

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

CIVIL APPLICATION NO. 495/06 OF 2023

BENSON NDILE..... APPLICANT

VERSUS

ABEL MWAKIFWANGE.....RESPONDENT

(Appeal from the ruling of the High Court of Tanzania at Mbeya)

(Mongella, J.)

dated the 28th day of July, 2021

in

Misc Land Application No. 5 of 2021

RULING

3rd & 10th July, 2024

KITUSI, J.A.:

An application under rule 63 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for restoration of an application that was dismissed for non-appearance, of the applicant, like this one is, ordinarily and as a matter of principle, straightforward. However, the present application is intriguing, therefore not straight forward.

The applicant failed to enter appearance on 22nd February 2023 when Civil Application No. 115/06 of 2022, for extension of time, was called for hearing. Since the present applicant was the applicant in that application,

the presiding justice of the Court dismissed it for non-appearance in terms of rule 63 (1) of the Rules. This application seeks to have the dismissal set aside by invoking rule 63 (3) of the Rules.

The record of application shows that it is supported by an affidavit dated 21/3/2023 of Benson Ndile, the applicant. In that affidavit the applicant avers that in the early morning of 22/3/2023, at 07:20 am, to be exact, he had to stop over at Igurusi Dispensary to receive treatment for sudden fever and headache when he was on his way to Mbeya City to attend Court session. After treatment he proceeded with his journey to Mbeya. Meanwhile a woman who happened to be the applicant's mother was already seated in chamber when the application was called out. Somehow, she communicated the fact that her son, the applicant, was on the way heading to court. With the court's indulgence, hearing was stood over for a while. Yet the applicant could not make it in time when the matter resumed later as, according to him, he arrived when the matter had been dismissed.

At the hearing of this application, the applicant was present in person and mainly argued as shown above to demonstrate that he was prevented by a sufficient cause. The respondent was present and also represented

by Ms. Irene John Mwakyusa, learned advocate. Drama started when Ms. Mwakyusa addressed me in opposition of the application.

She stated that the affidavit that had been served on the respondent which was also taken by the applicant bears a totally different story as to the cause of the absence. She further stated that according to that other affidavit dated 20/3/2023, what caused the applicant's delay was not illness, but his being arrested at 07:20 am and kept at Inyala Police Station where he stayed until 10.00am upon being released.

It seems true that the applicant signed more than one affidavit and the two tell different stories as to what caused the applicant's absence. The affidavit dated 20/3/2023 which was the one served on the respondent mentions arrest of the applicant as the cause. In the affidavit in reply, at paragraph 4, the respondent disputes the alleged arrest for being unsupported by any affidavit taken by a police officer.

On the other hand, the applicant could not explain this state of things other than that he was not aware of the other affidavit alleging arrest. Being unrepresented, he could not even know its content.

Ms. Mwakyusa submitted that the affidavit tells an untrue story and cited the case of **Ignazio Messina v. Willow Investment SPRL**, Civil

Application No. 21 of 2001 for the principle that an application that is supported by an untrue affidavit must be dismissed on the ground that the untrue affidavit is as good as non-existent.

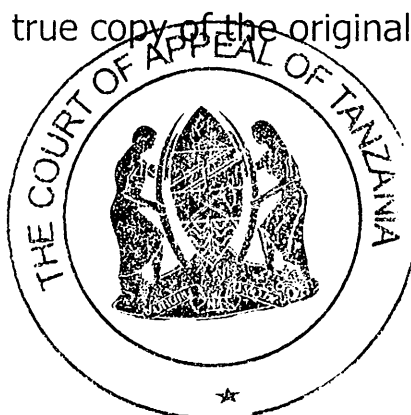
I agree with Ms. Mwakyusa that something is amiss. Since the applicant bears the burden of proof, it is upon him to clear the doubts as regards the two stories told by the two affidavits. This he has not been able to do. The affidavit which was served on the respondent contradicts the one on record and since this fact was raised in the affidavit in reply, it is not extraneous. I hold that the application is incompetent for being supported by an untrue affidavit.


Consequently, I dismiss the application with costs.

DATED at **MBEYA** this 5th day of July, 2024.

I. P. KITUSI
JUSTICE OF APPEAL

Ruling delivered this 10th day of July, 2024 in the presence of the Applicant in person and Ms. Latifa Ayoub holding brief for Ms. Irene Joel Mwakyusa, learned counsel for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL