

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(MWANZA DISTRICT REGISTRY)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO.159 OF 2021**

*(Originating from High Court Mwanza PC. Civil Appeal No. 49 of 2021)*

**DERRICK DAVID..... APPLICANT**

**VERSUS**

**MUSSA LUFUNGA..... RESPONDENT**

**RULING**

*24<sup>th</sup> March & 21<sup>st</sup> April, 2022*

**ITEMBA, J.**

By a Chamber Summons, filed on 22<sup>nd</sup> February, 2022, the applicant has moved this Court to grant an order for restoration of an appeal, preferred in this Court vide PC. Civil Appeal No. 49 of 2021, which was dismissed on 2<sup>nd</sup> December, 2021, for want of prosecution. The application is supported by an affidavit sworn by the applicant's counsel, setting out grounds on which the supported application is based. The respondent replied to the affidavit through his own sworn counter-affidavit.

During the hearing, the applicant's counsel adopted his own affidavit, prayed to set aside dismissal order of 2<sup>nd</sup> December, 2021 and restoration of P.C Appeal No. 49 of 2021.

On his part the respondent through his learned counsel, has prayed to adopt his own counter affidavit to form part of his submission. He objected the application for restoration of the above-mentioned appeal contending that, at the date of the last adjournment neither the applicant nor his counsel were present in court. He kept on contending that when the matter was set for hearing on 9<sup>th</sup> November, 2021 the applicant's counsel has requested his fellow counsel to hold brief on his behalf as stated in paragraph 4 of the affidavit. In that regard he holds the view that the learned counsel was given feedback that parties should appear in person and not via teleconference. He insists that the presiding Judge was very clear and he said nothing about teleconference.

In furthering his submission, the respondent attacked paragraph 4 and 5 of the affidavit that, it mentions people's names and title's in absence of their affidavits and even the verification clause does not state that he acknowledge the information given by the said persons in paragraph 4 and 6.

He insists that it is a legal practice that if someone mention someone in an affidavit the said person should swear an affidavit something which was not done. He argues this court to expunge or disregard the relevant paragraphs. He supported his arguments by citing the decision in the case

of ***Sabena Dar Ltd vs Michael Luwonnzu***, Civil Appeal No. 451/2018 of 2020 where the court insisted that if dispositions are not supported by evidence they become hearsay, he prays for application to be dismissed with costs.

In his rejoinder, the learned counsel for applicant avers that the records of the main case reveal that the matter was always conducted by way of teleconference and they attended all the days except for one that day, in which he relied on the information from his colleague, learned counsel who is from the respondent's counsel's firm. He argues nonappearance of one day should not limit them from hearing the appeal on merit.

In respect of the case cited by the respondent he states that it is distinguishable as every case has its own merits, circumstances on cited case was application for extension of time and the matter at hand is an application for setting aside a court order. He prays for the matter to be restored and each party to be heard on merit.

The question which arises at this stage and requires determination by this court is, whether the reasons raised by the applicant are sufficient to justify his non-appearance on the date when the appeal was dismissed.

It is trite law that grant of an order for setting aside a dismissal order is a matter of discretion, and the Court is vested with such discretionary powers. **Rule 17 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1963**, [G.N 312 of 1964] states that;

*"Where an appeal has been dismissed under sub rule (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."*

Therefore, a party which desires to move the court to invoke such powers should demonstrate existence of sufficient cause. In the decision of **Shamsudin Jiwan Mitha v. Abdulaziz Ali Ladak** [1960] 1 E.A. 154. The Court held that, to succeed under the rule, the applicant has to show that he did not appear and that he was prevented from appearing by sufficient cause. In a persuasive decision of the Indian supreme Court in the case of **Parimai v. Veena @ Bharti**, (2011) 3 SCC 545; Supreme Court of India at paragraph 9 stated as follows:

*"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended it should be observed that the term "sufficient cause" should not. Therefore, word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to excise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously".*

The applicant's sole reason for his non-appearance is that he believed that the matter was being disposed of by way of teleconference, and on the day of dismissal, his wait for the call was in vain. Later on, he made inquiry to the court clerk who informed him that the same was dismissed. He is of the view that the above advanced reason is sufficient to warrant granting of the order.



Having weighed the rival submissions and the reasons advanced in the affidavit, I am of the view that the applicant has failed to positively convince this court to invoke its discretionary powers to depart from its order delivered on 2<sup>nd</sup> December, 2021. The court's records are clear that on 9<sup>th</sup> November, 2021 when the matter was scheduled for mention Mr. Marwa Samwel (advocate) appeared in person on behalf of applicant's counsel, and the court ordered hearing of the matter to commence on 2<sup>nd</sup> December, 2021. There is no any indication in the proceedings that the matter was to be disposed of by way of teleconferencing. As the normal procedure it would have been recorded to that effect, and the phone numbers of both parties were supposed to be recorded as well. Nothing of the kind transpired in the court's proceedings. When the matter came up for hearing on 2<sup>nd</sup> December, 2021 both the applicant and his learned counsel were not present in court, consequently, the matter was dismissed for want of prosecution. The applicant's counsel explained that he was informed by the respondent's counsel Mr. Marwa Samwel that hearing was to be conducted via audio call due to Covid 19 outbreak, and he was waiting for the call at his off. He also stated that the appeal was dismissed on his absence and the following morning he approached the court clerk who informed him of the said dismissal. This explanation has no proof. Referring to the case of ***Sabena Technics*** (Supra), as rightly

mentioned by the counsel for the respondent, if the applicant had to rely on information from a certain advocate or court clerk, there is no such proof, the appeal he was expected to substantiate his averment by supporting affidavit of the said clerk or advocate. This would have given weight to his application, short of that, his contention remains to be mere allegations which does not amount to sufficient cause as explained in ***Shamsudin Jiwan Mitha*** and ***Parimal v. Veena @ Bharti***, above. Hence the learned trial Judge was, in my respectful view, justified to dismiss the appeal with costs.

In the circumstances, I find the applicants' arguments wanting as he has failed to show sufficient cause for his nonappearance. Therefore, the court is not persuaded to exercise its discretion power to reinstate PC Civil Appeal No. 49/2021. Accordingly, the application is hereby dismissed.

It is so ordered.

DATED at **MWANZA** this 21<sup>st</sup> day of April, 2022.



Right of appeal explained.

  
**L. J. ITEMBA**  
**JUDGE**  
**21.4.2022**

  
**L. J. ITEMBA**  
**JUDGE**  
**21.4.2022**

Ruling delivered in the presence of Respondent, the Advocate Mary Melkior for the applicant also holding brief for the Respondent and Ignas RMA.



**L. J. ITEMBA**  
**JUDGE**  
**21.4.2022**

