

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DODOMA DISTRICT REGISTRY)  
AT DODOMA**

**DC CIVIL APPEAL NO. 12 OF 2020**

(Arising from Misc. Civil Application No. 7 of 2019 of the District Court of Kongwa dated  
15/5/2020)

**MUSA CHIKUMBI..... APPELLANT**

**VERSUS**

<b>1. CAMEL OIL (T) LTD</b> <b>2. BILO STARS DEBT COLLECTOR</b>	}	<b>... RESPONDENTS</b>
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*19/10/2022 & 3/11/2022*

**JUDGMENT**

**MASAJU, J**

The Respondents, Camel Oil (T) Ltd and Bilo Stars Debt Collector instituted Miscellaneous Civil Application No.3 of 2018 in the District Court of Kongwa at Kongwa against the Appellant, Musa Chikumbi. The suit was dismissed by the trial court for want of prosecution on the 28<sup>th</sup> day of December, 2018. The Respondents then successfully filed Miscellaneous Civil Application No. 7 of 2019 before the same court seeking leave of the court to file an Application for setting aside the dismissal order in an extended time. Aggrieved by the decision of the trial court, the Appellant has come to

the Court by way of an appeal. The Appellant's Memorandum of Appeal is made up of two (2) grounds of appeal.

The appeal was heard in the Court on the 19<sup>th</sup> day of October, 2022 *inter parties* between the Appellant and the 1<sup>st</sup> Respondent and *ex parte* against the 2<sup>nd</sup> Respondent who was served by substituted service in the Mwananchi newspaper dated the 5<sup>th</sup> day of October, 2022 but defaulted appearance.

The Appellant consolidated the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal and argued that the trial court had discretion to decide on the Application for extension of time but the discretion should be judiciously exercised when there is a good cause pursuant to **Juma Mare V. Charles Masure** (HC) Miscellaneous land Case Application No. 105 of 2019, Dodoma Registry and **Kalinga & Co. Ltd V. NBC [2016] TLR 135 (CAT)**.

That the Respondents filed the Application for extension of time for them to file an Application to set aside a dismissal order a year after the original suit was dismissed. That, they failed to give the reasons for delay. That, the trial court misdirected herself for considering the facts which do not support the Application filed contrary to **Bernard Kaali V. Kassim**

**Mtonya** (HC) Miscellaneous Land Application No. 21 of 2019, Dodoma Registry.

The Appellant cited **Samo Ally Isack & 4 others V. The Republic** (CAT) Criminal Appeal No. 136 of 2021, Dodoma Registry for the Court to allow the appeal. That, the reasons given by the Respondents were not sufficient. That, Advocate Sarah Wangwe who was allegedly assigned to appear on behalf of the Respondents' advocate did not appear and there was no proof of travel by Advocate Pascal Msafiri to Mwanza.

The 1<sup>st</sup> Respondent contested the appeal by submitting that there is no laid and fast rule on the definition of sufficient reason. That each case must be determined in accordance with its facts as per **Deep Quarries V. Ikuti Investment Ltd** (HC) Miscellaneous Civil Application No. 16 of 2016 Dodoma Registry. The 1<sup>st</sup> Respondent further submitted that the Appellant did not contest the contents of paragraph 1,2,5, and 6 of the Affidavit hence did not seriously contest the Application in terms of **Max Hassan Omary V. Zainab Kalonga** (HC) Civil Application No. 35 of 2021, Dodoma Registry.

That, indeed Advocate Sarah Wangwe entered appearance accordingly even if the counsel Nziku appeared "*in lieu*" of Sarah Wangwe. That, the Respondents were let down by the learned counsels hence the dismissal of

the suit for want of appearance. That, the Appellant failed to prove that the learned counsel Msafiri neither did not travel to Mwanza nor his mother was sick at Mwanza.

The 1<sup>st</sup> Respondent also cited **Felix Tumbo Kisima V. Tanzania Telecommunication Ltd & another [1997] TLR 57, East African Cables (T) Ltd V. Spenco Services Ltd** (HC) Miscellaneous Application No. 61 of 2016, Commercial Division Dar es salaam and **Gania J. Kimambi V. Shadrack Reuben Ng'ambi** (HC) Civil Application No. 692 of 2018, Labour Division Dar es salaam to support her submissions.

The 1<sup>st</sup> Respondent prayed the Court to dismiss the appeal for want of merit.

In rejoinder, the Appellant maintained his submissions in chief and added that it was the duty of the Respondents to prove that the learned counsel had travelled to Mwanza. The Appellant prayed the Court to allow the appeal with costs.

That is what was shared by the parties in support of, and against the appeal in the Court.

The Respondents' reasons for the delay in filing an Application for setting aside the dismissal order were deponed in the Respondents' Affidavit in the 3<sup>rd</sup> -7<sup>th</sup> paragraphs in the trial court. The main reason being the Respondents' Advocate negligence of making follow up of the suit after he assigned another advocate to file the Respondents' Written submissions. The Appellant contests this main reason because there was no any documentary evidence to prove that the Respondents' Advocate Msafiri Pascal had travelled to Mwanza and he was attending his sick mother in Mwanza.

The Court is inclined to agree with the Appellant that the Respondents' learned counsel and his law firm were indiligent in handling their clients case so much that the suit was to be dismissed for want of prosecution. That, even the Application for extension of time in order to file an Application for setting aside the dismissal order was filed before the trial court on 20<sup>th</sup> day of December, 2019, one year after the dismissal of the impugned suit. There was no any documentary evidence in support of the allegations that indeed, the learned counsel for the Respondents had actually travelled to Mwanza to attend his allegedly sick mother and the time he spent there at Mwanza attending his alleged sick mother.

The allegations by the Respondents as to the reasons for delay as deponed in the Affidavit affirmed by their learned counsel in paragraphs 3-5 could have been given weight by the Court if the same had been so deponed by the learned counsels, Msafiri Pascal or Sarah Wangwe, who had to enter appearance for the Respondents but they defaulted, hence want of prosecution of the Respondents suit. That said, the Affidavit in support of the Chamber Summons Application as affirmed by the learned counsel Mariam Hemed, for the Respondents then was essentially a hearsay evidence bearing in mind that the source of information of the allegations in paragraphs 3, 4, 5, and 7 of the Affidavit was the Respondents themselves, not the learned counsels Msafiri Pascal and Sarah Wangwe who were advocating for the Respondents and had a first hand information as to what had transpired. Indeed, the Appellant had taken issues with the Respondents allegations in paragraphs 3, 4 and 5 of the Counter Affidavit as against paragraphs 3, 4 and 5 of the Respondents' Affidavit. The hearsay evidence adduced in the Affidavit in support of the Application couldn't have constituted a good cause for granting the Application. The trial court therefore didn't exercise its discretion judiciously. The Respondents' affidavit as so affirmed by their learned counsel, Mariam Hemed, fell short of the

requirements of Order XIX Rule 3 (1) of the Civil Procedure Code, [Cap 33 RE 2019] for want of the grounds thereof.

Secondly, a person who engages an advocate to represent him in litigations before courts of law does not abdicate his duty and right to follow up the progress and status of his case. So, both a person (party to a case) and his learned counsel have the duty to enter appearance and follow up the progress of the case in court in order to exercise their rights and obligations accordingly. The learned counsel for a party to a case has a duty to report to his client in time the progress of the case as they share what transpires in court and on the next level of the case for action accordingly.

It was inadvisable that in the instant suit, it took the Respondents one year to file an Application for extension of time to file Application for setting aside the dismissal order. The Respondents and their learned counsels were therefore negligent and indiligent to prosecute the suit. Their inordinate delay in filing the impugned Application was not supported by any credible evidence, hence want of a good cause for the extension of time to file an application for setting aside the dismissal order.

Thus, the meritorious appeal is hereby allowed accordingly. The Ruling of the trial court in Misc. Civil Application No. 7 of 2019 is hereby quashed

and set aside accordingly along with its orders. The parties shall bear their own costs accordingly.



  
GEORGE M. MASAJU

**JUDGE**

3/11/2022