IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO. 526/01 OF 2020
(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CATS NET LIMITED.....APPLICANT

VERSUS

TANZANIA COMMUNICATION REGULATORY AUTHORITY.....RESPONDENT

[Application for re-hearing of Civil Application No. 342/01 of 2018 allowed vide the decision of the Court of Appeal of Tanzania at Dar es Salaam]
(Mkuye, Mwandambo na Kitusi, JJA.)
dated the 13th day of November, 2020
in
Civil Application No. 342/01 of 2018
.....

RULING OF THE COURT

30th September & 6th October, 2022

MWAMPASHI, J.A.:

On 13.11.2020, the notice of appeal lodged by the applicant against the decision of the High Court of Tanzania at Dar es Salaam in Civil Case No. 107 of 2014, was struck out by the Court in Civil Application No. 342/01 of 2018. It is worth noting that the hearing of that application in which the notice of appeal was struck out, proceeded in the absence of the applicant in terms of rule 63 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) after the applicant had failed to appear despite being duly served. Aggrieved, the applicant duly lodged the instant application by way of a notice of motion under rule 63 (3) of the Rules, seeking for a re-hearing of the application. The instant

application is supported by two affidavits affirmed by Mr. Matojo Mushumba Cosatta, the Director of Legal Service Department of the applicant (the 1st affidavit) and Mr. Ramesh Kansara, the Director of the applicant (the 2nd affidavit). In opposition, there is an affidavit in reply sworn by Mr. Jehovaness Zacharia, the Principal Legal Officer of the respondent.

At the hearing of the application, the applicant was represented by Mr. Matojo Mushumba Cosatta, the Director of Legal Service Department of the applicant, whereas the respondent had the services of Messrs. Ayoub Sanga and Mathew Fuko, both learned State Attorneys.

Before we procced further, we find it appropriate to make it clear, at this stage that, in the instant matter, it is not in dispute that the applicant was duly informed of the day on which Civil Application No. 342/01 of 2018 was fixed for hearing. It is also clear that, despite being so notified, the applicant defaulted appearance and as we have alluded to above, the application was therefore heard and allowed in her absence in terms of rule 63 (2) of the Rules. The position of the law, in as far as the re-hearing of an application which is heard and allowed in the absence of a party, is stated by rule 63 (3) of the Rules that:

> *"**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 **to 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".***
>
> [Emphasis supplied]

From the above reproduced provision of law, it is clear that the Court may, in its discretion, re-hear the application which was heard and allowed under rule 63 (2) of the Rules, in the absence of one of the parties but only if such a party is able to show that he or she was prevented by sufficient cause from appearing when the application was heard and allowed in his or her absence. See- **Rosemary Stella Chambe Jairo v. David Kitundu Jairo**, Civil Application No. 517/01 of 2016 (unreported).

It is common ground that what constitutes "sufficient cause" is not elaborated by rule 63 (3) of the Rules and there is no universal definition of such term. However, it is settled that, what is sufficient cause is dependent on the circumstances of each case. It is the circumstances which prevented a party from appearing at the hearing

which have to be considered in determining whether or not they constitute sufficient cause. See- **Mwanza Director M/S New Refrigeration Co. Ltd v. Mwanza Regional Manager of TANESCO and Another** [2006] T.L.R. 329, **Mohamed Iqbal v. Esrom M. Maryogo**, Civil Application No. 141/01 of 2017 and **Phares Wambura and 15 Others v. Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016 (both unreported).

In the light of the above stated position, the only issue for our determination in the instant application, will therefore be whether or not the applicant has managed to show that she was prevented by sufficient cause from appearing at the hearing of Civil Application No. 342/01 of 2018 on 21.10.2020.

The applicant's justification or reasons for non-appearance at the hearing of Civil Application No. 342/01 of 2018 on 21.10.2020 as gathered from the two supporting affidavits, is based on the assertions that; Mr. Matojo Mushumba Cosatta, the Director of Legal Service Department of the applicant who was to attend at the hearing of the application, fell sick in the morning hours of the hearing day, that due to the fact that Mr. Cosatta could thus not attend at the hearing, he called and asked Mr. Ramesh Kansara, one of the Directors of the applicant, to come to the Court not only to inform the Court on what had befallen

him, but also to pray for an adjournment of the hearing. It is further averred that, Mr. Kansara came to the Court (Court of Appeal building) and went in Court Room No. 2 where he waited for the application to be called but to no avail, that after the Court had finished its business of the day, he inquired from a court staff about the application only to be informed that the hearing of the application was being conducted at the High Court building in court room No. 2. Upon rushing to the High Court building, he was informed that the application had already been heard.

In his submission in support of the application, Mr. Cosatta repeated what is averred in the two supporting affidavits as we have narrated above. He however added that the fact that the applicant was duly served is supported by two summonses annexed to the two affidavits as annexures CN1 and RK1 as it is for him falling ill which is supported by a hospital medical chit which is annexure CN2 to the first affidavit. Mr. Cosatta went on arguing that he also called Mr. Henry Chaula, the then counsel for the respondent, to inform him about his sickness but to no avail. He also added that the restoration of the applicant's notice of appeal which was struck out in Civil Application No. 342/01 of 2018 is of vital importance because in the intended appeal the applicant intends to raise a legal issue of great importance on the retrospectivity operation of procedural laws in Tanzania. He therefore

prayed for the application to be granted so that Civil Application No. 342/01 of 2018 is re-heard.

In response, Mr. Sanga made it clear at the outset, that he is not supporting the application. Having adopted the affidavit in reply and the list of authorities he had earlier on filed, he submitted that no sufficient cause in terms of rule 63 (3) of the Rules, has been shown by the applicant to warrant a re-hearing of Civil Application No. 342/01 of 2018. On this, he placed reliance on the decision of the Court in **Rosemary Stella Chambe Jairo** (supra). He contended that there is no good evidence proving not only that Mr. Cosatta fell sick on the hearing day, but also that Mr. Kansara came to the Court on that material day. As on Mr. Cosatta falling sick, it was argued by Mr. Sanga that the hospital medical chit is invalid and valueless because it does not show the time Mr. Cosatta attended the alleged treatment. He also argued that the diagnosed diseases indicated therein are different from what Mr. Cosatta had complained to have suffered from, as per paragraph 7 of the 1st affidavit.

It was further submitted by Mr. Sanga that the applicant's assertion that Mr. Cosatta fell sick and also that Mr. Kansara came to the Court on the hearing day, appear not to be true because the two supporting affidavits contain contradictory facts. He pointed out that while in

paragraph 8 of the 1st affidavit it was on 21.10.2020 when Mr. Cosatta called Mr. Kansara, paragraph 3 of the 2nd affidavit is to the effect that it was on 13. 11.2020 when Mr. Cosatta called Mr. Kansara. He also wondered how the applicant could be served with two summonses, that is, annexures CN1 and RK1, issued on different dates by different Deputy Registrars of the Court of Appeal. He contended that lack of explanations on why two summonses had to be issued makes it more probable that the assertions on Mr. Cosatta felling sick and that on Mr. Kansara coming to the Court on the material day, are nothing but a cooked story.

Mr. Sanga went on arguing that Mr. Kansara did not come to the Court on the material day because the assertion that he went to the wrong court room does not hold water. He pointed out that the venue, that is, High Court Room No. 2 was clearly indicated on the summons that was served upon the applicant (annexure CN1). He also contended that Mr. Kansara's claim lacks supporting evidence by way of affidavits from the court staff who allegedly informed him that the hearing of the application was being conducted at the High Court in Court Room No. 2 and also from whoever informed him at the High Court that the application had already been heard. He insisted that Mr. Kansara's affidavit contains hearsay information and therefore, it should not be

relied upon. To cement his argument Mr. Sanga referred us to the decisions of the Court in **Ignazio Messina v. Willow Investments SPRL**, Civil Application No. 21 of 2001 and **Lalago Cotton Ginnery and Oil Mills Company Limited v. The Loans and Advances Realization Trust (LART)**, Civil Application No. 80 of 2002 (both unreported).

Regarding the argument that the applicant intends to raise an important legal issue on the retrospectivity operation of procedural laws in her intended appeal, it was argued by Mr. Sanga that the same is irrelevant and it does not constitute a sufficient cause in terms of rule 63 (3) of the Rules.

In his short rejoinder, Mr. Cosatta reiterated his contention that the applicant was prevented from appearing at the hearing of the application by sufficient cause. He also argued that the hospital medical chit cannot be faulted but by another expert evidence. As on the date indicated on paragraph 3 of the 2nd affidavit, it was submitted by Mr. Cosatta that the same is just a typographical error.

As we have earlier alluded to when restating the relevant law applicable to the instant application, the issue before us is whether the applicant has disclosed sufficient cause to justify her non-appearance at the hearing of Civil Application No. 342/01 of 2018.

We have dispassionately and earnestly examined the notice of motion, the affidavits filed in support and in opposing the application and we have also considered the submissions made for and against the application. We are of a considered view that, it is not inappropriate, under the circumstances of this matter and from what we have endeavoured to state above, if we hasten to promulgate that no sufficient cause has been established to warrant a re-hearing of Civil Application No. 342/01 of 2018. We will explain.

Beginning with the assertion that Mr. Kansara came to the Court on the day Civil Application No. 342/01 of 2018 was called on for hearing, we agree with Mr. Sanga that the assertion is manifestly suspect and unreliable due to the following: **One**, it does not add up why Mr. Kansara could have gone to the wrong court room while on the summons served upon the applicant, that is, annexure CN1 to the 1st affidavit, it was clearly indicated that the venue for the hearing would be at the High Court in Court Room No. 2. It should also be noted that the second summons, that is, annexure RK1 to the 2nd affidavit, did not change the venue. **Two**, if really Mr. Kansara came to the Court and if having gone to the wrong venue he was directed and informed by a court staff that the hearing was being conducted at the High Court in Court Room No. 2 and also if upon getting at the High Court he was

informed that the application had already been heard, as it is claimed by the applicant, then affidavits of the said court staff were necessary to supplement and support the assertion that he really came to Court. Short of that, his assertion is far from being believed and relied upon.

In **Phares Wambura and 15 Others** (supra), the applicants whose application had been struck out for non-appearance, sought for the restoration of the application and one of their grounds was that they were misled by a court clerk to a different chamber of Justice of the Court before whom they were supposed to appear. In emphasising the need of an affidavit of the court clerk to substantiate the applicants' assertion that they came to Court and that they were so misled, the Court observed that:

> *"The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances I agree with the counsel for the respondent that there was a need for the said Court Clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits. ...the Court Clerk could have been useful to substantiate the applicants' assertions of her/his involvement in the matter".*

It is therefore our settled view, basing on the above observations, that the tale that Mr. Kansara came to Court on the material day is

highly suspect. This finding takes us to the assertion that Mr. Cosatta fell sick and that he could therefore not attend the hearing of the application. Our observation on this is that, under the circumstances of this matter, where the tale that Mr. Kansara came to Court on the material day has flopped, the assertion on Mr. Cosatta's sickness becomes insignificant because even if it is true that he was sick to the extent of not being able to enter appearance, still he was supposed to so inform the Court before or at the time the application was called on for hearing. Since no such information was relayed to the Court then no sufficient cause has been established to warrant re-hearing of the application in terms of rule 63 (3) of the Rules.

The argument by Mr. Cosatta that we should allow the application and let the application be re-heard because there exists an important legal issue on the retrospectivity operation of procedural laws in the decision she intends to challenge if the notice of appeal is retained, should not detain us at all. As rightly argued by Mr. Sanga, the argument is irrelevant and out of context. The same does not constitute sufficient cause in terms of rule 63 (3) of the Rules and besides such an argument did not fare in the Court's decision in Civil Application No. 342/01 of 2018.

To this end and for the above stated reasons, we find that the applicant has failed to establish sufficient cause to justify her non-appearance when Civil Application No. 342/01 of 2018 was called on for hearing on 21.10.2020. We therefore decline to exercise our discretional powers under rule 63 (3) of the Rules, in favour of the applicant and we accordingly dismiss the application with costs.

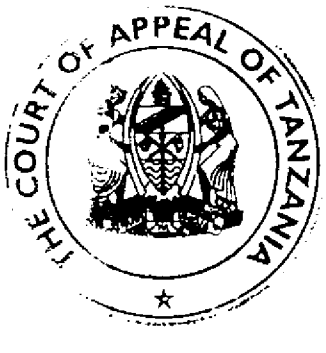
DATED at **DAR ES SALAAM** this 4th day of October, 2022.

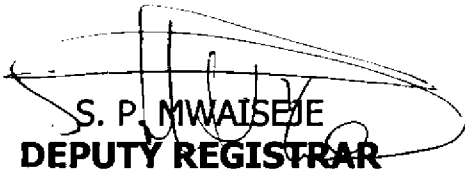
S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 6th day of October, 2022 in the absence of the Applicant and in the presence of Mr. Mathew Fuko, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.





S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL