

TANZANIA / JUDGMENT

RULING JOHN JONSON SUMMER

COURT  
TANZLII

DECIDED  
12 December 2024

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA  
SUB – REGISTRY AT MBEYA MISCELLANEOUS CIVIL APPLICATION NO. 12551 OF 2024 CASE  
REFERENCE NO. 202405291000012551 (Originating from Petition No. 18 of 2022 of the High Court  
of Mbeya) between JOHN JOHNSON SUMMER ..... APPLICANT  
VERSUS MASUMBUKO GEORGE MWAKYEMBE ..... 1ST RESPONDENT EPHRAIM  
ANYELWISYE KWPINDOMO (MAWAZO).....2ND RESPONDENT MBEYA HIGHLAND FM  
RADION .....3RD RESPONDENT ISSACK  
MWASHIUYA .....4TH RESPONDENT

RULING

24th September& 12th December 2024 NONGWA, J. This is an application for restoration of  
Petition No. 18 of 2022 which was dismissed for want of prosecution. It is made under Order IX  
rule 6 and section 95 of the Civil Procedure Code [Cap 33 R: E 3019] and supported by an affidavit  
of Faraja Msuya advocate for the applicant. It is averred that on the date, Petition No. 18 of 2022  
was called for hearing counsel for the applicant was bereaved and travelled to Kilimanjaro for  
funeral. Further that he communicated with his fellow Atuganile Job Kaponda to hold his brief  
but the said counsel did not locate 1 chamber of the judge for it was her first time to reach Mbeya  
high court chambers and was unfamiliar. The 3rd and 4th respondents oppose the application  
through their separate counter affidavits they filed. The 1st respondent refused to accept  
summons. When the matter came on for hearing the applicant retained service of Mr. Faraja  
Msuya learned counsel, the 3rd and 4th respondents appeared in person. The matter proceeded  
ex-parte against the 1st and 2nd respondents. It was agreed that parties file written submission to  
support and oppose the application. Written submission of the 3rd and 4th respondent has been  
drawn by Gwamaka Mwaikugile of MLG Attorneys. In his submission Mr. Msuya, as expected,  
adopted his affidavit and stated that on the date Petition No. 18 of 2022 was called for hearing he  
got emergency by being bereaved at Kilimanjaro and had to travel to attend the funeral. That he  
made effort to secure service of Atuganile Kaponda to enter appearance on his behalf but the  
latter did not make it on time to locate respective chamber the judge was sitting by a reason of  
her being unfamiliar with the place. By the time she was shown the chamber, the matter had  
already been dismissed. He referred to the case of Meis Industries Limited & Others vs Twiga  
Bankcorp, Misc. Commercial Cause No. 243 of 2015 [2016] TZHCComD 2071 (18 February 2 2016;  
TanzLII) which expounds that restoration of a suit is in the discretion of the court which must be

exercised judiciary. Mr. Msuya submitted that has been diligence all along in pursuing the matter only that on that date had emergency as explained. Further that the 3rd and 4th respondent counsel was not present on that date and the hearing would not have continued. Counsel added although the 3rd and 4th respondent has opposed the application but has not contested that he was bereaved on date the matter was dismissed. He thus prayed the application be granted. Responding the 3rd and 4th respondent filed joint reply submission. They submitted that the claim that another advocate was sent to hold brief was hearsay for not being supported by the affidavit of the said Atuganile Kaponda. They fortified the argument with the case of *Finca Tanzania Ltd vs Dotto Mdawalo Luseko*, Civil Application No. 582 of 2021 [2023] TZCA 236 (10 May 2023; TanzLII). They went on to submit that court orders must be respected and supported the argument with the case of *Anna Zakaria v Reniel Marthini*, Land Appeal No. 48 of 2023 [2024] TZHC 531 (22 February 2024; TanzLII) and *Shabani Amuri Sudi (administrator of the Estates of the Late Amuri Sudi) vs Kazumari Hamisi Mpala*, Misc. Land Application No. 30 of 2019 [2020] TZHC 4114 (10 November 2020; 3 TanzLII). Further submission was that the said advocate Atuganile Kaponda is not new in this city and it was duty of the applicant to render professional service, they referred to regulation 12 of the Advocates (Professional Conduct and Etiquette) Regulation, 2018. They went on to state it was not the first time the applicant and his advocate had not entered appearance in the matter. In the totality it was submitted the applicant had not advance good reason for restoration of the dismissed petition. I have considered rival submissions, the only issue for my determination is whether the application has merits. Being application for restoration of the dismissed suit, the law is very settled and clear that, in order for the applicant to succeed to prompt the court to exercise its discretion to restore suit which was dismissed, the applicant must bring to the fore justification that he was prevented by any sufficient cause from appearing when the matter was called on for hearing. The restoration order being a matter within the court's discretion, cannot be laid by any hard and fast rules but will be determined by reference to all the circumstances of each particular case including conduct of the parties. In this application the applicant has raised at least two reasons, one that was bereaved and two that procured service of advocate to hold brief. On the first reason that counsel for the applicant was bereaved as stated 4 in paragraph 3 of the affidavit, the 3rd and 4th respondent just disputed it without more. In my view the issue of bereavement can strike at any time. It is not out of choice and no one can be blamed for such a happening. In countering this argument, the respondent came with strong arguments in their submission which are not found in their respective counter affidavit. It is now settled that as a matter of general principle, submissions by counsel, as opposed to an affidavit, are not evidence. See *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman of Bunju Village Government and Others*, Civil Appeal No. 147 of 2006 (unreported). Therefore, all submission in regard to assertion that counsel for the applicant was not bereaved are neglected for not being borne of the counter affidavits. Just like the respondents who has submitted that Mr. Msuya is a well-reasoned advocate, and I add with unquestionable honour and integrity cannot have lied to the court that he was bereaved. Coming to the second reason of securing advocate to hold brief, holding brief entails a situation in a court of law where a fellow advocate instructs another to take his place during the proceedings due to his inability to be present in court. The 3rd and 4th respondents in their

counter affidavit did not dispute that Atuganile Job Kaponda was instructed to hold brief of Mr. Msuya and that was not familiar to court 5 chambers. Through their reply submission they came with submission that the said advocate was not instructed and was also familiar with setting of chambers of judges. Unfortunately, this statement came from the bar, if the 3rd and 4th respondent wanted to controvert assertion of instructing advocate to hold brief of another advocate and her familiarity with court chambers ought to have done so through their respective counter affidavit. The averment contained in paragraph 4 and 5 of the affidavit is controverted under paragraph 5 of the respective two counter affidavits. For clarity I reproduce paragraph 4 and 5 of the affidavit; '4. that I, made efforts and secured the service of advocate Atuganile Job Kaponda to hold brief with instruction to proceed, on my behalf.

5. that I made all efforts to ensure that the applicant is represented, unfortunately the advocate assigned to proceed with the matter got lost due to the reason that it was her first time to attend High court of Mbeya, hence she was not familiar with the lay out of the judge's chamber.' The 3rd and 4th in their counter affidavit stated; '5. the contents of paragraph 3, 4 and 5 are totally disputing from being acts well known by the applicant's counsel alone.' Reading the averments in the affidavit and those in counter affidavit, in my view were not seriously disputed what the applicant had stated in 6 the affidavit. Had it been so it would be reflected by strong evidence in the counter affidavit. I seek inspiration in the case of East African Cables T. Limited vs Spencon Services Limited Misc. Application Case No. 42 of 2016 [2016] TZHCComD 2077 (1 July 2016; TanzLII) in which Mruma, J. made the following observation; 'When a fact is stated on oath, it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (ie. Plaint, written statement of defence reply etc) and not to affidavit and counter-affidavit which are as said earlier evidence' Thus, all argument advance in the reply submission trying to narrate that the applicant's counsel ought to have communicated with other senior counsel inclusive those representing the respondent and familiar with chamber of judges are statement from the bar which needs no consideration. There was submission on previous non-appearance of the applicant's counsel and several cases were cited to support the argument, my perusal 7 of the respondents' counter affidavit has not sported such averments and is therefore ignored for not being evidence in record. For the above reasons, I find and hold that, the applicant has been able to demonstrate that he was prevented by sufficient cause from appearing when the petition was called on for hearing. In the result, I grant the prayer for restoration of Petition No. 18 of 2022. Costs will be in the cause. V.M NONGWA JUDGE 12/12/2024 DATED and Delivered at Mbeya this 12th December 2024 in presence of Ms. Evelyn Lawrence H/b Gwamaka Mwaikugile for 3rd and 4th Respondents. V.M NONGWA JUDGE 8

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