

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE SUB-REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM.**

**MISCELLANEOUS CIVIL APPLICATION NO. 477 OF 2023**

*(Originating from Civil Revision No. 29 of 2018)*

**SCHOLASTICA JOHN MAKUNE** (*administrator of the estate  
of the late JOHN FESTO MAKUNE*) .....**1<sup>ST</sup> APPLICANT**

**FESTO JOHN MAKUNE** (*administrator of the estate  
of the late JOHN FESTO MAKUNE*) .....**2<sup>ND</sup> APPLICANT**

**MARYAM JOHN MAKUNE** (*administrator of the estate  
of the late JOHN FESTO MAKUNE*) .....**3<sup>RD</sup> APPLICANT**

**WILLIAM JOHN MAKUNE** (*administrator of the estate  
of the late JOHN FESTO MAKUNE*) .....**4<sup>TH</sup> APPLICANT**

**VERSUS**

**FRANK MUSHENDWA**.....**1<sup>ST</sup> RESPONDENT**

**CHRISTOPHER MUSHENDWA**.....**2<sup>ND</sup> RESPONDENT**

**THE LIQUIDATOR OF TANZANIA  
HOUSING BANK**.....**3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of last order: 27<sup>th</sup> March, 2024*

*Date of Ruling: 19<sup>th</sup> April, 2024*

**A.A. MBAGWA, J.**

This is an application for restoration of Civil Revision No. 29 of 2018 which was dismissed by the Court (Hon. Chaba, J) on the 30<sup>th</sup> March, 2022.



The Court has been moved by way of chamber summons made under Order IX Rule 3 and section 95 of the Civil Procedure Code Act [Cap 33 R.E 2019]. the applicant prays for the following orders;

1. That this Honourable Court be pleased, for interests of justice to allow the restoration of the Civil Revision No. 29 of 2018 between JOHN FESTO MAKUNE versus FRANK MUSHENDWA, CHRISTOPHER MUSHENDWA AND THE LIQUIDATOR OF TANZANIA HOUSING BANK *sic* (TIB) which was before Hon. Chaba, J.
2. Costs of the Application be in cause.

On the one side, the application is supported by an affidavit affirmed by Mr. Salim Gogo, the applicants' advocate whereas on the other side, it is strongly contested by the respondents via a counter affidavit affirmed by Mr. Sypiriano Silungwe, learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondent. The 3<sup>rd</sup> respondent through Ms. Tausi Swedi, learned State Attorney, intimated her intention of not filing a counter affidavit.

According to the facts as gleaned from the parties' depositions, this application emanates from Civil Revision No. 29 of 2018 which was on 30<sup>th</sup> day of March, 2022 dismissed by this Court (Hon. Chaba J) for want of prosecution.



It has been deposed that, the 2<sup>nd</sup> applicant travelled to Morogoro in order to attend the case on the hearing date of the revision but he suddenly fell sick and he was hospitalized at St. Harry Hospital. As such he was also prevented from attending court on the hearing date. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> respondents through the affidavit affirmed by Mr. Silungwe learned advocate have generally disputed the facts in the affidavit in support of the application.

On 7<sup>th</sup> November, 2023, when the matter came for mention, I ordered the application to be argued by way of written submission and set a schedule for filing the same. For the reasons best known to the 3<sup>rd</sup> respondent, she did not file reply submission, thus I proceed to determine the application *ex parte* against her.

Before I proceed to determine the application, I commend both learned advocates for their timely compliance with the filing schedule. They have indeed demonstrated that, they are truly officers of the court.

I have gone through the submissions for and against the application. The applicants' submission is more or less the replica of his affidavit in support of the application. The main reasons advanced by the applicants is that on the hearing date i.e., 30<sup>th</sup> March, 2022, when the revision came before Hon. Chaba, J, the applicants believed that their counsel one Mashaka



Mfala would enter appearance instead, the said counsel did not enter appearance as he was engaged in another case which was scheduled for hearing before the Court of Appeal of Tanzania at Dar es Salaam on the same date. The affiant further contended that, he instructed Ms. Tausi Swedi, learned advocate for the 3<sup>rd</sup> respondent to hold his brief which she did.

Another reason advanced by the applicants was that, after the demise of the late John Festo Makune, all the respondents were appointed as the administrators of his estate and that, the 2<sup>nd</sup> respondent was on his way to Morogoro on 29<sup>th</sup> March, 2022, to inform the court about their appointment, unfortunately, he fell ill and was admitted to hospital. To back up their assertions, the applicants attached the proceedings in Civil Revision No. 29 of 2018, Death Certificate for John Festo Makune, letters of administration, bus ticket, medical information sheets and the affidavit of advocate Mfala which are annexure A1, A3, A4 and A5, respectively.

To bolster his stance, Mr. Gogo referred the Court to the decisions of **Regina Thobias Mihiga vs Rachel Anthony**, (Misc. Application No. 555 of 2020) [2021] TZHCLD 2023 and **Elias Masija Nyang'oro & Others vs Mwanachi Insurance Company Limited** (Civil Appeal 278 of 2019) [2022] TZCA 648 in which the courts discussed, in detail, the



circumstances constituting sufficient cause. Based on the affidavit and the submissions, the applicants' counsel prayed the Court to allow the application.

In rebuttal, Mr. Silungwe adopted his counter affidavit to be part of his written submission. He posited that the applicant had failed to furnish sufficient cause for the Court to set aside the dismissal order and restore the application. He contended that the applicants' failure to enter an appearance on the date for which the revision was dismissed for want of merits was a result of their sheer negligence as portrayed under paragraph 6 page 2 of the applicants' submission. He argued that all the applicants and their advocate were duty-bound to appear before the court on the hearing date but they failed to do that without reasonable excuse. He added that, the applicants spent about seven months without informing the court of the progress towards the appointment of the administrator of the late John Festo Makune.

The learned counsel further submitted that Mr. Mfala, learned advocate for the applicants ought to notify the court of his engagement to the Court of Appeal of Tanzania. To substantiate his stance, he referred the Court to the case of **Corridor Springs Hotel vs Ally Yusuph Martin**, Labour Revision No. 54 of 2016 (unreported), and **Elizabeth Paul and Another**



**vs Brac Tanzania Finance Limited**, Labour Revision 60 of 2020 which emphasized on the importance of advocates to notify the court when they are engaged in superior courts. He finally prayed the Court to dismiss the application.

In his rejoinder submissions, Mr. Gogo reiterated his written submissions in chief and distinguished the authorities cited by Mr. Silungwe. He stressed that the applicants were diligent enough as exhibited in the documents attached to the affidavit.

I have given due consideration to the parties' depositions and submissions. In applications of this nature, the only determining factor is whether the applicant has satisfied the court that his appearance was prevented by sufficient cause.

It is trite law in our jurisdiction and I need not cite any case law to the effect that there are no hard and fast rules determining what amounts to sufficient cause. The determining factors depend on the circumstances of each case including emergencies, sickness, etc.

As it can be gleaned from the record, it is undisputed that John Festo Makune died and the applicants were appointed the administrators of his estate by the Urban Primary Court of Arusha on 17<sup>th</sup> September 2021. The applicants diligently applied for an extension of time to file this



application *vide* Miscellaneous Civil Application No. 18 of 2023 in which my learned Sister (Maghimbi, J) granted the extension hence the instant application.

The applicants have deposed that on the hearing date, their counsel was engaged before the Court of Appeal of Tanzania at Dar es Salaam and they have attached the order of the Court of Appeal (Annexure A5) showing that, indeed Mr. Mfala was engaged before the superior court of the land. However, this reason is not itself a sufficient cause for his absence in the High Court. I hold that because, as per the proceedings (Annexure A3), this Court was not informed of Mr. Mfala's engagement in the Court of Appeal.

Further, I agree with Mr. Silungwe, learned advocate for the 1<sup>st</sup> and 2<sup>nd</sup> respondents that Mr. Mfala ought to have written a letter to the court and produce a summons requiring him to appear before the Court of Appeal. In the absence of such a notice, there was no way this Court could know the reason for his absence.

I have scanned the application documents in particular the proceedings of Civil Revision No. 29 of 2018. In the proceedings particularly on 30/03/2022, it is clear that after the demise of the late John Festo Makune, the present applicants took too long to apply to be parties to the case. Ms. Tausi Swedi, learned counsel for the respondents informed



the court that the applicants unreasonably delayed to complete the legal process for the appointment of the administrator of the estates of the late John Festo Makune.

Indeed, on the 19<sup>th</sup> day of April 2021, the applicant's counsel informed the Court that Mr. John Festo Makune had passed away. He thus prayed for an adjournment to allow the appointment of the administrator of the estates. Nonetheless, until on 30<sup>th</sup> March 2022 when the Civil Revision No. 29 of 2018 was dismissed, nothing had been done. This, in my considered opinion, was an indication of gross negligence which cannot be condoned by the Court.


Having considered all the circumstances that led to the dismissal of Civil Revision No. 29 of 2018, I am not persuaded by the grounds raised by the applicants. Put simply, I do not see good cause for restoration of the matter and for that reason, I dismiss the application with costs.

It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 19<sup>th</sup> day of April, 2024.



  
**A.A. Mbagwa**

**JUDGE**

**19/04/2024**