IN THE HIGH COURT OF TANZANIA

AT IRINGA

(DC) CIVIL APPEAL NO. 7 OF 2015

CELECESTA MLELWA ---------- APPELLANT

VERSUS

1. NJOMBE COMMUNITY BANK
2. MAJEMBE AUCTION MART } **---------- RESPONDENTS**

JUDGMENT

26th July, 2016 & 13th December, 2016

KIHWELO, J.

This is an appeal against the decision of the District Court of Njombe (Kapokolo, RM) which dismissed the application for setting aside the dismissal order given on 31st October 2013.

The facts as reflected in the court records are brief and may be stated as follows.

On 11th December 2013 the appellant filed Civil Application No. 17 of 2013 before the Njombe District Court seeking to set aside the dismissal order dated 31st October 2013 and restore the suit. The application was supported by the affidavit of one Edwin Msigwa, learned counsel from Jimmy Obed & Company Advocates. The main reason advanced by the learned counsel at that level was that the matter was not fixed for hearing but rather mention and that the counsel for the appellant was prevented to appear before the court owing to sudden sickness. The appellant attached a faint sick sheet and an undated letter addressed to the court and received on 31st October 2013. The district court dismissed the application for restoration hence the present appeal.

Before this court,the appellant was represented by Mr. Edwin Msigwa from Jimmy Obed & Company Advocates, while the respondents were under the services of Mr. Frank Ngafumika from Zinger Attorneys. It is instructive to point out that although the appellant were said to be represented by Mr. Msigwa, however, throughout the prosecution of this application Mr. Msigwa did not appear even once and in instead Mr.

Nitume, learned counsel, Ms. Prisca Mtanga, learned counsel and Ms. Kitta, learned counsel were holding brief in various occasion.

The appeal was accompanied by a Memorandum of Appeal, with the following grounds;

1. *That the District Court erred in law and fact in holding that the outpatient card of the Mnazimmoja Health Centre does not show a specific date on which advocate for the applicant (sic) went to Hospital.*

2. *That the District Court erred in law and fact for not considering that its decision will defeat its own order hence a defeat justice.*

3. *That the District Court erred in law and fact in holding in favour of the respondent (sic) when the Advocate for the respondents never disputed the application.*

4. *That the District Court erred in law and fact for not taking into consideration evidential standards of proof.*

At the direction of the Court the appeal was disposed through written submissions which were filed by the parties as directed. In support of the appeal the appellant valiantly argued that the appellant's counsel attended treatment at the medical centre on 30th October 2013. In support of his averment he attached the sick sheet as proof. The appellant's counsel went on to strenuously submit that the District Court erred when it dismissed the application while the respondents' counsel did not dispute it. He further argued that the District Court erred when it disregarded the evidential value while reaching at the decision it did. He also submitted that legal technicalities are handmaiden of justice as such they should not be used to punish the other party or defeat justice.

In reply Mr. Frank Ngafumika was very brief he first of all faulted the appellant's conduct of attaching exhibits with the written submission and prayed that they should be expunged from the court records and cited the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Limited V Mbeya Cement Company Limited and National Insurance Corporation (T) Limited**, [2005] TLR 41 to stress his line of argument. He further argued that it was wrong

to file the Memorandum of Appeal accompanied with the Ruling and Decree and that the proper approach was to file a Drawn Order and a Ruling.

In response to the argument touching upon legal technicality the respondents' counsel valiantly submitted that in the instant matter there was no any technicality involved but only that the court dismissed the application because the appellant's counsel did not demonstrate seriousness in prosecuting it and that the court is duty bound to dispense justice and in a timely manner. As regards to the argument that the District Court erred in dismissing the application while the respondent's counsel did not dispute, Mr. Ngafumika was of the view that, the argument was baseless as the court is duty bound to dispense justice the way it deems appropriate and not depending upon the position of one part or the other.

A cursory perusal of the court records and based upon both the submissions made by the parties as well as the grounds of appeal, it is my humble view that the only issue which cries for my determination is whether or not the appeal has any merit.

In my attempt to answer the above issue I will not deal with each ground of appeal separately. This is for the sake of preciseness and clarity as stated in the case of **Melita Naikiminjal & Loishilaari Naikiminjal V Sailevo Loibaguti** [1998] TLR 120 at 130 where the Court of Appeal of Tanzania Nyalali C.J (as he then was) had the following to say;

> *"We are however, of the considered opinion that an appellate court, so long as it grasps the essence of the case before it has the discretion to summarize the case and the grounds of appeal for purposes of conciseness and clarity. It does not need deal with them separately and with seriatim."*

A cursory perusal to the records of the District Court it speaks loud and clear that the appellant's counsel appearance has been conspicuously sporadic throughout both in the main case and the application and worse more the appellant's counsel has never appeared before this court. In my opinion this speaks volume for an officer of the court and taking into

account that Mr. Msigwa is not a solo practitioner but rather coming from a law firm which must have more than one counsel.

I wish to remark in passing also that I find considerable merit in Mr. Ngafumika's submission that annexures that have been attached to the submission needs and have to be expunged from the court records since they offend rules regulating written submissions. In the words of the court in the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Limited V Mbeya Cement Company Limited and National Insurance Corporation (T) Limited**, (supra);

> *"It is now settled that a submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or textbooks, have been regarded as evidence of facts and, where there are such annexures to written submissions, they should be expunged from the submission and totally disregarded".*

That takes me to another issue on whether the District Court rightly dismissed the application. According to the records of the court the appellant's counsel fell sick on his way to Ubungo Bus Terminal on 30th October 2013 and same day he was treated but looking at the copy of the undated letter to the court the same was stamped by the court as received on 31st October 2013 and in that letter the appellant's counsel is describing the outcome of his attendance at the Health Centre on 30th October 2013. In my view it is inconceivable as to how was that possible for a letter to have been written on 30th October 2013 presumably in the afternoon and still get in court on 31st October 2013 during working hours. Basically, all these boils down to one broad issue that the reason for the failure to appear as presented by the appellant's counsel before the District Court were not genuine and no wonder the said letter was not found in its file hence the questionable explanation that it was filed in a wrong file!

Although the court should not be made to swim in or pick and choose from a cocktail of truth, lies and suspicion simply heaped up in story that looks like truth but the court is duty bound to find truth as oil and water cannot mix together.

It is also imperative to stress that as a matter of public policy litigation has to come to an end and in any case there is nothing like mention in our civil justice system. That is only a matter of practice by the court, any time the, matter comes before the court it is upon the court to decide whether it seeks to proceed with hearing of the matter or not. The court is not supposed to condone delays caused by the parties in a case. I am saying so because the conduct of the appellant's counsel throughout at the District Court was sporadic and full of excuses and the situation was even worse before this court where they never appeared even once and this speaks volume. This has long been settled by the Court, in **Mwanza Director M/S New Refrigeration Co. Ltd V Mwanza Regional Manager of TANESCO**[2006] TLR 292 at 334-335 in which the court rebuke unnecessary delays in litigation caused by parties or their counsel by quoting with approval the court's prior decision in **Amratlal Damodar V Jariwala** [1980] TLR 31 where Mwakasendo J.A (as he then was) held that:-

> *"a court of trial has a duty not only to follow the rules of procedure but also to exercise firm control over proceedings before it and, if need be, to impose and enforce a timetable for*

litigation.....Litigation is the resolution of civil contention by methods preferable to violence...But the rule of law is not to be equated with a reign of litigiousness.....Moreover, dilatory procedure may defeat the very purpose of judicial process, namely to vouchsafe justice, since if litigation is prolonged, not only is there waste of time and money and moral energy, but circumstances may change in such a way that what would have been at the outset a just conclusion is in the end no longer so. Finally, delay will make it more difficult for the legal procedures themselves to vouchsafe a just conclusion, evidence may have disappeared and recollections become increasingly unreliable.....speedy rough justice therefore, generally be better justice worn smooth and fragile with passage of years."

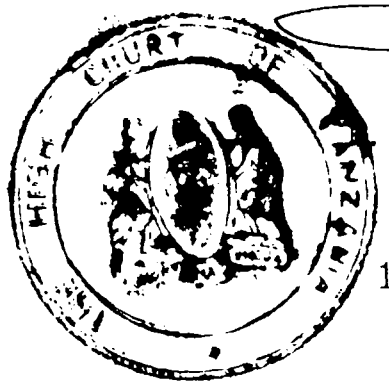
Similarly the Court of Appeal of Tanzania echoed the same standing in **Tanzania Harbours Authority V Mohamed R Mohamed** [2003] TLR 76 in which it had the view that the Court cannot aid a party who flouts rules of procedure with impunity. The Court held thus:-

".....this Court is duty bound to see that the rules of the Court are observed strictly and cannot aid a party who deliberately commits lapses."

The above authorities of the court of record although not directly linked to the situation in the instant case but makes emphasis that litigation has to come to end and that the court should not allow delays and prolonged civil trial at the expense of a party or an advocate who has lame excuses at all times.

In the upshot and for the reasons stated above I find the present appeal has no merit as a result the appeal is hereby dismissed with costs.

It is so ordered accordingly.

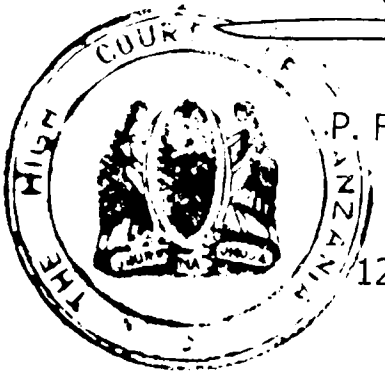


F. KIHWELO

JUDGE

12/12/2016

Judgment to be pronounced by the Deputy Registrar on a date to be fixed.



P. F. KIHWELO

JUDGE

12/12/2016