

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 614 OF 2019

(Arising from the order of the High Court in Civil Appeal No. 26 of 2019 dated 09/10/2019 before Hon. B. Mutungi, J)

PAUL MELCHIORY MMASSY 1st APPLICANT

FAUSTA MELCHIORY MMASSY 2nd APPLICANT

VERSUS

EVARIST PETER SOKA RESPONDENT

RULING

11th May & 22nd May, 2020.

E. E. KAKOLAKI J

The applicants herein are seeking to set aside an order of this Court dismissing Civil Appeal No. 26 of 2019 made on the 9th day of October 2019 and re-admission of the appeal so as to be heard on merit. The application has been preferred under Order XXXIX Rule 19 of the Civil Procedure Code, [Cap. 33 R.E 2002] and any other enabling provisions of the law, supported by the affidavit of **Paul Melchiory Mmasy** 1st applicant and **Yudathade Paul** applicants' advocate. The application is vehemently opposed by the respondent who filed the counter affidavit sworn by Mr. **Onesmo Mathius Kinawari** learned advocate for the

respondent. Both sides are represented. The applicants are represented by Mr. **Yudathade Paul**, learned advocate whereas the respondent enjoys the services of Mr. **Onesmo Mathius Kinawari** learned advocate.

Briefly the applicants being aggrieved by the decision of the District Court of Kinondoni filed appeal in this court Civil Appeal No. 26 of 2019. The appeal was assigned to my sister Hon. B. Mutungi J. When the same came for hearing on the 09/10/2019 neither the applicants nor their advocate Mr. Paul appeared in Court as a result a dismissal order was entered for non-appearance of appellants. Following that order the appellants filed this application seeking for orders of setting aside the said dismissal order and re-admission of the appeal.

The issue for determination before the court is whether the applicants have advanced sound reasons that made them to default appearance sufficient enough for this court to grant the orders sought. When the matter came for hearing of the 31/03/2020 parties agreed to argue the application by way of written submissions and a filing schedule was issued to that effect and complied with save for reply by the appellants whose right was waived.

Mr. Paul who craved to adopt both affidavits in support of the chamber summons submitted that on the 09/10/2019 when the appeal was dismissed for non-appearance he was present at the court waiting place in the 1st floor together with 1st applicant. That, it was raining on that day and the court clerk did not announce using the normal loud speaker rather asked them to enter courtroom number 4 only to be informed that the appeal was dismissed for non-appearance of appellants. He is of the view that non-appearance was not caused by their negligence. And

that in order to do justice this court should not be bound by technicalities as provided under Article 107A(2) of the Constitution of the United Republic of Tanzania, 1977. Therefore rules should not be used to prevent justice he contended. He therefore submitted that the reasons given in both affidavits by the 1st appellant and himself is enough evidence and carries weight by disclosing sufficient reasons to move this court to grant the orders. He prayed to have the appeal restored and determined on merits.

Mr. Kinawari for the respondent was of the different view submitting that the applicants have failed to advance good reasons to warrant this court grant the sought order. Craving court's leave to adopt the counter affidavit by the respondent argued that the evidence in both affidavits in support of the chamber summons is so wanting for it lacks sufficient weight to be relied on by this court. That the assertion that the court clerk failed to announce via loud speaker due to rain was not proved as it required mentioning the name of that clerk and have his/her affidavit in support of that fact. Mr. Kinawari submitted that failure to mention the names and secure his/her affidavit in support of the alleged facts renders them mere allegations. To support his stance he cited the cases of **Issack Sebegele Vs. Tanzania Cement**, Civil Application No. 25 of 2002 (CAT-unreported) and **Christopher Mtikila Vs. Jacoba Nkomola & 3 Other**, Civil Case No. 278 of 1997 (HC-Unreported). On the application of Article 107A(2) of the Constitution and submission by the applicant that this court should not to be bound by technicalities, he responded that the said article should not be invoked under the circumstances of this court since it is not a shield for those who acted negligently like the applicants in this application. He cited the case of **Durra Abeid Versus Honest Swai**, Misc. Civil Application No. 182 of

2017 (HC-unreported). For the foregoing reasons he called upon the court to dismiss the application with costs.

Having considered both parties submission I am inclined to agree with Mr. Kinawari's contention that the reasons given by the applicants in both affidavits and submission in support of the application are insufficient enough to move this court to grant the prayers sought. The applicants are alleging that the court clerk on the 09/10/2019 did not announce through loudspeaker as a result instructed all to enter court room No. 4 only to be told that the appeal was dismissed for want of appearance. This is very serious allegation on the part of the court clerk and court as well which if proved measures have to be taken. However, as rightly submitted by Mr. Kinawari the names of the said court clerk were not disclosed nor is there any affidavit from the said clerk to prove to the court that he/she actually mistakenly failed to call in the applicants when the appeal was called for hearing before Hon. Mutungi J. Under section 110 of the Evidence Act, [Cap. 6 R.E 2019] any person who seeks to prove existence of certain fact must so prove by tendering evidence. It is also a rule of practice of this court that an assertion must be proved by an affidavit of a person alleged to have given the applicant information about the status of the case. See the case of **Christopher Mtikila** (supra). Similarly in the same case considering the need to mention the names of court clerk and have the affidavit sworn the situation which is faced in this matter this court had the following to say:

"Thus failure by the learned counsel to indicate the name of the court clerk who told him that the case would be re-assigned and was not before the trial judge, coupled with the fact that no such an affidavit of the alleged clerk, make

me conclude that what the learned counsel deponed and subsequently submitted are mere allegations. I am sorry to say that the Court of Law cannot act on mere allegations, because to do so, the sky would be the limit."

I fully subscribe to the finds of the court above and therefore associate myself to it. Applying the same in this matter which in all fours is more or less similar on the issue sought to be addressed I am of the firm opinion that the applicants' failure to name the court clerk who failed to announce the case and later inform them of the appeal results renders the purported evidence submitted to prove those facts through their affidavits mere allegation.

With due respect to Mr. Paul this court cannot act on mere allegations. The issue therefore is answered in negative. With regard to Mr. Paul's submission that this court be guided by the provisions of article 107A(2) of the Constitution of the United Republic of Tanzania, 1977, I am also at one with Mr. Kinawari that the same should not apply to cover the applicant who acted negligently. On this point is I am seeking guidance in the case of **Abubakari Ali Himid Versus Edward Nyelusye**, Civil Appeal No. 70 of 2010 (CAT-Unreported) citing the case of **Zuberi Mussa Versus Shinyanga Town Council**, Civil application No. 100 of 2004 (Unreported) where the applicability of Article 107A(2)(e) of the Constitution (supra) was discussed and the Court had this to say:

"...Article 107A(2)(e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the court from taking cognizance of statutory

rules of procedure which when properly employed held to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice ...”.

I fully subscribe to the position of the Court of Appeal in the above cited case which also under the principle of stare decisis is binding to this court. The law requires parties to enter appearance on the date the matter is scheduled for hearing. Once an event is scheduled to proceed with hearing on certain date it cannot be departed from, unless for exceptional reasons and that should be placed before the scheduled hearing date. Since in this court the applicants did not place before the court any excuse before the hearing date their non-appearance is counted as negligence and sloppiness on their part which cannot be excused by this court.

In the event and for the foregoing reasons, I hold that, under the circumstances of this application, the applicants have failed to demonstrate good cause that would entitle them extension of time as sought. The application is consequently hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 22nd day of May, 2020.


E.E. KAKOLAKI

JUDGE

22/05/2020

Delivered Dar es Salaam today on 22/05/2020 in absence of the both Applicant and respondent and in the presence of Ms. Lulu Masasi, Registry Officer.

Right of appeal explained.



E. E. Kakolaki

JUDGE

22/05/2020