

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

MISCELLANEOUS CIVIL APPLICATION NO. 245 OF 2020

(Originating from Civil Case No.327 of 2000)

**KASSIM OMARY ALLY (LEGAL ADMINISTRATOR OF ALLY HAJI
GAMDUST) APPLICANT**

VERSUS

BP (T) LIMITED.....1ST RESPONENT

PARASTATAL SECTOR REFORM

COMMISSION.....2ND RESPONDENT

RULING

06/12/2021 & 12/8/2022

LALTAIKA, J.

The Applicant has filed this application under Order IX Rule 9(1) of the Civil Procedure Code, Cap 33 R.E 2002 seeking for an order that this Court be pleased to set aside its order dated the 23rd day of June 2015 dismissing the plaintiff's suit for none prosecution of the same; Costs of this Application to be met by the respondents and any further relief(s) the court deems fit and just to be ordered.

This Application is supported by an affidavit sworn by Mr. Godfrey Ukwonga, Advocate for the Applicant. Parties consented to argue the Application by filing written submissions as per court schedule.

The applicant, submitting in support of the application contended that, he is the legal administrator of the estate of the late Ali Haji Gamdust who was the plaintiff in **Civil Case No.327 of 2000**. Before the final determination of that case the plaintiff became sick and died. It is the applicant's prayer that this court be pleased to set aside its dismissal order dated the 23rd day of June, 2015 dismissing the plaintiff's suit for none prosecution. He stated that the plaintiff died on 6th day of August 2013 and the court was informed about it whereupon a bunch of documents marked "A" Collectively were presented in court.

The Applicant contended further that on the 12th day of November 2013, the court was informed that the process of applying for letters of administration was on the way. On 25th day of March 2014, once again, the court was informed that letters of administration were to be filed at the District Court of Kinondoni. Upon informing the court on what was going on, the appellant contended, he believed that all was clear that since the plaintiff had passed on, the Advocate was discharged pending the appointment of the legal representative. The learned counsel

submitted further that as an advocate for the deceased he had nobody to give him instruction and it was until the administrator was duly appointed that he got the strength to represent the applicant in this matter and the main suit upon its restoration.

It is the learned counsel for the applicant's submission further that the appointed administrator gave him instructions to have the suit restored and the main task was to gain time to reach this level of proceedings and in that regards he had to obtain an enlargement of time as per annexure D of this Application.

Upon perusal of the Court file in Civil Case No.327 of 2000 the learned counsel contended, that is when he discovered that the case proceeded in the absence of the Plaintiff and on 23rd day of June 2015 whereupon the suit was dismissed for want of prosecution pursuant to an application by the Counsel of the 1st defendant.

The Applicant's Counsel submitted further that the procedure of courts in our jurisdiction have been to adjourn matters pending the appointment of legal representatives except for those of criminal nature that death of an accused terminates the proceedings. The learned counsel for the applicant averred that the dismissal order was express and no notice was issued to the plaintiff or his counsel.

The applicant concluded that although on the 24th day of April 2020 this court granted the application for extension of time to file this application, in the interest of justice, there was a need for the court to set aside the dismissal order and restore the dismissed suit for onward proceeding.

In reply the 1st Respondent, opposing the application, submitted that on the 12th day of November 2013 the Court inquired from the Applicant's Counsel on the progress of appointment of the Administrator as the applicant had informed the court that the Applicant died while in India. The applicant prayed for a long-term adjournment pending the appointment of the Administrator. The court granted the prayers and set the matter for mention on 27th March 2014.

He went on to narrate that on the 27th March 2014 the Applicant's Counsel appeared and informed the court that the deceased family had already appointed the administrator and was preparing a petition for letters of Administration for purposes of filing the same at Kinondoni District Court. The learned counsel for the respondent averred that the applicant then prayed for yet another long adjournment of three months and was granted whereupon the matter was adjourned till 29th July 2014.

It is the learned counsel's recapitulation further that on the 29th day of July 2014 the matter was called for mention but the counsel for the applicant did not appear. On 23rd June 2015 the matter came for hearing, the applicant was absent and the 1st respondent was present. In the absence of the applicant and his counsel the court proceeded to dismiss the suit with costs for want of prosecution. The learned counsel averred that it is from the said dismissal order that the applicant filed this application seeking to set aside the dismissal order.

Having recounted the historical backdrop to the matter, the learned counsel emphasized that on the side of the 1st respondent, this application lacks merit. To substantiate his contention, the learned counsel for the 1st respondent referred this court to the provisions of **Order IX Rule 8 of the Civil Procedure Code**. He invited the court to the case of **Simon Pius Mwachilo v. Fred Edward & 2 Others**, Misc. Land Case No.662 of 2017(unreported) and Civil Appeal No.19 of 2019 (unreported) and **Nasibu Sungura v. Peter Machumu, TLR [1988]** where the court explained on what amount to sufficient reasons for non-appearance.

The 1st respondent's counsel contended further that, the applicant's counsel had raised grounds that since the demise of the late Ali Haji Gamdust he had no instruction to proceed with the matter and was

waiting for the appointment of the administrator. The learned counsel for the 1st respondent is of a firm view that the ground lacked merit because, he contended, the learned counsel for the plaintiff continued to appear even after the death of the plaintiff. He emphasized that his learned brother was aware or ought to have been aware of the date because he was present in the previous occasions when the matter was called for mention.

The learned counsel further took issues with the submission of his learned brother that where a party in a suit dies courts have been adjourning matters pending the appointment of legal representative saying that such a legal position was incorrect. He referred to section **3(1)** together with **Part III**, item 16 of **The Law of Limitation Act** read together with **Order XXII Rule 3(1), (2) of the Civil Procedure Code, Cap 33 R.E 2002**.

It is the counsel for the 1st Respondent's submission that the plaintiff had in law ninety (90) days within which to appoint a personal legal representative to replace the deceased plaintiff or else the suit would automatically abate. Therefore, the learned counsel averred, the suit abated ninety days with effect from the 1st day of July 2013 the date when the plaintiff passed on. He emphasized that technically, there was no suit

to be dismissed on the 23rd June 2015 because the suit was in law non-existent. He went on to argue that similarly, there is no suit to be restored by way of an application to set aside the dismissal order.

To back up his argument he cited the case of **Mr. Godwin Charles Lemila v. Salim Ndikoko and Likability Sereiyo**, Civil Appeal No.28 of 2016 (unreported) and **Salehe Said Nahdi v. National Microfinance Bank Plc & Another**, Commercial Case No.1 of 2015(unreported) which provides for abatement of suits.

The learned counsel for the 1st respondent concluded his submission by an assertion that this application is not maintainable in law and should be dismissed with costs.

Having dispassionately attended the rival submissions by both counsels, the issue for my determination is whether there is justifiable reason for this court to allow the application.

I have gone through the affidavit evidencing the applicant's submission and found that the main reason advanced as an excuse for his nonappearance is lack of instructions on the part of the learned counsel. Counsel for the applicant, rightly I would say, submitted that after the death of the plaintiff who engaged him, his instructions were no more there and he informed the court about it. It also appears that counsel for

the applicant appeared before the court on different dates and informed the court on what was going on from the deceased family with regards to appointment of an administrator and the petition filed before Kinondoni District Court.

I have seen that the learned counsel did not only appear but also prayed for a long adjournment which was granted by the court. Unfortunately, when the matter came for mention on 29th July 2014 he did not appear. The court again adjourned the matter to 23rd June 2015 for hearing. The applicant was absent while the 1st respondent had entered appearance as hitherto ordered. As a result, the court proceeded to dismiss the suit with costs for want of prosecution.

Unlike the applicant, the respondent strongly disputed this prayer by citing both statutory and case law to wit: section 3(1) of the Law of Limitation Act read together with Part III, Order XXII Rule 3(1), (2) of the Civil Procedure Code, Cap 33 R.E as well as the decided cases which, he asserted, provide for abatement of a suit once one or more plaintiffs die.

I have had ample time to read through the cited authorities and I am fortified to state that the same are distinguishable from the present situation. Regarding the point of abatement, I find that there is no way the pending case could be abated because after the death of the plaintiff,

the court was fully informed that family was in the process to elect an administrator who among other things would take over and prosecute the pending suit.

As submitted by counsel for the respondent, his counterpart counsel for the applicant indeed did appear several times even after the death of his client. I appreciate the efforts of the learned counsel who did appear after the death of the plaintiff and informed the court on what was going on. However, it is that failure to enter appearance on the date scheduled after the long adjournment and subsequent dates that resulted into this application. This is negligence on the part of the learned counsel because with or without instructions, he was the one who was granted audience and prayed for a long adjournment.

It does not take much thought to realize that he was equally under a duty (moral if you would call it) to appear and inform the court on the progress of appointment of the administrator. Now my question is, should the applicant be punished for the mistake of his counsel?

It is an elementary law that parties should not be punished for negligence committed by their advocate. This court in a number of occasions has ruled as such. See, for instance, the case of **Africa Engineering & Construction Co. Ltd vs. The Registered Trustees of the Diocese of Central Tanganyika**, Misc. Commercial Cause No. 4

of 2020, HCT, Commercial Division at Dsm (Unreported), Hon. Nangela J, stated:

*"...In my view, Mr. Masinga appeared as a representative of a client (the respondent) who in bonafide hired him knowing that he was a qualified advocate. **In view of this, should the sins of Mr. Masinga be allowed to visit the innocent client? I think not. In the interest of justice, the rights of an innocent client need to be secured.**"* [Emphasis is added]

See also the holding of this court in the case of **Marco Elias Buberwa vs. Agnes Kokushekya Elias Buberwa**, Misc. Civil Application No. 253 of 2020, HCT at Dsm (Unreported).

Premised on the above reasoned deliberation, I find that there is a reason for this court to grant the prayer. Consequently, I allow the application and set aside the dismissal order dated 23rd day of June 2015. The main suit which is Civil case No.327 of 2000 has to proceed to its finality.

It is so ordered.



E.I. LALTAIKA

JUDGE

12/08/2022