IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CIVIL APPLICATION NO. 131 OF 2021

SAMSON IBRAHIM ..... APPLICANT

VERSUS

KIHENGO MSOSO ..... 1ST RESPONDENT

MUGESI TEHATA ..... 2ND RESPONDENT

CHACHA MASIAGA..... 3RD RESPONDENT

MUSETI MSOSO ..... 4TH RESPONDENT

RULING

2nd December, 2021, & 8th February, 2022

ISMAIL, J.

This application represents the applicant's effort to give a lifeline to a to an appeal which was dismissed by this Court on 25th August, 2021. The dismissal was a result of the applicant's failure to file written submission, consistent with the filing schedule which was drawn by the Court 22nd July, 2021. The order required the parties to prefer written submissions for and against the appeal, and that the applicant's submission was due for filing on

or before 4th August, 2021. Noting that up until the close of business on the day nothing had been filed, and no extension had been sought or reason given for the inability, the Court dismissed the appeal with no order as to costs.

Supporting the application are two affidavits, sworn by the applicant setting out grounds on which the application for restoration of the appeal is based. Sickness of the applicant has been cited as a reason for his inability to take necessary steps in the prosecution of his appeal. The contention is that, between 1st and 16th August, 2021, the applicant was ailing and pneumonia has been cited as the cause of illness. This prevented him from filing his written submission on 4th August, 2021.

The application has been vigorously opposed to by the respondents. Through the 2nd respondent's counter-affidavits, the contention by the applicant has been shrugged. The averment by the 2nd respondent is that the medical chit filed in support of the application indicates that the applicant was an outpatient, meaning that he was not prevented from filing his submission when he was called upon to do so. The 2nd respondent argued, as well, that there was time between 22nd July, 2021 and 1st August, 2021, when the applicant allegedly fell ill.

Hearing of the application was done by way of written submissions with the applicant enjoying the usual privilege of setting the ball rolling. Enlisting the services of Mr. Emmanuel Gervas, learned counsel, the applicant made reference to paragraphs 4, 5, 6 and 7 of his affidavit and argued that his illness is something that was beyond his control. He further argued that the severity of his illness was such that he would not convey news of his indisposition to the Court, partly because he did not have any relative around him to help and convey the news.

Learned counsel submitted that the law is quite clear that, where illness is cited as a ground for inability to attend a dismissed matter, then the same constitutes as a sufficient ground for setting aside the dismissal order. He aided his cause by citing the decision of the Court of Appeal in *Kapapa Kumpindi v. The Plant Manager, Tanzania Breweries Limited*, CAT-Civil Application No. 6 of 2010 (unreported), in which it was held:

> *"Having heard the applicant viva voce and after going through the record, I am satisfied that the applicant was sick. And sickness is sufficient reason to allow him file his submission out of time."*

Mr. Gervas cemented his argument by citing the decision of this Court in ***Saulo Malima v. Petro King'oni***, HC-Misc. Land Application No. 8 of 2020, in which sickness was accepted as a sufficient or good cause for extending time. He urged the Court to grant the application.

The 2nd respondent's submission was concise but ferocious. Mr. Mussa Nyamwelo, learned counsel, took a swipe at the submission made by the applicant. It was his contention that the applicant had ten days between 22nd July, 2021 to 1st August, 2021, to file his submission. Instead, submitted Mr. Nyamwelo, the applicant sat idle and did nothing.

With respect to the medical chit that supported the application, Mr. Nyamwelo argued that the same revealed that the applicant was an outpatient who would still prepare and file his submission within the time prescription. Learned counsel's view was informed by the holding of the Court of Appeal in ***Athuman Mtundunya v. The District Crime Officer Ruangwa & 2 Others***, CAT-Civil Reference No. 15 of 2018 (unreported), in which an out patient party was considered to be in an able position of taking steps in a matter. His plea for extension of time on the basis of illness was thrown out by the upper Bench. Regarding the applicability of the principle in ***Kapapa Kampindi's case***, the respondent's counsel argued that the same is irrelevant as applicability of the said decision is limited to

extension of time and not in cases like this, where the applicant failed to file a submission. The same was said with respect to ***Saulo Malima's case***.

Mr. Nyamwelo went further to punch holes on the veracity of the medical chits, imputing that genuineness of the said chits was suspect. His view was premised on the various factors which include the variance of the applicant's age; dates on which they were issued; ownership of the medical facility that issued it; and the duration within which the applicant took ill and was treated. He concluded that, on account of the said shortcomings, the applicant was neither ill nor was he treated in the medical facility that he contends he was attended to. Learned counsel took the view that no sufficient cause had been adduced to warrant the setting aside of the dismissal order.

From these rival contentions, the question is whether sufficient ground for the grant of the application has been adduced. My unflustered response to this question is in the negative, and I will explain why.

I will begin by restating what is otherwise a known position. It is to the effect that a dismissed suit can only be restored where the applicant demonstrates that the absence leading to the dismissal was caused by good or sufficient cause. It, therefore, requires satisfying the Court that failure by the applicant falls in the realm of what is provided for under Order IX Rule

9 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC), which states as follows:

> *"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fir, and shall appoint a day for proceeding with the suit:*
>
> *Provided that, where the decree is of such a nature that it cannot be set aside as against the defendant only it may be set aside as against all or any of the other defendants also."*

The position in the cited provision is supported by several decisions of this Court and the Court of Appeal. A few of the said cases are: ***Benedict Mumello v. Bank of Tanzania*** [2006] E.A. 227; and ***Pimak Profesyonel Mutfak Limited Sikreti v. Pimak Tanzania Limited & Another***, HC-Comm. Application No. 55 of 2018; ***Nzibikire Robert Isack v. Access Bank Tanzania (T) Ltd*** HC-Misc. Land Application No. 82 of 2020; and ***Robert Sengerema Maziba v. Lumumba Mteia @ Mtera & Another*** HC-Misc. Civil Application No. 81 of 2021 (all unreported).

The reason cited by the applicant, for his inability to file written submissions is illness. It is a settled position, in this Country, that illness, once pleaded, constitutes a sufficient reason for a party's non-appearance or failure to take action within a prescribed time. This means that, upon proof, such illness can constitute a ground for setting aside a dismissal order. This was accentuated in the case of ***John David Kashekya v. The Attorney General***, CAT-Civil Application No. 2012 (unreported), wherein it was held:

> *".... sickness is a condition which is experience by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for checkup for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient enough for granting the application for extension of time to file ...."*

The applicant's contention is that he fell ill on 1st August, 2021. That came, as Mr. Nyamwelo contended, 10 days from the date the order for filing submissions was made, and four days to the last date of filing. While there may be little or no qualms about the illness itself, the dispute resides in the date he actually fell ill or the duration of his illness. No semblance of an explanation has been given on the 10 days that preceded his illness. Nothing is said to have prevented him from taking steps during the 10 days that preceded his illness. In the absence of any explanation regarding those 10 days, there can never be anything to convince me that illness alone would be the cause for the delay in filing the submission.

There is also a disquiet that comes with pregnant disharmonies apparent on the medical chits. While the intention is not to discredit the authority that is alleged to have issued the medical chits, the irreconcilable nature of the pointed anomalies point to a conclusion that the said chits are too 'porous' to be believed. The age difference, variance on the dates on which the applicant was attended to, date of issuance of the chits are some of discrepancies that are too glaring to be ignored. They invite the need for casting serious aspersions on, and on this, I get along with Mr. Nyamwelo and hold that it is possible that the applicant's effort was a mere afterthought

that was intended to hoodwink the Court and grant his wish. I resist that temptation.

But even assuming that the applicant fell ill as he avidly contends, the fact that he was an outpatient rules out the possibility that he would not find time and energy to file the submission, knowing that, in any case, he would enlist the services of an advocate to do that. This would massively cut down his work by simply engaging a counsel who would do what was expected of him. Borrowing a leaf from the superior Bench's splendid decision In ***Athuman Mtundunya*** (supra), I hold that the level of illness in this case was not an impediment for taking action.

In the upshot of all this, I hold that this application is barren of fruits and I dismiss it with costs.

Order accordingly.

DATED at **MWANZA** this 8th day of February, 2021.

M.K. ISMAIL

JUDGE