

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 267 OF 2018

DRTC TRADING COMPANY LIMITED APPELLANT

VERSUS

HAPPY SAMBEGA 1ST RESPONDENT

NATIONAL HOUSING CORPORATION..... 2ND RESPONDENT

Date of last order: 06/12/2019

Date of Judgment: 20/03/2020

J U D G M E N T

MGONYA, J.

This appeal originates from the decision of the Kisutu Resident Magistrates' Court in **Misc. Civil Application No. 163 of 2017** delivered on 10th day of September, 2018 by **Hon. Shaidi** in which the said court denied the Appellant's application for setting aside dismissal order on Application for Execution in **Civil Case Number 119 of 2001**. The Appellant herein being aggrieved by the said decision, appealed to this honorable court on the following grounds:

- 1. That the Honorable Resident Magistrate erred in law and in fact by disallowing the Application to set aside the dismissal order made on 05th September, 2017 on the ground that there is no***

sufficient ground established cause whereas the ground stated for non-appearance that the Appellant was caught in traffic jam by VIP Motorcade was sufficient to warrant the setting aside the dismissal order and restoring the Application for execution.

2. That the Honorable Resident Magistrate erred in law and fact for failure to consider that despite the absence of the Advocate for the Appellant the Appellant was presented by her officer namely Ibrahim Juma Mohamed who if he was given the right to be heard would address the court.

The Appellant was represented by Mr. Thomas Brash learned Counsel whereas the Respondent was represented by Mr. Silvanus Nyamikindo Advocate. With the leave of the court, the appeal was disposed of by way of written submissions.

Having gone through the grounds of Appeal raised and the parties' written submissions for and against the grounds of Appeal, the issue is **whether the lower court properly determined the matter and considered the parties prior submissions before arriving at its decision.**

Before determining the grounds of appeal, it is prudent first to have brief history of this matter. It is in record that the Appellant herein *inter alia* filed an Application before the Kisutu

Resident Magistrates' Court. The same was scheduled for hearing on 5th September 2017 for the 1st Respondent herein to show cause as to why execution should not be carried out against her.

On that hearing date, the Appellant herein was not in court when the matter was called. As a result, as there were no any notification as to his absence before the court, the Counsel for the 1st Respondent herein prayed for an order to dismiss the said Application for want of prosecution. The prayer was granted accordingly. It is undisputed fact that after the said Application was dismissed, the Appellant's Counsel arrived at the court and he was informed of what had transpired before the court.

It is from the dismissal order for want of prosecution, the Appellant herein filed an Application praying the court to set aside the dismissal order for the reason that his failure to attend the proceedings within time was caused by the heavy traffic jam at Lumumba and Morogoro road as there was a VIP motorcade. Further to that, he had no any other alternative to make him possible to appear in court within time. The said Application was denied by Hon. Shaidi the Principal Resident Magistrate on 10th September 2018. Aggrieved by the said decision, the Appellant preferred the instant Appeal with two grounds as outlined above.

Submitting for the first ground of appeal that the Honorable Resident Magistrate erred in law and in fact by disallowing the Application to set aside the dismissal order made on 05th September, 2017 on the ground that there is no sufficient ground established, whereas the ground stated for non-appearance that is VIP Motorcade was sufficient to warrant the setting aside the dismissal order and restoring the Application for execution; it is the Appellant's assertion that the reason he submitted for delay before the court constitutes the good cause since that is the reality to what had happened.

Submitting on the 2nd ground of Appeal that the Honorable Resident Magistrate erred in law and fact for failure to consider that despite the absence of the Advocate for the Appellant, the Appellant was presented by her officer namely Ibrahim Juma Mohamed who if he was given the right to be heard would address the court.

From the above ground it is the Appellant's Counsel submission that on the date the Application for execution was called for hearing, Mr. Ibrahim Juma Mohamed the Applicant's Administrative Officer was present before the court and was not given an opportunity to be heard. Instead, only the counsel for the Respondent was heard and prayed for dismissal of **Civil Case No. 119 of 2001**. In support of that allegation, the Counsel informed the court that the Affidavit of the said

Ibrahim Juma Mohamed was also attached to the Application for setting aside the dismissal order which was also not objected by the counsel for the 1st Respondent. The Counsel averred that, in the said Affidavit, Mr. Ibrahim Juma Mohamed clearly expressed what happened in Court on that particular day in his presence.

From the said assertion, it is the Applicant's Counsel submission that the ruling in respect of setting aside the dismissal order did not take the Affidavit into consideration.

From the above submission, the Appellant's counsel prayed the court to allow the instant Appeal with costs.

Responding to the Appellant's submission in support of the 1st ground of appeal, the 1st Respondent resisted the ground by stating that there was no sufficient reasons advanced by the Appellant to warrant the relief sought in his Chamber Application. The reason being that there was no any proof supplied by the Applicant's counsel in support of his allegation of having caught at the traffic jam associated by VIP motorcade. Further, it was from that failure, the Court failed to act on assumptions made by the Applicant's counsel that he was prevented by traffic jam. It is further the 1st Respondent's submission that the Appellant's counsel acted negligently since under the given circumstances, the counsel ought to have opted for an alternative transport and not to wait in a car for

more than 30 minutes while he knew for sure that he was running short of time.

Responding to the 2nd ground of appeal, it is the 1st Respondent's submission that on the hearing date, there was no any person before the court on the part of the Appellant. Further, it is the 1st Respondent's surprise that if at all that person was before the court he ought to have said something about his presence and the Magistrate could have noted his presence instead of keeping quite.

From the above submission, it is the 1st Respondent's prayer that the court dismiss the Appeal with costs.

At this juncture let me determine the two grounds of appeal in the following manner.

First, from the outset I have to declare that I am not going to determine the 2nd ground of appeal which is to the effect that:

"The Honorable Resident Magistrate erred in law and fact for failure to consider that despite the absence of the Advocate for the Appellant the Appellant was presented by her officer namely Ibrahim Juma Mohamed who if he was given the right to be heard would address the court."

I have reached to this decision since when determining this Appeal, I have failed to locate the lower court's record which showed the record on the date of hearing of the Application for the 1st Respondent to show cause was called. The said record could have assisted me to see from the coram who was present at the court when the matter was called and if the Appellant's Officer one Mr. Ibrahim Juma Mohamed who claimed to be in court was noted but he was not given chance to address the court in that respect. Further, on this matter, I am very much aware of the affidavit that the said officer presented during the hearing for setting aside the dismissal order at the lower court. It is not that I don't trust the said affidavit, but in the midst of the controversy that the said officer is said to be there from one side, while on the other side he is said not to be before the court, I have decided not to pursue the matter while having only the affidavit at hand without any other proof of his presence before the court. In the event therefore, I am proceeding to determine only the 1st ground meritoriously.

Going through the record of the lower court and after going through the parties' respective written submissions in respect of this appeal, it has come to my knowledge that, both parties to this Appeal being the Appellant and the 1st Respondent herein do not dispute on the following matters of which are crucial:

1st, that the application which the dismissal order was granted was all about Execution procedure for the 1st Respondent to show cause as to why the Appellant should not execute his decree against her.

2nd that, on the material date of hearing of the Execution proceedings, the Appellant's counsel went to court late. My main concern in this situation is that the Counsel went to court, though late.

Before I proceed, I have been curious to find the proper meaning of **EXECUTION in law**:

Below are some definitions that have come across my way:

Referring to the **BLACK LAW DICTIONARY *Fifth Edition by The Publishers Editorial Staff, St. Paul Minn West Publishing Co. 1979***, the term Execution has been termed as:

"Carrying out some act or course of conduct to its completion. The completion, fulfillment or perfecting of anything, or carrying it into operation and effect..... Execution is a process in action to carry into effect the directions in a decree or judgment."

It is from the above definition, it is my firm and considered view that the execution application that was before Hon. Mkeha at Kisumu RM'S Court which finally was dismissed for want of prosecution was to finalize the decision from the judgment that was before the court. It is also my concern that when this kind of application is to be dismissed, then the finality of the decision from that particular judgment cannot be performed or rather executed in that case.

Now coming back to the 1st ground which is to the effect that:

"Honorable Resident Magistrate erred in law and in fact by disallowing the Application to set aside the dismissal order made on 05th September, 2017 on the ground that there is no sufficient ground established, whereas the ground stated for non-appearance that is VIP Motorcade was sufficient to warrant the setting aside the dismissal order and restoring the Application for execution.";

I have the following:

Having seen the meaning of the Execution and the importance of execution under the law, that the proceeding is towards finalization of the court's decision being the judgment and its decree, this kind of application is to be handled on a

very serious note otherwise, the entire work that has been done during trial to the matter's finality being the judgment, and its decree will be rendered useless.

It is from the above definition and nature of the Application, though there were not before the court proof of the Appellant's Counsel act to be caught in a traffic jam of which was impossible anyway, he could have handled the matter differently. In such an application due to its importance, it is my firm view that, instead of dismissing the entire application for want of prosecution, the learned Magistrate could have taken into consideration of the importance of execution and grant an order for costs for to the parties who were in a court for the Appellant's absence. That penalty could have sufficed.

Further, as I have noted above, it is not disputed by both parties that the Appellant's counsel went to the court, but went late after the matter was already dismissed for want of prosecution. From that situation, I would like to point out that there is a big difference of one being late to the proceedings and one absconding totally in court's attendance. It is my concern that, the fact that the counsel was late to attend court's proceedings was already proved by his immediate appearance at the court as soon as other parties got out from the chamber/ court room. Under those circumstances, the fact

that he was late was already proved to command and seek for court's lenience to grant the restoration prayer to this kind of application.

Having said what I have narrated above, it is my firm view that under the given circumstances, it was wise and it was expected that the Magistrate who attended the application to restore the Execution Application could have considered the nature and the circumstances that surrounded the nonappearance of the Appellant's counsel. I have read that one of the reasons that the Magistrate took into consideration to dismiss the execution application was the poor attendance of the Appellant Counsel in court. However, this fact was not proved neither during the restoration application submissions nor in submissions contesting the instant appeal. As a result, I cannot rely on that matter hence no record or even quotation from the record on parties' attendance was provided before the court to prove this fact.

It is my further concern that, the 1st Respondent cannot escape the execution from what is called the non-appearance of the Decree Holder. If this happens, in any way, it has to be from any other major reason apart from the one we are having. This is all due to the importance of execution as shown above so that the litigants can reach to the ends of justice through the judgment and decree at large. I take it that what

could have happen if the Appellant's counsel could have appeared on time during hearing on that date? The answer is that, under the circumstances, the matter could have been heard on merits of the decree and that the decree holder could have been granted the execution of his decree or any other order according to the merits of the application.

Having said so, I am of the confirmed view that under the circumstances Honorable Resident Magistrate erred in by disallowing the Application to set aside the dismissal order made on 05th September, 2017 on the ground that there was no sufficient ground established, whereas the ground stated for non-appearance that is VIP Motorcade traffic jam was sufficient to warrant the setting aside the dismissal order and restore the Application for execution particularly where there was no possibility of proving that fact, that the Appellant's counsel was caught in traffic jam and having considered that he was before the court immediate after the order for dismissal was pronounced.

In the event therefore, I hereby proceed to allow the entire appeal through the 1st ground of appeal of which I consider the same to have merits. In the event therefore, I proceed to set aside the decision and orders in **Miscl. Civil Application No. 163 of 2017 by Hon. Shaidi** dated 10th

September 2018 which denied the Appellant's restoration of the said dismissed application.

Further, I am hereby exercising my revisionary powers and proceed to restore the **Execution Application in Civil Case No. 119 of 2001** dated 5th 2017 before Hon. Mkeha and order the same to be head on merits respectively.

I make no order as to costs.

It is so ordered.


Right of Appeal Explained.




L. E. MGONYA
JUDGE
20/03/2020

Court: Judgment delivered in my chamber in the presence of Ms. Hilda Lugakingira, Advocate for the Appellant, Sylvanus Nyamikindo, Advocate for the 1st Respondent and Ms. Janet Bench Clarke in my chamber today 20th March, 2020.




L. E. MGONYA
JUDGE
20/03/2020