

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION No. 112 OF 2018

*(Arising from the HC Civil Appeal No. 42 of 2017 before this court which originated from
Misc. Civil application No. 14 of 2013 of Nyamagana District Court)*

ROMULUS MSUNGAAPPLICANT

VERSUS

SUKARI MARIBATERESPONDENT

RULING

26th November & 09nd February, 2020

TIGANGA, J.

The Applicant Romulus Msunga filed an application through chamber summons made under Order XXXIX, Rule 19 of the Civil Procedure Code [Cap 33 R.E 2002] now [R.E.2019] seeking the following orders,

- a) This honourable court may be pleased for readmission of the appeal No. 42 of 2017 dismissed for want of prosecution on 14th August 2018,
- b) Costs of this application follow events.

The same was supported by the affidavit of the applicant, Romulus Msunga. The reasons for the application is that on 14/08/2018 when the appeal was dismissed for want of prosecution, he was admitted at Bungando Medical Centre suffering from Malaria and Typhoid. He deposed that he was so admitted from 12/08/2018 up to 16/08/2018. Immediately after he was discharged on 16/08/2018, he on 17/08/2018 made follow up to the bench clerk of Hon. Siyani, J who informed him that his appeal had already been dismissed for want of prosecution and that the record was showing that Advocate Mathew Nkanda was disqualified from practicing for want of practicing certificate.

That his failure to appear was attributed by being hospitalized at Bugando and failure of the advocate to inform him that he has been disqualified from practicing by failure to renew practicing certificate. He deposed that, it is in the interest of justice for the court to consider his application and grant it.

By the order of this court the application was heard by way of written submissions. Parties filed their respective submissions, the applicant filed his on 30th September, 2020 and the respondent was supposed to file his reply within 14 days from the date of service of the submission in chief but

he filed his reply on 19/10/2020. However there is no evidence of the date he was served with the submission in chief from the applicant, this means, the date on which he was served cannot be ascertained, in the circumstance the respondent therefore deserves to be given a benefit of doubt by assuming that he filed his submission within 14 days from the date of service.

In the submission in chief, the applicant submitted that, the provision upon which this application was preferred empowers this court to re admit the case which has been dismissed under Order XXXIX Rule 11(2) or rule 17 or rule 18 of the Civil Procedure Code [Cap 33 R.E 2019] where it has been proved that the appellant was prevented by any sufficient cause from appearing when the appeal was called for hearing. He submitted that, the appeal sought to be readmitted was dismissed in terms of Order XXXIX Rule 11(2). The reasons for re admission given in the affidavit filed in support of the application demonstrate the good cause for the applicant and his Advocate's absence. He cited the case of **Benedict Mumello vs Bank of Tanzania**, Civil Appeal No. 12 of 2019, in which the Court of Appeal of Tanzania held *inter alia* that what amounts to sufficient cause has not been defined. Further more, he cited the case of **Pimak**

Proffessional Mutfak Limited Sirketi Vs Pimak Tanzania Limited and Another, Misc. Commercial Application No.55 of 2018 in which it was generally held 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 other factors to be considered from the decided cases, a number of factors have to be taken into account in determining whether the appellant has given sufficient reasons. He also cited and asked the court to rely on the case of **Emmanuel R. Maira vs The District Executive Director Bunda District Council**, Civil Application No. 66 of 2010, where it was held *inter alia* that, health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike. While about to conclude, he urged this court to allow the application, as if the appeal will not be readmitted, the applicant will suffer irreparable loss and his right will be defeated. He reminded the court of the principle in the case of **Tanzania Air Service Ltd vs Minister of Labour & Attorney General** [1996] TLR 217, that justice must not only be done, but must be seen as done, he at the end asked that the application be allowed with costs.

In his reply, the respondent through Mr. Muhingo, Advocate, the submitted that the case of **Pimak Proffessional Mutfak Limited Sirketi Vs Pimak Tanzania Limited and Another**, Misc. Commercial Application No.55 of 2018, depict the true position of the law on what is to consider as the reasons for the readmission of appeal. He submitted that the reasons given for failure to appear on 14/08/2018 by the applicant himself and his advocate shows a gross negligence on the part of the Advocate for his failure to renew the practicing certificate. He also said that, as the applicant was aware that his advocate is bared from practicing, he was supposed to send another person to come and inform the court that he was sick and was admitted to Bugando Medical Centre. His failure cannot amount to good cause. The respondent prayed that the application be dismissed for want of merits.

Having summarized at length, the contents of the application and the arguments by the advocates for both parties, I find as correctly submitted by the counsel for the applicant, that Order XXXIX Rule 19 of the Civil Procedure Code (supra) empowers this court to re admit the appeal dismissed under Order XXXIX Rule 11(2) or rule 17 or rule 18 of the Civil Procedure Code [Cap 33 R.E 2019] where it has been proved by the

appellant that he was prevented by *any sufficient cause* from appearing when the appeal was called for hearing and got dismissed for want of appearance.

It is also true as rightly submitted by both counsel that, there is no hard and fast rule of what sufficient cause is, however, it is in the discretion of the court to assess depending on the circumstances of each case and the reasons given.

Now the issue is whether in the circumstances of this case and the reasons given, there was sufficient cause to warrant for readmission of the appeal. In this application, the reasons given by the applicant was his sickness which resulted into his admission in hospital from 12/08/2018 to 16/08/2018. This means on the date when the case was dismissed that is on 14/08/2018 he was still in hospital. The affidavit and the argument in support of the application also are that, even his advocate could not attend because he was barred to practice as he had not renewed his practicing certificate. The issue for determination is whether these reasons constitute sufficient cause. To support the reasons of sickness the applicant attached a copy of letter from Bugando Medical Center proving that the applicant was sick and was admitted from 12/08/2018 up to 16/08/2018.

In this case the strength of the application is built on the documents proving that he was sick and admitted in hospital. There is no fact to the contrary, it has been said so many times that affidavit is itself evidence, if believed it needs no further proof. In this application the letter annexed as GLA1 is amplifying the affidavit, as it is a letter from the proper authority I find no reason to disbelieve it. The affidavit and its annexure prove that he was prevented by sickness. That constitutes sufficient cause which prevented him from appearing on the date when the appeal was called for hearing.

Further to that, in paragraph 4 of the affidavit filed in support of the application, it has been deposed that Advocate Mathew Nkanda who was representing the applicant was prevented to appear because he had not renewed his practicing certificate. As earlier on pointed out the applicant has given sufficient cause which prevented him from appearing in the case when the appeal was called for hearing and got dismissed for want of prosecution, the application is allowed as prayed. Costs to follow events.

It is so ordered.

DATED at MWANZA, this 02nd December, 2020

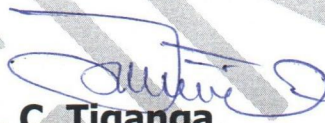


J. C. Tiganga

Judge

09/02/2021

Ruling delivered in the open chambers in the presence of the counsel for the applicant, but in the absence of the respondent.



J. C. Tiganga

Judge

09/02/2021