

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISC. CIVIL APPLICATION NO. 9 OF 2018

(C/F PC. Appeal No. 1/2016 of the High Court of Tanzania at Moshi)

EZEKIEL NAJEMA.....APPLICANT

Versus

ZAKARIA MAVELA.....RESPONDENT

RULING

Last Order: 29th June, 2020

Date of Ruling: 29th July, 2020

MWENEMPAZI, J.

The applicant Ezekiel Najema moved this Court by way of chamber summons made under Order xxxix Rule 19 of the Civil Procedure Code, Cap. 33 R.E 2002. The application was supported by the applicant's affidavit. In the affidavit sickness of the applicant is stated as the reason for his non-appearance on the hearing of his appeal. Since the respondent was nowhere to be seen and or found as evident in the summons the court ordered for the application to be heard ex-parte. The applicant was also ordered to file written submission in support of the application. The applicant complied by filing his written submission timely.

Submitting in support of the application the applicant stated that when he was still following up on his appeal he got sick and he went to Korogwe District Hospital for treatment. According to the letter annexed as A-4 from

Ngwe District Hospital the applicant was admitted in that hospital from 20th March 2016 to 4th April 2016 then he was under close follow up for two weeks.

The applicant submitted further that the medical treatment did not cure him so he resorted to herbal treatment until he felt better then he made follow up on his appeal and discovered that it was dismissed on 24th August 2016 for want of prosecution. He expressed further that he desires to proceed with his appeal thus filed the present application praying for this court to rehear his dismissed appeal because he did not intend to be absent as he was sick.

I have gone through the applicant's affidavit and his written submission in support of the application. Now in determining this application, I will examine one issues and that is whether the applicant has availed this Court with good cause warranting grant of this application.

The law under **Order XXXIX Rule 19** of the **Civil Procedure Code, Cap 33 RE 2019** provides to the effect that the court may re admit the appeal of this nature where it is proved that the applicant was prevented by any sufficient cause from appearing when the appeal was called on for hearing. In view of this provision it is clear that for this application to be allowed the applicant need to advance good cause that led to his non-appearance in court when the appeal was called on for hearing. What amounts to good cause is not defined but is left to the court's discretion when determining the application.

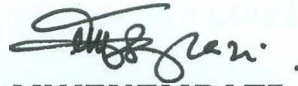
According to records, the petition of appeal was filed on 18th March 2016. On 23rd March 2016 an order was given for the respondent to be served

the matter was set for mention on 20th April 2016. On the mention date the respondent appeared and acknowledged receipt of the memorandum of appeal but the appellant was absent. This time the court set the date for hearing of the appeal and ordered for the appellant to be notified. On the date set for hearing all the parties were absent and the court ordered for summons to be issued. It followed another adjournment on 20th July 2016 where the hearing was adjourned until 24th August 2016. On that date is when the court decided to dismiss the appeal for want of prosecution.

The appellant in his submission stated that his absence in court was not intentional as he was sick. In proving that fact the applicant referred to the letter annexed in his affidavit marked A-4. In this letter it is explained that the appellant was undergoing treatment at Korogwe District Hospital until 4th April 2016 and was under close follow up for two weeks after he was discharged from hospital. After that the appellant alleged to have been under herbal treatment until 7th March 2018 is when he felt better. The appellant has not furnished any proof to substantiate that fact aside from his own statement in his affidavit. The court records show that on 15th June 2016 the court ordered for the appellant to be notified on the date of hearing and after that on the following date that is 20th July 2016 another summons was issued. The appellant neither entered appearance nor informed the court of his sickness despite being issued with summons to appear. Under normal circumstances it is not easy to believe a statement from the appellant two years down the line claiming that he was sick and undergoing herbal treatment. Although sickness could be a good cause for failure to appear in court but one needs to prove that he was sick by providing evidence to that effect instead of just alleging as the applicant

in did. It would suffice as a good cause if the applicant could submit proof of that fact.

In light of the above, I without any doubt find this application devoid of merits and consequently dismiss it with costs. It is so ordered.



T.MWENEMPAZI

JUDGE

29th JULY, 2020