

TANZANIA / JUDGMENT

# Rahma application Ruling 2

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Page 1 of 8 IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA GEITA SUB  
REGISTRY AT GEITA MISC. CIVIL APPLICATION NO. 22308 OF 2024 (Arising from Geita District  
Court in Probate Appeal No. 18179 of 2024) BETWEEN MOHAMED JUMA  
RAMADHANI.....APPLICANT VS RAHMA HARIS  
SUDY.....RESPONDENT

## RULING

Date of last order: 20/09/2024 Date of Ruling : 23/09/2024 MWAKAPEJE, J.: In accordance with Order XXXIX, Rule 19 of the Civil Procedure Code, Chapter 33, R.E 2019, the applicant seeks this court's indulgence to set aside the dismissal order issued against him on 12th August 2024. This application is brought through a Chamber Summons duly supported by an accompanying affidavit. Briefly, the applicant lodged an appeal before this court against the decision of the Geita District Court in Probate Appeal No. 18179 of 2024, delivered on 25/06/2024. When the appeal was scheduled for hearing, the applicant (the then appellant) did not appear, which led to the dismissal of the appeal for want of prosecution. Upon learning about the dismissal order, the appellant opted to file this application to restore his Page 2 of 8 appeal by seeking an order from this court setting aside the orders it previously issued on 12/08/2024. At the application hearing, the applicant used the services of Mr Vianne Mbuya, a learned advocate, while the respondent appeared in person. In his submission, Mr Mbuya narrated that on 12th August 2024, the date scheduled for the hearing of the appeal, the applicant was preparing to attend court when he suddenly began experiencing severe stomach pains, resulting in diarrhea. In an effort to recover in time, he sought first aid at a laboratory. Despite his attempts to attend court after receiving treatment, the counsel stated that the appeal had already been dismissed when he arrived, owing to his absence. He mentioned that on the same day, the applicant wrote to the court praying for a copy of the dismissal order and immediately took steps to reinstate the appeal. According to the counsel, the applicant's illness was unforeseen and sudden, preventing him from attending court on time. Mr Mbuya emphasised that the applicant had not been negligent in prosecuting his case but was hindered by circumstances beyond his control. He added that the applicant had no legal representative who could have appeared on his behalf to inform the court of his illness. Page 3 of 8 Mr Mbuya further argued that if the dismissal order were not set aside, the applicant would suffer irreparable loss, being the administrator of his late mother's estate and that the rights of other heirs could be affected. He asserted that the respondent would not suffer prejudice if the

application were restored, as the matter would still be heard and determined on its merits. The counsel also referenced Order XXXIX Rule 19 of the Civil Procedure Code, which empowers the court to restore an appeal if the applicant's failure to appear was due to a valid reason. In this case, the applicant's illness was argued to constitute such a reason, and the counsel prayed for the restoration of the appeal. In response, the respondent submitted that while the applicant claimed to have been ill as of 7:00 a.m. on the day of the hearing, the appeal had been scheduled for 9:00 a.m., leaving ample time for the applicant to send someone to inform the court of his illness. However, no such effort was made, and she pointed out that the affidavit did not mention any attempt to notify the court of the applicant's condition. The respondent further argued that the laboratory report submitted by the applicant was insufficient as evidence. She contended that the report did not indicate when the applicant visited the lab, nor did it include the attending doctor's name. Additionally, she argued that the report was not stamped, and there was no indication of when the applicant was discharged from the lab. The respondent contended that the report raised questions as to whether the applicant had visited the lab in the morning, much later in the day, or whether he had gone there. The respondent argued that this demonstrated negligence on the applicant's part and submitted that the application should be rejected. In his rejoinder, the applicant's counsel addressed the respondent's submissions, stating that the internal documentation procedures of laboratories or hospitals, such as stamping reports or recording arrival and departure times, were beyond the applicant's control. The applicant's counsel reiterated that the applicant had fallen ill in the morning, though not necessarily at precisely 7:00 a.m. The illness occurred while the applicant was preparing to attend court, preventing him from arriving on time. The counsel argued that the applicant could not have sent anyone to inform the court as he had no legal representative. The applicant's counsel also defended the laboratory report, stating that while it lacked a stamp, it bore the facility's letterhead, the signature of the attending staff, and a receipt. He furthermore argued that the respondent had failed to demonstrate what loss would be suffered if the application were granted. In conclusion, the applicant's counsel prayed that, in the interest of justice and the applicant's right to be heard, the dismissal be set aside and the appeal restored to allow for a fair hearing. Page 5 of 8 Having considered the applicant's chamber summons and its accompanying affidavit and the submissions by the parties thereto, I would mainly consider the ground raised by the applicant as the factor to set aside the appeal's dismissal order, noting that the respondent did not file her counter affidavit. In paragraphs 4 and 5 of his affidavit, the applicant cites his health condition as the sole reason for his failure to appear before the court as scheduled, supported by Annexure HJS/O. Specifically, in paragraph 4, the applicant states that on 13/08/2024, while preparing to attend court, he experienced severe stomach pain, prompting him to seek medical attention at 4-WAYS Laboratory for a health checkup. Consequently, he was unable to attend court as scheduled. I have meticulously reviewed the applicant's affidavit and empathised with his situation to see if the contents accurately reflect the events of that day. I express this sentiment because the date the applicant claims to have sought medical attention, whether for treatment or examination, is incongruent with the date of his appeal dismissal. In the affidavit, the applicant asserts that he fell ill on 13/08/2024, a day subsequent to the court's issuance of the dismissal order on 12/08/2024. This implies that on the hearing date of 12/08/2024,

the applicant was in a better state of health yet chose not to appear in Court as Page 6 of 8 scheduled for reasons undisclosed to this court. The aforementioned affidavit was accompanied by exhibit HSJ/0, a laboratory test report dated 12/08/2024. In situations like this, where the sworn affidavit indicates a different date from the attached document and Mr Mbuya's submission the question arises: which of the two should be given credence? Since an affidavit is evidence on oath and has mentioned a wrong date where the appeal was scheduled for the hearing, the same cannot be cured by its accompanying annexure and submissions. To me, this inconsistency is fatal as it undermines its credibility and reliability. See the case of VIP Engineering and Marketing Ltd vs SGS Societe Generale De Surveillance SA and SGS Tanzania Superintendence Company Ltd, Civil Application No. 105 of 2006, CAT at Dar es Salaam (Unreported). Moreover, the applicant has approached this court under Order XXXIX Rule 19 of the Civil Procedure Code, Cap 33 RE 2019. The same stipulates that: "19. 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." [Emphasis supplied] Page 7 of 8 From the foregoing, it is evident that the grant of such an application is not automatic but contingent upon the applicant providing sufficient cause for their failure to attend the court session as scheduled prior to the issuance of the dismissal order. In the present application, the applicant avers in his affidavit that a health condition prevented his attendance. However, no clear explanation or evidence was provided to this court regarding his health condition at the time in question. It was reasonably expected that the applicant, through a representative, whether a relative, friend or any other person, should have informed the court of his inability to attend due to illness. The absence of such communication raises concerns about the sufficiency of the applicant's explanation. See the case of Kagera Cooperative Union

(1990) Limited vs Minister for Cooperatives and Marketing and Two Others, Civil Appeal No. 23 of 2005 CAT at Bukoba (Unreported), where the court CAT insisted on explaining the absence of the party in the case. In this instance, I am afraid I have to disagree with Mr Mbuya, who submitted that the applicant did not have anyone to send to court at the time of his illness since he had no legal representative. This aspect also was not stated in the affidavit, and this court cannot be moved by mere submissions unrelated to the already available evidence. See the case of Page 8 of 8 Edward Jonas vs Tanzania Breweries Ltd (Civil Appeal No. 394 of

2020) [2024] TZCA 652 (29 July 2024). In light of the above, it goes without saying that the applicant's non- appearance resulted from his negligence and lack of diligence. The illness, which allegedly occurred a day after the court's order was issued, is discredited by the contents of his affidavit, which is untrustworthy. Further, the failure to notify the court, either personally or through a representative, such as a relative or friend, does not absolve the applicant from the duty to communicate his inability to attend. This demonstrates a willful disregard for court orders, which cannot be excused. Such conduct clearly

constitutes a lack of sufficient cause for non-appearance. Accordingly, the applicant has failed to present any compelling justification for setting aside the dismissal order.

Therefore, without any hesitation, I hereby struck it out with costs. It is so ordered. DATED at GEITA this 23rd day of September 2024. G.V. MWAKAPEJE JUDGE

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