IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY ARUSHA

AT ARUSHA

CIVIL APPLICATION NO. 58 OF 2017

(C/F HC Civil Review No. 1 of 2010, Civil Appeal No. 30 of 2006)

AMIEL KAAYA..... APPLICANT

VERSUS

CONSOLIDATED HOLDING CORPORATION..... RESPONDENT

RULING

DR. OPIYO, J.

Before me is an application preferred by the Applicant in which case he is seeking for restoration of the case which was dismissed for want of prosecution by this court Hon. F.H Massengi on 4th July, 2012. This application was proved ex parte following default by the Respondent's side to file counter affidavit despite being accorded with opportunity to do so by this court several times.

The Applicant in this application was represented by Vigilance Attorney. Owing to the ex parte order issued by this court as aforesaid, on the same date this court ordered that this application be disposed of by way of written submission in which case the Applicant Counsel was ordered to

have his written submission filed on or before 23/4/2018. Indeed this order was duly complied with as the Applicant's submission in support of the application was filed before this court on 23/4/2018 as per court order. In the written submission the Applicant's Counsel essentially submitted that the Applicant has been diligent towards the prosecution of his case, however his quest was cut short following non attendant of the matter by this court. He submitted that, he made close follow up to ensure that his case comes before the court for necessary order in vain. He went further to submit that it should be recalled that on 17/4/2012 the Applicant under legal service of Muno & Co. Advocates wrote a letter with reference No. MUCOA/AK/DR/1/2012 which was received by the court on 24/4/2012 informing this court that the matter has been pending for long time, praying the same to be scheduled for orders on 28/5/2012. That despite the letter being received by this court, there was no response either an act that left the Applicant in limbo.

That, the applicant continued to write letters to court vide letters with reference No. DR.S/AR/69/99,DR.S/AR/69/99 dated 15/4/2013 and 19/5/2014 respectively in which case he was reminding this court to schedule his case for necessary orders and all these letters were received and stamped by the court with no any response. That the Applicant was surprised to receive a letter from Deputy Registrar dated 23/11/2015 informing him that his case was dismissed for want of prosecution on 4/7/2012.

Basing on the above submission the Applicant's Counsel submitted that the Applicant was very vigilant in making a follow up for his pending matter even before the same was dismissed for want of prosecution as the first letter was addressed to this court 17/4/2012 without any success and the matter was dismissed. Basing on the above arguments the Counsel submitted that this court be pleased to find that the dismissal of Civil Review No. 1 of 2010 was not out of Applicant's negligence but was due to circumstances beyond his reach as indicated above.

Given the circumstances of this application, the main issue that needs to be considered by this court is to whether the arguments advanced by the applicant's Counsel pass the legal test that is needed to be taken into account by the court in application of this nature namely sufficient cause.
In the first place I agree with the Counsel for Applicant that what amount to sufficient cause has not been clearly defined by the court in our jurisprudence. This is because there is always a need to take into consideration a number of factors to reach at a conclusion as to what constitutes a sufficient cause in line with the spirit of the law such depends on special circumstances of each case.

In my view therefore, what constitutes sufficient cause is a good and logical reasons that prevented a party to appear before the court to prosecute or defend his/her case. This being the case, I am inclined to pose and ask myself as to what has presented as what prompted the Applicant to prosecute his case by way of writing letters instead of

attending the court and mark the dates on which his case was scheduled constitutes a good cause. This issue is pertinent to reflect because of the obvious reason that, no matter how long the case might been pending before the court, but normally the court sets a specific date for the next order unless the Applicant would have stated the case was adjourned indefinitely (***sine die***). Otherwise, I seen no any logic whatsoever for the party who was well represented by legal mind to pursue his case through letters instead of attending the court session as ordinarily done. In my view attending case session on the date fixed for any order is a mandatory duty to any party to the case and that duty cannot be substituted by writing letters to fix a date of party's choice. Such route is not supported by our laws in conducting court affairs to the best knowledge of the legal expert representing the applicant. This is an obvious flabbiness on the party and his representative, but unfortunate that is not an excuse or defence to the party. In the case **MANENO MENGI LIMITED AND THREE OTHERS VS FARIDA SAID NYAMACHUMBE AND THE REGISTRAR OF COMPANIES (2004) T.L.R. 391** *at pg. 396 where LUBUVA J.A. (as then was) had this to say:-*

> *"On the other hand, if Mr. Nassoro had exercised a modicum of diligence, he would have discovered that a drawn order of the decree was not included soon after 14th March 2003 when a copy of the proceedings was received. Had he done so, he would have taken necessary steps to rectify the position before the expiry of 60 days seeking extension of time from the court. As happened in this case,*

the appeal is clearly out of time in terms of Rule 83 (i) apparently because of Counsel failure to take action in time. ***It is now settled that an advocate's lack of diligence and in action is no grounds for circumventing the clear provisions of the rules"*** *(bold emphasis supplied)*

From the record, both the party and his advocate appeared on 27th day of April 2011 when the matter was fixed for mention on 20th July 2011. From there, they failed to appear in four consecutive dates, 20/7/2011, 12/10/2011, 15/12/2011, 22/3/2011 and 4/7/2011 when the matter was finally dismissed for want of prosecution. His claim is that he was writing letters to remind the court to finally determine the matter of fix the same for necessary orders, but those letters are nowhere to be traced in the file. Worse still, the alleged follow up letters were not attached to the application for restoration by the applicant, but came wrongly as an afterthought in the written submission. It is a trite law that written submissions is not part of evidence hence it cannot introduce or contain evidence relating to the matter at hand. So the letters annexed in the written submission are completely disregarded. In the case of Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement company Ltd v Mbeya Cement company Ltd and National Insurance Corporation (T) Limited (2005) TLR 41, Masati J. (as he then was) held that:-

It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded.

Based on that, it is my considered view that the applicant's act of resorting to a wrong move (writing letters, if at all) in following up his case in the court constitutes no sufficient cause for restoration of his application. In the upshot therefore, I find this application devoid of merit, thus it is accordingly dismissed. I make no order as to costs as the respondent did not defend the application.

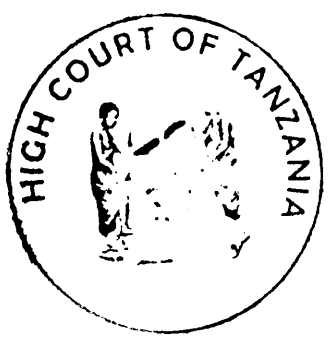
(SGD)

DR. M. OPIYO,

JUDGE

2/7/2018

I hereby certify this to be a true copy of the original.



DEPUTY REGISTRAR

ARUSHA

03/07/2018