

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 39 OF 2021**

*(Originating the High Court of the United Republic of Tanzania at Arusha, Civil Case No. 07 of 2020)*

**METROPOLITAN TANZANIA INSURANCE CO. LTD ..... APPLICANT**

***Versus***

**DOUBLE 'N' INSURANCE BROKERS LTD ..... RESPONDENT**

**RULING**

*6<sup>th</sup> April & 6<sup>th</sup> May, 2022.*

**Masara, J.**

In this Application, the Applicant seeks to set aside a dismissal order in respect of (HC) Civil Case No. 07 of 2020, which was dismissed on 28/04/2021 for want of prosecution. The application is supported by the affidavit of Evodius Rutabingwa, learned advocate. The Respondent contested the application through filing a counter affidavit deposed by Emmanuel Fredrick Kinabo, learned advocate. The Applicant also filed reply to the counter affidavit.

Brief facts of the case culminating this application as can be extracted from the affidavits of the counsel for the parties are that on 28/04/2020, the Applicant instituted Civil Case No. 07 of 2020 against the Respondents. In that case, parties herein were the Plaintiff and Defendant respectively. The Applicant's claim against the Respondent in that case was payment

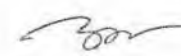


of TZS 69,456,573.98/= and USD 45,716.17, being the premium that came about out of insurance business between the two. The case was scheduled for 1<sup>st</sup> pre-trial conference on 15/02/2021, whereby the same was dully conducted. It was fixed for mediation before Gwae, J. On 15/03/2021 mediation was marked to have failed. The mediator Judge referred the file back to the trial judge but fixed the case for mention on 21/04/2021 instead of 25/03/2021 which was previously scheduled by the trial Judge for Final Pre-trial conference. As the record shows, the case was placed before the trial Judge on 25/03/2021 for final pre-trial Conference. None of the parties or their advocates entered appearance. It was adjourned to 28/04/2021 for final pre-trial conference. Similarly, there were no appearances. The suit was consequently dismissed for want of prosecution. It is against that dismissal order that the Applicant seeks to set aside in this Application.

Hearing of this Application proceeded through filing of written submissions. Submitting in support of the application, Mr Evodius Rutabingwa, counsel for the Applicant, contended that after mediation was marked to have failed the mediator Judge adjourned the case to 21/04/2021 due to easter vacations instead of 25/03/2021 which was fixed by the trial Judge. His complaint is that parties were not served with


a formal notice that the case would come for final pre-trial conference on 25/03/2021. The learned advocate fortified that he attended the Court for pre-trial conference on 21/04/2021, the date fixed by the mediator Judge, but the case was not called. He came to realize later that the case was fixed for final pre-trial conference on 28/04/2021 and at that time he could not travel in time to attend the case as scheduled. He further contended that the Applicant who was supposed to organize his travel arrangements from Dar es Salaam to Arusha had financial constraints throughout the first half of 2021. Later the counsel for the Applicant realized that the case was dismissed for want of prosecution. He therefore took initiatives by filing this application. Mr Rutabingwa was of the view that failure to enter appearance was due to the confusion regarding the dates for the Final Pre Trial-Conference. He sought reliance on the Court of Appeal decision of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited, Civil Appeal No. 260 of 2018** (unreported) which underscores the spirit that justice is better than speed. He urged the Court to allow the application with costs.

On his part, Mr Emmanuel F. Kinabo faulted the Application for being preferred under a wrong provision of the law. He asserted that the Application is preferred under Order IX Rule 2 and 3 of the Civil Procedure



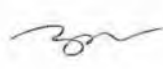
Code (CPC) which is applicable when a case is dismissed for non appearance of all parties at the hearing of a suit. That, Civil Case No. 7 of 2020 was not fixed for hearing, but it was fixed for final pre-trial conference, therefore the applicable provision for setting aside such order would be Order VIII Rule 20(1)(a) of the CPC. On that account he urged the Court to find the Application incompetent and strike it out.

Regarding merits of the application, Mr Kinabo submitted that the Applicant has not advanced sufficient reasons to warrant the setting aside of the dismissal order. He fortified that, in both the affidavit in support of the Application and the submissions in chief, the Applicant's counsel admitted that he was aware that the case was fixed for final pre-trial conference on 28/04/2021, but he failed to attend due to financial constraints, which does not amount to good cause to grant the order sought. He added that the Applicant has not accounted for failure to enter appearance by the Applicant's representative in the absence of its counsel. Mr. Kinabo blamed the counsel for the Applicant for failure to inform the Court of his absence through a formal letter or even have his brief held by another advocate. According to Mr Kinabo, the case cited by Mr. Rutabingwa is irrelevant since it does not deal with attendance in court.



Mr. Kinabo concluded by praying for dismissal of the Application with costs.

In a rejoinder submission, Mr Rutabingwa amplified that Order VIII Rule 20(1) & (2) is inapplicable because that provision applies where the case is fixed for first pre-trial conference, unlike Civil case No. 7 of 2020 which was fixed for final pre-trial conference. Mr Rutabingwa reiterated that at the time when the Applicant and its advocate became aware that the case was fixed for final pre-trial conference on 28/04/2021 neither of the two could have made it to Court on that date since they were in Court the date fixed by the mediator Judge. Due to the confusion, the Applicant expected that summons could have been issued, but in vain. According to Mr Rutabingwa, even if he had opted to write a letter, the same could have served no purpose since it would not arrive in Court in time. That the same applies had the Applicant's counsel opted to look for an advocate to hold his brief. That such measure would not be helpful since the case could not proceed as the Respondent and his advocate were also absent on 28/04/2021. He further added that the counsel for the Respondent has not shown any prejudice that the Respondent is likely to suffer in case the application is granted.



I have given deserving weight to the affidavits of Counsel for the parties and their submissions for and against the Application. The issue for determination is whether the Applicant has furnished sufficient reasons to warrant setting aside the dismissal order dated 28/04/2021.

It is trite law that a party who seeks to set aside a dismissal order has to furnish the Court with sufficient cause for non-appearance in Court. This was the holding of this Court in the case of **Sadru Mangaiji vs Abdul Aziz Lalani and 2 Others, Misc. Commercial Application No. 126 of 2016 (HC. Comm Div. Mwanza, unreported)**, where it was held:

*"It settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, he has to furnish the court with sufficient reasons for nonappearance when the suit was called on for hearing."*

In the Application at hand, the reason for non-appearance in Court on 28/04/2021 when Civil Case No. 7 of 2020 was fixed for final pre-trial conference, as deponed under paragraphs 8 and 9 of the affidavit in support of the application, is due to variation of dates by the mediator Judge. However, as pleaded under paragraph 6 of the affidavit in support of the application, the Applicant's counsel was present in Court on 21/04/2021, the date fixed by the mediator Judge, when the case file was never called. In both his submission in chief and rejoinder submissions, counsel for the Applicant admitted that he was aware that the case was

scheduled for final pre-trial conference on 28/04/2021. He was, however, unable to enter appearance due to financial constraints that faced the Applicant and also due to the fact that the Applicant could not process his travel arrangements from Dar es Salaam to Arusha within time. Now, the question is whether financial constraints that befell the Applicant amounts to sufficient cause for defaulting appearance in Court. The Court of Appeal in the case of **Wambele Mtumwa Shahame vs Mohamed Hamis,**

**Civil Reference No. 8 of 2016** (unreported), held:

*"As regards the issue of financial constraint, again that is not a sufficient reason for extending the time."*

Thus, the reason that the Applicant failed to enter appearance in Court on 28/04/2021 due to financial difficulties on the part of the Applicant does not amount to sufficient reason for setting aside the dismissal order. After all, the Applicant's counsel, as correctly pointed out by Mr Kinabo, had a lot of avenues to make the Court aware that he was unable to attend in Court on that date. He had an option of writing a formal letter informing the Court of his absence or look for a fellow advocate to hold his brief. Being aware that the case was fixed for final pre-trial conference on 25/03/2021 in his absence; also, being aware that the case was coming for final pre-trial conference on 28/04/2021 but did nothing, Counsel for the Applicant was not diligent in prosecuting the case. He knew the

probable consequences of non attendance but bother less to act accordingly. That even if he applied the above avenues the case would not have proceed since the Respondent and his advocate were all absent, appears to me to be an afterthought and, in my view, irrelevant. He ought to have played his part, whether the Respondent was present or not.

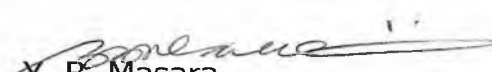
Mr Rutabingwa also submitted that the Respondent's counsel has not shown any prejudice the Respondent will suffer if the application is allowed. He relied on the case of **Mount Meru Flowers** (supra) to bolster his argument that justice is better than speed. That may have been the outcome, but there is no right that is absolute. Every right has to be enjoyed within certain limits as prescribed by law. If the inadvertence of counsel is to be condoned, there will be no point of having procedural laws limiting certain actions within specified period of time. In the second place, cases will not come to an end if mandatory requirements of the law are not adhered to. That said, since the Applicant's counsel was aware of the date that the case was coming for final pre-trial conference but failed to attend without any notification to the Court, his excuses cannot find any justification.

Regarding the Respondent's submission that the Application is preferred under a wrong provision of the law, I do agree with Mr Rutabingwa that



Order VIII Rule 20(2) of the CPC does not apply in final-pretrial conferences. Final pre-trial conference is governed by Order 20 Rule 40 of the CPC. Therefore, the submission that the Application is preferred under a wrong provision of the law has no merits. Again, Mr Rutabingwa complained that there ought to have been a formal notice informing the parties of the date fixed for final-pretrial conference. The advocate for the Applicant is misguided in that respect. A formal notice would have been issued if the parties had no notice of the date set for the Conference. Order 20 Rule 19(2) of the CPC makes cognizance of notice given *viva voce* to the parties. Since counsel admitted that he was aware of the date, issues of formal notice or summons do not arise.

On the premises and from what I have endeavored to discuss above, the application is devoid of merits, since the Applicant has failed to furnish sufficient reasons to set aside the dismissal Order by this Court dated 28/04/2021. The Application is accordingly dismissed with costs.

  
Y. B. Masara

**JUDGE**

6<sup>th</sup> May, 2022

