IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 472 OF 2019

(Arising from Civil Case No. 212 of 2005)

HALFAN MSAWANGA ..... APPLICANT

VERSUS

EPHRAIM G. MWAKAPALA ..... 1st RESPONDENT
HOOD TRANSPORT LIMITED .....2nd RESPONDENT

RULING

MRUMA,J.

This is a ruling on an application to set aside a dismissal order of this court dated 11th July 2013 in respect of Civil Case No. 212 of 2005. It is the statement of the Applicant's counsel that after being aware of the dismissal order, the Applicant filed Miscellaneous Civil Application No. 668 of 2018 seeking for extension of time "and / or" leave of this court to file this application. On 19th August 2019 leave was granted by this Court (Honourable Masabo,J) and he was given 14 days within which to file the same. This application was presented for filing on 30th August 2019.

As for reasons of his non- appearance on the date of the dismissal order it was the Applicant's contention that it was not a result of

negligence but because he was seriously injured in the car accident, his case file was misplaced and he had no money to hire an advocate. He did not however attach any medical document to substantiate that he was prevented from prosecuting his case because of the accident he got. In his further submissions in support of the application counsel for the Applicant contended that there were two reasons for the Applicants' non – appearance when the matter was called before a Judge on 11th July 2013. The first reason is that the Applicant was serious sick with injuries caused by a motor vehicle accident and the second is that he had no money to hire the advocate. Substantiating on the first reason, counsel submitted that court should take judicial notice of its ruling (Masabo,J) in Miscellaneous Civil Application No. 668 of 2018 and accept the assertion that the Applicant was very sick and because illness has been taken to be sufficient reason to set aside dismissal order, then this court should set aside its dismissal order dated 11th July 2013. The learned counsel cited as authorities several cases decided by this court and the court of Appeal including the case of **Sadru Mangaji Vs Abdul Aziz Lalami, Amin Ramji and Meli boob Ramji (Miscellaneous Commercial Application No.126 of 2016 Mwambege J**, (as he then was), **Leonard Magesa Vs M/s Olam (T) Limited – Civil Application No. 11 of 2015 (CAT – I .H. Juma CJ** unreported and **Emmanuel R. Maira**

Vs the District Executive Director of Bunda Civil Application No. 66 of 2010 (kalegeya J, as he then was.

On the second reason, the learned counsel submitted that as a result of being sick for a long time the Applicant had no money to hire advocate who could attend his case on his behalf.

I have carefully considered the Applicant's application, the contents of his affidavit and the submissions made on his behalf by his advocates. I have given due consideration to the parties respective positions as deposed and submitted. **Order IX Rule 4 of the Civil Procedure Code** under which the application is brought provides;

> "*Where court has adjourned the hearing of the suit ex- parte and the Defendant at before such hearing appears and assigns good cause for his previous non-appearance, he may upon such terms as the court may direct as to the costs or otherwise be heard in answer to the suit as if he had appeared on the date fixed for his appearance.*"

Counsel for the Applicant submitted that the citing of Rule **13(1) and (2)** in the chamber summons was a slip of the pen as the intended

and correct provision which the applicant had intended to invoke was **Rule 4 of the same Order 1X of the Civil Procedure Code**. However a look on rule 4 of the said Order would suggest that it related to remedies available to the Defendant in suit and where for good reason he had failed to appear on the date fixed for his appearance. Where like in the present case it is the Plaintiff who had defaulted appearance, the applicable law would have been Rule 2 of the same Order IX of the Civil Procedure Code which provides;

> *"Where a suit is dismissed under Rule 2, the Plaintiff may (subject to the Law of Limitation) bring fresh suit, or he may apply to set aside the dismissal order, and if the satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit."*

The orders sought in the chamber summons are discretionary. I am inclined to accept Mr. Elias Kitua's submissions that looking at the affidavit

evidence/ including the annextures to the affidavit) sickness and misplacement of the file has not been established.

The Applicant's counsel referred this court to its (Masabo,J) own ruling in which it found that there was sufficient cause for delay in filing this application to set aside the dismissal order. In my view sufficient or good cause which may prevent a party from filing an application or do an act prescribed by the law, may necessarily be sufficient in preventing a person to appear in court when his case is called for hearing. That is so because failure to appear on the date fixed for one's appearance is one time event while failure to take legal action is a continuous action which has a specific period of time.

In failure to appear on the date fixed for one's appearance the person who so failed must give explanation as to why did not notify the court.in advance of his inability to appear on the date fixed for hearing.

For instance in the case at hand the Applicant claims that he failed to appear because he has seriously sick as a result of an accident he got sometimes in the year 2005. Failure to appear occurred in 2013 which is over 8 years after the accident and after he had instituted the same cause which he had failed to prosecute.

Secondly, in terms of section 42 of the Evidence Act, previous Judgments or ruling or orders of the Court is relevant only where it bars fresh suit or application. The Previous Judgment or ruling of the Court cannot be a conclusive evidence claim. Each case has to be proved independent of any other previous or currently pending case. As correctly submitted by Mr. Kitua section 110(1) of the Evidence Act [cap 6 RE 2019] requires any person who desire court to give judgment as to any legal right or liability dependent on the existence of facts which he assert to prove that those facts do exist. Under section 62(1) (a) of the Evidence Act, oral like (affidavital) evidence in all cases must be direct from a witness who saw the act referred. In the present application all facts relating to the Applicant' accident and his treatment which were deposed in the supporting affidavit were not stated by a witness who says he saw them (ie the Applicants Counsel), but simply an advocate who was instructed to represent the Applicant.

All what he asserted in the supporting affidavit is not what he personally knows or saw, it is therefore hearsay evidence which is not admissible.

For all what has been discussed above this court finds that no good cause has been established to justify the Applicant's non-appearance

when his case was called for hearing on 11th May 2013. It is not only that he has failed to show good or sufficient cause to warrant restoration of the suit dismissed over 8 years after it was dismissed, but he has not explained as to whether the suit is not time barred for under Rule 3 of Order IX of the CPC restoration or setting aside dismissal order is subjected to the law of limitation.

That said the Application is dismissed but taking into consideration the economic weight of the parties which can be deduced from some facts deposed both in the affidavit and the counter – affidavit, I will make no order as to the costs. In other words each party shall bear own costs.

A.R. Mruma

Judge

27/7/2022