

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 184/18 OF 2022

SABENA TECHNICS DAR LIMITED APPLICANT

VERSUS

MICHAEL J. LUWUNZU RESPONDENT

**(Application to set aside the dismissal order of the Court of Appeal
of Tanzania at Dar es Salaam)**

(Korosso, JA., Galeba, JA., And Makungu, JA.)

dated the 21st day of March, 2022

in

Civil Appeal No. 246 of 2020

RULING OF THE COURT

1st & 16th November, 2023

MAIGE, J.A.

This application has been brought under rule 112(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is for restoration of the proceeding in Civil Appeal No. 246 of 2020 which was dismissed on 21st March, 2021, for want of appearance on the part of the applicant. The application is premised on the affidavits of two advocates namely; Mr. Benson Adam Mahuna who represented the applicant at both the Commission for Mediation and Arbitration (the CMA) and the High Court, Labour Division (the Labour Court) and Mr. Amin Mohamed Mshana who took the conduct of the dismissed appeal. The two

affidavits shall herein after be referred to as the "first affidavit" and "second affidavit", respectively. Both the affidavits have been opposed by the affidavits in reply by the respondent.

Historically, the application traces its origin from a referral by the respondent to the CMA questioning the fairness of termination of his service at the instance of the applicant. The applicant defaulted to appear on the date when the matter was called before the CMA. As a result, the matter proceeded in her absence and at the end, an *ex parte* award was pronounced against the applicant. The status remained the same notwithstanding the applicant's attempt to have the *ex parte* award set aside by the CMA and her subsequent application for revision which was dismissed by the Labour Court.

Once again aggrieved, the applicant filed the dismissed appeal, the subject of the instant application. As rule 106(1) of the Rules requires, the applicant was obliged to, within 60 days of lodging the record of appeal, file a written submission in support of the appeal. Again, the applicant defaulted to file the respective submission within time. She applied for extension of time to file the respective submission but her application was dismissed for want of merit.

The above anomalies notwithstanding, when the dismissed appeal was called for hearing, the applicant defaulted to appear and, as a result, the appeal was dismissed. Just as it was in the previous proceedings, the applicant

contends that the default leading to dismissal of her appeal was justified and hence the instant application. This time around, it would appear, the applicant has timely filed her written submission in support of the application and she is urging the Court to set aside the dismissal order and restore the Civil Appeal No. 246 of 2020.

At the hearing of the application, Mr. Mohamed Muya, learned advocate appeared for the applicant whereas his learned friend Mr. Odhiambo Kobas appeared for the respondent. Before the hearing could commence, we, by the consent of both parties, allowed the counsel for the applicant to amend the title in the notice of motion and the supporting affidavits to reflect the correct citation of the decision sought to be set aside, which he did.

When invited to address us on the substance of the application, Mr. Muya adopted the notice of motion, affidavits and written submission and made a brief oral argument. He submitted, making reference to the affidavits that, the applicant's failure to appear on the date of hearing of the appeal resulted from the fact that advocate Amin Mohamed Mshana to whom the notice of hearing was served, was, at the time of service and in a subsequent ten days, so sick that he could neither appear in Court nor notify the applicant on the date of hearing. Citing the cases of **Christian Alphonse Tomas (As Administratrix of the late DIDASS KASELE) v. Saamoja Masingija**, Civil Application No. 1 of 2014, (unreported) and **Murtaza Mohamed Raza Viran and Another**

v. Mehboob Hassanali Versi [2023] TZCA 6 (7 February,2023, TANZLII), the counsel contended that sickness can be a sufficient cause for restoration of an appeal. He prayed, therefore, that the application be granted.

In his brief oral argument in opposition to the application, Mr. Kobas having fully adopted the facts in the respondent's affidavits in reply was of the contention that sufficient cause for restoration of the appeal has not been demonstrated. He submitted that, while the applicant associates his non-appearance with sickness of advocate Mshana who received the notice of hearing, paragraph 5 of the second affidavit suggests that advocate Mshana had ceased to represent the applicant at the date of service of the notice for want of proper instructions. That, he submitted, is a signification of serious negligence on the part of the applicant and her advocates because in the absence of negligence a notice of change of advocate would have been timely filed.

Mr. Kobas submitted further or in the alternative that; if at all advocate Mshana had ceased to represent the applicant, he would have, in the absence of negligence, refused to receive the document. Otherwise, he submitted, advocate Mshana would have right away delivered the notice of hearing to the applicant or her current advocates. Negligence of an advocate, the counsel submitted, has never been a justification for restoration of a dismissed

proceeding. Reference was made in the case of **Kepha Huzi v. Elizabeth Kutimwa** [2011] T.L.R. 197 in support of that proposition.

In the second place, Mr. Kobas submitted that, the alleged sickness of the applicant's previous counsel Mr. Mshana in so far as it departs from the attached medical documentation cannot be relied upon to justify restoration of the dismissed appeal. He clarified that, while in paragraph 6 of the second affidavit, it is asserted that advocate Mshana was exempted from duties for at least 10 days from 10th March, 2020, the medical document in exhibit SAB-8 of the said affidavit, indicates that the exemption was for at least 8 days from 12th March, 2020.

In his rejoinder submission, Mr. Muya reiterated his submission in chief and contended that, Mr. Mshana cannot be blamed for the omission to appear and or notify the applicant on the date of hearing because he was prevented by sickness so to do. On failure to file a notice of change of advocate, it was Mr. Muya's submission that, the same was a minor irregularity which can be cured by the overriding objective principle. He submitted, therefore, that, the cases cited by the counsel for the respondent are distinguishable and thus inapplicable in the instant application.

We have prudently heard the submissions both for and against the application and considered them in line with the notice of motion and the affidavits both in support and in opposition of the motion. We shall hereinafter

determine the merit or otherwise of the application. It is common ground that, for the Court to set aside an order dismissing an appeal and restore the same, the applicant is obliged by affidavit or otherwise, to establish that he was prevented by sufficient cause from entering appearance on the date when the appeal was dismissed. This is in accordance with rule 112(1) of the Rules. The reason why the applicant failed to appear on the date of hearing of the appeal is explained in the notice of motion in the following words:

"The notice for hearing was addressed and served to Mr. Amin Mohamed Mshana who at the time of service was sick to the extent of failing to discharge his normal duties for about two weeks and consequently failed to enter appearance and or to notify the Applicant of the new date for hearing."

From the above statement, it is manifestly apparent that, the applicant's justification for her none-appearance on the date of hearing is associated with the alleged sickness of advocate Mshana on whom the notice of hearing was served. The above statement, in our reading, does not suggest that the said advocate had, on the date of the receipt of the notice of hearing, ceased to represent the applicant in the dismissed appeal as alleged in paragraph 5 of the second affidavit or at all. Neither does it suggest that there was a new advocate instructed to prosecute the appeal in place of advocate Mshana as alleged in the second affidavit or at all. It follows therefore that, as the alleged new advocate has not deposed any affidavit to support the claim, the same remains

as a mere hearsay. This is in line with the position in **NBC Ltd. v. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (unreported).

Assuming, without deciding that, advocate Mshana had ceased to represent the applicant, yet both the applicant and the alleged new advocate could not be free from negligence and or inaction. We shall explain as we go along.

In paragraph 12 of the affidavit in support of the applicant's application for extension of time to file written submission which has been attached in the first affidavit and marked SAB-2, it is stated as follows:

"12. That upon loosing communication with Advocate Amini Mohamed Mshana, the Applicant instructed Advocate Frank Steven Mwalongo who made a follow up and found out that time to file written submissions in respect of the filed appeal had lapsed and Advocate Amin Mohamed Mshana had no proper instructions from the Applicant at the time when he was supposed to have filed the written submissions."

While the above statement connotes that advocate Mshana had ceased to represent the applicant before the expiry of the period within which the applicant was to file a written submission in support of the appeal, in accordance with the notice of motion in exhibit SA-2 of the first affidavit, the application for extension of time to file written submission was lodged on 15th October, 2020. It is common ground that, the notice of hearing of the appeal

was served to advocate Mshana on 10th March, 2022 and the date of hearing was on 18th March, 2022. Counting from 15th October, 2020, it is apparent that more than fourteen months had lapsed from the date when Mr. Mshana allegedly ceased to represent the applicant to the date when the appeal came for hearing. Under rule 32(1) of the Rules, therefore, since the dismissed appeal was lodged by Mr. Mshana on 17th July, 2020, the applicant was obliged to lodge with the Registrar notice of the change of advocate from Mr. Mshana to the alleged new advocate and serve the same on the respondent as soon as practicable. That has never been done and no reason for the omission has been assigned in both the affidavits in support of the application. In the circumstances, as advocate Mshana was in accordance with the record still in the conduct of the appeal at the date of service, the applicant cannot be heard complaining that she did not appear on the date of hearing because the notice of hearing was served on advocate who had ceased to represent her.

The overriding objective principle cannot, as requested by Mr. Muya, be used to address the anomaly. This is because one of the purposes behind the principle according to section 3B(1) (c) of the Appellate Jurisdiction Act, is "timely disposal of the proceedings in the Court at cost affordable by the respective parties." The restoration of an appeal whose dismissal resulted from unexplainable omission of the applicant and his advocate would lead to unnecessary prolongation of the proceeding at the detriment of the respondent. In our view, this will defeat the purpose behind the principle. We, therefore, do

not accept the said contention. At the end, we agree with Mr. Kobas that, the applicant and her advocate were negligent in conduct of the appeal and, negligence by both a party and an advocate cannot, as we held in **Jamal S. Mkumba & Others v. the Attorney General** [2023] TZCA 21 (15 February, 2023, TANZLII) be an excuse.

Yet the applicant associates her default to appear with sickness of advocate Mshana. There is no doubt that in fit cases, sickness of an advocate can be a sufficient cause for restoration of an appeal. The proposition in the notice of motion is that advocate Mshana was seriously sick for a period of at least two weeks from the date of receipt of the notice of hearing. Conversely, in paragraph 6 of the second affidavit, the alleged sickness is for a period of at least ten days. This, in our view, is an apparent variance between the notice of motion and affidavit. Since under rule 49(1) of the Rules an affidavit has to support the notice of motion, in the absence of an amendment of the notice of motion, the factual deposition in the affidavit cannot be taken as a proof of the assertion.

Again, on the same paragraph 6 of the second affidavit, it is averred that advocate Mshana was exempted from duties for a period of at least ten days. Quite differently, in the medical report dated 12th March, 2022 which is attached in the same affidavit as SAB-8 and referred in the same paragraph, the period of exemption from duties is at least eight days. There being no evidential

clarification of this apparent contradictions between a deposition and attached document and between a notice of motion and affidavits, we look at the applicant's story on the sickness of her previous advocate suspiciously. The same can thus not be relied upon to establish sickness of the said advocate.

In view of the foregoing, therefore, we find that the applicant has not demonstrated to our satisfaction that, she was prevent by any sufficient cause from appearing on the date of hearing of the appeal. The application is thus without merit and it is hereby dismissed with costs.

DATED at DAR ES SALAAM this 15th day of November, 2023

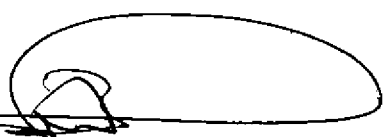
F. L. K. WAMBALI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Ms. Halima Semanda holding brief for Mr. Mohamed Muya, learned counsel for the Applicant and Mr. Michael Kabekenga, learned counsel for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL