

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

MISC. CIVIL APPLICATION NO. 638 OF 2021

(Originating from the order of the High Court, Dar es salaam District
Registry in Misc. Civil Application No. 254 of 2018 dated 18/11/2020)

KAMWAI ENTERPRISES CO. LIMITED APPLICANT

VERSUS

KINONDONI MUNICIPAL COUNCIL.....RESPONDENT

RULING

31st Aug 2021 & 10th Sept, 2021.

E. E. KAKOLAKI J

By way of chamber summons supported by affidavits of **Bernadeta Shayo**, applicant's advocate and **Gilliad David Ndossi** applicant's principal officer, this Court is moved to set aside its dismissal order in Misc. Civil Application No. 254 of 2020 dated 18/11/2020, dismissing for want of prosecution the applicant's application for leave to appeal to the Court of Appeal against the decision of this Court in Civil Case No. 13 of 2018. The application is preferred under Order IX Rule 3 of the Civil Procedure Code, [Cap. 33 R.E 2019] hereinto referred as CPC. The same has met resistance

of the respondent who through its solicitor one **Netho Philemoni Mwambalaswa** filed a counter affidavit duly sworn for that purpose.

Briefly as discerned from the record in Misc. Civil Application No. 254 of 2020, the applicant in this matter filed her application for leave to appeal to the Court of Appeal against part of the decision of this Court Mlyambina J, delivered on 22/04/2020 in Civil Appeal No. 13 of 2018. She instructed Mr. Sylvester Eusebi Shayo, learned advocate from Sylvester Shayo and Co. Advocates to prosecute the application who upon entering appearance in court on 06/10/2020, the date set for hearing of the matter after two prior adjournments, prayed this court for another adjournment of the said matter. Once again his prayer was granted by the court as the application was set to come for hearing on 18/11/2020 at 2.00 pm. When the matter was called for hearing on that date and time, the applicant defaulted appearance without any notice the result of which moved the respondent to pray the court for dismissal of the application for want of prosecution, the order which was granted hence the present application.

When the matter was called for hearing both parties appeared represented and it was agreed that, the application be disposed by way of written submissions. Despite of resisting the application by filing the Counter Affidavit the respondent failed to file its submission hence the application will be considered basing on the applicant's submissions only. As alluded to above, the applicant has moved this court under Order IX rule 3 of the CPC. The provisions of Order IX Rule 3 of the CPC reads:

*3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and **if he satisfies the court that there was good cause for his non-appearance**, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit. (Emphasis supplied)*

Under the above provision this court has discretion to set aside the dismissal order and appoint a day for proceeding with the hearing of the applicant's application. However such discretion is exercised upon the applicant assigning good cause for her non-appearance. As to what amount to good cause there is no hard and fast rules as it depends of the reasons advanced by the applicant to move the court to exercise its discretion. See the case **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported). In this case the Court of Appeal when considering as to what amounts to good cause in an application for extension of time had the following observations:

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. See, **Ratman Vs. Cumarasamy and Another** (1964) 3 All ER and **Reginal Manager Tanroads Kagera Vs.***

Ruaha Concrete Company Limited; Civil Application No. 96 of 2007 (unreported)

Similarly in the case of of **Jumanne Hassan Bilingi Vs. Republic**, Criminal Application No. 23 of 2013 (CAT-unreported) stated thus:

"...what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time."
(Emphasis added).

In light of the above authorities therefore like in the application for extension of time the principle applies also to application of this nature. I would therefore dare to say in any application for setting aside dismissal order of the trial court the applicant is duty bound to advance reasonable cause which prevented him/her from appearing in court to prosecute his/her matter. The question for consideration before this court therefore is whether the applicant has shown to the satisfaction of this court, that *there was sufficient cause for its non-appearance at the hearing* of the application on 18/11/2020. The reasons advanced by Ms. Shayo advocate for the applicant in this matter are in two limbs relying on paragraphs 2,3,4,5 and 6 of the affidavit sworn by Ms. **Bernadeta Shayo** and paragraphs 2 and 3 of the affidavit sworn by Mr. **Gilliad David Ndossi**, the applicant's principal officer. **One**, she says the advocate, one Bernadeta Shayo from Sylvester Shayo & Co. Advocates who was assigned

to represent the applicant in court on 19/11/2020 was prevented from so doing by their office intern one **Pendo** who fell sick suddenly and severely before she was rushed by her (Ms. Bernadeta Shayo) to Mnazi Mmoja Hospital at emergency reception for medical attention until 5.00 pm when she was discharged to go home at Buza. Medical chits attached to the affidavit as **annexure K-1** collectively were relied on by the applicant to prove the alleged illness. As in the office there was nobody by then to rescue the situation by appearing in court and inform the court of what befell Ms. Shayo, it was submitted the learned advocate was justifiably prevented from attending the court session due the said sudden illness of the office intern. **Second**, it was submitted that, Mr. **Gilliad David Ndossi** Principal officer to the applicant, who could have appeared in court to notify of the advocate's absence had travelled to Moshi for family matters since 02/11/2020 and came back Dar es salaam on 23/11/2020 hence unable to appear in court as well. Basing on those reasons Ms. Shayo is of the submission that applicant's failure to attend to the court was not caused by negligence or inaction of the applicant's part but rather resulted from duty of care which Ms. Shayo had towards the said intern who fell sick suddenly. She therefore implored the court to grant the application by setting aside the dismissal order and appoint the date to proceed with hearing of the application on merits.

I have dispassionately considered the applicant's arguments as well as perusing the affidavits in support of the chamber summons in this application and the proceedings in Misc. Civil Application No. 254 of 2020. It is the law that, an affidavit being a written evidence on oath is an

alternate or substitute to oral evidence as it was once held by this court in the case of **Hi Bros-Canvas & Tents Limited and Another Vs. I & M Bank (T) Limited**, Misc. Commercial Application No. 14 of 2018 (HC-unreported) where the Court stated:

“...it is now settled that affidavit is a written evidence on oath. A party opposing an affidavit (i.e. a written evidence on oath) is not expected to call for strict proof of his opponent evidence, but she is expected to produce counter evidence to disprove the opponent’s depositions.” (Emphasis supplied)

In her affidavit sworn by Ms. Bernadeta Shayo at paragraph 2 and 3 the applicant deposed that her failure to appear in court on 19/11/2020 resulted from the advocate’s act of escorting the intern one **Pendo** who suddenly fell sick to Mnazi Mmoja Hospital. Medical chits and payment receipts proving the service rendered to her were attached to that effect. With due respect to the learned advocate Shayo, I am not convinced with the advanced reason to justify the applicant’s absence during hearing of the application. I will explain why. **First**, the date set for hearing was 18/11/2020 and not 19/11/2020 in which advocate Shayo is claiming to have escorted the intern one **Pendo** to the hospital. **Second**, the medical chit and annexed receipts bore a different patient name as **Evon E. Tibanuwani** and not **Pendo** referred in the affidavit. If this court is to believe that advocate Bernadeta Shayo was prevented from coming to court when escorted the intern one **Pendo** who allegedly fell sick then it was not on 18/11/2020, the date in which Misc. Civil Application No. 254 of 2020 was set for hearing but rather 19/11/2020 as deposed in the

affidavit. Equally as per the attached medical chits and payment receipts it was **Evon E. Tibanuwani** and not **Pendo** who was escorted to the hospital. **Thirdly**, as per paragraph 2 and 3 of Mr. **Gilliad David Ndossi's** affidavit there is no annexed tickets to prove that he travelled to Moshi either by bus or air nor is it stated anywhere in the affidavit that, he used private transport. In absence of such evidence coupled with failure of Ms. Shayo to justify the reason that prevented her from appearing in court I find the applicant has failed to advance good cause as required by the law. Therefore the raised issue above is answered in negative as in this matter the applicant's advocate acted negligently in prosecuting this matter. It is the law negligence or inaction of the advocate is never a good cause for grant of the application. This clear position of the law was adumbrated in the case of **William Shija Vs. Fortunatus Masha** (1997) TLR 213 (CAT), where the Court of Appeal had this to say:

*"In determining whether the application should nonetheless be granted the **court took into account that counsel had been negligent in adopting the correct procedure and this could not constitute sufficient reason for the exercise of the Court's discretion.**" (Emphasis supplied)*

In light of the above authorities and for the reasons supplied I am satisfied that, this application is devoid of merit. I therefore proceed to dismiss it as I hereby do.

Each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 10th day of September, 2021.




E. E. KAKOLAKI

JUDGE

10/09/2021

The ruling has been delivered at Dar es Salaam today on 10th day of September, 2021 in the presence of Mr. Steven Luko, advocate for the Applicant and Ms. **Asha Livanga**, Court clerk and in the absence of the Respondent.

Right of appeal explained.




E. E. Kakolaki

JUDGE

10/09/2021