

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO.86 OF 2002

AFRICA MUSLIMS AGENCY APPLICANT

VERSUS

SHEIKH HUSSEIN KILANGA & ANOTHER RESPONDENT

Date of Last order: 29/7/2009

Date of Ruling 11/08/2009

RULING

MLAY, J.

This is an application made by Chamber Summons for the following orders:

- a) *That the honourable court may be pleased to readmit the Applicants Application for leave to Appeal, dismissed for want of prosecution on 24th May 2007.*
- b) *Costs of the Application*
- c) *Any other relief as the honourable court may deem just and fit to grant.*

The Application is supported by the joint affidavit deposed to by the two Applicants, SHEIKH HUSSEIN KILANGA and SAID PEMBE. The Applicants have deposed as follows:

1. That we were respondents in high court Civil Appeal No. 86 of 2002, and Applicants herein hence well versed with the facts deposed hereunder.
2. That judgment in the above named Appeal was passed on 20th May 2005 where after we filed an application for leave to appeal to the Court of Appeal.
3. That the said application was scheduled for hearing on 15th day of February 2007, and we attended the court but we were told by the court clerk, one MASEBO that the case file had been transferred to another judge to be identified later.
4. That thereafter we were making follow ups with the Civil registry in order to know to which judge our case file had been transferred
5. That after several future follow ups, we decided to confront the said MASEBO asked of him the fate of our case file, who advised us to check with chief registry Officer (C.R.O) of Civil Registry.
6. That the Chief registry Officer and advised us that our Application had been dismissed for want of prosecution on 24th May 2007, and further advised us to pay for a copy of ruling, which we did.

7. That the dismissal of our application was not on account of the Applicants as we had been misled by the clerk as aforesaid.
8. That no notice of hearing of our application on 24th May 2007 was communicated to us hence the dismissal was unlawful.
9. That in the interest of full justice and Application for leave to appeal to court of appeal be restored for hearing on merits.
10. That all what is stated above is true t the best of our knowledge.

The application was ordered to be disposed of by way of written submissions at the request of the Applicants and the Respondent. In their written submissions. The Applicants repeated their allegation in the supporting affidavit, that "This application was scheduled for hearing on the 15th day of February, 2007 and indeed the Applicants attended the court".

The Applicants further contended that "while at the court the presiding judges court clerk informed the Applicants that the case had been transferred to another judge to be identified later". They claimed that "..after several follow –ups they came to realise that their application had been dismissed for want of prosecution. The applicants stated that they had "now come to court with this application for readmission of the aforesaid Application on the sole ground that the dismissal of the said Application was not due to the

Applicants own default but due to the misrepresentation from the judges clerk on MASEBO...".

They further prayed that the court exercise the courts discretion in their favour due to the fact that the Applicants are old men who do not know the a-b-c of the rigorous legal procedures and rules.

The Respondent submitted that the application is improperly before the court as the chamber Summons does not disclose any provision of the law on which the applicants are relying to move the court. The Respondent submitted that this is sufficient to dismiss the application. The Respondent further submitted that the discretion of the court cannot be exercised to grant the application on a matter which is improperly before the court. Lastly, the Respondent submitted that, "... the allegation that the applicants matter was dismissed because they were misled by the court clerk MASEBO is of no merit for want of supporter affidavit from MASEBO".

This application is for re-admission of an application for leave to appeal to the Court of Appeal, which was dismissed by this court on for want of prosecution, as the Application did not appear for the hearing. Order IX Rule 4 of the Civil Procedure Code Cap 33 RE 2002, allows an applicant to "apply for an order to set the dismissal aside, if he satisfies the court that there was sufficient cause for his non appearance".

The question for consideration in this application is therefore whether the applicants have shown to the satisfaction of this court, that "*there was sufficient cause for their non appearance at the hearing*" of the application on 24/5/2007. The applicants have alleged that they were present in court on 15/2/07 and that they were misled by the court clerk one MASEBO that their application has been reassigned to another judge of whom they would be notified later. The applicants did not seek or obtain the affidavit of the said court clerk to support their allegation. The record of the proceedings shows that when the application came up for hearing on 15/02/07 no party was present and the hearing was adjourned to 24/03/07 and notice of hearing was issued as a copy is in the record. Application was dismissed for want of prosecution, as the parties again did not appear. Even assuming that the applicants were in court on 15/02/07, if they in fact made a follow-up on their application as they have alleged in their joint affidavit, for the three months the application stood adjourned from 15/02/07 to 24/5/07, they would not have failed to learn of the hearing date. Be that as it may, the applicants allegation that they were misled by the court clerk, which is a very serious allegation, is totally unsubstantiated. The record of the proceedings shows that an order to have the record placed before the judge in charge for reassignment was made on 18/9/07, after the applicants had filed the present Application for readmission of the application for leave to appeal, which had been

dismissed. There was no order for reassignment of the matter to another judge prior to the filling of present application.

Since the applicants allegation has not been substantiated the applicants have failed to show good cause for their non appearance at the hearing of the application for leave to appeal, which was dismissed. The application is accordingly dismissed, with costs.

The respondent had also submitted that the application was improperly before this court for not citing the provisions of the law by which the applicants intended to move this court. This submission was sneaked in through the written submissions in response to the applicants submissions. As the applicants were not given the opportunity to respond to this submission and this court having found that the applicants have not shown sufficient cause, it is not necessary to decide this application on the ground of non-citation of legal provisions.

For the reasons give above, this application is dismissed, with costs.

J. I. Mlay,

JUDGE

Delivered in the presence of both applicants and in the absence of the Respondent this 14th day of August 2009. Applicants informed of the right to appeal to Court of Appeal.



J. I. Mlay,
JUDGE

11/08/2009.