

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF SHINYANGA**  
**AT SHINYANGA**

**MISC. CIVIL APPLICATION No. 6 OF 2021**

**(Arising from the Dismissal Order of this High Court in Civil Appeal No. 05 of 2017)**

**JOYCE MWANG'ONDA.... APPLICANT**

**VERSUS**

**1. TITO THEOBALD.....**

**2. THEOBALD TITUS ISAKA.....**

**3. ZANZIBAR INSURANCE CORPORATION...**

**RESPONDENTS**

**RULING**

*28<sup>th</sup> March & 29<sup>th</sup> April, 2022*

**MKWIZU J.**

The applicant had filed a suit in this court rooted on the tortious culpability by the 1<sup>st</sup> defendant Tito Theobald. On 22/2/2021, the suit was dismissed for want of prosecution by the plaintiff (now applicant) after she had failed to enter appearance from 27/7/2020 without excuses. On becoming aware of the dismissal order, the applicant on 8/3/2021 filed this application applying for the setting aside of the dismissal order. The application was made through a chamber summons under **section 68 (e), 95** and **Order IX Rule 3 of the Civil Procedure (Cap 33 R.E 2019)** supported by two affidavit by the applicant **JOYCE MWANG'ONDA**, and **JOYCE SOJO**, applicants counsel. the applicant giving reasons for the non-appearance. The said application was strongly resisted by the respondents.

When the application came on for hearing, Mr. Elinihaki Kabula learned advocate appeared for the applicant, 1<sup>st</sup> and 2<sup>nd</sup> Respondents were in person without legal representation while the third Respondent had the services of Mr. Andrew Luhigo also learned advocate.

Economic hardships and sickness by the applicant are the reasons advanced in the affidavit in support of the application together with the oral submissions by the applicant's counsel for non-appearance by the applicant on the date the suit was scheduled for hearing. In his oral submissions, the applicant's counsels submitted that, initially the case was before Mkeha J, and the applicant made a reasonable follow-up of the matter after the transfer of Mkeha J but could not know the Judge before whom the matter was re assigned to until 16/2/2021 when she was informed that the suit was scheduled for hearing on 22/2/2021. The applicant was on that date sick, could not travel from Dodoma to Shinyanga, and was unable to fund her advocates traveling costs from Dar es salaam to Shinyanga. On that basis, she requested her advocate to write a letter seeking for an adjournment. The counsel insisted that there was no negligence on their part. They urged the court to allow the application and on this they relied on the case of **Constantine Victor John V Muhimbili National Hospital**, Civil Application No 214/18/2020 CA DSM (Unreported)

First and 2<sup>nd</sup> respondent had nothing substantial to tell the court. They left the matter to the court to decide. On his part, Mr Luhigo, counsel for the third respondent opposed the application. He said the reasons adduced are not sufficient to warrant the granting of the application



sought. He submitted that the illness ground is an afterthought because it was not accommodated in the letter written to the court seeking for the adjournment

Mr Luhigo submitted further that, the second ground of financial hardship is also not tenable because according to the affidavit in support of the application, applicants' relationship with her lawyer is that of a legal aid and that in a legal aid category of clients, the client is not subject to any costs including travelling costs. He said, applicant being the plaintiff in the main suit ought to have known that litigations are an expensive process thus she either had to abandoned it or find a legal aid institution capable of bearing all the expenses related to the case.

In a seemingly an alternative way, Mr Luhigo said, the grounds advanced in the affidavit were well addressed by the court in dismissing the suit and therefore cannot be brought against for re consideration at this stage of the proceedings. He on this cited to the court the decisions in **Zee Hotel Management Group and Others V. Minister of Finance and others**, (1997) TLR 265 and **Abdallah Hemedi HakiyaMungu V Selemani Marando**, H.C Civil Appeal No 12 of 2004 (unreported). And lastly prayed for the dismissal of the application with costs.

In his rejoinder submissions, Mr Elinihaki, counsel for the applicant said, this application is a creature of the statute. Applicant has a right to seek restoration and that this court is not functus official. He distinguished the cited cases with the matter at hand that in **Abdallah Hemedi**(supra) the suit was defective and therefore the material facts in that case are not matching the material facts in our case.

Responding on why the letter written to the court seeking for the adjournment did not address the sickness of the applicant, the counsel said, the letter was written by the counsel representing the applicant while the sickness ground is being brought by the applicant who failed to bear the travelling costs for her lawyer due to illness.

I have objectively and consciously considered the affidavit in support of the applications and parties' submissions. Order IX, R 3 cited by the applicant reads:

*"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"*

The above rule requires the court to consider whether applicant has furnished sufficient reasons for his absence in court on the date when the appeal was dismissed. This position was emphasised in the case of **Nasibu Sungura vs Peter Machumu** [1998] T.L.R at page 501 where the court observed:-

*"an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but **whether the reasons furnished are sufficient to justify the applicant's non-appearance on the date the suit was dismissed.**" (Emphasis added)*



Though it is true that, the dismissal order was given after consideration of the reason for adjournment stated in the letter by the applicant, I am of the strong view that, such a consideration is not a bar for this court to deliberate on the reasons advanced by the applicant in this application. Since, this in this application, the court is mandatorily required by the law to digest the grounds by the applicant and see if they are sufficient to warrant the setting aside of its earlier dismissal order, this court has no option but to do what the law requires it to do. Mr. Luhigo suggestion that this court is functus officio is a misconception.

Two reasons for non-appearance are deposed in the two affidavits filed in support of the application namely, is financial difficulties and illness. According to paragraph 8 of the applicant's affidavit which is supported by paragraph 10 of Joyce Sojo's affidavit, applicants and her advocates were aware of the hearing date after their last appearance on 18/5/2020 but on 20<sup>th</sup> July 2020 they were informed of the transfer of Judge Mkeha and that the case was subject to re assignment. Their efforts to follow-up the matter was interrupted by the applicant's sickness which led to financial hardship resulted into failure by the advocate to follow-up the matter due failure by the applicant to meet her advocate's travelling costs from Dar es salaam the fact which was communicated to the court through the letter dated 16/2/2021.

It is also apparent from the records that the applicant's illness is supported by a medical report from Dodoma Reginal Referral Hospital where applicant is said to have attended medication from 25/7/2020 to 18/2/2021. The report shows that applicant was admitted in hospital on 25/7/2020 diagnosed with a chronic Appendicitis, this was two days before the hearing date scheduled on 18/5/2020 when she last appeared

in court. She was discharged on 29/7/2020 at 05.35 pm and was required to attend surgical clinic. The report also indicates other attendance by the applicant to the hospital on 30/9/2020;19/10/2020; 27/11/2020 and 18/2/2021 just four days before the hearing date on which the matter was dismissed by this court. It is a common knowledge that sickness is beyond human control. And for that reason, no one is to be condemned for being sick. Having proved that she was sick, and having no evidence to the contrary, I find no reason why the application should not be allowed. This conclusion has also taken on board the fact that, though represented, applicant was receiving a legal aid clinic which required her to bear the travel costs of her lawyer from Dare Salaam to Shinyanga .

I have also considered that the respondents have not deposed any prejudice in case the application is allowed. In **Jesse Kimani V. McCornell and Another** (1966) EA 547 the court insisted that the application should be granted if the respondent would neither be prejudiced nor suffer any irreparable injury. Though I am sure that respondent may have incurred some costs resulting from attendances to the court and advocacy, but these costs are not irremediable ones.

And I was also convinced by the decision the Court in **Fredrick Selenga V. Agnes Masele** (1983) TLR 99 where it was insisted that matters should always proceed to merit unless there are special reasons to the contrary. There is no special reason, in this matter inhibiting the determination of the suit on merit. Having furnished to the court sufficient reason for her absence as explained above, I find the application justified.

Consequently, the application is granted. The order dismissing the Civil Case No. 5 of 2017 is set aside and the matter is to proceed from where it ended on 22/2/2021. No order as to costs.

**Dated at Shinyanga this 29<sup>th</sup> day of APRIL 2022**

  
**E.Y. MKWIZU**  
**JUDGE**  
**29/4/2022**