

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 100 OF 2019

(Arising from High Court Mwanza Civil Appeal No. 40 of 2018)

ATHUMAN NYENGE AND 5 OTHERS.....APPLICANTS

VERSUS

MUSSA MAKKA AND ANOTHERRESPONDENT

RULING

11th May & 20th July, 2020

TIGANGA, J.

On 25/06/2019, High Court Civil Appeal No 40 of 2018, which was originating from the Civil Case No 22/2016 of the Court of Resident Magistrate of Mwanza, was dismissed for want of prosecution following the prayers posed by Mr. Makwega learned Advocate, which was so posed following the non appearance of both, the appellants and their Advocates.

On 12/07/2019, the appellant in High Court Civil Appeal No 40/2019, filed this application, under Order XXXIX Rule 19 of the Civil procedure Code [Cap 33 RE. 2019] asking for an order for re admission of High Court Civil Appeal No 40 of 2018 which was dismissed on 25/06/2019, and an order that the costs of the application to follow event.



The chamber summons through which this application was filed was supported by the affidavit sworn by Mr. Mwita Emmanuel Advocate for the applicant, in which the grounds for the application were given, in that on 09th May, 2019 when High Court Civil Appeal No. 40 of 2018 was scheduled for hearing, he entered appearance holding brief for Mr. Mushobozi with instruction to proceed. However the appeal was adjourned to 25/07/2019.

He went on that on 25/07/2019 when Civil Appeal was scheduled for hearing the same was dismissed for want of prosecution on the instance that the Applicants and their counsel were absent.

He deposed that, on that date, he was instructed to enter appearance and proceed with hearing of HC Civil Case No. 40 of 2018. But on that very date he was having other cases to wit Land Appeal No 235/2018 and Land Appeal No 67/2018 before Siyani, J as well as Civil Appeal No 16/2019 before Hon. Mgeyekwa, J and all these cases were scheduled to start at the same time that is 09:00 am on that date.

That as he was awaiting the case to start, unfortunately to HC Civil Appeal No. 40 of 2019, the case before Hon. Siyani, J, commenced earlier than the case before Hon. Mdemu, J, so he had to attend the case which commenced earlier expecting to be done earlier, in those cases in order to attend Civil Appeal No. 40 of 2018.

It was further deposed by the deponent that, once he was done with Justice Siyani's cases, he immediately rushed to attend Civil Appeal No 40/2018 only to find that the case had already been dismissed for want of prosecution. He was informed by the Registry officer and confirmed after he was served with the dismissal order.



After such information he took initiative to secure the order which he was supplied on 03/07/2019. He said all dates (previous dates) which they did not attend, they had reasons as they were informed by cause lists that the honourable assigned judge would be absent and the matter would be adjourned through the Deputy Registrar.

Also that the dismissal of Civil Appeal No 40/2018 was occasioned due to the reasons beyond his control and it is in the interest of justice that the dismissal order be set aside so that the parties can be heard on merit.

The Application was counted by the respondent by filing the counter affidavit affirmed by Mussa Makka the respondent in which most the facts in the affidavit were noted and others were strongly disputed.

By the leave of the court the application was argued by way of written submissions. The submissions were filed as scheduled, the applicant in his submissions in chief adopted the content of the affidavit and asked the court, to use its powers under Order XXXIX Rule 19 of Civil Procedure Code (supra) to grant an order for re - admission if good cause which prevented the appearance of the applicant have been shown.

He relied on the authority in **Mwanza Director M/s New Refrigeration Co. Ltd vs. Mwanza Regional Manager of Tanesco Limited and another**, [2006] TLR 329 in what it was held that what amounts to good cause depends on the peculiar circumstances of each case.

While in the case of **Abdalla Magona vs. Hidaya Kawanisa**, Civil Application No. 304/2019 High Court at Dar es Salaam (unreported). Mutungi, J who quoted the authority of **Bahati Mussa Hamisi Mtopa vs**



Salim Rashid, Civil Application No. 112/2017 of 2018 CAT. Where it was held that, the applicant was prevented by sufficient cause from appearing when the application was called for hearing.

He actually asked this court to base on the principle in the case of **Fredrick Selenga and Another vs. Agness Masele**, [1985] TLR 99 where the Court insisted that whenever possible suit should be determined on merits. He prayed that, the application be allowed, the said HC Civil Appeal be re - admitted.

In the submission in reply, Mr. Makwega learned counsel for the respondent submitted that the applicants' submission were filed misconceivedly in the sense that, the application for re-admission was conceded by the respondent before Hon. Siyani, J, and therefore granted in the year 2019, (but Mr. Makwega did not mention the date when this application was granted). It was also his submission and that the order issued by this court on 21/04/2020 was directing the applicant to argue the appeal, but he did not do so, instead, he argued the application which had already been granted by Hon. Siyani, J. He prayed the failure to argue an appeal be taken to be tantamount to the non appearance of the applicant on the day of hearing the appeal he asked the appeal to be dismissed with costs.

In rejoinder the applicant conceded to have misconceived the order issued on 21/04/2020, and erroneously argued the application which has already been granted instead of arguing an appeal. He asked the court to be guided by section 3A of the CPC invoking an overriding objective principle and extend time for the applicant to argue an appeal.



The reply and rejoinder submissions have exercised my mind as throughout, I have understood that what is to be heard is the application No. 100/2019 not an appeal.

That necessitated me to look into the proceedings, and since Mr. Makwega, Advocate did not mention the date when the application was granted, then I had to pass through the proceedings of the whole case from when the application was filed to when I ordered for the hearing by way of written submissions.

The record shows that, the application was for the first time attended by Hon. Siyani, J, on 10/10/2019. When Mr. Julius Mushobozi Advocate appeared for the applicants and Mr. Stephen Makwega Advocate appeared for the respondents. On that date Mr. Mushobozi, asked for the other hearing date as he was attending the Court of Appeal meeting. Mr. Makwega did not object, the case was adjourned to 12/11/2019.

On 12/11/2019, Mr. Makwega asked for short adjournment as they were intending to settle, Mr. Mushobozi did not object, the application was adjourned for hearing on 20/11/2019.

On 20/11/2019, Mr. Ikupa Advocate appeared for the applicants, while Mr. Mshangi appeared holding brief for Mr. Makwega for the respondents. On that date Mr. Ikupa submitted that, they have received a letter proposing settlement of the matter, he prayed for time to settle the same. Mr. Mshangi replied that, "that is the position", the matter was adjourned up to 13/12/2019.

On 13/12/2019, Mr. Mwita Emmanuel Advocate appeared for the Applicants, while the Respondents were in person. Mr. Mwita Emmanuel



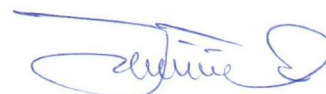
informed the court that they have failed to settle the matter, therefore prayed to proceed with the hearing of the application. The first respondent asked for the adjournment because their advocate was not in court on that day. The request was not objected by Mr. Mwita Emmanuel. Following that state of affairs the hearing was adjourned up to 23/01/2020.

On 23/01/2020, the matter was adjourned before Hon. James Karayemaha, Deputy Registrar in the presence of Mr. Mwanaupanga for Mr. Mushobozi and Mwanalyela Advocate who was holding brief for Mr. Makwega Advocate and it was fixed on 03/03/2020.

There after the matter was assigned to me and on 03/03/2020 the applicant were represented by Mr. Mwita Emmanuel while the Respondents were present in person where the Respondent asked for the adjournment because their advocate was indisposed. The application was adjourned up to 21/04/2020 a date on which the order to argue an application by way of written submission was made. In that order of 21/04/2020, to be specific, I ordered the application to be argued by way of written submission.

By this factual back ground, there is nowhere in the proceedings where the application was either expressly or implied by conceded by the respondents in person or through their advocate, and there is no order granting the application for re - admission of appeal No. 40/2018.

This means, the submission by Mr. Mwita Emmanuel for the appellant was properly placed, and filed in the proper contextual situation. That being the case, I therefore find the argument in the reply to the submission in chief to be misconceived and so the rejoinder.

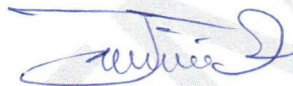


However, what I gather in those submissions is that the counsel for the respondents is not intending to object the application. That being the case I find no reasons, especially after taking into account the reason given in support of the application to refuse the same.

That said, the application for re - admission is therefore granted, High Court Civil Appeal No 40/2018 is hereby re - admitted as requested in the application.

It is so ordered.

DATED at MWANZA, this 20th day of July, 2020.



J.C. Tiganga

Judge

20/07/2020

Ruling delivered in the presence on line (via tele conference) of both counsel representing the parties.



J.C. Tiganga

Judge

20/07/2020