</sup> October, 2021 for the 1<sup>st</sup> November, 2021 hearing of the application.

What is in dispute is whether, at the time the application was dismissed the applicant was in the High Court corridors waiting to be called to enter Court room No. 1 where the Court conducted the session for the

hearing of the application. It has been averred by the deponent that, he and one Margaret Theodore, his sister, readily entered the Court premises on the particular day at 8.50 am and stayed near the door of Court room No. 1, but were not called until they found that the application had been dismissed for non-appearance. Additionally, he asserted that, following that dismissal, he complained to Dorini (the Court clerk) and later, to E.G. Mrangu (the Deputy Registrar) who were in Court on that date, as deposed at paragraph 7 of the supporting affidavit.

Nonetheless, we decline to accept the deponent's allegations for one main reason. It might have been difficult for him to get the affidavit of the policemen who advised him to keep waiting in the corridor. We are of the view that he could have sought and obtained affidavits of the said Ms. Dorini and Mr. E. G. Mrangu who he alleged to have met on that day to substantiate his allegations. Unfortunately, he did not do so. Most importantly, he did not even present an affidavit of his own sister who he claimed to have accompanied him on that day. The said omission, in our considered view violated the mandatory rule of evidence which requires that, in any contentious judicial proceedings, where the proof of existence of certain fact deposed in an affidavit needs evidence of the other person,

that other person has to swear an affidavit to supplement the allegations of the principle deponent, in this case Mr. Kanyana. We have reiterated that principle in a number of cases, including **Benedict Kiwanga v. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000, **Franconia Investments Ltd v. TIB Development Ltd**, Civil Application No. 270/01 of 2020 and **NBC Ltd v. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (all unreported). For instance, in **NBC Ltd** (supra) we stated that:

*"...an affidavit which mentions another person is hearsay unless that other person swears as well".*

Moreover, while it is acknowledged that, in considering to restore or refuse to restore an application previously dismissed, the Court takes cognizance of several factors including sufficiency or insufficiency of good cause shown by the applicant for his non-appearance on the material hearing date, we are of the view that promptness and diligence of the applicant in taking action is important. While it is not disputed that the current application was lodged within the limitation period stipulated under rule 63 (4) of the Rules, the applicant through the deponent may have so reported the incident immediately, as averred. However, the deponent has

not clearly demonstrated in the affidavit where and when exactly he registered his concern with Ms. Dorini and Mr. Mrangu, after he learnt that the application had been dismissed. If it was on that day, where and at what time he met them? The answers to those questions would have assisted the Court to show promptness and diligence of action taken by the applicant if he was really in the corridors of the High Court on that particular day. It is in this regard therefore, that the affidavits of those officers of the Court and that of Margaret are important.

In the sum, in the absence of proof that indeed, the application was dismissed for non-appearance of the applicant while the deponent was in the High Court corridors waiting it to be called out, we do not find any justification that the applicant, through her attorney has demonstrated that she was prevented by sufficient cause to appear when the application was called on for hearing on 1<sup>st</sup> November, 2019.

As we wind up, and for the interest of justice, we wish to stress that, when there is proof of service for the Court processes including appearance of the parties to the respective judicial proceedings, they are bound to appear in accordance with the directions or orders of the Court.



In the end, for the reasons stated above, we find the application to be devoid of merits and dismiss it. In the interest of justice, and having considered the circumstances of the application, we make no order for the costs.

**DATED at DAR ES SALAAM** this 18<sup>th</sup> day of May, 2023.

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 22<sup>nd</sup> day of May, 2023 in the presence of Mr. Raphael Balegele Kanyana (with Power of Attorney to represent the applicant and Mr. Raphael David, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**