

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO 170 OF 2018

(Originating from PC Civil Appel No. 38/2017)

JOHN NZALALILA MANUMBAAPPLICANT

VERSUS

MWANAIDI SHABANIRESPONDENT

RULING

22/06/2021 & 02/07/2021

KAMUZORA, J,

This application was brought by John Nzalalila Manumba praying for order of this court setting aside the dismissal order issued in the main appeal; PC Civil Appeal No 38 of 2017. On the date set for hearing of the appeal, the applicant who was the appellant in that appeal did not enter appearance and the appeal was dismissed for want of prosecution hence the present application brought by way of chamber summons supported by the affidavit of the applicant.

In his affidavit the main reason deposed by the applicant for non-appearance is that, he was making follow up of the summons to the High Court for purpose of serving the respondent but he was informed that the case file was missing. He came to discover later that the case was

dismissed for want of prosecution. To him failure to appear was not intentional but failure by the court to issue summons on account that the case file was missing.

When the matter was set for hearing, both parties appeared unrepresented and they opted to argue the application by oral submissions.

In his submission in support of the application, the applicant argued that, he visited the court registry several times requesting to be issued with the summons to serve the respondent but he was informed that the same was yet to be prepared. That, he was later informed that case was dismissed before he could even serve the respondent. The applicant claimed that, he did not know how the respondent received the summons and appeared in court as he was the one making follow up of the summons. He submitted further that, there was a time he informed his lawyer of the delay in issuing a court summons. The lawyer made follow up of the case file and discovered that the case was dismissed and advised applicant to file an application to set aside the dismissal order. This application was then filed by the applicant seeking for an order setting aside the dismissal order so that the main PC Civil Appeal No.38 of 2017 be heard on merit and justice be done.

The Respondent on the other hand strongly opposed the application and prayed for application to be dismissed. The respondent submitted that, she stayed for so long without receiving the summons and she decided to come to court. It is when she discovered that the case was already scheduled. She was then issued with a summons to serve to the applicant and the applicant was appearing before he decided to stop appearing.

She averred that, the court took initiative of calling the applicant through his mobile phone after she offered the applicant's phone to the Judge but he did not turn up and the case was dismissed. The respondent added that, the case was adjourned for almost a year before the same was dismissed. The respondent's payer is for this court to consider that this case has taken so long and she is taking care of the disabled child whom the applicant has refused to assist in taking care of. She thus prays for the dismissal of the application.

In his rejoinder, the applicant insisted that, much as he was the one who instituted an appeal, he expected the summons to be issued to him for serving the respondent. For him, the summons was never issued to date and he was only served with summons from the primary court concerning another case.

I have considered the arguments by both parties. There is no doubt that the main appeal; PC Civil Appeal No.38 of 2017 was dismissed by Hon. Mutungi J on 22/11/2017 for want of prosecution with no orders as to costs. The records in appeal No. 38 of 2017 show that, the appeal was presented for filing on 07/02/2017 as endorsed by the Court registry. It was admitted and registered the same day as per exchequer receipt No. 13907129 dated 07/02/2017. The court column shows that, the appeal was first mentioned in court on 04/05/2017 in the absence of both parties. After one more adjournment, the respondent appeared and after two more adjournment to which the applicant did not appear, the appeal was dismissed for want of prosecution on 22/11/2017. This is almost nine months and two weeks from the date the appeal was instituted in court but almost seven months and two weeks from the date the appeal was

first called in court. There is no record showing that the applicant entered any appearance.

The reasons adduced by the applicant that he was making follow up of the summons to no avail is justifiable for the first two months where no record as to whether the appeal was called in court. Applicant claim that he was making follow up of the summons after every two weeks is unjustifiable. It seems that the applicant became reluctant in making follow up of the case and his reluctance resulted into the dismissal of the appeal. The reason that he was waiting for the summons to be issued is unjustifiable for the rest of seven months. The records of the court also shows that the summons was issued and the same was served to the respondent to appear on 4th July 2017 and a copy of the said summons is in court records. The respondent appeared on the date mentioned in the summons, but the applicant did not appear. If the applicant was told that no summons was issued then the respondent could not have appeared on the date set in the summons. The applicant being the one who instituted the appeal, was supposed to know the schedule to his appeal than the respondent.

It is in my considered view that the seven months follow up was too excessive and the applicant ought to have reported to the Registrar or complained through a letter. Apart from verbal words, the applicant was unable to prove that he made any effort to ensure proper handling of his case. No reasonable person will accept that the summons was not issued for seven months and the applicant still relaxed and considered the situation normal. In that I am convinced to believe that the applicant made follow up for the first two months and thereafter decided to relax. His reluctance in making follow up for other seven months is unjustifiable.

Apart from the reluctance in making follow up when the appeal was still in court, the records also reveal that even after the appeal was dismissed, the applicant did not take immediate action in bringing the present application. In his affidavit in support of the application, the applicant claimed to discover the assignment of the appeal to the Judge by early January 2018 and later the dismissal of the appeal. He did not state why the present application was filed on 6th April 2018 which is almost three months later. All these reveals the applicant's inaction which is unjustifiable to grant the application to set aside the dismissal order. In the event therefore, I find this application devoid of merit hence dismissed with costs.

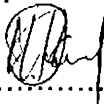


D.C. KAMUZORA,

JUDGE

02/07/2021

Ruling delivered this 2nd day of July, 2021 in the presence of both parties.
Right to appeal clearly explained.



D.C. KAMUZORA

JUDGE

02/07/2021

