

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. 541 OF 2023
(Arising from Civil Appeal No. 22 of 2023)

IDANI FRANCIS MSUYA-----APPLICANT

VERSUS

HAMAD ABDALLAH HEMED-----1ST RESPONDENT

ARBITER (T) COMPANY LIMITED-----2ND RESPONDENT

RULING

Date of last order: 19/03/2024

Date of Ruling: 19/04/2024

A. A. MBAGWA, J.

This is an application for setting aside a dismissal order made by this Court (Hon. Pomo, J) dated 23rd day of August, 2023 in Civil Appeal No. 22 of 2023 (the appeal) and restoration of the same. The Court has been moved by way of chamber summons made under Order XXXIX Rule 19 of the Civil Procedure Code, [Cap 33 R.E 2019] (the C.P.C). To be specific, the applicant prays for the following order;

1. That this Honourable Court be pleased to re-admit Civil Appeal No. 22 of 2023 that was dismissed on 23rd (sic) of August, 2023.



The application is supported by an affidavit sworn by Mr. Joseph Kipeche, the applicant's counsel. The 1st respondent, on his part, did not contest the application whereas the 2nd respondent defaulted appearance despite being duly served through publication on the *Habari Leo* News Paper dated 7th March, 2024. As such, the matter was heard *ex parte* against the 2nd respondent.

The facts of the matter as gleaned from the applicant's affidavit and the attending attachments may, briefly, be stated as follows: the applicant instituted before this Court Civil Appeal No. 22 of 2023. The said appeal was adjourned on 27th June, 2023 and fixed for hearing on the 23rd August, 2023 before Hon. Pomo, J. On the 23rd day of August, 2023, when the appeal came for hearing, neither the applicant nor his counsel entered appearance. As such, the appeal was dismissed for want of prosecution. Further, it was contended that, on 23rd August, 2023, the applicant's counsel failed to enter appearance because he was summoned to appear before the Court of Appeal in Civil Application No. 73/01 of 2023. A copy of the summons for hearing of Civil application No. 73/01 of 2023 was annexed to the affidavit as marked **Annexure KRA-2**.

In view thereof, the applicant prays the Court to allow the application and re-admit the dismissed appeal namely, Civil Appeal No. 22 of 2023.

On 19th March, 2024, when the application was called on for hearing, Mr. Joseph Kipeche, learned advocate appeared for the applicant whilst Mr. Burhan Mussa also learned advocate appeared for the 1st Respondent. The 2nd Respondent did not enter appearance. Mr. Kipeche produced in court the *Habari Leo* News Paper dated 7th March, 2024 in which the summons for hearing of the application was published at page 22 and successfully prayed for the hearing of the application to proceed *ex parte* against the 2nd respondent.

Submitting in support of the application, Mr. Kipeche did not have much to tell the court rather, he reiterated the contents of his own affidavit in support of the application. He added that, he informed Mr. Burhan Mussa learned counsel for the 1st respondent of his absence on the date to which the appeal was set for hearing. Very unfortunately, Mr. Mussa did not enter appearance when the appeal was called for hearing. In view of the grounds stated in the affidavit together with the submission, Mr. Kipeche prayed the Court to grant the application and re-admit the said appeal.

On the other hand, Mr. Burhan Mussa, learned advocate for the 1st respondent supported the application. He further submitted that, he was served with the summons by the applicant's counsel a day before the hearing date but as he was late on the hearing date of the appeal, he found the said appeal already dismissed.

Having canvassed the rival submissions and upon appraisal of the depositions made by the parties, the pertinent issue for determination is whether the applicant has demonstrated sufficient cause to warrant this court to re-admit the appeal. The law governing restoration of a dismissed appeal is Order XXXIX Rule 19 of the Civil Procedure Code which provides;

"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".

In terms of the foregoing provision above, the Court will only grant an application for restoration of an appeal upon being satisfied that the applicant's presence was prevented by sufficient grounds. The question which immediately pops up at this juncture and which I have posed above is whether the applicant herein has shown sufficient cause for the non-



appearance to warrant the Court to exercise its discretion to grant the re-admission sought.

The reason for the non-appearance has been deposed by Mr. Kipeche at paragraph 6 of the affidavit that he appeared before the Court of Appeal in Civil Application No. 73/01 of 2023.

I am aware of court hierarchy in our jurisdiction and seniority among the Judges. However, an advocate appearing before a superior court or senior judge is duty bound to give a reasonable notice to the lower court or junior judge. I say so, because it is a settled position that court orders must be respected and complied with. In the case **Tanzania Breweries Limited vs. Edson Dhobe**, Misc. Civil Application No. 96 of 2000 (HC) at Dar es Salaam at page 1, the Court held;

"Court orders should be respected and complied with. Court should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur. Always court should exercise firm control over proceedings."

In this case, the counsel for the appellant now the applicant did not notify this Court his engagement to the Court of Appeal nor did he swear in his affidavit to the effect that he informed the respondent's counsel Mr.



Burhan Mussa. Surprisingly, he came to raise the issue of informing Mr. Burhan Mussa from the bar during hearing of the application. This being statement by counsel from the bar is not evidence and hence cannot be acted upon by the court to grant the application.

All the above considered, I hold that, the applicant has failed to demonstrate sufficient cause for his absence which triggered the dismissal of the appeal. This is because the applicant's counsel neglected or ignored to notify this Court of his appearance before the Court of Appeal despite the fact that he received the summons on the 4th day of August, 2023. In my view, this is negligence on the part of the applicant and disrespect to the court orders.

All that said and done, I find the application without merits and consequently, I proceed to dismiss it with no order as to costs as the same was not contested by the 1st respondent.

It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 19th day of April, 2024.




A.A. Mbagwa

JUDGE

19/04/2024