

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. CRIMINAL APPLICATION NO. 56 OF 2022

CASTORY MBOJE.....APPLICANT
VERSUS
DOMINICO KAGITO.....RESPONDENT

RULING

01st & 01st June, 2023

Kilekamajenga, J.

The instant application seeks to re-admit the appeal which was dismissed for want of prosecution on 1st September 2022. The application is accompanied with the applicant's affidavit stating the reason for failure to prosecute the appeal on the date scheduled by the court. During the hearing of the application, the applicant appeared in person whereas the respondent appeared in person and also represented by the learned advocate, Mr. Masoud Mwanaupanga. In his oral submission before this court, the applicant blamed the court officer who promised to inform him about the progress of the case when he lodged the appeal. Furthermore, despite failing to appear on the date fixed for hearing, the applicant's counsel one Mr. Sijaona was handling the appeal and appeared before the court. He further blamed the court for opting to phone him instead of issuing a summons for his attendance. Even when he followed-up the matter in court, one of court clerks informed him that there was communication



predicament leading to failure to reach him. He urged the court to re-admit the case because he had no intention to disobey the order of the court. He also wanted his matter to be heard by this court.

When prompted for a response, the counsel for the respondent objected the application arguing that, the applicant failed to accompany the affidavits of the persons that misled him. In absence of the affidavits of the person behind his failure to prosecute the appeal, there is no evidence to substantiate the applicant's allegations. The counsel invited the court to the legal principles stated in the cases of **Mzee Mohammed Akida and 7 Others v. Low Shek Kon**, Civil Application No. 481/17 of 2017, CAT at Dar es salaam (unreported) and **Dianarose Spareparts LTD v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021, CAT at Dar es salaam (unreported). He finally urged the court to dismiss the application.

The applicant had no meaningful rejoinder rather than insisting on the re-admission of the appeal for determination of his rights.

Before addressing whether this court should re-admit the dismissed appeal, the facts of the case are pertinent. The applicant's cows trespassed in the respondent's rice farm and caused destruction. When the dispute landed in the

Primary Court of Ushiroombo, the applicant was ordered to pay general damages at the tune of Tshs. 1,530,000/=. Dissatisfied with the decision of the trial court, the applicant appealed to District Court of Bukombe, where the general damage was reduced to Tshs. 900,000/=. Still unhappy, the applicant lodged an appeal before this court on 21st February 2022. The case was immediately assigned to the Judge for determination and scheduled for hearing on 12th April 2022 but the applicant and respondent were absent. The appeal was scheduled to come for hearing on 26th April 2022, again none of the parties appeared. This court re-scheduled the appeal for a hearing on 21st July 2022; the applicant was absent. Again, the appeal came for hearing on 04th August 2022 but the applicant was absent though the respondent's counsel Mr. Maro Samwel appeared. When the case came for hearing on 1st September 2022, the applicant was absent but two advocates for the respondent, Mr. Raphael Lukindi and Mwita Emmanuel appeared. Mr. Lukindi for the respondent moved the court to dismiss the appeal because the applicant was not appearing. This court consequently dismissed the appeal for want of prosecution. Almost three months later, the applicant filed the instant application that is on 24th November 2022.

On the third paragraph of the affidavit in support of the application, the applicant stated that, he followed up the case in April and he was informed by one of the court officers that, his appeal was registered and when assigned to the judge he

will be informed by phone. From that date, he did not hear any information about his case until he was awakened by the execution processes of the decision of the Primary Court. Furthermore, on the fifth paragraph of the affidavit, the applicant alleged to have sent Masalu Juma Charles to follow-up the case but there was no clue about it until it was dismissed. However, as stated by the learned counsel for the respondent, in absence of the affidavit of the court officer who misled the applicant, the allegation that the applicant followed up the case is unsubstantiated. This court was previously faced with a similar predicament in the case of **Phares Wambura and 15 others v. Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016 (unreported) and decided that:

"The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances, I agree with the counsel for the respondent that there was a need for the said court clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits. ...the Court Clerk could have been useful to substantiate the applicants' assertions of her/his involvement in the matter."

The Court of Appeal of Tanzania in the case of **Dianarose** (*supra*) addressed a similar issue thus:

"The stance of the law is that, where an affidavit mentions another person on a material point, that other person should also take an affidavit."

Despite the fact that, the applicant failed to substantiate his allegation, I also find gross negligence on the part of the applicant for failing to follow-up the case from the date when it was filed in February 2022, until it was dismissed on 1st September 2022. Surprisingly, the respondent's counsel continued to attend to the case but the applicant who filed the appeal went back home and relaxed. I have no hesitation to declare that, the appeal was fairly dismissed and the applicant has no good reason to warrant the re-admission of the case which was dismissed due to the negligence of the applicant. I hereby dismiss the application and order the applicant to pay the costs of the application.

DATED at **Mwanza** this 01st day of June, 2023



Ntemi N. Kilekamajenga.
JUDGE
15/06/2023



Court:

Ruling delivered this 01st June 2023 in the presence of all the parties present in person. Right of appeal explained.



Ntemi N. Kilekamajenga.
JUDGE
01/06/2023

