

TANZANIA / JUDGMENT

abdallah mgona vs hidaya kawanisa

2019 tzhc 134 23 october 2019

COURT
TZHCDECIDED
23 October 2019

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IN THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA. (DAR ES SALAAM DISTRICT REGISTRY) AT PAR ES SALAAM MISC.CIVIL APPLICATION NO. 304 OF 2019 (Arising from Civil Appeal No. 10 of 2019 of High Court Dar es salaam Registry - Before Mufungi, Judge) ABDALLAH MAGONA----- APPLICANT VERSUS HIDAYA KAWANISA----- RESPONDENT

RULING

MUTUNGI. J. This application is for restoration of Civil Appeal No. 10 of 2019. The said appeal was dismissed for want of prosecution. The present application has been taken under the provisions of order xxxix rule (19) of the Civil procedure code (Cap 33 R.E 2002). It is fully supported by an Affidavit of Abdallah Magona. The application was argued orally before me on 03/09/2019 during which the Applicant appeared in person whereas, Mr. Mgalla, learned Advocate represented the Respondent. In his submission, the Applicant adopted the affidavit supporting the application and had the following to say; In brief the Appellant's submission in support of this application is that, he lodged an appeal on time and was told would be notified once the file was in Dar es salaam. After a long period of time he tried to make a follow up and was to wait for the files to be in a large number for ease of transportation. On 16/05/2019 he went again and was informed according to the register, the file had been sent to the High Court Dar es salaam since January, 2019. He then decided to travel to Dar es salaam on the same day only to find the said appeal had been dismissed for want of prosecution since 13/05/2019. He prays before this court for re - admission of the dismissed appeal for the reasons that, he was not notified of the transmission of the file to this registry by the lower court. In reply Mr. Mgalla Learned Advocate submitted that, there are no sufficient reasons for the re admission of the appeal. Perusing through the court record (as annexed) is clear that, the matter was set for mention several times but the applicant never made appearance. Five months lapsed without any follow up. He further urged that, the alleged follow ups 2 made in the lower court have not been proved. To cap it all, the applicant has not demonstrated overwhelming chances of success of the said appeal. In the main Probate cause, the applicant's appointment was revoked by the Ngerengere Primary Court contrary to the procedure. The deceased lived at Vinguguti - Dar es salaam and not Ngerengere (Morogoro). Thereafter the court ordered the Probate be instituted in Dar es salaam. The

Respondent did institute Probate proceedings and an Administrator was appointed. The learned counsel insisted, what the applicant wants done has been overtaken by events. The learned advocate hence prayed for the dismissal of the application and costs. In a short rejoinder the Applicant submitted that, he made a lot of follow up, that is how he came to learn that, the appeal file was already in court. He had left his contact number in the file. As to the competence of the appeal he explained, the respondent filed an appeal in Morogoro District Court (Msaki, RM) and told to appeal to the High Court. The respondent preferred for a revision before the same court and it nullified the District court's order by Msaki RM. There is thus an anomaly that, there are now two Judgments from the same court. That's why they came to this court. 3 I have carefully considered the arguments for and against this application. It is trite law that an applicant seeking to set aside a dismissal order which was dismissed for the want of Prosecution must prove before the court that he/she has sufficient reason (s) for nonappearance when the matter was called up for hearing. The only stated sole major reason found in the corresponding affidavit is that, the applicant was not informed by the lower court as to the status of his appeal. The only proof he has is the contact address number in the file. The applicant narrated that, he had made several follow ups at the Lower court and told his file was still there. It is on 16/May/2019 when it came to his personal knowledge that the appeal record was already at the High court in Dar es salaam. On the other hand, the respondent's counsel argued that there is no proof as to whether there were efforts to trace the movement of the file to the High Court. Order XXXIX rule (19) of the Civil Procedure Code Cap. 33 R.E 2002 reads as follows: - "...Where an appeal is dismissed...the appellant may apply to the court for the readmission of the appeal; and, where it is proved that he was 4 prevented by any sufficient cause from appearing when the appeal was called on for hearing..." The same was amplified in the case of BAHATI MUSA HAMISI MTOPIA VS SALUM RASHID, CIVIL APPLICATION NO. 112/07 OF 2018 CAT (UNREPORTED) where among other things the applicant must show that he was prevented by sufficient cause from appearing when the application was called for hearing. The presence of the Applicant's contacts in the court file prove nothing as regards the follow ups purported to have been made. There is nothing to show whether there was a struggle by the Applicant of knowing the status of his appeal from 19/10/2018 when he lodged the same up to May 2019 when it was dismissed. It is baffling for one to sit around for seven months waiting for the file to reach the High Court registry doing nothing about it or taking any step. In each registry there is a Resident Magistrate in charge to whom the Appellant could have lodged his complaints. There is no such proof in the Applicant's Affidavit or submission. The court is in the circumstances not satisfied with such insufficient reasons to proceed to re-admit the dismissed appeal by this court. The 5 file can not be left lying unattended in the registry. The application is henceforth dismissed. Each party to bear own costs. B. R. MUTUNGI l> 7 .. JUDGE \ 'V • , ...3 23/10/2019 Ruling read this day of 23/10/2019 in presence of both parties. IV / ■ B- R- MUTUNGI A .. / ■ , it \ r? \ JUDGE w : j . v 23/10/2019 /v: Right of appeal explained. / B. R. MUTUNGI' •A , (, V " J U D G E 23/10/2019 V 6

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