

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO 107/2019

(Arising from Misc. Application No. 71/2018, Misc. Civil Application No. 112 of 2018 and Civil Appeal No 42 of 2017, which Originate from Misc. Civil Application No. 14 of 2013 in the District Court of Nyamagana)

ROMULUS MSUNGA.....APPLICANT

VERSUS

SUKARI MARIBATE.....RESPONDENT

RULING

**06th May & 29th July, 2020
TIGANGA, J**

Misc. Civil Application No. 112/2018 was dismissed on 14/5/2019 for want of prosecution for non appearance of the applicant on the date when the applicant was scheduled for hearing.

Following that order for dismissal, the applicant immediately filed Misc. Civil Application No. 71/2019, which he later on withdrew with leave to re file within 14 days, the result of which this application was filed. The application has been filed by chamber summons under order IX Rule 4 and Section 95 of the Civil Procedure Code [Cap 33 R.E 2002] (now R.E 2019) and any other enabling provision of the law.



The order sought are that the Court be pleased to set aside the dismissal order and restore Misc. Civil Application No. 112/2018, the cost to be in the course and any other relief as the court may deem fit and just to grant.

The application was supported by an affidavit sworn by one Romulus Msunga, the applicant, who deposed that after instituting a case Misc. Civil Application No 112/2018, he engaged an Advocate one Adam Robert to appear and represent him.

Having so engaged an advocate, and while being sure that the advocate will be appearing in court, on 14/5/2019, he travelled to Musoma to attend official meeting, while the application was called for hearing before Hon. Siyani, J. He contacted his Advocate Mr. Adam Robert who promised to be present, and appear to represent him. Having that promise and assurance, from the advocate he had no worries as he engaged the advocate for purposes representing him.

Instead of going to the court, the advocate sent his legal officer who went and asked the advocate Mr. Mwita Emmanuel, and informed him that, Mr. Adam Robert was for the respondent, the facts that moved the advocate so holding brief to pray for the dismissal of the case due to non appearance of the applicant while in fact he was there representing the applicant.

Together with this application he also filed an affidavit of Yulitha Hezron a Legal officer who mistakenly misled the Advocate Mwita



Emmanuel leading to the dismissal of the application. It is his deposition that if the prayers are not granted he will suffer irreparable loss.

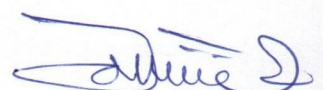
The Application was countered by the counter affidavit affirmed and filed by the respondent who asked the court to dismiss the application with costs as the dismissal was due to the negligence of the applicant himself.

By the leave of this court the application was argued by way of written submission. All submissions were filed as ordered, in which the counsel for the applicant reiterated the contents of the affidavits and asked the court to allow the application.

He submitted that the conducts of the applicant before dismissal showed commitment to prosecute the application and proves that what happened was by bad luck not by the negligence of the applicant.

He asked the court to be guided by the authority in the case of **Mangalji Vs Abdul Aziz Lalami and 2 others**, Misc commercial Application No. 126 of 2016 (HC) of Tanzania Mwanza in which it was held that in determination of this matter of the application of this nature the conduct of the applicant before dismissal must be taken into account.

He also cited the case of **Benedict Mumero vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported) CAT in which it was held that in establishing sufficient cause, a number of factors have to be taken into account including the conduct of the applicant before the order of dismissal.



He also cited the case of **Pimak Profesyonel Mutfak Limited vs Sirketi Pimak Tanzania Limited and Another**, Misc. Commercial Application no 55/ 2018 in which it was held *inter alia* that;


"It is generally established that sufficient cause has not been defined but it can be determined according to the circumstances of each case by looking at whether or not the application has been brought promptly".

The respondent in his submission in reply submitted that, the dismissal was due to the negligence of the applicant. He also asked for the application to be dismissed for want of merit as no reasonable cause has been shown.

That is makes a summary of the contents of the application and the arguments by the parties.

As submitted by both parties, for the application of this nature to be granted the party seeking to set aside the dismissal order and restore the application must prove to the court that he was prevented by the sufficient cause to appear on the date when the application was called for hearing.

In this application, the reasons given are that the applicant was not present but his advocate sent a legal officer who misinformed the Advocate whom she asked to hold brief, that they were for the respondent while in fact they were for the applicant. It was basing on that misconception the advocate holding brief asked his own case to be dismissed for want of prosecution.



It is the law that there is no set of facts which when given constitutes sufficient cause for non appearance. As held in the case **Pimak Profesyonel Mutfak Limited Vs. Sirket Vers Pimak Tanzania Limited and Another** (supra) that sufficient reasons depends on the circumstances of each particular case.

In this case, the applicant was actually present through an advocate, who was misled and asked for dismissal. That being the case, I find this case to be one in which the application may be granted. That said, I find the applicant has given sufficient cause, and had actually acted promptly to apply for re admission or restoration of the application after the dismissal was noted.

The Application is therefore granted, Misc Civil Application No 122/2018 is hereby re admitted and restored, costs in due course.

It is so ordered.

DATED at **MWANZA**, this 29th day of July, 2020.



J.C. Tiganga

Judge
29/07/2020

Ruling delivered in the presence on line of the counsel for the parties.



J.C. Tiganga

Judge

29/07/2020



ORIGINAL