IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

MISC. CIVIL APPLICATION NO. 25 OF 2021

(Originating from Miscellaneous Civil Application No. 24 of 2020 in the High Court of Tanzania Dodoma Sub-Registry, dated 25th May, 2021)

YAHAYA ISSA.....APPLICANT

VERSUS

ISSA MOHAMED.....RESPONDENT

RULING

31st October & 15th November, 2023

HASSAN, J.:

The applicant herein filed the instant application under Section 95 and Order IX Rule 2 of the Civil Procedure Code, [Cap. 33 R. E 2019] praying for restoration of Miscellaneous Civil Application No. 24 of 2020 which was dismissed for want of prosecution by this court on 25th day of May, 2021.

In his significant step, toward convincing the court to grant restoration order upon this application, the applicant herein grounded the following issues to be determined by the court:

1. *That this honourable court be pleased to make an order for restoration of Miscellaneous Civil Application No. 24 of 2020 which was pending before Hon. Masaju, J.*
2. *That, any other relief (s) this honourable court deems just and fair to be granted.*

The matter proceeded in writing, and to their credit, parties complied with the order of preference to file their written submission in time. On that, it appears from submission that, the applicant was enjoying the representation of the learned counsel, Josephine M. Paulo. Whereas, on the other hand, learned counsel, Majaliwa Wiga served for the respondent.

Submitting in support of application, the learned counsel for applicant firstly prayed to adopt an affidavit deponed by the applicant, Yahaya Issa in support of the application to form part of the submission. Reflecting on the affidavit as at paragraph 2, the applicant stated that he and the respondent were diverse parties in the Miscellaneous Civil Application No. 24 of 2020 which was prematurely dismissed for want of prosecution by this court on 25th day of May, 2021.

Single out paragraph 7 and 8 of the applicant's affidavit, learned counsel, Ms Paulo submitted that the application was prematurely dismissed. Detailing on that, she pressed that on 25/05/2021 when the application was called on for hearing the applicant was seriously sick and at that point of a time, he had no advocate who could have represented him. He added that, his former advocate, Hemedi Semith was employed as Resident Magistrate as deponed under paragraph 5 of affidavit. Further to that, she submitted that the applicant in spite of his sickness, he made some efforts to look for another advocate who could have hold a brief of his former advocate but went in vain.

To cement her submission, she drew the attention from Order IX Rule 2 and 3 of the Civil Procedure Code, [Cap. 33 R. E 2019]. On that, she submitted that rule 2 provide that:

> *"where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed."*

Whereas Rule 3 of Order IX provide that:

> *"where a suit is dismissed under rule 2 the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he*

satisfied that court shall set aside the dismissal order and shall appoint a day for proceeding with a suit."

In her judgment, these provisions offer the effect that the plaintiff may restore the suit if he satisfies the court that there was a good cause for his non-appearance. Thus, she submitted that sickness of the applicant is a sufficient cause as it was an unforeseen event and it has never been intentionally. To support her argument, she referred the case of **Alfred Eliau Sayoloi V. Joseph Peter Massawe and 30 others (Misc. Land Application 96 of 2019 H/C (unreported)** where it was held that:

".....as well as reason given namely; sickness of the applicant and that of the advocate Haraka. I am therefore convinced that there are reasons for an order of restoration to be made."

From this respect, she contended that sickness is considered as sufficient cause for restoration as it is in the application at hand, thus she prayed for an order of restoration to be granted.

She further submitted that the applicant could not have instituted an application and hire an advocate and then later abandon his case. To that effect, she contended that because of that reason the applicant failed to appears on the date fixed for hearing.

Learned counsel for applicant further directed the court to refer the record of attendance to observe the applicant's trend of attendance through his counsel which prove seriousness, commitment and good intention of the applicant in prosecuting this case as deponed under paragraph 4 and 6 of affidavit.

In response to the call by the applicant, learned counsel for the respondent kickstarted by attacking paragraph 5 of the applicant affidavit to the effect that the recruitment letter was not issued of the 9th day of November, 2020 instead it was issued of 23rd day of November, 2020, and not any other letter was issued to that effect.

Moving forward, he also argued against paragraph 7 of the applicant's affidavit that on 25th May, 2020 when the matter was called on for hearing the applicant was seriously sick hence focused on the medical check-up. On this shield, he protested that the medical examination the applicant relied on that of 25th May, 2021 while the applicant claimed to have been sick on 25th May, 2020 which is almost a year later.

The respondent's counsel kept on marching by attacking paragraph 8 of the applicant's affidavit where the applicant averred that his fault was contributed by his struggle to look for another advocate who could have

hold a brief for his former advocate who had been employed as a Magistrate. To his resistive argument, Mr. Wiga submitted that the duration since his advocate was appointed as Magistrate to the date when the matter was called on for hearing, it was almost six months and two days. He argued that during that period he could have engaged an advocate and he did not, then why did he only become sick on 25th May 2021 when the matter was called on for hearing, the counsel inquired.

Finally, learned counsel Wiga faulted paragraph 11 and 12 of the applicant's affidavit for containing argument contrary to the guidance given in **Uganda commissioner of Prison Ex parte Matovu (1966) E.A 519** where it was held that an affidavit should not contain an arguments, conclusion and irrelevant matters.

In conclusion to what he has contested, the respondent's counsel prayed not to restore the Misc. Civil Application No. 24 of 2020 as there is no good ground advanced by the applicant to grant the restoration order.

Re-joining her earlier submission, Ms. Paulo reiterated her prior stand and she generally submitted that the respondent's counsel has failed to show that the applicant did not show a good cause for his

application to be restored. Thus, she maintained that, the applicant has been able to show a good cause for his application to be allowed.

Further to that, the applicant's counsel recapped that apart from complaining for typing error on dates and year as at paragraph 7 and 8 in the applicant's affidavit, the respondent has not disputed. In the end, she disputed the respondent's submission with regard to the Applicant's affidavit which to the respondent's view paragraph 11 and 12 contain an argument. In her response, she submitted that the respondent did not show the effect of those paragraphs which he disputed.

Essentially, this is what was submitted by the parties in their written submissions. In such circumstance therefore, the question that does raise is, whether the applicant raised a good cause worthy consideration for grant of restoration order.

In my endeavour, I am desired to signpost in the first place that, although there is no clear indication of provision which was used by the court to dismiss the Miscellaneous Civil Application No. 24 of 2020, however, owing to the nature of the matter, it is apparent that what the court has dismissed was an application for certificate of point of law and grant of leave to appeal to the court of appeal, and not a suit. Thus, to that note, the correct provision applicable for dismissing the application

for want of prosecution should be Order XXXIX Rule 17 of the CPC and not Order IX rule 2 as sought by the applicant. On that premise, the reason is simple, that the contested matter is an application and not a suit. Therefore, even if that provision of Order XXXIX Rule 17 was not conspicuously availed in the order of the court, the presumption is, and will always be that such order was made under Order XXXIX Rule 17 of the CPC.

That said, marching on with the issues in context, I will be therefore guided by provisions of Order XXXIX Rule 17 and 19 of the Civil Procedure Code, Cap. 33 R.E 2019 to address this matter in its core. In essence, these provisions provide for the dismissal of appeal for appellant's default and the remedy available thereof, thus rule 17 (1) provides:

> *"Where on the day fixed or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed."*

Thus, the remedy available for aggrieved appellant who suffer the consequence from the order given in terms of Order XXXIX rule 17 (1) is

to make an application for re-admission of his appeal under Order XXXIX rule 19 of the CPC which provide:

> *"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."*

I will also seek guidance from section 2 (1) of the Law of Limitation Act, Cap. 1 R.E 2019 which provide for the definition of a suit thus:

> *"**suit**" means any proceeding of a civil nature instituted in any court but does not include an appeal or application."*

See also Order XLII Rule 3 which provide that:

> *"The provisions as to the form of preferring appeal shall apply, mutatis mutandis, to application for review."*

That said, since the matter at hand is an application, I will take refuge under Order XXXIX Rule 17 and Order XLII Rule 3 of the CPC to lay down foundation of this matter.

At this juncture, before moving on to address the key issue raised in this application, that whether or not the applicant has raised a good cause worthy consideration for grant of restoration order. I will first answer the question whether by citing the wrong provision in Order IX Rule 2 this application is bad in law. On that, my response will be simple that, in my considered view, there was no prejudice occasioned. It appears, that apart from Order IX Rule 2, the applicant had also cited section 95 of the CPC which is a proper law to move the court to entertain this application.

Now moving forward, I will start to assess the point raised by respondent's counsel that paragraphs 11 and 12 of the applicant's affidavit contain argumentative statement. As for the respondent, he prayed for the same to be expunged. However, the applicant did not disagree with such allegation, but rather she threw the blame to the respondent that he did not show the effect of that anomaly.

Going through the content of paragraph 11 and 12, I am of the considered view that the counsel for the respondent is right that both paragraph 11 and 12 of the applicant's affidavit in support of application contains solemnly an argumentative statement. The statement which call for the court to uphold an overriding objective principle, and the plea that the applicant has great chance of success are not a statement of facts but rather an argument based on the application of law. For that note, as rightly submitted and reinforced in the decision of **Alfred Eliau Sayoloi v. Joseph Peter Massawe and 30 Others** (supra). To that end, I expunge both paragraph 11 and 12 from the applicant's affidavit.

At this point, the matter to resolve is whether or not the applicant has raised a good cause to warrant a grant of restoration order for Miscellaneous Civil Application No. 24 of 2020. In his application, the applicant raised two issues. ***One***, that his advocate was appointed as a magistrate and he did not get other advocate to hold brief on behalf. ***Two***, that on the date set for hearing where the matter was dismissed, he was seriously sick and he submitted a copy of hospital certificate as proof of his assertion.

By recapping the first issue that the applicant's advocate was appointed as Magistrate on 9th November, 2020 for Tandahimba District

Court and thus, he did not have another advocate to represent him in spite of looking for another advocate who could have hold a brief on his behalf. However, this argument was vehemently opposed by the respondent's advocate that, firstly he corrected the assertion that his advocate was appointed as Magistrate on 9th November, 2020 instead, he was appointed of 23rd November, 2020 which is almost six months later from the date the matter was dismissed for a want of prosecution. He therefore contended that, for that period, the applicant could have engaged another advocate.

Having meticulously considered the argument above, in my considered view, I hold the same baseless and the argument cannot be used as shield for the applicant to escape his responsibility to attended his case. Say it by himself, or through legal representation as the case may be. For instance, looking on the records of attachment as it appears in attachment "Y12" at paragraph 5, it is obvious that from the date of which the applicant's advocate was appointed as Magistrate to the date the matter was dismissed for want of prosecution, six months elapsed. Thus, in my view, there was enough time for the applicant to engage another advocate but he negligently ignored.

On the other point, that is, on the date set forth for hearing, the impugned application was dismissed for want of prosecution. Thus, to analyse this point, as to whether the applicant claim that, on that date he was seriously sick does hold water. To go about it, at paragraph 7 of his affidavit the applicant attached a copy of medical report to prove his assertion that he was seriously sick.

Looking on the record, it is apparent that a medical report is attached to the affidavit indicating that on 25/05/2021 the applicant suffered sickness marked as ***"abdominal discomfort associated with loose stool fever"*** and to him, that was the reason why he did not attend the court session on that same date.

Challenging the aforementioned argument, the respondent in his counter affidavit at paragraph 2 contested this assertion by submitting that the medical report relied by the applicant does not qualify to be "sick sheet" (medical report) and that no receipt of payment was annexed for out-patience record to prove that he attended hospital, the fact that the applicant must prove. Adding to that he disputed that the applicant averred that he was sick on 25th May, 2020 with medical report indicated that it was issued on 25th May, 2021, which is almost a year.

To satisfy myself on the assertion, I elegantly observed record of proceeding to that effect, as well as the said medical report in order to ascertain its realism. Thus, looking on the face of proceedings, the impugned date the matter was scheduled for hearing and so dismissed was 25th May 2021, and the disputed medical report was issued on the same date. That means, a date that the applicant has mentioned that he was seriously sick and the matter was scheduled for hearing does not correspond to the reality. And, as it was cleared by the applicant in his rejoinder submission that it was a typing error. Thus, on my part, I held the same view that it was a mere key board error which can be ignored since the real date is apparent in both court proceedings and medical report, that is 25th May, 2021.

Now, in my endeavour, going through the argument I am certain that based on the medical report, the applicant was sick on the date the matter was called on for hearing. The argument raised by the respondent in his affidavit that the medical report is unqualified and receipt of payment was attached for the out-patient. To me, at this far, I see no tight reason to disqualify the impugned medical report. First, because there is no law which impose mandatory payment for out-patient

individual. Second, the respondent had not shown any default qualification in the medical report.

Needless to say, by glancing on the record, I observe sign of irresponsibility on the part of the applicant which in the future, should be looked at with open eyes. For instance, this application was initially called on for hearing on 30/03/2021 but neither applicant nor his advocate appeared. It was called again on 25/05/2021, they were also absent and nor prior notice for the absence or that the advocate had disengaged to the matter owing to his appointment as Magistrate. In my view, that was a contempt on the part of the applicant which do not deserve lenience.

However, since the date under scrutiny at this juncture is only 25th May, 2021 and not otherwise, thus based on what I have observed, this application has merit and consequently I make an order to restore the Miscellaneous Civil Application No. 24 of 2020. Costs will follow the events.

It is so ordered.

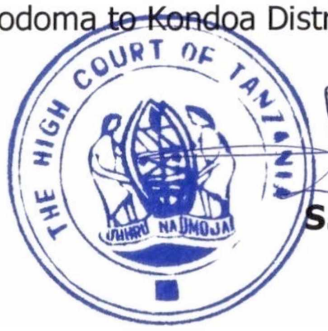
DATED at **DODOMA** this 15th day of November, 2023.

S. H. HASSAN

JUDGE

COURT

Ruling read over in the presence of the respondent's advocate who also hold brief for the applicant's advocate Ms. J. M. Paulo. The matter proceed via video conferencing facility linking the party from IJC-Dodoma to Kondoa District Court at Kondoa.



S. H. HASSAN

JUDGE