IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 240/01 OF 2019

JAMAL S. MKUMBA &
ABDALLAH ISSA NAMANGU & 359 OTHERS ..... APPLICANTS

VERSUS

THE ATTORNEY GENERAL ..... RESPONDENT

(Application for restoration of Civil Appeal No. 22 of 2016 from the Judgment and Order of the High Court of Tanzania, at Dar es Salaam)

(Mkasimongwa, J.)

dated the 10th day of October, 2015
in
Civil Case No. 57 of 2015

RULING OF THE COURT

6th & 15th February, 2023

MWAMBEGELE, J.A.:

The applicants in this matter were appellants in Civil Appeal No. 22 of 2016 before the Court. When that appeal was called on for hearing on 17.06.2019, neither the appellants nor their advocate entered appearance. As the record showed that they were duly served for that day's hearing, the Court dismissed the appeal with costs for want of appearance in terms of rule 112 (1) of the Tanzania Court of Appeal Rules (the Rules). By a notice of motion, the appellants now seek to restore that appeal alleging that their nonappearance was prevented by sufficient cause. That is stated in an amended affidavit in support of the application deposed by January Raphael

Kambamwene, the applicants' advocate. For the avoidance of doubt, the amended affidavit, hereinafter to be referred to as the affidavit, was lodged following the order of the Court given in a ruling rendered on 15.12.2021.

The application was argued before us on 06.02.2023 during which the appellants were represented by the said Mr. January Raphael Kambamwene, learned advocate, and the respondent had the services of Ms. Pauline Mdendemi, learned State Attorney. When we invited Mr. Kambamwene to argue the application, he first adopted the contents of the notice of motion and the founding affidavit and, thereafter, clarified that on the material date he was within the Court precincts with the applicants discussing the fate of their case before the appeal was called for hearing. He submitted that when they were done with their discussion, they entered the Court premises but alas! they realized that the appeal had already been called for hearing and the Court was composing an order which eventually was pronounced dismissing the appeal for want of appearance.

When prodded on why he could not procure and accompany an affidavit deposed by one of his clients who were present with him in the Court precincts or one from the Court clerk or the Deputy Registrar present in Court on the material date to support his depositions in his affidavit, the

learned Counsel told the Court that the idea did not come to his mind. However, he was quick to submit that the applicants should not be punished for his negligence, if any. He cited to us a decision of the High Court in **Sadru Mangalji v. Abdul Aziz Lalani and Others**, Miscellaneous Application No. 126 of 2016 (unreported) and our decision in **TANESCO v. Mufungo Leonard Majura and others**, Civil Application No. 94 of 2016 (unreported) to support that proposition.

The learned Counsel had an additional point to support the application. He added that the appeal which is sought to be restored raises important points of law which need to be determined by the Court to rectify the ailment in the decision of the High Court sought to be challenged. The totality of all the circumstances, he argued, makes it incumbent upon the Court to grant the application for the interest of justice and so prayed.

For her part, Ms. Mdendemi strenuously resisted the application. Having adopted the contents of the affidavit in reply she deposed in opposition of the affidavit sworn by the applicants' advocate, she was firm from the outset that the learned counsel has not brought to the fore sufficient reasons to warrant the Court to exercise the discretion to restore the appeal in terms of rule 112 (1) of the Rules. In addition, she argued, the appellant

should have brought an affidavit sworn by one of the clients present on the material day. Short of that, she contended, what is deposed at paragraphs 3, 4 and 6 cannot constitute sufficient reason to grant the order for restoration sought. She referred us to the unreported decision of the Court in **Phares Wambura and 15 Others v. Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016 to underscore the proposition. She added that cases referred to by the applicants' advocate are distinguishable and not relevant to the situation before us. Eventually, the learned State Attorney implored us to dismiss the application with costs.

Ms. Mdendemi added that the appellants' advocate also deposed at para 7 of the affidavit that the appeal has important points of law to be clarified by the Court should the appeal be restored. That argument, she argued, is also not sufficient to grant the order sought. What was important in the application before us, she argued, was to show sufficient cause for the nonappearance. She thus argued that the application should be dismissed with costs for want of merit.

Rejoining, Mr. Kambamwene reiterated his arguments in chief and added that the case of **Phares Wambura** was distinguishable in that there,

unlike here, there was dishonesty in allegations by the parties. He thus urged us to allow the application.

We have considered the contending submissions by the counsel for the parties in the light of the record of the application. Having so done, we think there is only one issue calling for our determination; that is, whether the applicants have shown sufficient cause to trigger us exercise our discretion to restore the appeal we dismissed on 17.06.2019. Our starting point will be the provisions of rule 112 (1) of the Rules under which the applicants have, essentially, made their application. For easy reference we take the liberty to reproduce it hereunder:

> *"112.-(1) Where on any day fixed for the hearing of an appeal, the appellant does not appear, the appeal may be dismissed and any cross-appeal may proceed, unless the Court sees fit to adjourn the hearing, save that where an appeal has been so dismissed or any cross-appeal so allowed has been heard, the appellant may apply to the Court to restore the appeal for hearing or to re-hear the cross-appeal:*
> *Provided that the appellant shows that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing."*

In terms of the foregoing provision, especially the proviso thereof, the Court will only grant an application for restoration of an appeal dismissed under this rule upon an applicant showing sufficient cause for the nonappearance. The question which immediately pops up at this juncture and which we have posed above is whether the applicants herein have shown sufficient cause for the nonappearance to prompt us exercise our discretion to grant the restoration sought.

The reasons for the nonappearance have been deposed by Mr. Kambamwene at paragraphs 3, 4, 6 and 7 of the affidavit. We shall let the paragraphs speak for themselves:

> *"3. That at 0900 hours I reported at the Court premises ready for the hearing, on arrival I found myself surrounded by a good number of my clients who had turned up very earlier at the court premises. This case was being prosecuted on behalf of 361 persons.*
>
> *4. That as me and my clients aforesaid involved in talks on well wishing and good luck in the appeal exercise, time slipped by unnoticed and while we were still outside the Court room we had no idea that the case has been called and so the Court recorded we were absent. That when finally I entered the*

Court room I was in time to learn that the matter has been ordered dismissed for lack of prosecution, the Order to that effect had been drawn up and was being signed by the Judges.

6. That sheer inadvertence, and not negligence, had prevented the applicants from answering when the application was called for hearing. Furthermore, applications for restoration have been filed promptly and without any delay.

7. That the pending appeal will raise important points of law for determination by the Court of Appeal, particularly on the application and interpretation of the Law of Limitation Act. We still dispute the Judge's decision on the date when the cause of action accrued and the period of limitation adopted. There in also the question of law whether limitation period involved in this matter falls under the correct item of the Schedule of the Law of Limitation Act."

We will start to consider the reason for delay as deposed at paragraphs 3, 4 and 6. Under these paragraphs, the applicants depose that they could not enter the courtroom timely because they were outside "involved in talks on well-wishing and good luck in the appeal exercise". The learned counsel deposes that on reporting at the Court premises, he found himself

surrounded by a good number of his clients who happened to have showed up there very early.

With unfeigned respect to the deponent, we find difficulties in believing as true what he deposed. We say so because it is very uncommon for an advocate, let alone a seasoned advocate like Mr. Kambamwene, to be outside the courtroom overwhelmed by clients and "involved in talks on well-wishing and good luck in the appeal exercise" while he was supposed to be at the bar, in Court appearing to prosecute the appeal he filed. This difficulty in believing Mr. Kambamwene is exacerbated by the fact that he did not procure any affidavit from one of his clients to support his depositions. Worse still, he also did not procure any affidavit from the court clerk or Deputy Registrar of the Court of Appeal who were in court when he entered the Courtroom. What was expected of him in the circumstances, we think, was for him to saunter to the bar and rise to attract attention of the Court and say something before they could finalize the short order. As this is a Court of justice, we believe, presiding Justice and his panel could have listened to him and most probably could have aborted the detrimental short order dismissing the appellants' appeal now complained of. That was not done and, as already stated above, we have serious doubts if what he deposes has any scintilla of

truth. If anything, and with utmost respect to Mr. Kambamwene, what comes out of paragraphs 3, 4 and 6 of the affidavit is but unsubstantiated depositions. Therefore, even with the applicants' advocate sugarcoating the nonappearance with such phrases as being "involved in talks on well-wishing and good luck in the appeal exercise", we find it to be too good to be true. Accordingly, we find and hold that the applicants have not shown sufficient cause for their nonappearance.

The foregoing takes us to the argument by the applicants' counsel that his clients should not be punished by his negligence, if any. We find ourselves unable to agree with him. Much as we agree that in a fit case, a party may not be punished for the negligence of his advocate, what transpired in the matter under scrutiny, cannot be excusable. Even if we believed that the applicant's advocate deposed the truth, we do not find it practicable for all 361 applicants, or even less, to be with their advocate engaged in an unproductive telltale outside the Courtroom while they were supposed to be in the Court room. If anything, negligence here was for both the applicants and their advocate. This cannot be an excuse for nonappearance. The foregoing takes care of the reason for nonappearance deposed in paragraphs 3, 4 and 6.

The applicants' advocate has deposed, at paragraph 7 of the affidavit, that the impugned decision raises important points of law calling for the determination of the Court if the appeal will be restored. We now turn to determine this argument.

Borrowing a leaf from applications for extension of time in which time may be extended even when an applicant has not shown good cause, if there is an illegality in the decision sought to be challenged - see: **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported), we are settled in our mind that the same may be the case with applications for restoration. That is, in applications for restoration like the present, a point of law of sufficient importance may constitute sufficient cause for the grant of the prayer for application. It should be noted that it is not any point of law but only one of sufficient importance which will qualify to be relied upon in the circumstances.

In the matter under scrutiny, the point of law relied upon by the applicants' advocate is whether the limitation period in the impugned decision

fell within the scope of the correct item of the Law of Limitation Act, Cap. 89 of the Laws of Tanzania. With due respect to Mr. Kambamwene, this point may be one of law but we have serious doubts if it is one with sufficient importance to trigger us grant the application for restoration sought.

In the end, we find and hold that the applicant has neither shown sufficient cause for the nonappearance nor a point of law of sufficient importance to persuade us exercise our discretion to restore the appeal. We find this application with no iota of merit and dismiss it with costs.

DATED at **DAR ES SALAAM** this 14th day of February, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSAO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 15th day of February, 2023 in the presence of Ms. Rehema Lenard Mgweno who holds brief for Mr. January Kambamwene, learned Advocate for the Applicants and Ms. Hosana Mgeni, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL