

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 239 OF 2022

*(Arising from Miscellaneous Civil Application No. 47 of 2022, originating from
PC Civil Appeal No. 141 of 2019)*

ANNA STEVEN NYAGAWA..... APPLICANT

VERSUS

TADEO MODESTUS MBILINYI (Administrator of the Late **MARIAO MODESTUS
MBILINYI**) **RESPONDENT**

R U L I N G

23rd & 28th September, 2022.

MWANGA, J.

The Application is filed in this court to set aside its order of dismissal of Hon. Ismail, J. in Miscellaneous Application No. 47 of 2022 dated 11th May, 2022 and restore the same so that parties can be heard to the finality. It was brought under Rule 17 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules: (GN No.312 of 1964), The application was supported by an affidavit of Mr. Meswing Masinga, learned counsel for the applicant.



Briefly stated, the applicant filed Miscellaneous Civil Application No.47 of 2022, requesting Certificate in this court to certify on the point of law for the Applicant to appeal to the Court of appeal. The application was presided over by **Hon. Ismail, J.**

On the date set for hearing and when the matter was called for on a loud speaker, Mr. Richard Kihara, learned counsel for the respondent entered appearance before the honourable Judge while Mr. Meswing Masinga, learned Counsel for the applicant did not. Consequently, the application was dismissed for want of prosecution.

Submitting in support of the application, the applicant commenced his arguments by fully adopting the contents of his affidavit. At paragraph 6 of his affidavit it was stated that he personally attended to the court on 11th May, 2022 when the case was set for hearing and that, while in court, he approached a court clerk by a name EMMY, who ultimately assured him that his case would also be called on through a loud speaker as she usually does in other cases.

It is the further case of the learned counsel that, at around 12:00 noon, when other cases were still being called, he was told by EMMY (the



said court clerk) that his case has been called and subsequently, for want of prosecution.

In the course of the hearing, learned counsel for the applicant that he, unsuccessfully, attempted to obtain an affidavit of the clerk to support his claims on circumstances leading to demerit application. At paragraph 11 of his affidavit reads: -

'That, I have at several times followed the court clerk to help me to swear an affidavit showing that I was not called on the 11th May, 2022 and I asked her several times to sign my client's case, but she has refused to sign'.

'I have, at several times, followed the court clerk to help me to swear an affidavit showing that I was not called on the 11th May, 2022 and I asked her several times to sign my client's case, but she has refused to sign'.

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Another reason advanced was that, Civil Application No. 47 of 2022 which was dismissed by this court aimed at addressing illegalities which were not noticed by the primary court, the district court and the high court, altogether. The learned counsel reiterated at paragraph 12 of his affidavit that, the late Mariaio Modestus Mbilinyi was a christian and they celebrated their marriage in Christian faith, hence the primary court had no powers to determine matters involving christian on probate issues.

He cited several cases where court granted orders for extension of time basing on proof of illegalities. He referred this court in **Amour Habib Salum V. Hussein Barfag**, Civil Application No. 52 of 2009 and **Hassan Ramadhan V R**, Criminal Appeal No. 160 of 2018, where it was held that where the illegality is established or is apparent on the face of record, can constitute a **good cause** for the extension of time, the reason being to avail an opportunity to the appellate court to correct an illegality manifest on the face of the record.

Again, he cited a case of **Emilion Mpelembe@Songambe V. R**, Criminal Appeal No. 18 of 2013, (CA) and **Ltd V. Income Tax [1974] VOL.1EA1 125 (HCTZ)** where it was held that there is no specific definition or explanation of **what is a good cause**, and that each case has to be



decided upon its own facts and circumstances. Finally, he had relied on **Rule 17 of the GN No. 312 of 1964** which provides that where an appeal has been dismissed for non-appearance, the applicant can apply for its re-admission.

By way of reply, learned counsel for the respondent submission focused on **FIVE** key areas. **One**, that the counsel for the applicant should have taken administrative measures against the court clerk through Registrar or Deputy Registrar for her refusal to swear an affidavit. **Two**, that the ground that the learned counsel was around court premises but failed to appear before the concerned judge does not amount to an appearance. **Three**, at that particular day, cases before **Ismail, J.** were called on through a loud speaker and all concerned individuals assembled in front of the door of the judge but, learned counsel for the applicant was not present. **Four**, that the question of illegality not being noticed in the primary court, district court and the high court are matters which could have been surfaced in Application No. 47 of 2022, and not in this current application. **Five**, that the counsel for the applicant must show a good cause as to why he did not enter appearance before the court.



I have gone through the submission by both counsels and it is relevant to state that, being in court premises alone by parties to the case do not constitute an appearance before the court.

Also, the submission by learned counsel that court clerk refused to swear an affidavit was rebutted by the counsel for the respondent on the ground that such a serious allegation against the court clerk ought to be complained or reported to the Registrar or Deputy registrar for his necessary actions. The Court of Appeal of Tanzania in **Phares Wambura and 15 Others V. Tanzania Electric Supply Company Ltd**, Civil Application No.186 of 2016; (Unreported) CAT, had this to say: -

'a mere fact that the applicants and their advocates were in court premises on the hearing date does not amount to appearance because they did not appear before the responsible Justice who was dealing with their matter. Parties to a case must always remember that, a Judge or a magistrate does not deal with everybody who hangs around the court's corridors, but specific parties as per his or her assignment. Therefore, mere presence of a party and/or his counsel in court premises without physically appearing or being virtually linked with a presiding Judge or Magistrate on a hearing date and time amounts to non-appearance'.



Coming to the issue of court clerk refusing to swear an affidavit. I totally agree with the counsel for the respondent that, allegations against such court clerk were so serious, such that logic and common sense required the counsel for the applicant to take necessary steps such as reporting the same to the relevant authority. Under such circumstances, lack of an affidavit of the court clerk and or failure to complain to the relevant authority about such acts, this court will be in difficult position to substantiate the assertion by the learned counsel. The Court in **Phares Wambura and 15 others V. Tanzania Electric Supply Company Ltd.**, Civil Application No.186 of 2016 TZCA (Unreported), (Supra) had this to say about the importance of the affidavit of the court clerk-

'The affidavit of the court clerk could have been useful to substantiate the applicant's assertions of his or her involvement in the matter'.

With refence to the above decision, the learned counsel for the applicant being in court premises alone and that he did not take some necessary steps to show his failure to procure the sworn affidavit of the said court clerk, is not sufficient or good cause for the court to grant an order for restoration of the dismissed application.



As to the reason of illegality not being noticed by the courts, I wish to state that, there are several authorities where illegality is established or is apparent on the face of record, can constitute **a good cause**. See. **Hassan Ramadhan V. R**, Criminal Appeal No. 160 of 2018(Unreported) and **Amour Habib Salum V Hussein Barfag**, Civil Application No. 52 of 2009(Unreported). It was the contention by the learned counsel for the respondent that, the question of illegality are matters which could have been surfaced and determined on merits in Application No. 47 of 2022.

I must admit that, I have some reservations on this point, what will happen to those cases which contain some illegalities apparent on the face of record? In the authorities cited, the question of illegality arose and the court considered it to constitute a **good cause** for court to grant an extension of time.

From the above authorities cited, the applicants sought indulgence of the court for orders of extension of time and not restoration of the dismissal orders. But in essence, the two have the similar consequences or effect if the application is granted or denied. In **Emilion Mpelembe @ Songambe V. R**, Criminal Appeal No. 18 of 2013, **and Ltd V Income Tax [1974]** VOL.1EA1 125 HCTZ, the court held that there is no specific



definition or explanation of what is a good cause, and that each case has to be decided upon its own facts and circumstances.

In the circumstances, the question of illegality apparent on the face of record, as in this case, is a **good cause** for the court to grant orders for restoration. I hereby set aside the dismissal order of Hon. Ismail J, dated 11 May, 2022 in Miscellaneous Civil Applications N.47 of 2022. Costs follow the event.

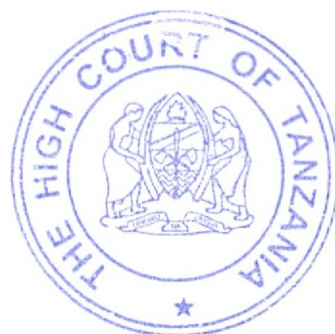
It is so ordered.




H.R. MWANGA
JUDGE
28/09/2022

ORDER:

Ruling delivered in Chambers this 28th day of September, 2022 in the presence of both applicant and respondent.




H.R. MWANGA
JUDGE
28/09/2022