

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

CIVIL APPEAL NO. 18 OF 2021

BRITAM INSURANCE TANZANIA LIMITED APPELLANT

VERSUS

BARAKA MGISHWA 1ST RESPONDENT

ANORLD FRANCIS BYRUGABA 2ND RESPONDENT

JOSEPH MASAE 3RD RESPONDENT

EXSAVERI D KAPENU 4TH RESPONDENT

**(Appeal from the decision of the District Court of Kinondoni
at Kinondoni in Civil Case No. 80 of 2019)**

RULING

7th and 11th November, 2022

KISANYA, J.:

In the District Court of Kinondoni at Kinondoni, Baraka Mgishwa, the 1st respondent herein, sued the 2nd, 3rd and 4th respondents (who were the 1st, 2nd, and 3rd defendants) in Civil Case No. 80 of 2019. He claimed for payment of TZS 50,000,000/ for temporary total and partial incapacity, general damages of TZS 30,000,000/=, costs of the suit and any other relief that the trial court deemed fit and equitable to grant. The appellant was joined through the third party procedure as an insurer of the vehicle which caused an accident that injured the 1st respondent, thereby leading to the above stated claims.

At the end of the trial, the 1st respondent (the then plaintiff) was awarded TZS 15,000,000/= as damages of total, permanent and partial incapacity, TZS 5,000,000/ as general damages and costs.

Dissatisfied with that decision, the appellant preferred the present appeal on five (5) grounds of appeal. I find no need of restating the grounds of complaints and the background facts of this matter due to the reasons to be apparent in this ruling.

When the appeal came up for hearing on 12th October, 2022, the learned counsel for both parties prayed for the appeal to be disposed of by way of written submissions. This Court granted the prayer and went on directing the parties to file their respective written submissions in the following schedule:-

- 1. Appellant's submission in chief be filed on or before 20th October, 2022.*
- 2. Respondents' reply submission be filed on or before 28th October, 2022.*
- 3. Rejoinder submission, if any, be filed on or before 5th November, 2022.*

When the matter was placed before me, on 7th November, 2022, for mention with view of fixing the date of judgment, the appellant had the legal services of Mr. Peter Kaozya, whereas, the 1st respondent was represented by Ms. Sikujua Clement, learned advocate. Other respondents were not in attendance.

Mr. Kaozya conceded that the appellant had not filed the written submissions in chief after having been ordered to file the same. He contended that he was sick during the date on which the written submission was to be filed. On that account, the learned counsel prayed for extension of time within which to file the written submissions.

Ms Clement vehemently resisted the prayer for extension of time to file written submission and argued that the settled law is to the effect that failure to file the written submission is equivalent to failure to prosecute the case. To reinforce her argument on that position of law, the learned counsel cited this Court's decision in the case of **Zalha Mohamed Bakari vs Bakari Amir**, PC Civil Appeal No 120 of 2021 (unreported). In that regard, Ms. Clement urged this Court to dismiss the appeal for want of prosecution. She also prayed for costs.

In his brief rejoinder, Mr. Kaozya reiterated his submission in chief that that he failed to file written submission in chief due to sickness. He also called upon this Court to consider the principle of overriding objective and uphold the substantive justice as provided for under Article 107A(2) (b) and (e) of the Constitution of the United Republic of Tanzania, 1977 (as amended) and section 3A of the Civil Procedure Code Cap. 33, R.E. 2019(the CPC).

To start with, I wish to restate procedure on hearing of appeal. In terms of Order XXXIX, Rule 16(1) of the CPC, the appellant is heard first in support of the

appeal on the date fixed for hearing of the appeal. Thereafter, the respondent is heard against the appeal before requiring the appellant to submit in rejoinder.

It is settled law that the practice of filing written submissions in support of the appeal or against the appeal is equivalent to oral hearing. I am fortified by the case of **Kelvin Thobias Mvenile vs R**, Criminal Appeal No. 32 of 2022, HCT at Mbeya (unreported) in which my learned brother, Hon. Karayemaha, J, cited the case of **P3225 LT Idahya Maganga Gregory vs the Judge Advocate General**, Court Martial Appeal No. 2 of 2002 where it was held as follows: -

"It is now settled in our jurisdiction that the practice of filing written submission is tantamount to hearing."

In the instant appeal, the order for disposal of the appeal by way of written submissions was issued at the instance of the parties' counsel. That being the case, the appellant was duly given the right to be heard in support of her appeal.

It is however, not disputed that the appellant defaulted to file the written submission in support of the appeal. In the result, the respondent had nothing to submit in opposition of the appeal. As good luck would have it, there is plethora of authorities advocating the position that, failure to file submission is tantamount to failure to appear when the case is called on for hearing. Apart from the case of **Zalha Bakari** (supra) relied upon by Ms. Clement, this position was stated in **P3225 LT Idahya Maganga Gregory** (supra) in the following terms:

"...therefore, failure to file submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequence of failure to file written submission are similar to those of failure to appear and prosecute or defend, as the case may be...."

Similar position was also stated in the case of **Godfrey Kimbe vs Peter Ngonyani**, Civil Appeal No. 41 of 2014 (unreported) the Court had this to say when the applicant failed to file his written submission against the preliminary objection:-

"In the circumstances, were 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 submission after being ordered by the Court, is tantamount to failure to prosecute or defend one's case."

The Court of Appeal further cited its decision in the case **National Insurance Corporation of (T) Ltd & another v. Shengena Limited**, Civil Application No. 20 of 2007 in which it was underlined as follows:-

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case."

Being guided by the above position of law, it is clear that the appellant defaulted to appear on the day fixed for hearing when he failed to file the written

submission after being ordered by this Court. Given the fact that the appellant was given the right to be heard, she cannot seek refuge on the principle of overriding objective. In consequence, this Court is enjoined to exercise its power under Order XXXIX, Rule 17(1) of the CPC and dismiss the appeal for want of prosecution.

This Court has further considered Mr. Kaozya's contention that he was sick on the date when the written submission was required to be filed in this Court. It is unfortunate that the learned counsel did not produce any medical evidence to support his contention. Be as it may, the issue whether the appellant was prevented by any sufficient cause calls for evidence. It cannot not be determined at this stage.

The upshot of the matter is that the appeal is dismissed for want of prosecution. The 1st respondent shall have his costs.

It is so ordered.

DATED at DAR ES SALAAM this 11th day of November, 2022.



S.E. KISANYA
JUDGE