

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 1 OF 2002

(Original Civil Appeal No. 37 of 2001 Ilala District Court before Mr. Mnengo H.M.)

CHARLES MOSES APPELLANT/APPLICANT

VERSUS

SHAMTE KHATIBU RESPONDENT

Date of last order – 21/12/2007

Date of Ruling – 29/9/2008

R U L I N G

Shangwa, J.

This is an application for setting aside the dismissal order of the Applicant's appeal which was made by Ihema, J (Rtd) on 21/3/2003. It is supported by counsel he swore on 4/3/2008 argued this application by way of written submissions.

In his written submissions, counsel for the Applicant Mr. Masaka stated that there was a mistake on the part of this court which ordered the Applicant in its ruling delivered on 20/2/2008 to file a fresh application for restoration of his appeal. According to Mr. Masaka, the granting of the Applicant's application dated 14/4/2005 automatically did render the appeal restored as the second prayer in the Applicant's application which was granted was for setting aside the dismissal order dated 21/3/2003, and for restoration of the Appeal to hearing on merits.

With respect, I think Mr. Masaka did not properly read my ruling dated 20/2/2008. Had he done so, he would have realized that although the Applicant's application dated 14/4/2005 was requesting for two orders one for extension of time within which to apply to set aside the dismissal order dated 21/3/2003 and another one for setting aside the said order and restore the appeal to hearing on merits, I

deliberately avoided granting both orders at the same time because it was not practicable to do so. What I did therefore was to deal only with the application for extension of time within which to apply for setting aside the dismissal order of his appeal made by Ihema, J (Rtd) on 21/3/2003 and fix the period within which to apply for the same.

In arguing this application, Mr. Masaka submitted that the grounds upon which it is based are contained in the Applicant's affidavit. He did not mention any of those grounds. A perusal of that affidavit will show that the Applicant is praying for restoration of his appeal on grounds that when it was called for hearing by Ihema, J (Rtd) on 21/3/2003 and dismissed for want of prosecution, he was not aware that this case had been fixed for hearing due to lack of notice.

On the other side, Mr. Semgalawe submitted on behalf of the Respondent that the Applicant is telling the court lies

by saying that he was not aware of the date of hearing his appeal. He contended that the Applicant had a duty to follow up his appeal which he did not do because of negligence. Thus, he prayed that his application should be dismissed with costs.

I have gone through this court's record and found that the Applicant presented his Memorandum of Appeal for filing on 20/12/2001. Ihema, J (Rtd) was assigned to hear his appeal. On 18/2/2002, he fixed it for hearing on 17/5/2002 and made an order that the parties should be notified. No notice was issued to them. On 17/5/2002, Mutungi, Dr fixed the appeal for hearing on 23/9/2002 and ordered that the parties should be notified. On that date, the Appellant/Applicant did not appear for lack of notice. Mr. Jundu for the Respondent appeared. Ihema, J (Rtd) adjourned the hearing up to 21/3/2003 and ordered that the Appellant/Applicant should be notified. On that date, the

Appellant/Applicant did not appear. Mr. Semgalawe for the respondent prayed the court to dismiss the appeal for want of prosecution. His prayer was granted by Ihema, (Rtd) in the following words and I quote:-

"As the Appellant is absent and without notice the appeal is hereby dismissed with costs for want of prosecution as prayed. Order accordingly".

After reading the above quoted order, I went through the copies of the summonses that were issued by this court from the date of filing the appeal to the date of dismissing it but I have not seen any summons which shows that the Appellant/Applicant was notified to appear on 21/3/2003 or any document to prove that the Appellant/Applicant was notified to appear on that date but that he neglected to do so.

For this reason, I hold that the Appellant/Applicant was not aware of the date on which his appeal was fixed for hearing. Due to the said fact, it cannot be said that he neglected to follow up his appeal or that he is telling this court lies just as it was submitted by Mr. Sengalawe for the Respondent.

Therefore, for the sake of justice, I do set aside the dismissal order of the Appellant/Applicant's appeal made by Ihema, J (Rtd) on 21/3/2003 and I restore it to hearing on merit. Consequently, I order that the appeal should come for hearing on 18/11/2008. Costs in the main cause.




A. Shangwa

JUDGE

29/9/2008

Delivered in open court this 29th day of September, 2008 in the presence of Mr. Msafiri for Mr. Masaka for the Appellant and in the presence of the Respondent appearing in person.




A. Shangwa

JUDGE

29/9/2008