IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SUMBAWANGA DISTRICT REGISTRY

AT SUMBAWANGA

MISC. CIVIL APPLICATION NO. 14 OF 2022

(Arising From the decision of this Court (Ndunguru J in Civil Appeal No 8 of 2020; Original Civil Case No 4 of the District Court of Nkasi at Namanyere Before Mwakibibi Esq RM)

BETWEEN

MAGINA CHELA.....APPLICANT

VERSUS

NKASI DISTRICT COUNCIL..... RESPONDENT

RULING

MRUMA, J

This is an application by the Applicant Magina Chela seeking to set aside the dismissal order of this court (Ndunguru J), dated 26th May 2022 which dismissed the Applicant's Civil Appeal No. 8 of 2020 for want of prosecution. The application is made under **Rule 19 of Order XXXIX of the Civil Procedure Code** [Cap 33 R.E. 2019], and it is supported by an Affidavit sworn by Mr Magina Chela and that of applicant's advocate, Mr Samson Suwi.

At the hearing this application, the Applicant was represented by Mr Samson Suwi learned advocate while the Respondent was

represented by Mr Didas Julius Sadam learned State Attorney. The matter proceeded by way of written submissions.

Arguing in support of the application Mr Suwi adopted the contents of the affidavit sworn by himself and that of the Applicant to form part of his submissions. He contended that that on the material date and time the Applicant was in court premises but he did not hear his case being called. He said that, that alone is sufficient ground for restoration. The learned counsel submitted that under paragraphs 3, 4, and 5 of the Applicant's affidavit, read together with paragraph 3 of the of his affidavit there is evidence to the effect that when Civil Appeal No. 8 of 2020 was coming for hearing on 26th May, 2022 before Hon. Ndunguru, J, the Applicant was in the court premises for purposes of informing the court that his advocate had travelled to Arusha to attend Tanganyika Law Society Annual General Meeting.

Further to that it was the counsel's submissions that under paragraphs 6, 7, and 8 of the Applicant's affidavit read together with paragraphs 4 and 5 of his own affidavit, the Applicant shows that up to 11:00hours his case had not yet been called. He said that the Applicant was informed by a court clerk that his appeal had already been dismissed for want of prosecution.

Mr Suwi submitted that after the dismissal order the Applicant made efforts to see the presiding judge but such effort ended in vain as he was told by the court clerk that the presiding judge could not be able to attend him because he had finished court businesses and was preparing to travel to Mbeya to meet the Principal Judge who was on his way to Sumbawanga for an official visit.

On his second limb of argument Mr Suwi submitted that the Applicant's involves a point of illegality in that the district trial court lacked jurisdiction to entertain the matter. On those grounds Mr Suwi maintained that the Applicant has been able to demonstrate first that he was present on the material day and time and second that he made efforts to meet the presiding judge but in vain as the court clerk whose name was not disclosed could not assist him. The learned advocate cited the case of **Jamal S. Mkumba & Abdallah Issa Namangu & 359 Others versus Attorney General** as his authority. Further to that it was further argument of the learned counsel that the averment under paragraph 9 of the applicant's affidavit which is to the effect that the learned State Attorney for the Respondent was also present in court premises on 26th May 2022 but he did not enter appearance had not been denied by Respondent in his counter affidavit which implies that

averment is true. To cement his position he cited the decision of the Court of Appeal in the case of **Shija Marko versus Republic, Criminal Appeal No. 246 of 2018** as his authority.

Substantiating on the issue of illegality, Mr Suwi submitted that the decision of the District Court was tainted with illegalities as the court had no jurisdiction to entertain the matter, a fact which was also a ground of appeal in the dismissed appeal. He contended that allegation of illegality is sufficient cause for restoration of an appeal dismissed for want of prosecution as stated in the case of **Jamal S. Mkumba & Abdallah Issa Nmangu & 359 Others versus Attorney General**, supra and also the case of **Vodacom Tanzania Ltd versus Innocent Daniel Njau,** Civil Appeal No. 60 of 2019 (all unreported).

Responding to the Applicant's counsel submissions, counsel for the Respondent submitted that upon perusal of the Applicant's affidavits and submissions he realized that there was no proof of what was deposed therein but mere hearsay. He said that despite the fact that counsel for the Applicant had stated to have attended Tanganyika Law Society Annual General Meeting on 26th May 2022, he ought to have been accompanied by a proof of his attendance but that was not done. Mr Sadan contended that the Applicant and his advocate were aware of the

hearing date but negligently did not make any communication with the court as reflected in paragraphs 3 and 4 of the Applicant's affidavit and paragraphs 2 and 3 of the Applicant's advocate affidavit. The learned attorney was in agreement with the position stated in the decision of the case of **Jamal S. Mkumba & Abdallah Issa Namangu** [supra] on how to deal with dismissal order, but he maintained that the Applicant was required to comply with the decision of the Court of Appeal cited. He was of the view that the applicant told untruth story as he failed to disclose sources of his information.

Regarding illegality on the basis that the trial court lacked jurisdiction the learned State Attorney contended that the requirement of the law is that objection as to jurisdiction has to be taken on the of first opportunity possible as per section 19 of Civil Procedure Code [Cap 33 R.E. 2019]. The learned State Attorney was the view that the case of **Vodacom Tanzania Ltd versus Innocent Daniel Njau (supra)** is inapplicable in the circumstances of this case. He accordingly prayed for the court to uphold the dismissal order.

From the affidavits and counter affidavits which constitute evidence of the parties' the parties' and the records of this court in Civil Appeal No 8 of 2020 the contentious issue for determination by this

court is whether the Applicant has been able to establish good cause of his absence when the appeal was called for hearing on 26th May 2022.

It was the Applicant's counsel contention that the Applicant was in court on 26th May 2022 for purposes of informing it the absence of his advocate who had gone to attend AGM of Tanganyika Law Society which was taking place in Arusha on that day. As up to 11:00hrs he was not called, he communicated his advocate who advised him to ask a court clerk. The court clerk informed him that his appeal had lraedy been dismissed for non-appearance. He wanted to see the presiding judge but he was not afforded that opportunity for reason that the presiding judge had already finished court's businesses and was preparing to travel to Mbeya to meet the Principal Judge who was on the way to Sumbawanga on official visit.

As a general rule, a party who asserts has a duty to prove. Section 110(1) of the Evidence Act provides to the effect that whoever desires any court to give judgment in his favour as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The Applicant asserts that he was informed by a court clerk that his case had been dismissed for non-appearance. However he could neither mention the name nor procure his/her affidavit of the

court clerk who gave him such information. This leaves his assertion regarding the dismissal of his appeal either hearsay or fictitious. It is hearsay because he heard it from another person and he didn't procure any evidence from that person and it may be fictitious in that it is possible that he was not in court on the material day and time but he decided just to say so as a sheer lie.

On the other hand the assertion that his advocate was attending Annual General Meeting of the Tanganyika Law Society at Arusha was also not substantiated. The learned counsel didn't attach to his affidavit any document exhibiting that there was such a meeting and that he attended it. Courts of law do not accept mere narrations of the parties where the narrations can be substantiated by documentary evidence. It is common ground that in order to attend Annual General Meeting of an organization attendees are invited. No invitation letter or copy of attendance register or even any travelling document was produced to prove that there was such a thing.

Regarding illegality, while I agree with the principle laid down by the Court of Appeal in several cases cited by the counsel for the Applicant, nevertheless I am of the view that the complained illegality must be explained and substantiated to the court of first instance. If a

party complains that the trial court had no jurisdiction to entertain the matter before it the type of jurisdiction intended should be albeit briefly canvassed before the court which is considering the application for restoration. The party complaining about jurisdiction must expound to the court determining the application whether the impugned jurisdiction is territorial, pecuniary or statutory (i.e. that is to say the jurisdiction of the matter is exclusively vested in another court or tribunal). In my view Just like in an application for certification of a point of law fit for consideration by the Court of Appeal which is highest court of the land, when the issue is illegality which constitutes a point of law, such point has to be tested first by the high court or the court determining the application before it can be allowed to go for further determination by the appellate court. Otherwise there is danger of clogging the appellate court or the Court of Appeal with matters which could be determined and completely solved at the lower level or stage. The Court of Appeal for instance should be left to deal with matters which couldn't be solved by courts subordinate to it or which have been siphoned by the High court first. Issue of the jurisdiction of a District Court is not among them. Those issues should first be brought to the attention of the court hearing the application be it by way of application as in this matter and/or by way of an appeal (as it was in Civil Appeal No 8 of 2020 which

however was dismissed for want of appearance). Since the complained lack of jurisdiction has not been canvassed by the Applicant I am unable to use it as a ground for setting aside the dismissal order.

For those reasons I dismiss the Application. Taking into consideration economic weight of the parties I make no orders as to the costs.

Order accordingly,

A.R. MRUMA,

JUDGE,

19. 9. 2023.