

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

MISC. CIVIL APPLICATION NO. 596 OF 2020

MICHAEL PIUS NYAGOGA ----- APPLICANT

VERSUS

NATIONAL MICROFINANCE

BANK & 2 OTHERS ----- RESPONDENT

Date of Last Order: 11/05/2021

Date of Ruling: 23/07/2021

R U L I N G

MGONYA, J.

The Applicant herein made this Application under **Order IX Rule 3 and 4 of the Civil Procedure Code, Cap. 33 [R.E 2019]** as per **Civil Procedure Code (Amendment of the 1st Schedule) Rules, 2019 Rule 7 (c)**, seeking for the orders that: -

- 1. This Honorable Court be pleased to make an order restoring Civil Case No. 171 of 2017 and set a date for proceeding with the suit; and***
- 2. Costs of or incidental to this Application be in the main suit.***

Being vested with the duty to determine the application as filed by the Applicant, I have carefully gone through the

application, Counter affidavit and submissions of both parties of which I do not intend to reproduce, I hereby proceed to determine the Application as herein below;

Counsel for the Applicant avers that the dismissed application was due to non-appearance which was caused by traffic jam that had resulted from heavy rains causing the Jangwani area situated at Morogoro road being flooded by water and mud.

However, his delay was a fifteen minutes delay approximately since he managed to reach the Court by 07:45 am and was informed of the dismissal by the Respondent's side. Efforts were made to obtain the copies of the dismissed order and after obtaining the Order, this application was then filed on the **25/11/2020**. It was the Respondent's reply to the Application and reason set forth by the Applicant that traffic jam has never been sufficient reason as the Counsel for the Applicant was required to take due diligence and spend night within the precincts of the city taking into consideration that he resides far from town.

I am fully aware that delaying to Court or non-appearance before the Court on a date a matter is set for appearance on the reason that there was traffic jam as it has never been sufficient reason to warrant an excuse to a party. This was stated in the case of ***PHARES WAMBURA AND 15 OTHERS***

VS TANZANIA ELECTRICITY SUPPLY COMPANY LIMITED, CIVIL APPLICATION NO.186 OF 2016 as cited by the Respondent, the said case is distinguishable to the circumstance of this case. The Court of appeal in the above case moreover urged that each case has to be determined according to its circumstances.

Therefore, coming to this case at hand the circumstance that is stated by the Counsel for the Applicant on delayed to enter appearance in Court, is because of traffic jam at Jangwani area located at Morogoro road, of which resulted from heavy rains that rained on previous night causing the place to be flooded by water and mud. It is a well known fact that Jangwani is one of the notorious areas after heavy rains within the city of Dar es salaam. Heavy rains are an act of God of which is not foreseen or cannot be controlled by human being. Jangwani has a nature of being swampy of which then attracts water and mud and caused the place to be chaotic to cause traffic jam when it rains.

It is from the records, that ample efforts were done to secure or cure the order that was given without delay. It is from the above that I find the reason ascertained for setting aside the dismissal order to be **sufficient**.

Moreover, it was the Applicants averments that the Order cited to strike out **Civil Case No.171 of 2017** is a

wrong/deleted provision of law as per **Civil Procedure Code (Amendment of the first Schedule) Rules, 2019, Rule 7 (d)**. It is indeed from the reading of the statute that **Rule 5 Order IX** of the Code has been deleted in accordance to the amendments of **2019**. Hence when reading what seems to be **rule 5** after the amendments does not talk of striking out or dismissal for non-appearance of the Plaintiff. It is the Applicant's contention that citing a provision that does not exist makes the decision of the Court an invalid decision. The Respondent argued that it is true what is being stated by the Applicant the Judge cited **Order 9 Rule 5 of the Civil Procedure Code (supra)** this is not reason enough to qualify a sufficient case for setting aside the dismissal order.

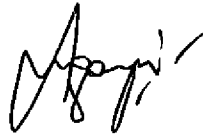
From the above I took time to go through the order of the Court and have observed that the Order portrays the provision of **Order 9 Rule of the Civil Procedure Code Cap 33 R.E 2019**. I am of the firm view on the citation of the law in the dismissal order to be a slip of the pen. The Order once in the hands of a lawyer would not disturb the meaning of the Order since the same will still direct its meaning to the provisions of **Order IX Rule 5 of the Civil Procedure Code**. In the circumstance of this case, the context of **Rule 5** of the amended act states that in circumstances of non-appearance of

the Plaintiff, the matter is to be dismissed. I therefore find the contention of the Applicant in this aspect holds no water.

In the event therefore, in consideration of the Court's intention to see matters being heard on merits this application is granted. **The Dismissal Order is hereby set aside and the matter be restored for determination.**

It is so ordered.

Each party to bear their own costs.

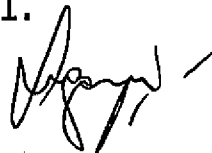


L. E. MGONYA

JUDGE

23/07/2021

Court: Ruling delivered in my chambers in the presence of Mr. Chacha Mrungu, Advocate for the Applicant, Susan Botho for the 1st Respondent, Nicodemus Agweyo, Advocate for the 2nd Respondent, 3rd Respondent in person and Mr. Richard, RMA, this 23rd day of July, 2021.



L. E. MGONYA

JUDGE

23/07/2021