

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. LAND APPLICATION NO. 74 OF 2021

(Originating from Order in Land Appeal No. 23 of 2020 in High Court of Tanzania, in the District Registry of Arusha at Arusha) before Hon. M. R. GWAE, J made on the 1st day of September, 2021)

1. BOAY HHAWU.....1ST APPELLANT

2. HHAWU HAQWET.....2ND APPELLANT

VERSUS

TLWU HHAWU.....RESPONDENT

RULING

29/04/2022 & 27/05/2022

GWAE, J

This ruling is a result of the applicants' application for re-admission of an appeal registered as Miscellaneous Land Appeal No. 23 of 2020 which was dismissed for want of appearance on the 1st day of September 2021. This court on the material date ordered and I quote;

“As it is evidently clear that the appellants and their advocates have severally defaulted necessary appearances, I therefore dismiss this appeal with costs”

Following the above dismissal order, the applicants are now before the court in order to have their appeal restored under Order XXXIX Rule 19 of the Civil Procedure Code, Cap 33 Revised Edition, 2019. This application is duly supported by a sworn affidavit of the applicants' advocate one John Kivuyo Lairumbe.

It is in the applicants' affidavit where reason for non-appearance of the applicants and their advocate on the material date is given namely; that on the material date, the applicants' advocate who had full instruction to proceed with hearing was sick and that he was hospitalized in AICC for a number of days. In support of his assertion that he was sick and admitted on the material date, the applicants' advocate appended his sick sheet.

Opposing this application, the respondent's counsel one Basil Boay filed his counter affidavit by stating that this application is subject of dismissal due to the fact that both applicants and their advocate did not enter appearance for more than two sessions consecutively without notice to the court.

On the 29th day of March 2022 when this application was called on for hearing, Mr. John Kivuyo and Mr. Salehe Salehe for the applicants and respondent respectively did enter appearance and the matter was orally argued. Kicking the ball rolling, Mr. Kivuyo merely adopted his affidavit

and cemented on the reason for the non-appearance. He then urged this court to this court to make a reference to a case of **Salum v. Maria**, Misc. Application 415 of 2021 (unreported) where this court (**Mgeyekwa J**) correctly stated that in re-admission of an appeal must pertain with sufficient cause.

Equally, Mr. Salehe sought court's adoption of his counter affidavit adding that the reason given by the applicants' advocate does not justify this court to grant the application since neither the applicants nor their advocate entered appearance on the material date. He finally asked this court to exercise its discretion judiciously.

In his rejoinder, the applicants' learned counsel stated that, the respondent will not be affected in anyhow if this application is granted.

Issue for the court's determination is, whether the applicants through their counsel has given sufficient cause for the non-appearance to justify this court to restore their appeal.

It is the cardinal principle that whoever seeks an order of the court re-admitting a dismissed appeal or application must adduce good cause (s) for his absence on the date on which the appeal or application was called on for hearing. Hence, it is the explanation for the absence by the absent party that is most important unless such absence by such party was not deliberate but was due to accident or mistake (See the foreign

In our application, the applicants' advocate has explained that he was sick and therefore unable to attend and prosecute the appeal when it was called on for hearing. In support of his contention he has attached the sick sheet which shows that he attended AICC Hospital on the 23rd August 2021 while this application was dismissed on the 1st September 2021.

I am of the decided view that a reason of illness, if given and proven, warrants the court to reinstate the appeal which was dismissed for want of appearance however there must be a cogent proof that the absent party was really unable to appear on the material date due to sickness as opposed to our case where the applicants' advocate merely attended medication at AICC Hospital on the 23rd August 2021 while the appeal was dismissed on the 1st September 2021. Hence, in my considered view, it is not worth to rely on the alleged sickness nor is it indicated thereto that the applicants' counsel was admitted on that date (23rd August 2021) or subsequent to that date.

I am alive of the principle that sickness or illness constitutes a good cause for re-admission or extension of time if proved (**Kijiji Cha Ujamaa Manolo vs. Hote** (1990–1994) 1 EA 240 and **Range Chacha v. Elifas Nyirabu** [1967] HCD 115.) In our instant application, it is seriously miserable to re-store the dismissed appeal since there is no clear proof if


the learned advocate for the applicants was sick and unable to attend court's session scheduled on the 1st September 2021 since he merely told the court that he just attended the hospital on 23rd September 2021 for medication via his sworn affidavit. If the applicants' advocate was truly weak and incapable of dealing and handling the matter on the dismissal date, he personally or through his clients ought to have notified the court of the alleged illness and incapability.

I have also considered the previous conducts of the applicants and or their counsel by examining the appeal file's records and I have indisputably noted that the applicants and their advocate did not enter appearance on several court's sessions without notice to the court that is on 5/11/2020, 20/11/2020, 13/5/2021, 15/7/2021 and 1/9/2021 excluding on when the applicants' counsel was absent but with notice by the respondent's counsel (8/3/2021). That being the case, it sounds to me that the previous conducts of the applicants and their advocate should not be free from condemnation as correctly argued by the respondent's counsel.


For the foregoing reasons, I am justified to decline granting this application for want of good cause which would have warranted this court to invoke its judicial discretion to reinstate the dismissed appeal. Consequently, this application is dismissed with costs.

It is so ordered.

Date at ARUSHA this 27th May, 2022


M. R. GWAE
JUDGE
27/05/2022

Court: Right of appeal explained


M. R. Gwae
Judge
27/05/2022

