

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

MISC. LAND APPLICATION No. 4 OF 2021

*(Arising from Dismissal order of Land of Appeal No. 1 of 2019 before
Hon. Amour. J)*

EZEKIEL MHOJA (Administrator of the

Estate of the Late **MHOJA DOTTO**..... **APPELLANT**

VERSUS

SALU SAMWEL

MILEMBE MALEHIWA **RESPONDENTS**

RULING

Date: 8/6/2022 & 15/7/2022

BAHATI SALEMA, J.:

The applicant herein, **Ezekiel Mhoja** is aggrieved by the decision of Nzega District Land and Housing Tribunal at Tabora in Application

No. 53/2016. The applicant filed Land Appeal No. 1 of 2019 to this court. On 9th March 2021, Land Appeal No. 1/2019 was **dismissed for want of prosecution.**

The applicant intends to pursue his appeal and, as such, filed the present application seeking re-admission of Land Appeal No. 1/2019 dismissed by this court.

The said application was brought under **Order XXXIX Rule 19 of the Civil Procedure Code, Cap. 33 [R. E 2019]** and it has been supported by the affidavit of one Majula Magembe Mfungo who was the applicant's advocate in the dismissed Land Appeal No. 1 of 2019 and it is the applicant's prayer that the same be part of this submission.

When the matter was scheduled for hearing both parties were represented. The applicant was represented by Ms. Stella Nyaki, learned counsel whereas the respondent was represented by Mr. Kelvin Kayaga, learned counsel. Leave of the court was granted for the hearing to be disposed of by written submissions.

The application was disposed of by way of written submission in chief by the applicant, replying submissions by the respondent, and rejoinder by the applicant as per the order of this court providing for the filing schedule, which was dully complied with by the parties. The

submissions elaborated on matters that were averred in the respective affidavits and counter-affidavits of the parties. I undertake not to reproduce the averments and the submissions on record in full, save to the extent necessary for the determination of the application.

The main arguments and submissions by the applicant's counsel in support of the application were that there were sufficient reasons for re-admission of the dismissed appeal. The counsel for the applicant stated that what can be gathered from the affidavit, the non-appearance by the applicant on the date of the dismissal was justified for the following reasons; since the applicant filed the dismissed Land Appeal No. 1 of 2019, he has been attending most of the court sessions, a fact which shows that he has been active within the corridors of justice and that what happened on the dismissal date was accidental.

She further stated that there are sufficient reasons to show that on the dismissal date, the applicant counsel was sick, as averred in paragraph 4 of the applicant's affidavit, and that he had instructed the applicant's brother, one Mayunga Mhoja, to attend the matter and inform the court, but it was unfortunate, as elaborated at paragraph 6 of the affidavit, that when the said case was called by the court clerk, she said the appeal had been dismissed.

Further, she submitted that there is sufficient evidence to show that; the applicant's brother was within the court premises, but because of being unfamiliar with the court procedures and environment, and taking into consideration that because of the COVID- restrictions by then; a limited number of people were allowed to enter the court chamber, he could not hear when his case was called, this constituted a good cause for the re-admission and restoration of the dismissed appeal, and that, when the applicant discovered that, his appeal had been dismissed for non-appearance, he immediately filed this application so that the same could be restored. This shows how diligent the applicant was in addressing the anomaly upon discovery.

Therefore, following the reasons elaborated above, the non-appearance by the applicant on the dismissal date of appeal No. 1 of 2019 was justifiable. To bolster her stance, she cited the cases of **Hassan Hamis Nzomari (applicant) versus Edmund Thomas Lusebe and three others**, Misc. Land Application No. 351 of 2019, at Dar es Salaam where it was held that;

"Where the applicant demonstrates sufficient cause for his non-appearance on the date of the dismissal order, the application can be granted."

Likewise, in the case of **Sungura vs. Peter Msechu**, Civil Appeal No. 24 of 2017, the court observed that;

"In an application to set aside the order dismissing the suit for non-appearance, the important question is whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed."

She prayed to the court for its readmission since his non-appearance on the dismissal date was justifiable.

Opposing the application, the affidavit and submission of the counsel for the applicant he insisted that the applicant has alleged several grounds for this application, all alleging that the applicant was sick, that the applicant's **brother** was present in court, and that this application has been brought as a way of showing negligence.

He stated that, according to the affidavit supporting the application, the major reason is that the applicant's counsel was sick on the 6th day of March, 2021. However, even if the counsel was not sick, this would not be a reason for non-appearance, and the same counsel had not appeared in court between the 1st of February 2022 and the 25th of May

2021 when he renewed his license. On the 6th day of March, the counsel was not qualified counsel, and therefore, the reasons advanced for non-appearance were not valid excuses or sufficient grounds in the eyes of the law.

Secondly, the applicant raised the ground that one Mayunga Mhoja the younger **brother of the applicant**, was in court for such matter and that the counsel had instructed him to appear in court and inform the court. He further stated that this argument is not supported by evidence. Firstly, an affidavit of Mayunga Mhoja is not annexed to support the version that, in reality, the counsel for the applicant had sent him to appear in court and that he did not hear the case being called. Furthermore, the facts deponed in paragraphs 6 and 7 are hearsay evidence, which carries less weight unless it was deponed by the said Mayunga Mhoja. To substantiate his stance in the case of **Workers Development Co Ltd Vs Vocal Networks Ltd**, Civil Application No. 28/2008, CAT at Dar es Salaam (Unreported), the Court of Appeal stated on page 7 that:

"The requirement to file an affidavit of a person whose evidence is to the matter in dispute cannot be over-emphasized here. It is of paramount importance. Failure to file such an

affidavit cannot help a party concerned, as is the case in the instant application".

In similar circumstances, in **Isack Sebegele Vs Tanzania Portland Cement CO. LTD**, Civil Reference No. 26/2004, CAT AT Dar es Salaam (unreported), the court stated that:-

"We are of the firm view that there is no ground, let alone sufficient ground for interfering with the decision of the single judge. As rightly held by the single judge, the applicant filed no affidavit to substantiate that a registry officer delayed the application. Furthermore, the applicant could not even identify the alleged registry officer.

Secondly, the **attitude taken by the counsel** to send another person who is not a party to the case, to hold his brief or inform the court in itself is not a practice worthy of an advocate, who would simply ask another officer of the court to cover for him or could simply instruct his office to prepare a letter for him disclosing the circumstances pertaining to this inability to appear. Hence, lack of an affidavit from Mayunga Mhoja plus this one, it remains doubtful if at all the applicant's failure to appear was without fault.

Thirdly, the affidavit supporting the application does not mention the name **of the court clerk/officer** from whom the said Mayunga Mhoja made inquiry and informed about the status of the case on the same day the case was dismissed. The position is that the alleged Mayunga Mhoja was not present in court because there is no proof of that allegation.

By way of rejoinder, the counsel for the applicant submitted that the respondent did not oppose the fact that he was sick. In his submission, he has conceded to the applicant's counsel that on the dismissal date **he was sick and his main concern** is that the said counsel had no practicing licence, hence he was not legally a qualified advocate to appear in court.

She submitted that the allegation by the respondent's advocate to the effect that the advocate had no practicing licence has been elaborated by one Majula Magembe Mfungo who was the applicant's counsel by then, and who insisted in his reply to the counter affidavit dated 1st day of August 2021 where he made it clear in paragraph 4 that he had a practicing license but he failed to attend because of sickness.

Secondly, the issue that the applicant's counsel had no valid practicing licence was never brought to the attention of the court, throughout the time this application was active in court. Had this been brought to the

attention of the court, the court could have been in a better position to investigate the same and make prerequisite orders to meet the end of justice before prematurely terminating this application.

Thus, since this matter had never been brought to the attention of the court, and since the court, through its offices are duty-bound to prove that those who prepare court documents to be filed and those who appear before the court are qualified advocates by cross-checking through the TAMS System, this mischief cannot be shouldered by the innocent applicant who has no access to the said system. In the case of **CRDB Bank versus NBC Holding Corporation and Another** [2006] TLR page 422 and the case of **Mwanza Director m/s New Refrigeration Co. Ltd versus Mwanza Regional Manager Tanesco of Tanesco Ltd and Another** [2006] TLR page 422], it was held, among other things, *that it is not correct to punish the appellant, who is the client, for the wrongs committed by the advocate.*

And at page 353 the court stated that;

"That in my considered opinion, there are no hard and fast rules as to what amounts to good cause, the answer depends on peculiar circumstances of each case. In the present case, the defendant is non-legal person; he acts through its officers. The responsible officer died either before taking action (it is not

reasonable to believe or reasons to suggest that the defendant would lie on this fact), or he took action but with his superior officer now unconscious, it is difficult to ascertain the true state of affairs. But the defendant showed diligence- taking prompt action after becoming aware of the case from the court cause list; and taking prompt action to engage counsel.

Hence, with this reasoning, it is the applicant's submission that failures of the former counsel who was representing the applicant should not be shouldered by the applicant who is innocent. Hence, his application, which was dismissed, should be restored so that he can get an opportunity to prosecute his appeal, taking into consideration he was attending the court throughout the time.

Having carefully paid due consideration to the affidavit in support of the application and the respondent's counter affidavit along with the rival arguments submitted by the counsel for the parties. The issue to be determined by this court is whether the applicant has established sufficient reasons for this court to re-admit an appeal.

In principle, according to Order 39 Rule (19) of the Civil Procedure Code, Cap.33 [R.E 2019] an appeal dismissed may be re-admitted if it is proved that the applicant was precluded by "**sufficient cause**" from

appearing when the appeal was called for hearing. The section provides that:

"Where an appeal is dismissed under rule 11 Sub Rule (2) of rule 17 or 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 for hearing, the appeal on such terms as to costs in otherwise as it thinks fit." (Emphasis supplied).

In the light of the above section, the fact that the restoration of the suit will depend on whether the applicant establishes, to the satisfaction of the court, plausible justification for non-appearance on the date of the dismissal.

As submitted by the applicant's counsel in paragraph 4 of the affidavit deposed by Majula Magembe Mfungo, counsel, that which was not opposed by the respondent,

"In the very day scheduled for hearing, I did not appear since I felt sick on 6th March, 2021 and I was hospitalized at Iyenze Health Center. Hereby attached are hospital documents and marked as MY-1

Certainly, the position of the law is that sickness accompanied by proof or attachment of a medical report is a sufficient cause or good cause for re-admission of an appeal dismissed or non-appearance. This view has been taken by the Court of Appeal in various decisions, including **Director Ruhonge Enterprises V January Lichinga** , Civil Application No. 1 of 2006 , CAT- DSM ; **John David Kashekya v The Attorney General** , Civil Application No. 1 of 2012 .

Since the Counsel for the applicant has adduced evidence to prove that he was sick as Annexure MY-1. I find this has merit.

It is also a trite law that an application for re-admission of an appeal dismissed for want of prosecution has to be filed within 30 days from the date of the dismissal order. It is on record that the land appeal No. 1/2019 was dismissed on 9th March,2021 as such the time for filing the application to set aside was filed within the time.

At para 5, "after such an admission, I succeeded in not attending the hearing date. As a result, I instructed the younger brother of the applicant, Mayunga Mhoja to attend the matter to report on the issue that made me not attend the hearing on the particular date. Unfortunately, it happened that he did not hear once the case was called for by the clerk.

Guided by the above authorities and without wasting much time, I am content that the above reasons constitute sufficient cause for readmission. The application is meritorious. An order for re-admission of Misc. Land Appeal No .1 of 2019 was dismissed on 9 March, 2021 in the circumstances I will not make any order as to costs.

Order accordingly.



A. BAHATI SALEMA

JUDGE

15/7/2022

Ruling delivered in chamber on this 15th July, 2022 in the presence of both parties. Via virtual court link.



A. BAHATI SALEMA

JUDGE

15/07/2022

Right of Appeal fully explained.



A. BAHATI SALEMA

JUDGE

15/07/2022

