

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 165/18 OF 2021

FINCA TANZANIA LIMITEDAPPLICANT

VERSUS

HASSAN LOLILA.....RESPONDENT

**(Application for restoration of Civil Application No. 276/18 of 2019 arising
from the decision of the High Court of Tanzania, Labour Division
at Dar es Salaam)**

(Nyerere, J.)

dated the 26th day of September, 2017

in

Labour Revision No. 382 OF 2016

.....

RULING

24th & 31st August, 2022

KIHWILO, J.A.:

In this application the applicant, represented by Ms. Stella Manongi, learned counsel by way of notice of motion filed on 9th April, 2021 under Rule 63(3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) is seeking restoration of Civil Application No. 276/18 of 2019 for extension of time within which the applicant shall lodge notice of appeal. This follows a dismissal order (Levira, J.) dated 11th February, 2020. The notice of motion has been supported by sworn affidavit of Ms. Stella Manongi wherein, the reasons for the applicant's failure to appear on the date of the hearing of the application have been indicated. The application was resisted by the

respondent who submitted from the Bar since he did not file any affidavit in reply nor any written submission.

At the hearing of the application before me, the applicant was represented by Dunstan Nyakamo, learned counsel whereas the respondent appeared in person unrepresented. Upon the applicant being asked to take the floor and expound his application, Mr. Nyakamo prayed to adopt the notice of motion, affidavit in support of the application as well as the written submissions which were earlier on lodged in Court on 7th June, 2021 in support of the application. He very briefly and meticulously referred to paragraphs 15 and 16 of the affidavit which according to him clearly indicates that the applicant was not aware of the hearing date of the application on the date when it was dismissed for non-appearance which warrants this Court to grant the application for restoration. He rounded up by praying that the Court should be pleased to grant the prayers sought.

When it was his turn, the respondent was fairly brief and submitted from the Bar that the application has no merit simply because the applicant did not produce the affidavit of one Advocate Didace.

In rejoinder Mr. Nyakamo contended that the respondent's submission was made from the Bar and therefore has no legs to stand and went on to submit that paragraphs 9 and 10 of the affidavit is very categorical and

clear that the applicant was not informed by advocate Didace Respicios of the existence of the impugned judgment and decree until such time when she received the demand note from the respondent seeking satisfaction of the decree and even after email was sent to advocate Didace he did not respond.

The power of this Court to restore an application for hearing or to re-hear it, is obtained in the provision of Rule 63 (3) and (4) of the Rules which reads inter alia that:

"(3) Where an application has been dismissed under sub-rule (1) or allowed under sub-rule (2), the party in whose absence the application was determined may apply to the Court to restore the application for hearing or re-hear it, as the case may be, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.

(4) An application made under sub-rule (3) shall be made within thirty days of the decision of the Court or in the case of a party which has been served with notice of the hearing but was not so served, within thirty days of his first hearing of that decision."

At the outset, I wish to point out that, the law is very settled and clear in this jurisdiction that, in order for the applicant to succeed to prompt the court to exercise its discretion under rule 63(3) of the Rules to restore an

application which was dismissed he must bring to the fore justification that he was prevented by any sufficient cause from appearing when the application was called on for hearing.

Although rule 63(3) does not go further to define as to what amounts to sufficient cause for non-appearance. However, it is clear that restoration 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. In the instant application, it is clear from the record of proceedings that the respondent did not file affidavit in reply to counter what was averred in the affidavit in support of the application. All what the respondent stated to oppose the application was a mere statement from the Bar and as it is well known a statement from the Bar is not evidence and therefore the court cannot act on it. See, for instance, **Transafrica Assurance Co. Ltd v. Cimbria (E.A.) Ltd** (2002) E.A. 627.

The sequence of events leading to the dismissal of the application are clearly stated in paragraphs 14, 15, 16, 17, 18, 19, 20 and 21 of the affidavit supporting the notice of motion. Essentially, the applicant is stating that he was unable to appear during the day when the application was called for hearing owing to sickness of the office clerk one Happy Emmanuel who received the summons but suffered stroke shortly upon receipt of the summons and before she recorded the date in the office diary. The medical

chit relied upon and the affidavit of Happy Emmanuel bail out the applicant. It is common ground that, health matters, in most cases, are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike. The applicant's failure to appear on the date of the hearing of the application was prevented by sickness which in my view is sufficient cause in terms of rule 63 (3) of the Rules.

The above aside, the record also shows that the applicant made determined efforts to pursue the matter upon being made aware of the impugned decision. I find that the applicant acted with reasonable promptness within the spirit of rule 63(4) of the Rules.

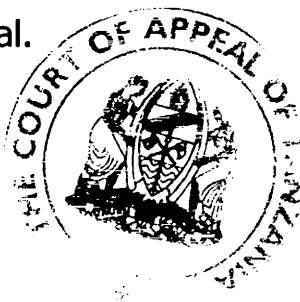
For the above reasons, I find and hold that, the applicant has been able to demonstrate that it was prevented by sufficient cause from appearing when the application was called on for hearing.

In the result, I grant the prayer for restoration of Civil Application No. 276/18 of 2019 as prayed in the notice of motion. Costs will be in the cause.

DATED at DAR ES SALAAM this 26th day of August, 2022.

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 31st day of August, 2022 in the presence of Mr. Dunstan Nyakamo, learned counsel for the applicant and the respondent appeared in person, is hereby certified as a true copy of the original.




C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL