

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 652 OF 2019

LABAN R. MAMPAGAWA ----- APPLICANT

VERSUS

BABU A. SOLANKI ----- 1ST RESPONDENT

MISKY BABU SOLANKI ----- 2ND RESPONDENT

KIBAHA TOWN COUNCIL ----- 3RD RESPONDENT

Date of last order: 17/06/2021

Date of Ruling: 13/08/2021

R U L I N G

MGONYA, J.

This is an application made under **Order XXXIX Rule 19 of the Civil Procedure Code Cap. 33 [R.E. 2019]** whereas the Applicant before this Court is seeking for:

- a) This Honorable Court be pleased to Re – admit Civil Appeal No. 1103 of 2018 which was dismissed by this Honorable Court (Hon. L.E Mgonya) on 05/11/2019.***
- b) Cost of this Application be provided for.***
- c) Any other order(s) that the Honorable Court may deem fit and just to grant.***

The Application at hand was made in support of an affidavit sworn by one **VICTOR KIKWASI**, Advocate for the Applicant. When this application was called for appearance this Honorable Court ordered the same be heard by way of written submissions and a schedule in that respect was provided by the Court. Upon compliance of the same, it is here then that the application is ready for determination.

The Applicant submits before this Court that he seeks for readmission of **Civil Appeal No. 113 of 2018** that was before Hon. L. E. Mgonya and was dismissed on **05/11/2019**, which originates from the District Land and Housing Tribunal for Kibaha at Kibaha. Counsel for the Applicant Mr. Victor Kikwasi states that on the material day, the matter was dismissed he was assigned three cases to appear for his clients at different time before two different Judges.

Mr. Kikwasi states that he was to appear before Hon. L. E. Mgonya at **09:00 am**, for Mention on **Civil Case No. 130/2016** of which he did. After that he was to appear before Hon. Mgeta, J. at **10:00 am**, for mediation in respect of **Civil Case No. 33 of 2017** of which he did. Thereafter, he was to appear again before Hon. L. E. Mgonya at **11:00 am**, for hearing of **Civil Case No. 113 of 2019**.

It is from the above schedule of the day the Counsel for the Applicant states that, while in chamber of Hon. Mgeta J.

attending a mediation session that the same prolonged for a long time and extending to **11:00 am**, the same caused his nonappearance before Hon. L. E. Mgonya for hearing of **Civil Appeal No. 113 of 2019**. Therefore, the matter was called and, in his nonappearance, the same was then dismissed. Soon after that on the **08/11/2019** he requested for copies of the dismissed order and the same was supplied to him and by the **02/12/2019** this application was filed in Court.

It is the Applicant's Counsel claim that for the interest of justice, the icon that this Honorable Court stands for, and due to the fact that there was no inaction on the part of the Applicant; and for the interest of rule of natural justice and the fact that the application was promptly filed, the discretion of this Court is sought to warrant a re-admitting order for **Civil Appeal No. 113 of 2019**.

Countering the Application, the 1st and 2nd Respondent's Counsel strongly opposes the application since the Law Associates is a well-known big firm having so many Advocates. Therefore, stating that the Applicant was assigned with three cases was an afterthought and the Counsel for the Applicant has not stated before this Court the whereabouts of other Advocates as to that material day.

Further, Counsel for the Respondents reiterates that it has been the Conduct of Advocate and the Applicant in **Civil**

Appeal No. 113/2017 not to appear on their appeal on various dates without any reason furnished to the Court as to their non-appearance. Further it has been stated that, it is in the records that the Applicant and his Counsel have not appeared in their case for three consecutive days and the Applicant either has not sworn an affidavit to state his whereabouts on the date the matter was dismissed. The dates that the parties did not appear have been identified to be **04/09/2018, 13/02/2019, 11/04/2019, 10/09/2019, 16/10/2019** and **05/11/2019** the day the appeal was dismissed.

The 3rd Respondent however, states that an application for restoration is within the discretion of the Court of which the same has to be exercised judiciously by the existence of a sufficient reason for granting such an application.

Further the 3rd Respondent further avers that the Court have through various cases established what is sufficient reason, and what constitutes to sufficient reason which was extensively discussed in the case of **MELANE VS SANTAM INSURANCE 1962 (4) SA 531** in South Africa.

It is the 3rd Respondent's Counsel submission that the Applicant has not shown any illegality as stated in his pleadings. What the Applicant has submitted are facts which

elaborate this Application and analysis of evidence in the main cause but not point of law but general findings of the fact.

Having gone through the application, replies and submissions of the parties, this Court is at a position of determining the instant application as hereunder.

It is the Applicant's prayer that this Court re admits the dismissed appeal for the reason set forth by this same Court being nonappearance. It is well known that the business of the Court is to be respected with in accordance to Court orders. It is due diligence for one to find means to notify the Court whenever one sees signs of failure to appear before a Court as scheduled by a Court order.

Moreover, it is the Advocates duty to be attentive and kin whenever attending a Court session so as to grasp properly the dates announced for next appearance. This is for the benefit of both parties so that the correct dates are not missed since such an action would automatically cause non appearance if the date was not grasped properly.

In the instant case, the above circumstance occurred and lead to nonappearance by Counsel for the Applicant on the date the matter was scheduled for appearance. The Counsel for the Respondents claim that the Applicant's act was habitual and the reason stated to be cause of the nonappearance was

an afterthought and hence does not qualify to make a sufficient reason.

This Court from the above is of the opinion that from the nature of the dismissed case being a Land Case and is before this Court on appeal, then the same is advocated by this Court to be heard on merits so as to grant justice to the parties. All of the above is in the desire to see justice to have been done and a conflict solved once and for all rather than existence of endless litigations.

However, Advocates representing their clients are urged to always take proper records of the orders pronounced in the Court by Judges or Magistrate so as to do away with confusing of dates that can led to nonappearance in Court when the matter is called. It is also urged that whenever Advocates find it barred by any obstacle to enter appearance, due diligence ought to be taken to into action to inform the Judge or Magistrate on failure to appear before them and not to assume that the obstacle faced would amount to sufficient reason for nonappearance.

In the event therefore, and from all that has been stated above, **the dismissal order of Civil Appeal No. 113 of 2018 is set aside and the same be readmitted and proceed from where it ended.**

It is so ordered.

Each party to bear their own costs.

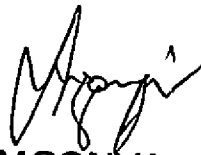


L. E. MGONYA

JUDGE

13/08/2021

Court: Ruling delivered in chambers on 13th day of August, 2021 before **HON. C. M. KISONGO, DEPUTY REGISTRAR** in the absence of Applicant, 1st and 2nd Respondents and presence of Mr. A. John Richard for R. Methew, Advocate for 3rd Respondent and Mr. Richard, RMA.



L. E. MGONYA

JUDGE

13/08/2021