

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 02 OF 2019

COMWEL F. MTALO.....APPELLANT

VERSUS

ASUMPTA KIMWAGA.....1ST RESPONDENT

GERALD KAMTAWA.....2ND RESPONDENT

**[Appeal from the Judgment and decree of the District Court of Temeke at
Temeke.]**

(Hon. Batulaine, RM.)

dated the 19th day of October, 2018

in

Civil Case No. 46 of 2017

JUDGMENT

29th March, 2021 & 31st May, 2022.

KULITA, J.:

This is an appeal from Temeke District Court. Following the allegations that the Appellant advanced loan to the 1st Defendant through the 2nd Defendant with interests thereof, the Appellant partly successfully claimed for payment of money amounting Tshs. 35,000,000/=. As alluded, finally, the trial court ordered the Respondents to pay the

Appellant herein Tshs. 9,800,000/= being the loan advanced to them. Together with that, the court ordered the Appellant to return to the Respondents herein, a motor vehicle with registration No. T 629 CMM make Toyota Vitz which was handed to him as a loan security. This last order, was scheduled to be done after the Appellant's money being paid to him.

Aggrieved with that decision, particularly on the last order, the Appellant lodged this Appeal relying on the following two grounds; **One**, the trial court erred in fact and law by ordering the Appellant to return to the 1st Respondent a motor vehicle with registration No. T 629 CMM Toyota Vitz while there was no such claim advanced by the first Respondent. **Two**, the trial court erred in fact and law by ordering the Appellant to return to the 1st Respondent a motor vehicle with registration No. T 629 CMM Toyota Vitz while there was no proof to substantiate that the 1st Respondent handed the same to the Appellant.

Following avoidance of spread of corona virus, on the on the 31st day of March, 2020 the appeal was scheduled for hearing through written submissions. The schedule was to the effect that, the Appellant to file his written submissions by 14th April, 2020, Respondents to reply by 28th April, 2020 and rejoinder by the Appellant to be lodged by 5th May, 2020.

The records show that both parties were absent on the date that this court fixed the said schedule of hearing by way of written submissions. It is further in records that, the Respondents never filed their written submissions to defend their case. On the other hand, the Appellant filed his written submission in support of the appeal on 15th April, 2020. As the court's order shows that the Appellant was required to file his written submissions not more than 14th April, 2020, then it follows that, the Appellant also did not comply with the hearing schedule.

Actually, the Appellant's written submission shows that, it was prepared and ready for filing since 9th April, 2020. This tells me that, though he was not present in court, yet the Appellant had knowledge of the scheduling order, that's why he prepared his written submission within time. However, he failed to file it in court within the scheduled time. The Appellant's failure to file his submission in time can be verified by the fees receipt for filing the said written submission, which is dated 15th April, 2020. On that note, I am firm that, neither the Appellant nor the Respondent adhered to the scheduling orders.

The question is, what should be done then in this situation whereby parties to the appeal have failed to adhere the scheduling order for filing the written submission? The answer is not far to fetch.

In the High Court case of **Harold Maleko v. Harry Mwasanjala, DC Civil Appeal No. 16 of 2000, HC-Mbeya**, (unreported) Mackanja, J. (as he then was) held:

"I hold, therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amounted to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."

Again, in the High Court case of **Olam Tanzania Limited v. Halawa Kwilabya, DC Civil Appeal No. 17 of 1999** it was held:

"Now what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act

within prescribed time, he will be guilty of in-diligence in like measure as if he defaulted to appear...This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."

Furthermore, in the High Court case of **Andrea Njumba v. Trezia Mwigobene, PC Civil Appeal No. 1 of 2006, HC-Mbeya** (unreported) it was also held:

"If a party fails to act within the time prescribed, he will be guilty of diligence in like measures as if he has defaulted to appear and submissions which were filed out of time will not be acted upon."

The same position has been enshrined in the reported case of **Mobrama Gold Corporation Ltd v. Minister of Energy and Minerals and Others [1998] TLR 425.**

The Court of Appeal had taken the same position in **The Registrar of Industrial Court of Tanzania & Another, Civil Application No. 90 of 2011**, (unreported), also in **Godfrey Kimbe v. Peter Ngonyani, Civil Appeal No. 41 of 2014** (unreported) while citing the case of

National Insurance Corporation of (T) Ltd & another v. Shengena Limited, Civil Application No. 20 of 2007, in which it was held;

"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case"

Armed with the above cited cases, I am settled in mind that, failure of the Appellant to file his written submission within the scheduled period is like non-appearance on the day that was fixed for hearing the appeal. The same amounts to failure of the Appellant to prosecute his case. On that account, the appeal is hereby dismissed. Each party to bear its own costs.



**S.M. KULITA
JUDGE
31/05/2022**

DATED at **Dar es Salaam** this 31st day of May, 2022.



**S.M. KULITA
JUDGE**

31/05/2022

