

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

**CIVIL APPEAL NO 62 OF 2019**

*(Originated from Misc. Civil Application No. 323 of 2016 before the District Court of  
Ilala)*

**PAULO MASHIRO .....APPELLANT**

**VERSUS**

**JUMA KASSIM.....RESPONDENT**

**JUDGMENT**

**J.L.MASABO, J.**

The appellant herein was a judgment debtor in Madai Kata Na. 15 of 2015 before Ilala Primary Court. He appealed to the District Court of Ilala in Civil Appeal No. 29 of 2016. His appeal was dismissed for want of prosecution. To restore his appeal, he applied to have the dismissal order set aside. His application, Misc. Civil Application No. 323 of 2016 was dismissed on the ground that he failed to demonstrate a good reason to warrant setting aside of the dismissal order. He is now before this court armed with 6 grounds challenging this decision. His reasons are that:

1. The court erred in failure to consider that he had sufficient reasons to prove the application,
2. The court erred in not considering that he made follow ups with a court clerk who informed him that the original record was yet to be brought from the primary court;

3. The court erred in dismissing the appeal as whereas he was not summons to appear and defend his appeal;
4. The court erred in failure to consider his preliminary objection against the respondent's counter affidavit
5. The court erred in law and facts for not considering that the appellant will suffer irreparable loss is the application is denied.

The appeal was argued in writing. The appellant who was self-represented submitted that he deserved to be granted the application because he ably advanced sufficient reasons in proof that the failure to enter appearance on the date of hearing was not out of his own negligence. He was misled by a court clerk who informed him that he should wait as the case file was still in the primary court. Surprisingly he learned that the appeal was dismissed on 5<sup>th</sup> July 2016 although he had no notice that the appeal was scheduled for hearing/mention. He added further that, in fact, this appeal was dismissed even before he was given summons for the respondents. Therefore, it was in the interest that his application be allowed. He submitted further that the court erred by ignoring a preliminary objection which he had raised against counter affidavit filed by the respondent. His objection was that the counter affidavit was accompanied by a defective jurat which did not show the date when it was deponed contrary to section 8 of the Notaries Public & Commissioner for Oaths Act, [Cap 12 RE 2002]. Also, it contained extraneous matters and prayers contrary to Order XIX Rule 3(1) of the Civil Procedure Code Cap 33 RE 2019].

In reply, the respondent submitted that the application was rightly dismissed because the appellant not assign any good reason for failure to enter appearance on the date for hearing. He reasoned that the claim that he was waiting for summons is baseless because being the appellant he was supposed to follow up and prosecute his appeal instead of relaxing and waiting to be summoned by the courts as if he was the respondent contrary to the practice of this court. He also dismissed the arguments in respect of the preliminary objections and argued that if they were not determined, it was due to the appellants default appearance in court.

Having considered the submissions, there are only two issues for determination, namely did the appellant adduce a good reason for setting aside the dismissal order? was the preliminary objection raised by the appellant determined.

Re- admission of an appeal dismissed for want of prosecution is within the discretionary powers of this court exercised within the parameters of Order XXXIX rule 19 of the Civil Procedure Code which states as follows:

“19. Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.”

It is crystal clear from this rule that, readmission of appeal is predicated upon the applicant's demonstration that he was prevented by a sufficient cause from appearing when the appeal came for hearing. In the absence of such reasons, the appeal cannot be re-admitted. In the instant case, the appellant furnished two reasons: (i) he was informed by a court clerk that the lower court record was still in the primary court (ii) he was not served with notice for hearing. Having weighted these grounds, the court found them to be devoid of merit and dismissed the application.

I have carefully scrutinized the court record but I found no reasons upon which to fault the decision of the district court to which I fully subscribe. Let me add that, the claim that it was a court clerk who informed/mislead the applicants is devoid of merit because the name of the court clerk and his/her identity were not stated in the applicant's affidavit hence it was not possible to authenticate the appellants claim. Besides, it is principle of law that when an affidavit mentions another person as source of information, such person should depone a separate affidavit to confirm what has been deponed in the affidavit but this was not done. This rule has been articulated in numerous cases including in **Benedict Kimwaga vs Principal Secretary, Ministry of Health**, Civil Application No. 31of 2000, Court of Appeal of Tanzania at Dar es Salaam where it was held that:

“ If an affidavit mentions another person, then that other person has to swear an affidavit. However, I would add that that is so where the information of that other person is material evidence because without the other affidavit it would be hearsay. Where the information is unnecessary, as is the case here, or

where it can be expunged, then there is no need to have the other affidavit or affidavits.”

The argument that the appellant was not summoned to appear and prosecute his appeal is equally baseless because, as rightly held by the district court, the applicant herein being the one who moved the court was duty bound to follow up and prosecute his appeal. Summons are served to the Respondent not the appellant. Order XXXIX rule 12 of the Civil Procedure Code is very explicit on this issue and so is the practice of this court. In sum, the findings of the district court were correct as the appellant hopelessly failed to furnish a good cause for exercise of the discretion under order XXXIX rule 19.

Regarding the preliminary objection, having scrutinized the record, I have observed that, indeed the appellant raised two preliminary objections. I have noted further that the two preliminary objections were heard in writing and found meritorious by Luhwago, RM on 6/11/2017. A further scrutiny of the record reveals an irregularity to wit, upon the counter affidavit being found and held to be defective it was not expunged from the record. The court proceed to hear both parties. In my considered view, this was certainly wrong because, having found the preliminary objection to be meritorious and having upheld them, the next step was to expunge the counter affidavit from the record and the application be deemed uncontested.

In my settled view, whereas there was procedural irregularity through which the respondent was accorded an undeserving right to file written submission,

the same does not vitiate the findings of the court. As stated above, the exercise of the discretionary powers under Rule 19 is predicated upon demonstration of a good reason for failure to enter appearance on the date of hearing. Thus, even when the application is uncontested or deemed uncontested, the applicant's obligation to furnish a good cause subsists. Where, like in the instant case, no good cause is furnished, the application cannot be sustained simply because it was not contested.

In the end result, based on what I have endeavored to demonstrate above, I find and hold that the appeal is without merit and I hereby dismiss it with costs.

DATED at DAR ES SALAAM this 10<sup>th</sup> day of August 2020



A handwritten signature in black ink, appearing to read "J.L. MASABO".

**J.L. MASABO**

**JUDGE**