

**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. 423 OF 2022

MAMMUT HOLDINGS INTERNATIONAL LIMITED APPLICANT

VERSUS

JUNIOR CONSTRUCTION COMPANY LIMITED RESPONDENT

(Appeal from the order of this Court on Civil Appeal No. 111 of 2021)

RULING

20th February & 2nd March, 2023

KISANYA, J.:

The above named applicant was the appellant in Civil Appeal No. 111 of 2021 filed to this Court to challenge the decision of the District Court of Kinondoni at Kinondoni in Civil Case No. 162 of 2018. When the said appeal was called for hearing on 11th July, 2022, the applicant failed to appear. Upon being moved by the respondent's counsel, the Court dismissed the appeal for want of prosecution under Order XXXIX, Rule 17(1) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC).

The applicant's counsel learnt of the dismissal of the appeal when he appeared arrived at the Court few minutes later. Therefore, the applicant was

inclined to lodge the present application seeking an order of restoration of the Civil Appeal No. 111 of 2021.

The application is by chamber summons predicated under Order XXXIX, Rule 19 and section 95 of the CPC. It is supported by an affidavit deposed by the applicant's counsel, Mr. Henry Mwangwala. On the adversary side, the respondent contested the application vide the counter affidavit deposed by her advocate, Mr. Juventus Katikiro.

When the application was placed before the Court for hearing, Messrs Henry Mwangwala and Juventus Katikiro, learned advocates appeared for the applicant and respondent, respectively.

In his address, Mr. Mwangwala adopted the affidavit in support of the application to form part of his oral submission. He contended to have learnt of the dismissal of the appeal when he arrived at the Court at 9.10 am. It was his further contention that, he failed to arrive at 9.00 am because he was hailing from Mbeya to attend the burial ceremony of his sister. Contending that the applicant had advanced sufficient reason, the learned counsel urged that the appeal be restored. To bolster his argument, he cited the case the case of **Honest Marandu vs Farida Rashid**, Misc. Civil Application No. 220 of 2022 (unreported) in which this Court held that an accident is sufficient cause for restoration.

By way of reply, Mr. Katikiro started by adopting the counter affidavit as part of his reply submission. He opposed the application on the ground that the applicant had not demonstrated sufficient cause. It was his further contention that the applicant was negligent. His argument was based on the basis that the applicant had failed to file the amended memorandum of appeal as prayed and ordered by the Court on 12th April, 2022. It was also his further argument that the applicant was being advocated by Mr. Jamal as Mr. Mwangwala informed the Court he was holding his brief. On that account, he submitted that Mr. Jamal was required to appear and not Mr. Mwangwala. Citing the cases of **Mwanahawa Haruna vs Fatuma and Another**, Misc. Civil Application No. 358 of 2020, **Hashim Ndwangila vs Yusta Njechele**, Misc. Land Case Application No. 692 of 2019 (both unreported), the learned counsel submitted that negligence is not a sufficient cause.

Mr. Katikiro further submitted that the affidavit of the Court Clerk named in the affidavit was not appended to support the application. It was also his firm view that, the case of **Honest Marandu** (supra) is distinguishable from the circumstances of this case on the ground that the application therein produced documents to support his application. On the foregoing submission, the learned counsel prayed that the application be dismissed for want of merit.

Having examined the record and considered the arguments made by counsel for the parties, this Court is enjoined to determine merit or otherwise of the prayer for the restoration of the appeal subject to this application.

This application is governed by Order XXXIX, Rule 19(1) of the CPC cited in the chamber summons. For ease of reference, the said provision is reproduced thus:

*"Where an appeal is dismissed under sub-rule (2), of rule 11 or rule 17 or rule 18, the appellant may apply to the Court for the re-admission of the appeal; and, **where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit** the appeal on such terms as to costs or otherwise as it thinks fit."* (Emphasis supplied)

As it can be observed from the above provision, the applicant is duty bound to prove that sufficient cause which prevented him from appearing when the appeal was called for hearing. Upon being satisfied that the applicant has proved to have been prevented by any sufficient cause, the Court has no option than to re-admit the appeal on terms as to costs or otherwise.

In the instant case, the facts deposed in the supporting affidavit show that six days before the hearing date, the applicant's counsel lost his sister, namely Ruth Emmanuel Mwangwala who met his demise on 5th July, 2022. It was further

deposed that the said counsel travelled to Kyela District, Mbeya Region where his late sister was buried on 9th July, 2022. Appended to the affidavit are copies travelling certificate issued by Lutethan Church- Boko, Burial Certificate which support the contention by the applicant's counsel. The applicant went on stating that, Mr. Mwangwala travelled back to Dar es Salaam where he arrived on 11th July, 2022 at 2.15 am. No evidence was brought by the respondent to dispute the said facts.

It is my considered view that the fact that the applicant's counsel was bereaved and inclined to travel to bury his sister is a sufficient cause which prevented him from appearing when the appeal was called on for hearing 11th July, 2022 at 9.00 a.m. This so when it is considered that, despite the foregoing reason, the said counsel came in the court's room after dismissal of the appeal as deposed in paragraph 4 of the supporting affidavit. The Court could not make any order in the absence of the respondent's counsel who had left the court's room.

I have further considered Mr. Karikiro's contention that the applicant had failed to comply with the Court's order of filing an amended appeal. In my considered view that, the said issue cannot be determined at this stage. As stated earlier, the Court is required to consider whether the applicant was prevented by sufficient cause. The issue whether the applicant failed to comply with the Court's order will be dealt with if the appeal is restored.

Last for consideration is the respondent's argument that Mr. Mwangwala did not represent the applicant's counsel in the appeal that was dismissed by the Court. At the outset, I hold that the argument is not supported by what was deposed in the respondent's counter-affidavit. Pursuant to paragraph 4 of the counter-affidavit of the respondent, Mr. Mwangwala introduced himself as the applicant's counsel when the appeal was called on for hearing on 12th April, 2022. Being guided by the trite law that parties are bound by their own pleadings, the contention that Mr. Mwangwala was not representing the applicant lacks legal basis.

In the end, the Court finds this application with merit and grant it. Accordingly, the dismissal order of Civil Appeal No. 111 of 2021 is hereby set aside. In lieu thereof, Civil Appeal No. 111 of 2021 is be restored. Costs to follow event in the appeal.

It is so ordered.

DATED at DAR ES SALAAM this 2nd day of March, 2023.



S.E. KISANYA
JUDGE