

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO.109 OF 2023**

*(Originating from Civil Appeal No.207 of 2022 High Court at Dar es  
salaam District Registry)*

**KAMALA RWIZA STEPHANO.....APPLICANT**

**VERSUS**

**TANZANIA WOMEN'S BANK PLC.....RESPONDENT**

**RULING**

*23/05/2023 & 28/07/2023*

**POMO, J**

In the instant Application, Kamala Rwiza Stephano, is applying for restoration of his appeal, Civil Appeal No.207 of 2023, which was dismissed for want of prosecution on 1<sup>st</sup> March,2023 and Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 R.E.2019] (the **CPC**) is cited as the enabling provision in moving the court. It is supported by two affidavits. Firstly, that

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deposed by Paschal Kamala, learned Advocate and secondly, that of Antipas Lakam, the learned advocate too.

On the other hand, on 19<sup>th</sup> April, 2023 the Respondent filed the counter affidavit resisting the Application and the same was deposed by Innocent Mhina, the Respondent's Principal Officer.

Briefly stated, the Applicant had an appeal, Civil Appeal No.207 of 2022 before this court, against the Respondent. When the appeal was called on for hearing on 1<sup>st</sup> March, 2023 only the Respondent appeared prepared for the hearing. The Applicant didn't appear so is his advocate. Such non - appearance by the Applicant led to the dismissal of the appeal for want of prosecution, hence the application herein for its restoration

When this Application was called on for hearing on 19/4/2023 Mr. Sabas Shayo and Mr. David Chillo, learned advocates appeared for the Applicant and the Respondent respectively. I ordered hearing be by way of written submissions and both parties have fully complied with the schedules of filing their respective submissions. I thank them for their commendable job well done.

Arguing the application, Mr. Shayo adopted the two affidavits supporting the application and submitted that on the material date all the advocates from their law firm were engaged in other courts. That, Mr. Paschal Kamala, learned advocate travelled to Zanzibar to attend Misc. Application No.124 of 2021 between Atlas Michamvi versus Bank ABC which was fixed for hearing, and Application No.39 of 2022 Abubakar Mohamed versus ABSA Bank Ltd both before the High Court of Zanzibar asserting that Mr. Kamala is the only advocate from their law firm admitted in Zanzibar. And that, such averments are per paragraphs 4; 5; 6; 7 and 8 of an affidavit deponed by the said Paschal Kamala, learned advocate.

That, the rest of the advocates from their law firm were engaged in other courts as follows. **Antipas Lakam** travelled to Iringa and Mbeya to attend Land Case No.2019 between Hassan Stone Sanga Vs CRDB Bank PLC pending at High Court Iringa district registry; and, Labour Execution No. 32 of 2021 High Court at Mbeya District Registry. Sabas Shayo was attending Misc. Land Application No.63 of 2023 between Jamila Mahmoud Dagan versus Commissioner for Lands, Ministry of Land Housing and Human Settlement and 4 Others at High Court (Land Division) before Arufani, J. And lastly, that Ester Msangi, was assigned to attend Commercial Case No. 6 of





2023 between Signo Tanzania Limited versus CFAO Motors Tanzania Limited High Court (Commercial Division) at Dar es Salaam before Hon. Nangela, J.

That, on the basis of the above, the counsel for the Applicant sought assistance from the Respondent's counsel Mr. Phillip Irungu of B & B Anko Law who was contacted by Mr. Antipas Lakam, learned advocate asking him to hold his brief and inform the court for their absence. That, it was very unfortunate that the said advocate did not appear in court on the material date instead another advocate from the said B&B Anko Law appeared and he came to find out the matter was dismissed.

That, under the circumstances, it was beyond their control of any reasonable human being.

Mr. Shayo, is of the further argument that suit should be determined on merits unless there are special circumstances to the contrary and in support, he cited the case of **Sadru Mangalj versus Abdul Aziz Lalani and 2 Others, Misc. Commercial Application No.126 of 2016 High Court Commercial Division at Mwanza (Unreported)**. That, the advanced reasons are good cause and to support the argument Mr. Shayo

cited to this court the case of **Abdallah Zarafi versus Mohamed Omari [1969] HCD 173**

That, by notifying the counsel for the respondent to notify the court on their absence demonstrates the Applicant is still desirous of pursuing his claims against the Respondent thus asking the court to afford him right to be heard and to bolster the assertion he cited to this court the case of **Mbeya Rukwa Auto Parts & transport Ltd versus Jestina George Mwakyoma [2003] TLR 251 (CAT)**. In the end, he prayed the application be allowed by re-admitting Civil Appeal No.207 of 2023 asserting the respondent will not be prejudiced in any way by the order

Responding, Mr. Chillo argued that per **Order XXXIX Rule 19 of the CPC** the court can re-admit a dismissed appeal where it is proved that the appellant was prevented by sufficient cause to appear in court when the appeal was called on for hearing. That, from the Application and the supporting affidavits, so is the submission, nothing is said as to why the Applicant didn't appeal on the material date when his appeal was dismissed. To support the argument, Mr. Chillo cited the case of **Elias Masija Nyang'oro & 2 Others versus Mwananchi Insurance Company**



**Limited, Civil Appeal No.278 of 2019 CAT at Dar es Salaam**

(Unreported).

Arguing further, Mr. Chillo submitted that cases are not for advocates and where a party engages an advocate, likewise, has a duty to make follow-up of his case and for that matter the Applicant could have appeared in court and inform the court on the absence of his advocate the day his appeal was dismissed. Such non-appearance on the material date was a negligence on the part of the Applicant and/or intention not to prosecute his appeal.

Mr. Chillo in his further submission argued that the allegation by the Applicant's counsel that they were all engaged in other courts, to him such allegation goes contrary to **Order XVII Rule 1(3) of the CPC** which provides for grounds of adjournments. That, the summons attached in the affidavits are in respect of the cases before the High Court and the Commission for Mediation and Arbitration whereas summons in respect of Misc. Application No.623 of 2023 between Jamila Mahmoud versus Commissioner for Lands and 4 Others which is annexure b-4 to the affidavit to which the Applicant's counsel seeks to rely on shows the matter stood scheduled for mention on 1/3/2023 contrary to the one dismissed which was coming for hearing.

The allegations concerning Ester Msangi, learned advocate to be appearing before the High Court (Commercial Division), Mr. Chillo argued that it lacks support for failure to attach summons to appear. Likewise, the allegations concerning attending to High Court at Zanzibar the attached traveling tickets cannot be sufficient proof for attending in court as he might have travelled for other businesses including for leisure. On the need to show sufficient ground Mr. Chillo cited to this court the case of **Flomi Hotel Limited versus Equity Bank Tanzania Limited, Civil Case No.163 of 2017 High Court at Dar es Salaam (Unreported)**.

That, since they were fully aware that they are not going to appear on the material date the Applicant's Appeal was dismissed, a formal notice in terms of letter could have been issued by them to the court but due to their negligence and sloppiness they didn't. That, the Applicant has no clean hand and cannot benefit out of his own negligence. In support, he cited the case of **Walter Kiwoli versus International Commercial Bank (T) Ltd, Misc. Application No.267 of 2019 High Court Labour Division at Dar es Salaam; Victoria Mericha Osaki and 3 Others versus Sarah Iddy and 9 Others; Misc. Civil Application No.571 of 2019 High Court (Land Division) at Dar es Salaam and Asigo Emmanuel versus**



**Letshego Bank Ltd, Civil Appeal No.12 of 2020 High Court at Mwanza** (All Unreported). In the end, he asked the court to dismiss the Application for want of merit.

Having given due scrutine the parties' submissions for and against the application; the affidavit and the counter affidavit thereto together with the case file, Civil Appeal No.207 of 2023, the subject of the restoration application herein, now, the task ahead of me is to determine whether this Application is merited.

The law governing restoration of a dismissed appeal is Order XXXIX Rule 19 of the Civil Procedure Code (the CPC) and it provides thus: -

*"R.19 – 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 on such terms as to costs or otherwise as it thinks fit**".*



Reading Rule 19 of Order XXXIX of the CPC above reproduced, duty is imposed to the appellant to be present in court when his appeal is called on for hearing and again it tasks him in an application for restoration of his dismissed appeal for want of prosecution, to show cause as to why he didn't enter appearance on that particular date of dismissing his appeal.

Again, the position of the law is settled in that even where a party to a case engages legal service of an advocate, still it doesn't mean by so doing his duty to appear in court becomes redundant. In the decision of the Court of Appeal, cited by the Respondent, in **Lim Han Yung and Another Versus Lucy Treseas Kristensen**, Civil Appeal No.219 of 2019 CAT at Dar es Salaam (unreported) at page 22, the Court of Appeal had this to state: -

***"We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him".***

[See also: **Elias Masija Nyang'oro and 2 Others versus Mwananchi Insurance Company Limited**, Civil Appeal No.278 of 2019 Court of Appeal at Dar es Salaam (unreported)]

As to the instant Applicant, the Applicant's Appeal, Civil Appeal No.207 of 2023 sought to be restored, was dismissed on 1<sup>st</sup> of March, 2023 the date the appeal was set for hearing. Only the Respondent appeared prepared for hearing. Neither the Applicant nor his advocates appeared.

Regardless of the duty imposed to the Applicant to be present in court when his appeal is called for hearing, there is no affidavit by him in support of the application explaining why he was absent on the material date his appeal got dismissed. Also, reading two supporting affidavits, which are of his advocates, Paschal Kamala and Antipas Lakam, in them there is nowhere stated as to why the Applicant didn't appear on the dismissal date of his appeal.

Therefore, guided by the above decision of the court of appeal, and in absence of explanation as to why the Applicant didn't appear on the hearing dated, in my considered view, the applicant failed to perform the duty imposed to him under the law by not closely following up his appeal, Civil

Appeal No. 207 of 2022, which was dismissed on 1/3/2023 for want of prosecution.

Equally so, failure to procure an affidavit from the counsel allegedly to be asked by the Applicant's advocates to hold their brief on the Applicant's appeal hearing date makes their assertion that they so asked him be nothing rather than a hearsay. Time without number the Court of Appeal insisted on this, see **Kighoma Ali Malima versus Abas Yusufu Mwingamno**, Civil Application No.5 of 1987 CAT; **Sabena Technics Dar Limited versus Michael J. Luwunzu**, Civil Application No.451/18 of 2020 CAT at Dar es Salaam (Unreported) and **NBC Ltd versus Superdoll Trailer Manufacturing Company Ltd**, Civil Application No.13 of 2002 CAT (Unreported), to mention but a few. In the latter, the Court of Appeal had this to state: -

*"...an affidavit which mentions another person is hearsay unless that other person swears as well".*

Now, from the above facts, the resultant effect is that the court was not put on notice on the absence of both the Applicant as well as his advocates



As to the cases cited by the Applicant, which are of this court, in my view, cannot serve any purpose in presence of the position well-articulated by the Court of appeal in **Lim Han Yung** and **Elias Masija Nyang'oro** case (supra) on the need for the Applicant to be present when his appeal is called on for hearing and the need to formally notify the court by the advocates for their absence.


That said, I find the application to be un-merited and consequently I hereby dismiss it with costs.

It is so ordered

Right of Appeal fully explained

Dated at Dar es Salaam this 28<sup>th</sup> day of July, 2023




  
**MUSA K. POMO**

**JUDGE**

**28.07.2023**

Ruling delivered in presence of Ester Msangi, learned advocate for the applicant and in absence of the Respondent's counsel



  
**MUSA K. POMO**

**JUDGE**

**28.07.2023**