IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

MISCELLANEOUS APPLICATION NO 24 OF 2020

BETWEEN

1. CHACHA THOMAS_____1st APPLICANT

2. NYAGETARO MARWA_____2ND APPLICANT

3. PIUS OBASI_____3RD APPLICANT

4. GABRIEL MKAMI_____4TH APPLICANT

5. ANTONI NSIMBA _____5TH APPLICANT

VERSUS

PETER CHACHA MAKENDE _____RESPONDENT

(Arising from the decision and orders of the High Court of Tanzania at Musoma, Galeba J in Land Appeal no 25 of 2019 dated 23.04.2020)

RULING

Date of last order; 22.06.2020
Date of Ruling; 03.07.2020

GALEBA, J.

This application has been preferred under **order XXXIX rule 19 of the Civil Procedure Code [Cap 33 RE 2019] (the CPC)** praying for orders that;

> ***"1. That this honourable court be pleased to re admit the land appeal no 25 of 2019 which was dismissed for want of prosecution on 23rd April 2020***

before Hon. Galeba J, the said land appeal was filed at the High court of Tanzania at Musoma Registry.

2. Costs be provided for.

3. Any other relief/order(s) as this Honourable Court may deem fit and just to grant."

Briefly, the applicants are moving the court to set aside a dismissal order. The application is supported by a joint affidavit of all the 5 applicants. In seeking to back the above prayers, at paragraphs 3, 4, 5 and 6 of their affidavit, the applicants swear as follows;

"3. That we engaged advocate of the High Court of Tanzania Mr. Paul Obwana to represent us in the Land Appeal no 25 of 2019, and we agreed with him that, he will offer legal representation to finality.

4. That on 23rd of April 2020 the Land Appeal no 25 of 2019 was scheduled for hearing before Justice Galeba J and before 23rd April 2020 we communicated with our advocate Mr. Paul Obwana and he promised to attend the hearing as scheduled. Following the outbreak of global pandemic disease covid 19 we remained at home as we had our advocate who represent us in court.

5. That surprising on 23rd of April 2020 when the matter came up for hearing our advocate Mr. Paul Obwana was not in court and the Land Appeal no 25 of 2019 was dismissed for want of prosecution. The copy of the ruling is attached and marked as ML 1.

6. That the Land Appeal no 25 of 2019 was dismissed for want of prosecution on 23/4/2020 due to failure of our advocate Mr. Paul Obwana to appeal (sic) before the court, who was engaged to represent us and appear on our behalf. "

Essentially, those were the reasons advanced for this court to set aside a dismissal order. In reply the respondent disputed the above facts in the counter affidavit.

When this appeal came up for hearing, obviously there was nothing new from Mr. Ostack Mligo, learned advocate for the applicants. He submitted that the applicants did not appear, because there was corana virus threat, so his clients did not appear on the day that the appeal was dismissed. He cited the decision of this court in **MISELLANEOUS COMMERCIAL APPLICATION NO 55 OF 2018 BETWEEN PIMAK PROFESYONEL MUTFAK LIMITED SIRKETI VERSUS PIMAK TANZANIA LIMITED AND FARHA ABDULAH NOOR** wherein it was held that sickness of the applicant is a ground for setting aside a dismissal order. The respondent maintained that the application must be refused because there are no valid reasons advanced to show why their advocate did not appear.

With the above submissions of counsel this court is now comfortable to deal with the issue which needs resolution of this application; which is, did the appellant demonstrate sufficient reason for non-appearance of their advocate when their appeal came up for hearing on 23.04.2020. I will start with the law, in order to get illumination for the way forward. Order **XXXIX rule 19 of the CPC,** under which this application was preferred, states as follows;

> ***"19. Where an appeal is dismissed under subrule (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."***

The point I am looking for in the above provision is ***"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 ..., the Court shall re-admit the appeal."*** That is what I will be searching for in both the affidavit of the applicants and also in the submissions of Mr. Mligo.

With the benefit of the information from the affidavit and also the submissions, let me get to the real issue but with a rather brief background. Generally, dismissal of a case or an appeal is not an easy order to make. In this case when the appeal came up for hearing on 23.04.2020 in the presence of the respondent, before I could dismiss it I confirmed the status with my bench clerk. This is what part of the dismissal order reads;

> ***"..Before this court could make any orders, I checked with my bench clerk Mr. Jovian Katundu who informed me that he had personally called Mr. Paul Obwana learned counsel for the appellants on 22/4/2020 reminding him of the time and date of hearing of this appeal and that Mr. Obwana promised to appear for hearing today after he confirmed time with him on phone."***

In other words, the information in the affidavit is largely authentic. But does the affidavit give any reasons for the absence of Mr. Obwana who had not only instructions of the applicants to appear, but who also had confirmed both to the applicants and to the court registry that he would enter appearance in court to argue the appeal on 23.04.2020? It is important to note that Land Appeal no 25 of 2019 was filed by Mr. Obwana on behalf of 9 appellants including the

applicants in this application. Therefore any necessary communication details on the file were those of Mr. Obwana, who according to the applicants had full instructions to represent them from filing the appeal up to its final disposal which impression the court also had. That is to say Mr. Paul Obwana was 100% responsible with the appeal to the exclusion on the appellants because they had given him full mandate to handle their affairs in the appeal. In such circumstances, the appellants did not have an obligation to enter appearance, ***first*** because it was an appeal where no evidence was expected but ***second*** they were all comfortable that there was an advocate engaged to take care of their interests in the appeal. Therefore the fact that they remained home because of the threat of corona, is not a sufficient reason that made their advocate to fail to appear. In any even there was no affidavit from Mr. Obwana attesting to the reasons for his absence. One point, I must be clear at this point on consequences of a relationship of an advocate and his client when the latter gives him instructions. Once a party to a litigation instructs an advocate to represent or act for him in a court matter, the acts or omissions of the advocate instructed in respect to the matter he has instructions, binds the party who gave instructions to the advocate. To be contextual, the consequences of the absence of Mr. Obwana bind the applicants.

What this court has seen as a reason advanced by applicants and by Mr. Mligo is that their advocate did not appear, but that with due

respect is a fact we all know and it is even the reason why I had to dismiss the appeal. What I was looking for are reasons for nonappearance of their advocate. Regrettably no such reason was advanced.

In the circumstances, the applicants have not met the conditions set in **XXXIX rule 19 of the CPC, to** demonstrate sufficient reason which caused the applicants' advocate from appearing when the appeal was called for hearing. Based on the above discussion, this application is dismissed for want of merit.

DATED at MUSOMA this 3rd July 2020



Z. N. Galeba
JUDGE
03.07.2020

Court; This ruling has been delivered today the 3rd July 2020 in the absence of parties but with leave not to enter appearance.



Z. N. Galeba
JUDGE
03.07.2020