

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 229 OF 2022

ZALHA MOHAMED BAKARI APPLICANT

VERSUS

BAKARI AMRI RESPONDENT

**(Appeal from the decision of ruling of this Court dated 20th day of May,
2022 in PC Civil Appeal No. 122 of 2021)**

RULING

18th August & 2nd September, 2022

KISANYA, J.:

This is an application for restoration of an appeal that was dismissed by this Court for want of prosecution. It is brought under rule 17 of the Civil Procedure (Appeal in Proceedings Originating in Primary Courts) Rules, GN. No. 312 of 1964 (henceforth "the Rules"). Supporting the application is an affidavit affirmed by the applicant, Zalha Mohamed Bakari.

Although the chamber summons indicates that the case sought to be restored is PC Matrimonial Appeal No. 122 of 2021 the ruling appended to the affidavit suggests that the dismissed appeal is PC Civil Appeal No. 122 of 2021. Parties are at one that the said appeal (PC Civil Appeal No. 122 of 2021) was

dismissed for want of prosecution on 20th May, 2022. It is also common ground that the appeal was dismissed for want of prosecution due to the applicant's failure to file the written submissions. That prompted the applicant to file the present application.

At the hearing of this application, Mr. Herman Kilenzi, learned advocate, represented the applicant, whereas Ms. Neema Cuthibet, also learned advocate appeared for the respondent.

Arguing in support of the application, Mr. Kilenzi prayed to adopt the chamber summons and supporting affidavit to form part of his submission. He contended that the applicant's former advocate filed the submission through electronic filing system. Although the learned counsel admitted that the court filing fees was not paid for, he contended that the filing process was not completed due to negligence of the former counsel for the applicant.-The learned counsel referred the Court to the case of **Hamis Madede vs Annamaria Maenda**, Misc Land Case Application No. 189 of 2019, HCT Land Division at DSM (unreported) where it was held that negligence of the advocate of the parties to the case should not deny them of the right to be heard. That said, Mr. Kilenzi urged this Court to grant the application.

Resisting the application, Ms. Cuthbert invited the Court to consider that the application is based on the reason that the application was filed through electronic filing system. She then submitted that the applicant has not proved to have filed the written submission through electronic filing system. Ms Cuthibet went on to submit that the applicant's advocate had imputed negligence in her former counsel. It was her further argument that the applicant was duty bound to make follow up of the case. To bolster her argument, she cited the case **Lucy Kasoma Makinda vs Zaina Abdalla Making'inda**, Misc. Land Case Application No. 72 of 2019 (unreported). Thus, the learned counsel prayed that the application be dismissed.

Rejoining, Mr. Kilenzi submitted that the printout appended to the supporting affidavit proves that the affidavit was filed through online system. He further submitted that the case of **Lucy Kasoma** (supra) is distinguishable from this case on the account that the applicant believed that her counsel would file the written submissions.

Having heard the submissions of both learned counsel, I embark on determining the merit of this application. The condition for readmitting an appeal which was dismissed for want of prosecution are set out under rule 17 (1) of the Rules which stipulates: -

*"Where an appeal has been dismissed under subrule (2) of 13 in default of appearance by the appellant, he or his agent may apply to the appellate court for the re-admission of the appeal; and if the court is satisfied **that he was prevented by any sufficient cause from appearing either personally or by agent when the appeal was called on for hearing** it may re-admit the appeal on such terms as to costs or otherwise as it thinks fit."*

As it can be glanced from the above bolded excerpt, an appeal dismissed for want of prosecution is re-admitted upon the applicant satisfying the Court that he or she was prevented by any sufficient cause from appearing when the appeal was called on for hearing. In that regard, where an appeal is dismissed for want of prosecution due to the appellant's failure to file the written submission, the applicant must prove that the written submission was not filed due to sufficient cause.

In view of that position, the point for this Court's determination is whether the applicant has proved that he was prevented by a sufficient cause from filing the written submission. I am alive to the trite law in this jurisdiction that what amount to sufficient cause is not defined by the law. It is, therefore determined basing on the circumstances of each case.

In the present case, parties are one that the applicant was ordered to file her submission in chief on or before 5th May, 2022. The applicant deposes to have engaged counsel Godlove Godwin who filed the written submission through electronic filing system. This fact is reflected in paragraphs 4 of the supporting affidavit which also refers to the printout generated from computer filing system. It is on record that, such fact was not disputed in the counter affidavit filed by the respondent.

The supporting affidavit reveals further that the applicant believed that the written submissions had been filed by her advocate. She even made follow up of the matter by asking the respondent's counsel of the reply submission in order to file the rejoinder submission. This fact was adduced in paragraph 5 of the supporting affidavit which reads:-

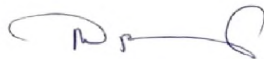
"That on subsequent date in which this court fixed for me to file rejoinder submission I called my advocate to whom I sought help from but the effort proved futile and I decided to call the respondent advocate asking for the reply submission so that I can file rejoinder submission in which the respondent advocate replied that he never received the submission in chief."

Again, the above fact was not disputed by the respondent. Further to the foregoing, the applicant averred to have engaged another advocate (Mr.

Kilenzi) to take up the matter. It is on record of this Court that, the newly engaged counsel appeared when the appeal was dismissed for want of prosecution. In that regard, it is vivid that the applicant was diligent in making follow up of her case. She did all she could as a lay person after leaving the issue of filing the written submission to his counsel. Being guided by the position of the Court of Appeal in the case of **Yusuf Same and Another vs Hadija Yusuf**, Civil Appeal No. 1 of 2002 I am of the view the negligence by the applicant's counsel, in the circumstances of this constituted a sufficient cause.

For the foregoing reasons, the application is found meritorious and granted. Consequently, PC Civil Appeal No. 122 of 2021 is hereby re-admitted. I make no order as to costs because the application stems from a matrimonial matter.

DATED at DAR ES SALAAM this 2nd day of September, 2022.



S.E. Kisanya
JUDGE

Court: Ruling delivered 2nd day of September, 2022 in the presence of Mr. Herman Kilenzi, learned advocate for the applicant and Ms. Neema Cuthibet, learned advocate for the respondent.



A handwritten signature in black ink, appearing to be "S.E. Kisanya".

S.E. Kisanya
JUDGE
02/09/2022