

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB DISTRICT REGISTRY

AT BUKOBA

MISC. LAND APPLICATION NO. 18 OF 2022

*(Arising from the order of this court in Land Appeal No. 55 of 2021, N.N.
Kilekamajenga, J)*

FRANCIS TIBENDA.....APPLICANT

VERSUS

ADIJA SIMON.....1ST RESPONDENT

JONATHAN SIMON.....2ND RESPONDENT

BUTAIRUKA VILLAGE COUNCIL.....3RD RESPONDENT

RULING

*01/07/2022 & 20/07/2022
E. L. NGIGWANA, J.*

This is a ruling in respect of an application for setting aside a dismissal order and re-admission of Land appeal No. 55 of 2021. The application has been preferred under Order XXXIX Rule 19 of the Civil Procedure Code Cap. 33 R: E 2019 (The CPC) and, it is supported with an affidavit of Francis Tibenda, the Applicant.

The facts giving rise to this application as can be gathered from the available records are to the effect that; the applicant lodged an appeal to wit; Land Appeal No. 55 of 2021 in this court against the respondent.

On 25/10/2021, it was agreed that the said appeal be disposed of by way of written submission, and as a result, a filing scheduling order was set in place.

The applicant was to file his written submission in-chief by 09/11/2021; reply was to be filed by 24/11/2021, while rejoinder was to be filed by 02/12/2021. The filing scheduling order was not complied with by the applicant, whereas, on 13/01/2022, the appeal was dismissed for want of prosecution.

Following the said dismissal, the applicant has now come before this court via the instant application in a bid to have his matter; Land Appeal No. 55 of 2021 restored and heard on merits.

It is trite that, in accordance with Order XXIX rule 19 of the Civil Procedure Code; an appeal dismissed for want of prosecution may be re-admitted if it is proved that the appellant was prevented by **"sufficient cause"** from appearing when the appeal was called on for hearing. For easy reference, Order XXXIX rule 19 of the Civil Procedure Code Cap. 33 R: E 2019 provides that;

*" Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, **where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing** or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."*

In his affidavit, the applicant averred that he had the intention to prosecute his appeal but he became seriously sick and eventually, he was admitted to Ndolage Hospital for surgical treatment. A medical chit was annexed to the

affidavit which is to the effect that the applicant was admitted at Ndolage Hospital on 09/08/2021 and discharged on 25/08/2021.

It is further averred that the applicant appeared in court on 13/01/2022 and learnt that his appeal was already dismissed on the same date for want of prosecution.

The 1st respondent filed a counter affidavit resisting the application. The counter affidavit is to the effect that the issue not sickness raised by the applicant is an afterthought that is why it was not raised on 13/01/2022 when the appeal was dismissed for want of prosecution. That the Medical chit annexed to the affidavit does not cover the period from 25/10/2021 up to 9th November, 2021 in which the applicant was ordered to file his written submission.

The 3rd respondent filed a counter affidavit sworn by one Fred Gervas Fransis, learned advocate. In the same, the 3rd respondent did not object to the application.

The 2nd respondent was duly served but he neither entered appearance nor filed a counter affidavit, therefore, the hearing of this application proceeded in his absence.

When the matter came for hearing, the applicant appeared in person, unrepresented, likewise the 1st respondent. The Village Chairman Mr. Arobogast Bandiro appeared for the 3rd respondent.

Submitting in support of the application, the applicant stated that, he failed to enter appearance when the matter came for hearing because

since August 2021, he had been seriously sick suffering from prostatitis, and eventually, he was subjected to prostatectomy.

Opposing the application; the 1st respondent, Adija Simon submitted that there is no evidence that the applicant was prevented by sickness from appearing in court on the hearing date.

Mr. Arobogast on his side submitted that the applicant had been sick for quite long time. He ended his submission urging the court to grant the application if it is in the interest of justice to do so.

Having heard submissions by the parties, the issue for determination is whether the applicant has demonstrated sufficient cause to warrant the grant of this application.

It is trite law that applications of this nature have to be filed within 30 days from the date of the dismissal. In the instant application was filed within the prescribed time.

It is common knowledge that sickness accompanied by proof or attachment of medical report may constitute a sufficient cause or good cause for re-admission of an appeal dismissed for want of prosecution. This view has been taken by the Apex Court of the Land in **Director Ruhonge Enterprises versus January Lichinga**, Civil Appeal No. 1 of 2006 (unreported) **Kalunga and Company Advocates versus national Bank of commerce Ltd** (2006) TLR 235 and **John David Kashekya Versus The Attorney General**, Civil Application No. 1 of 2012 (unreported).

In the instant application, the record reveals that Appeal No. 55 of 2021 was filed on 28/06/2021. On 25/10/2021, it was agreed that the appeal be argued by way of written submission. The applicant on that date was represented by his wife Fraista Francis. The applicant was to file his written submissions by 9th November, 2021.

The medical chit attached to the affidavit supporting the application revealed that the applicant was admitted at Ndolage Hospital on **09/08/2021 and discharged on 25/08/2021**. It is therefore apparent that the period in which the applicant was seriously sick is counted from 09/08/2021 up to 25/08/2021. In other words; those are dates which have been accounted for by the Applicant and they have nothing to do with the dates (25/10/2021 up to 09/11/2021) in which the applicant had to file the written submission in chief.

There is no doubt that failure to file submission is tantamount to failure to prosecute the case. No extension of time ever sought by the applicant before the expiry of the time set for him to file the written submission or even after expiry of that time.

The records reveal that on the date when the appeal was dismissed for want of prosecution, the applicant was present and he did not tell the court that he was prevented by sickness from filing the written submissions as per court order.

Indeed the applicant has failed to demonstrate how sickness prevented him from filing the written submissions as per court order. It is not enough to allege the issue of sickness, there must be cogent evidence to move the

court to believe that the applicant was sick on the day of the hearing of the appeal.

In the upshot, I find this applicant has failed to state sufficient cause of his failure to file the written submission as per court order in Land Appeal No.55 of 2021. Consequently; I hereby dismiss this application without costs.

Dated at Bukoba thi 20th day of July, 2022.




E.L. NGIGWANA

JUDGE

20/07/2022

Ruling delivered this 20th day of July 2022 in the presence of the 1st respondent, Mr. Arobogast Bandiro for the 3rd respondent, Hon. E .M Kamaleki, Judge's Law Assistant, Ms. Tumaini Hamidu, B/C, and Ms. Fraista Francis, the wife of the applicant.




E.L. NGIGWANA

JUDGE

20/07/2022