

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL REVISION NO. 49 OF 2016

(Originating from Civil Case No. 75 of 2014, Temeke District Court)

CHARLES ANTONY KASWIZA..... APPLICANT/PLAINTIFF

VERSUS

JOSEPH MKUNDA.....1st RESPONDENT/DEFENDANT

ANTONIA BWAGIDI.....2nd RESPONDENT/DEFENDANT

JUDGEMENT

5th March & 3rd June 2020

ACK. Rwizile, J

This application emanates from the decision of the District Court of Temeke. It is filed under sections 79(1) (c) and 95 of the CPC and section 44(1) (b) of the Magistrates' Court Act. The applicant moves this court to call for and examine original record in Civil Case No.75 of 2014 of Temeke District Court as to its legality, correctness and regularity of the proceedings and orders. The applicant also asked for costs and any other relief that the Court may deem fit and just to grant.

The application has been supported by the affidavit of Emmanuel Herman Hyera stating grounds for this application. Mr. Hyera and Mr. Malima learned advocates appeared for the parties.

The arguments for the parties were as follows; Mr. Hyera for the applicant submitted that the trial Magistrate was not justified to strike out the suit when the matter was for defence hearing. The applicant's lawyer according to him, was absent but his absence was well grounded since the defence lawyer Mr. Malima informed the court that he was appearing before the High Court in Appeal No. 128 of 2016 before Judge Feleshi. Further, he said, even the defence counsel had no witness. He submitted that the trial Magistrate was therefore in contravention of O. XIV R. 4 of the CPC. It was his prayer that this application be granted.

On his part, Mr. Malima opposed this application and advanced the following points. First that this application is incompetent before this court. To show so, he invited this court to see the nature of the pleadings and the parties. The record as rightly submitted by him is that the chamber summons is instituted by the applicant and not by the plaintiff as it is the case here. He submitted, that since what is before this court is the application and not the suit, the parties ought to be applicant and respondent, and not the plaintiff and defendant. According to him this is in contravention of O. 43. R .2 of the CPC. As to whether the trial court's decision was right, he submitted that since parties were not ready for the case, the court was justified to strike the same out. It was proper to invoke XVII. R.2, the learned advocate concluded.

By his brief rejoinder, the applicant asked this court to apply the overriding objectives principle to cure the mischief, since it was erroneously made as plaintiff and defendant instead of the applicant and respondent. He asked this court to maintain that the trial court failed to exercise its powers properly and so this application be granted.

In the first place I agree with Mr. Malima that this is an application for revision. An application is not a suit to be filed by the plaintiff. It has always been the case that applications are filed by Applicants and not plaintiffs. The application before me is as per the pleadings filed by the plaintiff and so it was not proper to appear that way for that matter. I was asked by Mr. Malima that the same be dismissed for failure to observe the procedure. In as much as I agree with him that it was not proper, I do not agree with him on the remedy asked. I do not think that this is an irregularity that goes to the route of the matter. It is therefore my view that the same cannot have the effect of rendering this application unmaintainable. This point is therefore dismissed.

From the record, it is shown that the case was heard and on 9th June, 2016 the applicant (plaintiff) closed its case. This was happening before Hon. Tarimo Senior Resident Magistrate. The defence case was to open on 15th June 2016. Mr. Malima asked the court for an adjournment since he had no witnesses. Again the matter was adjourned to 29th June, 18th, 26th July, 8th August 2016 and ultimately on 8th November when the same was struck out.

It is on record that the cases was heard by Tarimo throughout. It is only on two occasions when it seems to have been before Mfanga RM and it was

Since the matter was coming for defence hearing and it was last adjournment, this court hereby strike out this case for default of both parties because it was last adjournment today.

It follows from the order that the reasons leading to the striking out was; *one* failure of the plaintiff to appear, *second*, failure of the defence case to proceed, and *third*, because it was the last adjournment.

I have said before that it is not known as to how this case appeared before her. If it was assigned to her, then there was no order of re-assignment and therefore there was no justification for her to proceed with it. Apart from the above, there is no specific provision of the law that mandated her to strike the case out. But further to that in law there is no provision that entitles a court to strike out a suit because of the so called last adjournment.

So was the trial court justified to strike out the case?, if so under which law? And given the state of affairs in this case was it the proper cause of action to take?

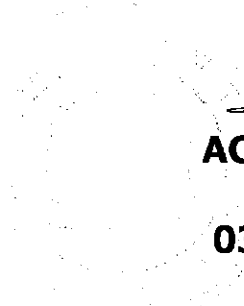
To be able to answer the above, one has to visit the law. Appearance, non-appearance of the parties and the consequences thereof is governed by O. IX of the CPC. Perhaps the trial court made an order under this head. I have gone through the whole of the same. There is no situation covering the order made. In my view, striking out the suit due to the default of the parties to proceed with the case was not justified. Sub rule 8 of O. IX may be good to answer what happened. It states as follows;


...Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the

The proper avenue was to proceed to consider the decision basing on the existing evidence. This is clear and provided for under rule 3 of order XVII of the CPC which states as follows;

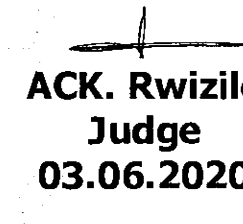
Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith


Having said what I have said. I agree with applicant and proceed to invoke powers of this court under section 79 of the CPC. The order striking out Civil Case No.75 of 2014 of Temeke District Court dated 8th November 2016, is accordingly quashed. It is directed that the case be remitted back to the trial court for continuation of the trial where it ended, before another magistrate with competent jurisdiction.




ACK. Rwizile
Judge
03.06.2020

Judgment delivered in the absence of the parties, this 3rd of June 2020.




ACK. Rwizile
Judge
03.06.2020