IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB- REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 59 OF 2023

(Arising from Civil Appeal No. 22 of 2022 before Hon. Dyansobera, J)

JOHN SIMON---------- APPLICANT

VERUS

SIYA SIMON---------- RESPONDENT

RULING

Last Order: 26.05.2023
Ruling Date: 31.05.2023

M. MNYUKWA, J.

Before me is an application to set aside dismissal order issued by this Court on 02/06/2022 in Civil Appeal No 22 of 2022 and restore the hearing on merit the Civil Case No 22 of 2022. The applicant filed this application pursuant to Order XLIII Rule 2, Order XXXIX Rule 19 and section 95 of the Civil Procedure Code Cap 33 RE: 2019.

The application is accompanied by the affidavit deposed by the applicant, John Simon that was challenged by the respondent, Siya Simon.

At the hearing of the application which proceeded orally, both parties enjoyed the legal representation. The applicant was represented by Yulitha Hezron while the respondent afforded the services of Joseph Mange, the learned counsel too.

In brief, the applicant was the loser before Sengerema District Court in Probate Appeal No 6 of 2021 delivered on 26/10/2021. He filed an appeal to challenge the decision in the above case at this Court through Civil Appeal No 22 of 2022. In opposing the appeal, the respondent on 13/04/2022 filed a reply to petition of appeal and also filed a notice of preliminary objection on 27/05/2022. It is on record that the summons of this Court issued on March 2022, scheduled the matter for hearing on 02/06/2022 at 9.30 am.

On the date when the matter was scheduled for hearing, the applicant appeared in person while the respondent had the services of Mr. Joseph Mange. The counsel for the respondent quickly prayed to withdraw the notice of preliminary objection and proceeded to pray the appeal to be heard on merit. On his part, the applicant who was the appellant, prayed the matter to be adjourned for the reason that his advocate was absent, the prayer that was objected by the respondent and prayed the matter to proceed with the hearing since the applicant was present or be

condemned for costs to be paid to the applicant for adjournment. At the end, this Court dismissed the appeal for want of prosecution and condemned for costs.

Aggrieved by the above decision, the applicant filed the present application whereby in his affidavit gave reason for this application to be granted. He mainly deposed that on the date when the matter was scheduled for hearing his advocate got an excuse and that his advocate knew that the matter was coming for Mention in order to ascertain if the respondent filed the reply to the petition of appeal to served. He added that, the court refused his prayer to adjourn the matter and proceeded to dismiss the appeal for nonappearance of his advocate and that there is overwhelming chances of success on the appeal that was dismissed.

On his counter affidavit the respondent deposed that, the summons to which she was served with shows very clear that the matter was scheduled for hearing on 02/06/2022 and that the advocate who was named to got an excuse had never enter appearance as per the court record. And that no record in this Court which shows that the applicant was represented and therefore it was the duty of the applicant to prosecute his case on his own. He finally deposed that the rights of the heirs of the deceased are available and that the respondent who is the

administrator of the deceased estate failed to distribute the estate to the heirs of the deceased due to a number of cases filed by the applicant against her.

Submitting in support of the application, the applicant's counsel prayed to adopt the chamber summons and the affidavit sworn by the applicant to form part of his submission. She averred that, when the applicant appeared in court, he knew that the appeal was coming for Mention that's why he was not accompanied by his advocate and also he wanted to ascertain if the respondent filed his reply to the petition of appeal. She added that, when going into the court record, the same shows that the matter was coming for Mention and he was aware with that fact and he was surprised when he appeared before the Court he was told that the matter was coming for Hearing and since his advocate was absent, he failed to proceed and the matter was dismissed for want of prosecution.

She finally retires her submissions by praying this Court to grant the application so that the applicant should enjoy the right and not to lose his right as the beneficiary of the estate of the deceased since as the appeal has chances to succeed.

Responding, the counsel for respondent opposed the application and prayed to adopt the affidavit sworn in by the respondent to form part of his submissions. He briefly submitted that, for the application of this kind to succeed, the applicant must show sufficient cause as to why the court should set aside its dismissal order. He went on that, the applicant was aware that the case was coming for hearing because he was the one who filed the application and serve summons to the respondent which notified parties that on 02.06.2022 the matter was scheduled for hearing. He added that, since the summons which is an order of the court it has to be respected as it was stated in the case of **Elihaki Musa Kanyika v Badi Salehe Msangi,** Land Appeal No 1 of 2020. He added that, the summons shows that the matter was coming for Hearing, the applicant appeared on that date and was afforded a right to be heard, but chose not to proceed to prosecute his appeal that's why his appeal was dismissed for want of prosecution.

On the issue of the applicant's counsel to get an excuse when the matter was scheduled for hearing, the respondent's counsel strongly opposed that assertion for the reason that the same was not supported with any exhibit not only on the date when the matter was dismissed for

want of prosecution but even today when the application was heard. For that reasons he prays the application not to be granted.

To support his submissions why the application should not be granted, he referred to the case of **Adam Mohamed Zuberi v Kulwa Mashaka,** Civil Appeal No 175 of 2018 where the Court of Appeal held that there should be good cause for restoration of the case and gave the conditions as per Regulation 13(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, GN No 173 if the matter was dismissed before the District Land and Housing Tribunal.

He also referred the decision of this Court in the case of **Tryphony Gwalanda t/a Gwalanda v National Microfonance Bank & Another,** Land Appeal No 57 of 2021 which among other things insist about proof that is to say, if there was an excuse on the part of the applicant's counsel, there must be a proof so as to convince the court to grant the application. He further supported his submissions with the decision of the Court of Appeal in **Christina Alphonce Tomas (As Administratix of the late DIDASS KASELE DECEASED) V Saamoja Masingija,** Civil Application No 1 of 2014 which held that unnecessary adjournment should not be entertained.

Finally, he retires his submission by praying before this court not to grant the application because the applicant failed to show good cause and therefore, the application should be dismissed with costs.

In a short rejoinder, the applicant's counsel insisted that his client knew that the matter was coming for Mention and that he was not served with the reply and that the applicant was taken by surprise after being informed that the application was coming for hearing.

After hearing the submissions of parties, the main issue for consideration and determination is whether the applicant has demonstrated sufficient cause for this Court to set aside its dismissal order and order restoration of the Civil Case No 02 of 2022.

In determining this kind of application, first of all it has to be noted that, restoration of a matter dismissed for want of prosecution is only grantable when sufficient cause or causes have been established and depending on the circumstances of each case, the good cause must be supported with a cogent proof to substantiate the same. The applicant's affidavit also should demonstrate the same otherwise parties will be defaulting appearance or unwilling to prosecute the case for the reasons best known for themselves at their own wishes and later on come to seek restoration on very flimsy stories. The Provision of Order XXXIX rule 19 of

the Civil Procedure Code Cap. 33 RE: 2019 in which this application is preferred reads that: -

> *"4. Where an appeal is dismissed under sub rule (2) of rule 11 or rule 17 or 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 the appeal on such terms as to costs or otherwise as it thinks fit."*

The above Rule gives power to this Court to re-admit the appeal if one the above conditions stated therein exists. Upon going through into the court record, it is my considered view that, as per the above provision, the applicant is supposed to prove that he was prevented by a sufficient cause from appearing when the appeal was called for Hearing.

The question that may arise is whether the applicant appear on the date when the matter was scheduled for hearing? It has to be understood that, in law the word appearance does not mean and limited to only physical appearance, it encompasses entering an appearance in response to the order of the court for example appearance to address the court on a certain issues, appearance for Mention appearance or for Hearing of the matter, to mention a few.

Turning now to our application at hand, this court dismissed the application for want of prosecution as the applicant entered physical appearance but failed to appear in response to the Order of the Court which called the matter for Hearing so as to proceed to prosecute his appeal. Now, as the above rule requires the applicant to show sufficient cause for this court to re-admit the appeal after setting aside the dismissal order, it is upon him to show that his non-appearance was with sufficient cause. What amount to "sufficient cause" is a question of fact, and there is no hard and fast rules that are laid down as to what constitutes and what does not constitute a sufficient cause.

Going into the records, specifically paragraph 6 and 7 of the applicant's affidavit which is drawn and filed by the counsel who represented him in this application, he deposed that, on the date when the applicant enter appearance in court, his advocate did not enter appearance because he got an excuse and she also knew that the matter was coming for Mention and to see if the respondent filed his reply, and that the appeal was dismissed just because his advocate did not enter appearance.

On the other hand, in her submission, the counsel for the applicant submitted that, when his client attended before the court, he knew that

the matter was coming for Mention and the records of the court suggests so. And that, when he appeared before a court he was told that the matter was coming for Hearing and as he was not accompanied with his advocate he failed to prosecute his case.

Regrettably, I wish to state that, the affidavit sworn by the applicant contradicts with the submission of his counsel. While the applicant sworn that her advocate was not aware if the matter was coming for Hearing as she knew that the matter was coming for Mention, his counsel submitted that the applicant knew that the matter was coming for Mention and she was told that the matter was coming for Hearing when he was in the Court. The above presuppose that, both of them were not aware if the matter was coming for Hearing. But was that the truth? How does they get to know that the matter was coming for Mention? The answer is definitely available from the submissions of the applicant's counsel who avers that, the court records shows that the matter was coming for Mention.

To ascertain the above fact alleged by the applicant's counsel, I revisited the court records that is the Proceedings of Civil Appeal No 02 of 2022 and the summons which called the parties to appear on that date. Surprisingly, both the summons and the proceedings shows that the

matter was scheduled for Hearing. On the proceedings dated 24/03/2022, both parties were absent and the matter was scheduled for Hearing and the court ordered parties to be notified. Fortunately, the parties were notified since the summons was issued which was served to the respondent as his counsel submitted that they were served with the summons for them to appear for Hearing. How come now the applicant and his counsel who filed the appeal were not aware with the hearing date while they were the one who served the respondent with the summons. Indeed, it is very doubtful if the affidavit of the applicant and the submissions of his counsel is not tainted with falsehood.

For that reason, I find the reason advanced by the applicant that they knew that the matter was coming for Mention is not a sufficient reason for this court to re-admit the appeal. I hold that view because court record are believed to be authentic and the same shows that the matter was coming for Hearing. As it is settled, court records are deemed authentic and cannot be easily impeached. In the case of **Hellena Adam Elisha @ Hellen Silas Masui vs Yahaya Shabani & Another,** Civil Application No. 118/01 Of 2019 referred to the case of **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 it was held that:-

"(i) A court record is a serious document. It should not be lightly impeached.

(ii) There is always a presumption that a court record accurately represents what happened."

On the second reason, the applicant's affidavit and his counsel averred that the advocate did not enter appearance for the reason that he got an excuse. It is neither the applicant's affidavit nor his counsel submissions which evident that excuse apart from the mere words. The Court always enjoined to discourage adjournment which is not supported by the concrete proof that they are with genuine reason(s). This is because, allowing unnecessary adjournment may result to the unnecessary prolong of the litigation which is costly to the litigants and the court. To that end, it is my view that, this also is not a sufficient reason.

Before I conclude I wish to comment on the right to be heard and the chances of the appeal to succeed as claimed by the applicant and his counsel. It is noteworthy that, the right to appeal is not absolute, it is subject to the law of the land. A party cannot claim that he was not afforded the right to be heard while he chose not to prosecute his case when the matter was coming for Hearing. As I have said, physical appearance is not enough for the purpose of hearing as there must be

appearance with procedural compliance which also includes appearance as per the court order.

In any event, this application must fail as the applicant failed to show a sufficient cause for this Court to grant the application. Consequently, the application is dismissed with no order as to costs considering the relationship of the parties who are reatives.

Order accordingly.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

M. MNYUKWA
JUDGE
31/05/2023

Ruling delivered in the presence of both parties

M. MNYUKWA
JUDGE
31/05/2023