

**IN THE HIGH COURT OF TANZANIA**

**MAIN REGISTRY**

**AT DAR ES SALAAM**

**CORAM: J. S. MGETA J, L. E. MGONYA J, Z. A. MRUMA, J**

**CIVIL APPEAL NO. 5 OF 2021**

*(Appeal from the Decision of the Advocated Ethics Committee before the Advocated Ethics Committee Panel before Chairman Hon. DR. Ntemi, J. Dated 16<sup>th</sup> June, 2020, In Application No. 6 of 2019: Stanbic Bank Limited V. Paul Kibuuka)*

**STANBIC BANK (T) LTD ----- APPELLANT**

**VERSUS**

**PAUL KIBUUKA ----- 1<sup>ST</sup> RESPONDENT**

**ADVOCATES ETHICS COMMITTEE ----- 2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

***Date of Last Order: 8/7/2022***

***Date of Judgment: 29/11/2022***

**Z. A. MARUMA, J.**

This Appeal arises from Application No. 6 of 2019 in which the Advocates Ethics Committee dismissed the Applicant's Application for want of prosecution. Being aggrieved by the decision of the committee, the Applicant appeals to this Court on the ground that the learned Committee erred in law and fact by dismissing his application for want of prosecution for failure to bring a witness to testify as the Applicant does not habitually

adjourn hearings. Following that, the Appellant's requests, among others, are that his appeal be granted, the order of the Advocates Committee dated 16<sup>th</sup> June, 2020, be reversed and quashed, and a new trial be ordered.

The hearing of this appeal was conducted by way of written submission, following the order of this Court given on 8<sup>th</sup> July, 2022. Subsequently, the parties filed their submissions in chief and replies from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, respectively.

Addressing the ground of appeal, the Applicant segments it into two limbs. One is an application of Rule 10 (1) of the Advocate (Disciplinary and Other Proceedings) Rules 2018, which states that if a case is called for hearing and the Applicant fails to appear, the Committee may dismiss the application or complaint unless it deems it appropriate to adjourn the hearing. The Applicant argued that, in the present application, the counsel for the Applicant was physically present but without the appearance of the witness on the date set for the hearing. He submitted that, despite the sufficient reasons advanced by the counsel for the Applicant, Mr. Kakiziba had left the country and was no longer the Applicant's employee. The Committee did not consider it and went on to dismiss the application for want of prosecution. He further pointed out that before condemning the Applicant, the Committee could consider that the Applicant could

not bring another witness without the leave of the Committed to substitute the witness and expunge Kaziba's affidavit, which is already in the record. Thus, in those scenarios, the Applicant cannot be blamed for the failure to prosecute the application. He added that, alternatively, the Committee could adjourn the hearing or allow a substitute witness. On the second limb, it was the Applicant's submission that the committee erred in fact and law by finding that the applicant habitually adjourned hearings. He added that the record shows that since the application was lodged on 16<sup>th</sup> June, 2019 it was the first time the Applicant sought an adjournment. Therefore, the Applicant's request was for the Committee to avoid technicality under the principles of overriding objectivity and determine the matter on merit.

Responding to the grounds of the appeal, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions were of the same view that the appeal is untenable as the Appellant has an alternative remedy before resorting to this Court by way of appeal, while he has a right to apply for restoration before the Committed as per Rule 10 sub rule (3) of The Advocates (Disciplinary and Other Proceedings) GN. No. 120 of 2018. According to the Respondents, this matter began in 2017 when the appellant filed Application No. 6 of 2017 against the respondent in the Advocates Committee. The application was dismissed on 6<sup>th</sup> December, 2018, because the affidavit was defective. In 2019,

the appellant filed a fresh application No. 6 of 2019 and it was set for hearing on the 16<sup>th</sup> of June, 2020. The Advocate for the Appellant appeared in person on the set date but failed to produce her witness. The reasons were that the witness had travelled up country and, moreover, he had departed from the Appellant's employment. Therefore, the witness could not be available to testify. It was their argument that on those grounds, the Committee, at its discretion, found the Applicant's grounds to be insufficient and dismissed the application. To back their arguments, they cited cases such as **Pangea Minerals Ltd vs. Petrofuel (T) Ltd and 2 Other**, Civil Appeal No. 96/2016, and **Jaffari Sanya Jussa and Another Vs. Saleh Sadiq Osman**, Civil Appeal No. 54/1997.

Having evaluated the rival submissions on both sides, we have directed ourselves on the grounds of appeal and the position of the law regarding the dismissal order as it was argued in this appeal. Reading Rule 10 (1) of The Advocates (Disciplinary and Other Proceedings) Rules GN. 120 of 2018, it provides as follows:

*"Where an application or complaint has been dismissed or allowed, the party in whose absence the application or complaint was determined may apply to the Committee to restore the application or complaint for hearing, as the case may be, if he can show that he was prevented by good*

*cause from appearing when the application or complaint was called on for hearing...”*

Also, as pointed out by the counsel for the 2<sup>nd</sup> Respondent that the term non-appearance is defined under Rule 10 (5) of the Act (Supra) to include circumstances where a party enters appearance physically before the Committee but is substantially unprepared and or unable to proceed with the hearing for no good cause.

Having the legal position and taking into account what happened on the relevant day as reflected in the proceedings, we come up with the following findings: First, on the material day, the Applicant was present when the matter was set for the hearing, but it was in the absence of the intended witness. Reading the provisions of Rule 10 (1) of the Act, it provides for the consequence when the Applicant does not appear, and of course we take note that non-appearance includes circumstances under Rule 10 (5) of the Act (Supra). However, that is not the scenario in the application subject to this appeal. The record shows that the Applicant was present on that material day, represented by her counsel. Besides, the counsel for the Applicant advanced the reasons for the non-appearance of the witness and made a request for the substitution of the witness. However, without determining whether or not the Applicant could substitute for the witness, the Committee dismissed the

application. Assessing this point, it draws us to the principle of “right to be heard,” which has been insisted on by several authorities, as it was held in the case of **Sadiki Athumani vs. The Republic, TLR 1986 at page 235;**

*“...The right of presence at the hearing of an appeal is not confined to physical presence, it includes the right to participate in the proceedings by inter alia, making submissions on issues raised by the appeal with a view of assisting the court to reach a just and correct decision... The right is very important one, and the denial of it is a grave error that vitiates the proceedings in the District Court...”*

On the basis of the above, notwithstanding that it is at the discretion of the Committee to decide whether the reasons given before amount to a good cause for adjournment or dismissal, a decision could be reached by the committee. It is our considered view that the Applicant could be accorded the right to be heard on the issue raised by the substitution of the witness by the Committee to evaluate and determine the issue raised before proceeding to the dismissal of the application for want of prosecution.

Furthermore, if the hearing date had already been set, the issue would be in which forum the applicant could address the

issue of the witness's absence or seek leave for the witness's substitution prior to the hearing date. In our view, the Committee instead of proceeding to dismiss the application, was supposed to ascertain these points raised by the Applicant to demonstrate fairness in the handling of the matter.

Taking the same approach to the issue of the available restoration remedy to which the applicant could apply, with all due respect for the Respondent's arguments, that principles of overriding objective, as urged by the Applicant, should not disregard the mandatory provision of the law available. It is our finding that, it is not in dispute that the law provides an avenue for the Appellant to apply for the restoration of the matter before the Committee. However, going by the record and the findings of the Committee in its order of 16<sup>th</sup> June, 2020, the Committee has almost determined the Applicant's fate in advance, even before the restoration. Therefore, even if the Applicant could apply for the restoration, in our view, based on the findings in the said order, the committee will offer little more than what it has already determined. As a result, the argument that allowing the Appellant to access this Court via appeal while he has a remedy to apply for restoration will set a bad precedent by allowing forum shopping and opening a Pandora's box for litigants whose applications will be dismissed due to a lack of prosecution and failure to bring witnesses holds water. This

argument has no weight under the circumstances of this appeal, in which the Committee did not apply the principles of natural justice as they were discussed above. Hence, the principles and guidance applied by the Court of Appeal in the cases cited by the Respondents such as Pangea and Jaffari Sanya (Supra) could apply if the Committee itself would apply the principle of natural justice and fairness.

Furthermore, the Committee considered the issue of habitual adjournment, which it used as a reason to deny the applicant's application. The Committee discovered that every time the matter was scheduled for hearing, the Applicant always made excuses. Having had the opportunity to review the proceedings before the Committee, the Applicant requested adjournment on 16<sup>th</sup> June, 2020, for the reasons discussed above. Besides, the reason given by the Committee cannot be used as a ground for dismissal.

The Committee was supposed to confine itself to the issue that arose in that particular session and determine it. This was held by the Court of Appeal in the case of **Mrs. Fakhria Shamji vs The Registered Trustees of the Khoja Shia Ithnasheri (MZA) Jamaat**, Civil Appeal No. 143 of 2019 (unreported). Whereby in this case, the court dismissed the preliminary objection raised on the date set for mention for the non-appearance of the Appellant. The Court has this to say;

*"...We agree that not hearing the parties on the merits of the Preliminary Objection raised and dismissing the same on the "mention" date without being moved by a party present was a serious omission constituting an illegality that violated the rule of natural Justice..."*

Given the above-mentioned settled position, and applying it to the current appeal, despite the fact that the application was scheduled for hearing, the reason for the witness's absence was presented to the Committee along with a request to substitute another witness. The Committee's omission to determine the request for the substitution of the witness and proceed with the dismissal order, amounts to a violation of the right to be heard. The dismissal order was premature as there was a pending issue to determine whether the Applicant could substitute a witness or not. As a result, the Committee's failure to make a decision on the request denied the Applicant's right to be heard.

For the reasons and facts stated above, we believed this appeal has merit and is hereby granted. The dismissal order given by the Committee on 16<sup>th</sup> June, 2020, is overturned. The application should be reinstated; but rather than conducting a fresh trial, the Committee will pick up where it left off. There is no order as to costs.



**J. S. MGETA**

**JUDGE**

**29/11/2022**



**L. E. MGONYA**

**JUDGE**

**29/11/2022**



**Z. A. MARUMA**

**JUDGE**

**29/11/2022**

**Court:** Ruling delivered on 29/11/2022 before Hon. E. D. Massawe Deputy Registrar in Chamber in presence of Ms. Hamisa Nkya, Advocate for the Applicant, Mr. Ismail Bulembo, Advocate for the 1<sup>st</sup> Respondent and Ms. M. G. Kanyagha, RMA and in the absence of the 2<sup>nd</sup> Respondent.



**J. S. MGETA**

**JUDGE**

**29/11/2022**



**L. E. MGONYA**

**JUDGE**

**29/11/2022**



**Z. A. MARUMA**

**JUDGE**

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