

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

MISCELLANEOUS CIVIL APPLICATION NO. 04 OF 2021

(Arising from PC. Civil Appeal No. 06/2020, in the High Court of Tanzania at Songea, Originating from Civil Appeal No. 04/2020, District Court of Songea, Original from Civil Case No. 13 of 2020 Nakapanya Primary Court)

HASSAN ABDUKARIM ISMAIL APPLICANT

VERSUS

SAID ADAM MTUPI RESPONDENT

RULING

Date of Last Order: 31/8/2021

Date of Ruling: 23/09/2021

BEFORE: S.C. MOSHI, J

This is an application for restoration of an appeal. The applicant is seeking restoration of Pc Civil Appeal No. 06 of 2020 which was dismissed on 20th April 2021 for want of prosecution and non appearance of the appellant. The application is made under Rule 17 of the Civil Procedure (Appeal in Proceedings Originating in primary courts) Rules G.N No. 312 of 1964 and is supported by affidavits of Hassan Abdugarim Ismail and Yusuph Kaukuya.

During the hearing of this application the applicant was represented by Mr. Zuberi Maulid, advocate whereas the respondent appeared in person.

Mr. Zuberi prayed the court to adopt the affidavits and submitted among other things that applicant's failure to attend on 20/04/2021 was not due to his negligence as he was always diligent following up the proceedings of the appeal. He had engaged an advocate Mr. Yusuph Kaukuya who advised him that the advocate may appear on his behalf and that even if he(applicant) didn't come to court the hearing of the appeal may proceed. The applicant wished to be present at the hearing, he told his advocate that when the appeal is ready for hearing he should inform him.

He argued that, the appeal was set to come for hearing for first time on 08/12/2020. The record shows that applicant's advocate did attend. It was adjourned and set for hearing again on 09/03/2021. On saturday, 6th March, 2021 the applicant was informed by his advocate that he was preparing to travel for hearing of the case on 09/03/2021 however, he was not feeling well, he could not travel. He was therefore to ask another advocate to hold brief for him so they could get another hearing date. Mr. Kaukuya advised the applicant not to travel as the case would not be heard on that date. He contacted Mr. Makame Sengo, and asked him to

hold brief for him on 09/03/2021 and inform the court accordingly. He said that, the application was adjourned and fixed for hearing on 20/4/2021. After a week the applicant called his advocate by phone asking for a next hearing date so he could prepare to travel. It was Mr. Zuberi's submission that, the advocate mistakenly told the applicant that hearing would be 22/04/2021 instead of 20/04/2021. Mr. Makame, advocate, called Mr. Kaukuya and informed him of the date of hearing however, when recording in his diary instead of recording 20th April, 2021, he mistakenly recorded 22nd April, 2021. That is why he informed his client that it was 22/04/2021.

On 22/04/2021, the applicant and the advocate, believing that it was hearing date, the applicant was informed by the advocate that he couldn't appear on that date. Luckily, the applicant attended. He waited outside court for very long time to be called; he was not called. He later went to the registry to ask. They orally told him that the appeal was on 22/04/2021 and that it was dismissed because the applicant and his advocate did not attend. Therefore, the applicant requested for a copy of the order and confirmed that indeed the appeal had been dismissed.

It was Mr. Zuberi Maulid's submission that, in the circumstances it is evident that the applicant acted diligently in prosecuting his case. All happened due to his advocate's human error when recording the next

hearing date in his diary. He said that, there are many decided cases that decided that advocate's negligence may not amount to sufficient reasons however, there are human errors done by an advocate which the court may consider to be sufficient reason; he prayed that, to see that justice is done let the cases be heard inter – parties. He cited the case of **Fredrick Selenga and another vs. Agness Masele**, (1983) TLR 99. He added that, even if it's granted the respondent won't suffer any irreparable injury, in this regard he cited the case of **Jene Kimani V. M.C. Cornel and another**, (1966) EA 547.

He prayed the court to be guided by the decision reached in the case of **Bahati Musa Hamis Mutopa V. Salum Rashid**, Civil Application No. 112/07/2018, Court of Appeal sitting at Dar es Salaam page 7 – 12.

In reply, the respondent opposed the application submitting that the applicant being the one who brought the appeal in court was responsible to keep proper records to avoid unnecessary disturbance. His failure to notify the court in writing that he would not appear led to wastage of time and loss of respondent's resources.

He said that, the fact that his advocate did forget the date is against advocate's conduct. The advocate was supposed to have a diary for noting the dates. He ended his submission by praying the court to dismiss the

application with costs and to maintain its dismissed order which was in accordance to law and not favour.

The issue to be determined is whether the applicant has adduced sufficient reasons for his absence. It is settled law that an applicant seeking to set aside a court order dismissing the suit or an appeal for want of prosecution, has to furnish sufficient reasons for his non- appearance. Rule 17 of the Civil Procedure (Appeals in Proceedings originating in Primary courts) Rules G.N No. 312 of 1964 clearly provides this position. It states: -

"17. Where an appeal has been dismissed under rule 2 of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for re-admission of appeal; and if the court is satisfied that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing it may re admit the appeal on such terms as to costa or otherwise as it thinks fit."

It is self- evident that applicant's only ground of his absence is human error committed by his advocate who misled him on the date set for hearing instead of telling him the case was scheduled on 20/04/2021 he told him that it was 22/04/2021. The immediate issue is whether human error committed by the applicant's advocate may amount to sufficient cause. In the case of **Bahati Musa Hamis Mtopa vs. Salum**

Rashid (supra), it was held that human error committed by advocate who misled the applicant by telling him that the application would be heard in Mtwara and not in Dar es salaam taking into consideration that at all time the application was heard in Mtwara was sufficient cause to warrant re admission of the application and the court went further to state that if the application is granted no serious damage will be done to the respondent who was also not in attendance when the reference was dismissed.

I have perused the applicant's and his advocate's affidavits in support of the application, the applicant has explained why he made no appearance on 20/4/2020 when appeal number 6 of 2021 came for hearing. Paragraph seven to thirteen are quoted hereunder: -

7. That after a week, I had to make a call to my advocate for feedback regarding to scheduled hearing date so as to make preparation for attending during hearing, then informed me that the said appeal scheduled on 22/04/2021 for hearing of which the same my advocate guaranteed me to appear on that particular date if he will be physically fit.

8. that coming on 22/04/2021 being the date of hearing my advocate Yusuph Kaukuya further informed me that he was still indisposition, hence he will not manangae to appear before the court and the same directed me to appear.

9. that eventually on 22/04/2021 being the hearing date per information from my advocate, I managed to appear personally before the court and waited for so long for calling of the matter but was in veil and upon inquiring at the court registry on the status of the said case, I was orally informed that the said appeal was scheduled on 20/4/2021, and that the same was dismissed with costs for want of prosecution and nonappearance.

10. That, thereafter I requested to be supplied with the copy of the said order for further legal procedure and very late on May 2021 I was supplied with copy of the said order. a copy of dismissal order is herein annexed and marked as annexure A-1 from which leave of this court is craved for it to form part of this affidavit.

11. That, failure to appear during hearing of appeal was not done deliberately rather due to reasons which was out of my control as shown herein above.

12. That I am having interest in appeal, and it is just if I will be afforded an opportunity of the right to be heard for, since there is a great chance for the appeal to succeed due to some irregularities in the decision interslis being the two court below decided the matter based on illegal contract and the same decide the matter contrary to the case brought before it.

13. That it is for the interest of justice that the prayers in chamber summons be granted to facilitate

substantive justice for hearing the matter on merits unless it will be great injustice for hearing the matter on merits unless it will be great injustice by being condemned the applicant herein unheard and great inconveniences and considering that if the application will be granted no any harm or loss will be suffered by the respondent herein.

From the paragraphs of the affidavit above, the applicant has shown that the reasons for his nonappearance was because of human errors committed by his advocate as he improperly recorded the date set for hearing. As rightly submitted by Mr. Zuberi it is in the interest of justice and the practice of the court that suits are determined on merits unless there are special reasons to the contrary; see the case of **Fredrick Selenga vs. Agness Masele** (supra). In the case of **Jesse Kiman vs. MC Cornell and Another** (supra), it was decided that application should be granted if the respondent would neither be prejudiced nor suffer any irreparable injury.

Now, the question is will the respondent be prejudiced in any way if the application is granted. The respondent complained of time and resources wastage. Evidently, the record shows that the respondent has been appearing in court all the time. It is only just that the applicant

should pay the costs of this application as will be assessed by the taxing master.

I find that the applicant has been able to make out sufficient reason for non appearance and for non prosecution. In the circumstances it is just and fair to have Civil Appeal No. 6 of 2020 determined on merit between the parties. That said and done I set aside the dismissal order and restore Pc. Civil Appeal No. 06 of 2020.

It is so ordered.

Right of Appeal Explained




S.C. MOSHI

JUDGE

23/09/2021