

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 186 OF 2021

(Arising from Civil Case No. 247 of 2017)

SAMBARU MINING GROUP CO. LTD..... APPLICANT

VERSUS

WANG SENG LIM.....1ST RESPONDENT

CHIN CHI KIT.....2ND RESPONDENT

CAI ZHEN HUA.....3RD RESPONDENT

MEGA COPPER COMPANY LIMITED.....4TH RESPONDENT

RULING

Date of last Order: 03/03/2022.

Date of Ruling: 18/03/2022.

E.E. KAKOLAKI, J

On the 03/11/2020, this court dismissed the applicant's suit Civil Case No. 247 of 2017 which was scheduled for Final Pre-trial Conference for want of prosecution after the applicant (plaintiff) had failed to enter appearance in court more than once. It is from that decision the applicant has preferred this application under Order IX Rule 3 of the Civil Procedure Code, [Cap. 33

R.E 2019] supported by affidavit of Stephen Ally Mwakiborwa, Applicant's advocate. The application is challenged by Respondents who filed the counter affidavit to that effect dully affirmed by their advocate one Peter Dominic Mshikilwa.

The matter proceeded by way of written submissions as the applicant and respondents were represented by Mr. Stephen Ally Mwakiborwa and Mr. Peter Dominic Mshikilwa, both learned advocates respectively. It is the law that, this court has unfettered discretion to grant the prayed relief of setting aside the dismissal order upon good cause shown by the applicant which prevented him from entering appearance in court. Order IX Rule 3 of the CPC provides thus:

3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit. (Emphasis supplied)

In this matter the applicant is therefore duty bound to state to good cause for his non-appearance. In discharging that duty Mr. Mwakiborwa for the applicant informed the court good or sufficient cause for non-appearance is not defined by the law as it include human error which is the main reason in this matter. He argued, during mediation the court clerk informed the applicant one Walter Muro that he will be informed of the next mediating date as there was ongoing efforts to conduct online meeting due to the fact that, the respondents were outside the country. Further to that he contended, the said court clerk never notified the plaintiff/applicant of the date when the matter will be referred back to the trial court, before he came to learn that the case file was already returned to the trial court and dismissed for want of prosecution. To him the court clerk's failure to notify the applicant of the return of the case file and the date for appearance before the trial court is a human error which amounts to good cause for setting aside a dismissal order. To back up his argument on human error as good cause Mr. Mwakiborwa referred the court to its decision in the case of **Clement George Mwakibinga Vs. CRDB Branch Manager Kahama & 2 Others**, Civil Appeal No. 17 of 2019 (HC) citing the case of **Yusufu Same and Another Vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002 (Unreported)

where it was held human error was good cause for setting aside dismissal order. He thus prayed the court to find the applicant has established good cause and proceed to grant the application by setting aside the dismissal order of this court dated 03/11/2020 in Civil Case No. 247 of 2017, as withholding it will suffer ordeal to the applicant than it would do to the respondents.

Resisting Mr. Mwakiborwa's the submissions, Mr. Mshikilwa for the respondents lamented that, the applicant raised new issue in the submissions which were not deposed in the affidavit when asserted that, the court clerk informed Mr. Walter Muro of the intended scheduled online session with the respondents on the reason that they were outside the country. He said even if that assertion is believed which is not the case, still the same is unfounded as the online scheduled session was communicated to the parties whereas Mr. Walter Muro and Mr. Khalfan Masoud directors/shareholders appeared for the applicant in person while the respondents represented by their advocate Mr. Peter Mshilikwa who was accompanied with the 4th Respondent Ally Seleman Nganzo. That aside he contended, the reason of sickness as deposed by the applicant's advocate in paragraphs 5,6,7 and 8 of the affidavit that, he was indisposed are not

supported by any evidence or record from Hindu Mandal Hospital Polyclinic Tegeta, where alleges to have been admitted. As to the grounds for moving this court to grant the orders sought he argued, the advanced reasons as set out in paragraph 9 of the affidavit again are frivolous and vexatious as the fact that the applicant stands a chance to lose its matrimonial house leaves a lot to be desired. Lastly Mr. Mshikilwa submitted, jurat of the applicant's affidavit does not comply with section 8 of the Notaries Public and Commissioner for Oaths Act, [Cap. 12 R.E 2019] for want of the place and date on which the same was taken or made. In view of the fore submissions he prayed the court to dismiss the application. In his brief rejoinder on none compliance of the provision of section 8 of the Notaries Public and Commissioner for Oaths Act, Mr. Mwakiborwa said the mistake was minor, thus this court be pleased to invoke the oxygen principle as set out in section 3A of the CPC, [Cap. 33 R.E 2019] and proceed to find the application in favour of the applicant. Otherwise he reiterated his submission in-chief and the prayers therein.

I have dispassionately considered the rival submission in this matter as well as consulted the pleadings in this application and the record in Civil Case No. 247 of 2017. Mr. Mwakiborwa has advanced the reason of failure of the court

clerk to notify her of the return date of the case filed to the trial court as sufficient cause to convince this court to grant the application for being human error as it was decided in **Clement George Mwakibinga** (supra). I do not subscribe to the proposition by Mwakiborwa that, the court clerk failed to notify the applicant of the date for return of the case file to the trial court for continuation with the Final Pre-trial Conference for three reasons. **One**, on the 25/08/2020 when the mediator judge set the date of 31/08/2020 as the date for final pre-trial conference the plaintiff was present, thus was made aware as to when the case file would be returned to the trial court. **Second**, the alleged court clerk who is accused to have failed to inform the applicant of the return date of the case file to the trial court is not mentioned nor is there any affidavit from him/her to prove that assertion that she/he indeed promised to notify the applicant but failed to do so. **Third**, the said Mr. Walter Muro, applicant's officer whom Mr. Mwakiborwa alleges would be informed of the next scheduled mediation date before the case file was returned to the trial court apart from not being deposed in the applicant affidavit did not swear any affidavit to prove that fact, thus this court cannot rely on bare submission of Mr. Mwakiborwa as submission by the advocate is not a substitute of evidence. This stance was

aired by the Court of Appeal in the case of **Tina & Co. Limited and 2 Other Vs. Eurafrican Bank (T) Ltd Now known as BOA Bank (T) Ltd**, Civil Application No. 86 of 2015 (CAT-unreported) when cited with approval the Ugandan Court of Appeal case of **Trasafrica Assurance Co. Ltd Vs. Cimbria (E.A) Ltd** (2002) E.A where the court held that:

"As is well known a statement of fact by counsel from the parties is not evidence and therefore, court cannot act on."

It is worth noting from the fore findings that, despite of being aware that the case file was returned to the trial court and the matter was scheduled for Final PTC on the 31/08/2020, the record proves that, without notice or assigning any reason the applicant defaulted appearance before the trial judge, the fact which led the case be to adjourned to 06/10/2020 before it lastly came in court on 03/11/2020. Again on those two dates consecutively, the applicant defaulted appearance something which moved the court believe that she had lost interest in her case, consequently dismissed the suit. Convincingly there is no factual materials to warrant his court believe that the applicant was not aware of what was transpiring in court, as her non-appearance is attributed to apathy, sloppiness and negligence which cannot be condoned by the court.

Another reason advanced by the applicant in her affidavit though not canvassed during the submission is two months sickness of the applicant's advocate who alleges in paragraphs 5,6 and 7 of the affidavit that, was suffering from Covid19 and admitted at Hindu Mandal Hospital Polyclinic Tegeta until 13/12/2020, when he was discharged only to find the case is dismissed for want of prosecution. As rightly submitted by Mr. Mshikilwa the applicant failed to substantiate her assertions as she ought to have attached any medical evidence be it medical chits or discharge card proving her advocate's admission in the alleged hospital. I discount this reason too.

Next for consideration is the ground by the applicant as stated in paragraph 9 of the affidavit that if the order sought is not granted the applicant stands to lose a home and place that her family has conducted farming for own subsistence taking into consideration her matrimonial rights too. As submitted by Mr. Mshikilwa the submission which I subscribe to, this ground leaves a lot to be desired. In the first place and with due respect to Mr. Mwakiborwa, I find the ground too strange. It is beyond comprehension of any reasonable person as to how the applicant which is company and legal person can maintain a family and possess matrimonial home whose rights is

claimed will be affected if the order sought is not granted. Indeed this ground is frivolous and vexatious, I therefore find it not worth of consideration.

Lastly, is the submission by Mr. Mshikilwa that applicant's affidavit is incurably defective for not containing the place and date in its jurat something which is contravention of the provisions of 8 of the Notaries Public and Commissioner for Oaths. Mr. Mwakiborwa in response submits that, that is a minor mistake in which this court should invoke the oxygen principle and proceed to determine the application on merit. While I am in agreement with Mr. Mshikilwa that, the jurat in the applicant's affidavit might be defective, I do not accept the route taken by him to cruise in the said preliminary objection through submission as that goes against the principles of fair hearing which requires opposite party not be caught by surprise. The respondents ought to have raised the preliminary point of objection earlier on and before the hearing of this application so as to enable the applicant prepare and marshal her response properly something which she was denied. It is from that violation of such mandatory principle of the law I refrain from entertaining the said objection.

That said and done I am satisfied that, the applicant has failed to account for his none appearance before the court on the 03/11/2020 when her

matter Civil Case No. 247 of 2017 was dismissed hence a finding that this application is devoid of merit. In the circumstances I remain with only one option which is to dismiss it with costs which I hereby do.

It is so ordered.

DATED at DAR ES SALAAM this 18th day of March, 2022.



E. E. KAKOLAKI

JUDGE

18/03/2022.

The Ruling has been delivered at Dar es Salaam today on 18th day of March, 2022 in the presence of Mr. Francis Alex, advocate who is holding brief for, advocate Steven Mwakiborwa for the applicant and Ms. Asha Livanga, Court clerk and in the absence of the Respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

18/03/2022

