

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
MISC. CIVIL APPLICATION NO. 78 OF 2021

(Arising from the judgment of the district court of Chato district at Chato, before Hon.
E.A Kagimbo – RM)

ROJAS FORTUNATUS APPLICANT

versus

EVA LUDIGIJA RESPONDENT

RULING

26th & 30th July, 2021

RUMANYIKA, J.:

Pursuant to ruling of this court (Mgeyekwa, J) dated 24/6/2021, where, but following an incompetency based preliminary point of objection the court struck out Civil Appeal No 18 of 2021, and now that one was time barred, the application for extension of time within which Rojas Fortunatus (the applicant) to re file appeal it is supported by affidavit of Beatrice Paul Meivukie whose contents the learned counsel adopted during audio teleconference hearing on 26/07/2021. Ms Catherine learned counsel appeared for Eva Ludigija (the respondent). I heard them through mobile numbers 0753377116 and 0766548545 respectively.

In a nutshell, Ms. Beatrice learned counsel submitted that now that initially the within time filed appeal was, for good cause struck out, and for that reason the applicant was now back in court, sufficed, in favour of the applicant the ground to dispose of the application. That is it.

Having adopted contents of the counter affidavit, Ms. Catherine Mohaigwa learned counsel submitted that following the point of objection raised by the respondent's counsel and the applicant prayed to withdraw it, the court struck it out with costs yes, but contrary to what was deposed in the supporting affidavit the applicant had no express leave of the court to re file the matter but for the untrue affidavit, on that basis only the application was liable to be dismissed with costs (case of **Ignatio Messina v. Willo Investment SPRL**, Civil Application No. 21 of 2001 (CA) unreported).

That the appeal would not have been struck out but for the advocate's negligence which nevertheless constituted no sufficient ground (case of **Musa Lusangi & Another v. Anna Mkomea**, Civil Application No. 188/17 of 2019 CAT at Dar es salaam unreported).

The issue, and the bottom line is whether the applicant has assigned a sufficient ground for extension of time. Whether improperly or properly, no doubts end of the day, therefore without the court going onto merits of it the appeal was struck out. There is no wonder the appellant (now the applicant) was, through the instant application back in court whether or not the latter had court leave it is immaterial unless it was established that the withdrawal was induced by fraud or mistakes. It would have been a different scenario which is not the case here, if the applicant had, without leave to refile withdrawn the appeal (see the case of **Sijaona Kayonda @ Triphon v.R**, Criminal Application No. 71/04 of 2020 (CA)) unreported.

It therefore should always be known to all that unless one was constructively time barred, in which case if need be one would only have had applied for extension of time, once a matter was, for some reasons struck out, the applicant needed no leave to re file it he in fact may wish to just come back as of right. On that one therefore, with greatest respect Ms. Catherine learned counsel could not be more incorrect.

The application is granted. Each party shall bear their costs. It is so ordered.

Right of Appeal explained.

S. M. RUMANYIKA

JUDGE

28/07/2021

Ruling delivered under my hand and seal of the court in chambers
this 30/07/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

30/07/2021