

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION NO. 54 OF 2021

(Arising from the Dismissed Misc. Civil Application No36 of 2021)

JOVIA CLEMENT.....APPELLANT

VERSUS

JUDITH EMMAUELRESPONDENT

RULING

Last order date: 19.08.2021

Ruling date: 27.08.2021

M. MNYUKWA, J.

This is a Ruling in respect of the application brought under Rule 17 of the Civil Procedure (Appeals in Proceedings Originating in Primary Court) Rules G.N No. 312 of 1964.

The applicant filed his application by presenting a chamber summons along with affidavit sworn in by Jovia Clement. In her application the applicant's prayers before this court are

- 1. That this honourable court be pleased to restore the dismissed Miscellaneous Civil Application No. 36 of 2021 which was*



dismissed for non-appearance after being scheduled or slated for hearing on 18th May, 2021

2. Costs be in the cause

3. Any other order which this honourable court may deem fit to grant.

In brief, the facts of the case are as follows: The applicant sued the respondent in the High Court of Tanzania, Mwanza Registry in the Misc. Civil Application No 36 of 2021. When the matter was called on for necessary orders, the applicant's husband pray for adjournment in order to notify the applicant who was alleged to be out of Mwanza. The respondent prays the court to do the needful because the applicant playing delaying tactics. Ultimately, the court dismissed the application hence the present application.

During the hearing, the applicant enjoyed the services of Mr. Ryoba, the learned counsel while the respondent appeared in person, unrepresented.

With the leave of the court, the application was argued orally through audio teleconference where parties were remotely present on 19/08/2021.

Submitting in support of the application, Mr. Ryoba told this court to adopt the affidavit filed by Jovia Clement to form part of his submission. He went on to state that, the applicant prays for restoration of the Misc. Civil Application No. 36 of 2021 which was dismissed for non-appearance



on 18/05/2021. The applicant's counsel advanced the following reasons as to why the applicant's application should be restored.

He averred that, on 14/5/2021 the applicant travelled to Karagwe to attend funeral ceremony that was planned to take place on 17/5/2021. To substantiate his argument, he attached the travel receipt which tends to support the view. He added that, when the matter was called up as scheduled, the applicant's husband one Clement Kamuhanda communicated with the advocate of the applicant, Ms Hidaya to represent her in a suit but he failed to reach her through mobile phone. On 18/5/2021 the applicant's husband went to the court to register the excuse of the applicant but he was informed that the case will be conducted through audio teleconference and that they will connect him through his mobile phone.

The applicant's advocate went on to state that, the applicant was sharing the same mobile phone with her husband because she lost her mobile phone. He insisted that, on the day when the application was dismissed her husband enter appearance and informed the court about non-appearance of the applicant but the court disregard her excuse and proceed to dismiss the application. He averred that, the case was dismissed when the matter was coming for mention and on top of that the respondent did not file the counter affidavit. He added that, on her



return from Karagwe, on 19.5.2021 the applicant was informed that her case was dismissed for non-appearance.

The counsel for the applicant submitted that, if a person fails to appear for a reasonable cause, she is allowed to send a representative to inform the court on her excuse. He supported his argument by referring to the following cases; **Nasibu Sungura v Peter Machumu** 1197 TLR 497, **Tanga Cement Company Ltd v Jumanne B. Masangwa & Amos A. Malandwa**, Civil Application No 6 of 2001, **Sadru Mangalji v Abdul Aziz Lalani and two others**, Misc. Commercial Application No 126 of 2016, **Michael Tungara Chacha v John Bernard Massawe**, Misc, Land Case No. 496 of 2017 and **Hezron Mwankenja v Mbeya City Council**, Misc. Land Case Application No 44 of 2014 HCT at Mbeya (All unreported). He concluded by stated that in all these cases the applicant had advance sufficient cause and the court granted application. Likewise, to her client who had sufficient cause for non-appearance since her advocate was absent but also, she sent a representative

Opposing the application, the respondent Ms. Judith Emmanuel submitted that, on the day scheduled for hearing the applicant did not appear and the trial Judge dismissed the application. She added that the travel tickets presented by the applicant were forged since both ticket were issued on the same day. She therefore prays the court to dismiss the application.



In a rejoinder, the counsel for the applicant reiterated his submission in chief. He added that the tickets are genuine and every company had its own system of issuing the travel tickets.

I have given careful consideration to the arguments for and against the application herein advanced by the learned advocate for the applicant and the respondent respectively, the central issue for determination is *whether the application is meritorious*

In determining an application of this kind, the court has to consider whether the applicant has advanced sufficient reasons to convince the court to grant the application sought. What amount to sufficient cause is not subjective as it depends on the circumstances of each and every case.

A close look at the court's proceedings of the Misc. Application No.36 of 2021 that was dismissed on 18.5.2021 for non-appearance of the applicant, it shows that the matter was called up on 29/04/2021 of which all parties were absent and the court stated that;

"Court: Upon filing of the matter, let the parties appear on 18/05/2021 at 9.00 am for necessary order."

The above court order implies that parties were supposed to be informed on the date on which their matter was scheduled for necessary orders. In other words, as the matter of practice in our jurisdiction though it was not stated anywhere, the matter was coming for mention.



Furthermore, the Proceedings also shows that when the matter was coming for necessary order as scheduled, that is on 18/05/2021 the record reads as follows;

'Applicant's husband: I pray for adjournment so that I could notify the applicant.

Respondent: The applicant plays delaying tactics. She served me personally, therefore she had reasons to know this case coming up today. I pray that the court do the needful."

In the above Order dated 18/05/2021 the trial Judge dismissed the application. The contents of the Order reads as hereunder:-,

"When, with respect to decision of 21/09/2019 the applicant for extension of time within which Jovia Clement (the applicant) to appeal was, this afternoon by way of audio teleconferencing called on for necessary orders and both parties were through Mobile numbers 0769304916 and 0767293200) respectively duly notified, for reasons known to her the applicant was not online. Judith Emmanuel (the respondent) blamed the applicant for the playing delaying tacticts in disguise. Now that the applicant was duly notified but as said for the reasons known to her she entered no appearance, the application is dismissed with costs for non - appearance"

Even though in the above Order it was not clearly shown under which provision of the law, the court dismissed the application, but going through Order IX Rule 5, it is evident that the trial judge used this provision to dismiss the application. The provision provides that:



'When 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 suit is dismissed unless the defendant admits the claim or part thereof in which case the court shall pass the decree against the defendant upon such admission and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.'

It is evident in the court's proceedings that on the day in which the application was dismissed the case was fixed for necessary orders whereby the applicant sent a representative to inform the court about the applicant's excuse.

Again, when looking at paragraph 5 and 6 of the applicant's affidavit, it reveals that an effort was made by the applicant's husband to find the advocate of the applicant to represent her on that date but he did not succeed to trace her. Even if that was not enough, still the husband went physically to the court to register the excuse of the applicant and he was informed that, the matter will be conducted through audio teleconference and that he will receive a call. When the matter was called on for necessary order as scheduled, the husband applicant pickup the phone but unfortunately, the trial judge dismissed the application after considering the respondent's prayer.

It is my considered view that, the grounds advanced by the applicant in her affidavit and the oral submission supporting the reasons advanced

therein, it goes without say that, the applicant adduced sufficient reasons warranting setting aside a dismissal order dated 18/05/2021 in a Misc. Civil Application No. 36 of 2021.

By the way, in the case of **Shengena Ltd v National Insurance Corporation and Another**, Civil Appeal No 9 of 2008 CAT at Dar es Salaam (Unreported) the Court held that:

"... It is therefore, a practice before courts of law whereby parties to a case appear before the court to ascertain the state of pleadings or stage reached in the trial and then proceed to make necessary orders. It is not the practice of courts in our jurisdiction to dismiss or make other orders that substantially bring a case to finality on a day fixed for Mention. In our considered view, therefore a case can be dismissed for various, legally recognized grounds when it comes up for hearing not Mention. In our present case, we find it improper for the trial judge to have dismissed the case when it came up for Mention".

Guided also by the above decision and the provision of Order IX Rule 5 of the Civil Procedure Code, Cap 33 [R.E 2019] it is very clear that the Misc. Application No 36 of 2021 was dismissed when the matter came up for necessary order and not for hearing as the law requires.

As it was rightly submitted by the advocate of the applicant, the matter was in the state of pleadings because even the respondent was not ordered by the court to file counter affidavit and she did not opt either

to file the same or otherwise. In other words, the present application was dismissed when the matter was in a stage of pleadings. In that circumstances, I think it was not proper to dismiss the application while pleadings were not completed and the matter was not scheduled for hearing.

For the foregoing reasons, I proceed to set aside the dismissal order dated 18/05/2021 in the Misc. Civil Application No 36 of 2021. The Misc. Civil Application No. 36 of 2021 is hereby restored and should proceed between the parties at a date to be fixed by this court. I shall not make any order for costs. Each party shall bear its own costs for this application. It is so ordered.



M. MNYUKWA
JUDGE
27/08/2021

Ruling delivered on 27/08/2021 via audio teleconference whereby all parties were remotely present.

M. MNYUKWA
JUDGE
27/08/2021