

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 07 OF 2022**

*(Arising from PC Criminal Appeal No. 16 Of 2021 in the High Court of Mwanza-Sub-registry)*

**HAMISI SWAIBU ..... APPLICANT**

**Versus**

**NOTI ISSA .....RESPONDENT**

**RULING**

*2<sup>nd</sup> & 17<sup>th</sup> May, 2022*

***Kahyoza, J.:***

Hamisi Swaibu, (Hamisi) seeks to restore PC Criminal Appeal, which this Court dismissed for want of prosecution. The applicant deposed that this Court dismissed the application on the day he was before the court waiting to be connected for teleconference hearing of the appeal. Noti Issa (Noti) opposed the application by filing a counter affidavit.

A brief background is that; Hamisi and his co-accused person, Anord Robert, lost the appeal before the district court. The district court upheld Hamisi's conviction. Aggrieved, Hamisi appealed against the judgment of the district court upholding his conviction. Anord Robert did not appeal. The appeal was fixed for hearing on 25<sup>th</sup> January, 2022 in the virtual

presence of both parties. On that date, Noti, the respondent appeared whereas Hamisi, the appellant in that case absented himself. The Court dismissed the appeal for want of prosecution. Hamisi is seeking this Court to vacate the dismissal order.

It is settled that a party seeking to set aside a dismissal order must furnish good cause for his non-appearance. See the holding in **Nassib Sungura Vs Peter Machumu (1998) TLR 497** where this Court held-

*"In an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed."*

Hamisi is required to prove that he was absent for good cause. He averred that he entered appearance on the day fixed for hearing. On advice by undisclosed court clerk that the appeal will be heard virtually, he decided to find a convenient place waiting to be linked to the virtual court. Unfortunately, the Court did not hear the appeal virtually. He made follow-up and found that the appeal was dismissed. He deposed that-

*"5. Kwamba mnamo tarehe 25/11/2022 mleta maombi alihudhuria mahakama mapema sana ili kujua kama kesi inaendeshwa pia kwa simu au utaratibu umebadilika.*

*6. Kwamba mleta maombi akiwa katika viunga vya mahakama alifahamishwa na mmoja wa watumishi wa mahakama kuwa endapo hajapokea mabadiliko yoyote yale kwa njia ya simu basi utaratibu utakuwa ule ule hivyo asubiri atapigiwa simu."*

Noti opposed the application by filing a counter affidavit. He did not appear on the date the application was fixed for hearing, so the application proceeded *ex parte* against him.

The issue is whether the applicant has adduced good cause for non-appearance. The applicant adduced one ground of appeal that he entered appearance and one staff of the Court advised him that the appeal will be heard virtually. He left the Court premises to a convenient place waiting to be connected to the virtual court. Hamisi did not disclose the staff who notified him that the Court will hear the appeal virtually nor did he file the staff's affidavit in support of the allegation. I find Hamisi's assertion that one the Court's staff informed him that the appeal will be heard virtually not proved. The applicant was required to consult the judges' court clerk before he left the court premises. I doubt if there was such a staff who

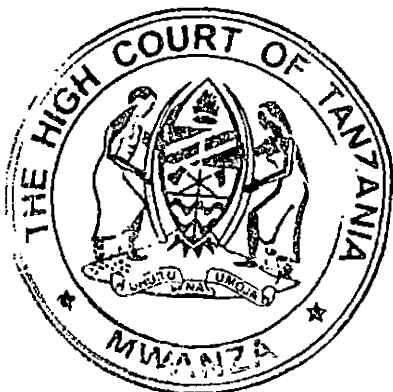
notified the applicant that the appeal will be heard by tele-conference. He was required to cause the staff to file an affidavit in support of the allegation. Confronted with an akin situation, the Court of Appeal held in **Heritage Insurance Company v. Sabians Mchau & 2 Others**, Civ. Application No. 284/09 of 2019, where the Company's advocate deposed in the affidavit that *he was advised by the court official that the Memorandum of Appeal and the records of Appeal always remain with the registry .....*" the allegations were not substantiated for want of the affidavit of the court official referred to in that affidavit. In the same vein, I do not find the allegation that the undisclosed staff told **Hamisi** that the Court will hear the appeal by tele-conference.

Even if it was true that this Court's staff told him that the Court will hear the appeal by tele-conference, still I would have held **Hamisi** not a diligent litigant. I cannot comprehend that a diligent litigant would leave the Court premises without seeking to hear the Judge's court clerk to confirm the information. That notwithstanding, the record shows that the Court dismissed the appeal for want of prosecution on 25<sup>th</sup> January, 2022 and the applicant filed the application seeking to restore the appeal on 28<sup>th</sup>

February, 2022, that is after 30 days. Why did Hamisi take long to institute the application for restoring the appeal?

In the upshot, I find that Hamisi failed to convince me, that his non-appearance was for good cause. Consequently, I dismiss the application for want of merit.

It is ordered accordingly.



**J. R. Kahyoza**

**JUDGE**

**17/5/2022**

**Court: Court:** Ruling delivered in the presence of Mr. Hamisi, the applicant and in the absence of the respondent. B/C Ms. Jackline (RMA) Present.



**J. R. Kahyoza**

**JUDGE**

**17/5/2022**