

**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. 280 OF 2021

MORIAL FINANCIAL SERVICES LIMITED..... APPELLANT

VERSUS

CAMPAIGN INTERNATIONAL MARKETING LIMITED RESPONDENT

***(Appeal from the decision of the District Court of Kinondoni at Kinondoni
in Misc. Civil Application No.238 of 2020)***

JUDGMENT

25th April & 24th May, 2022

KISANYA, J.:

This is an appeal against the ruling and drawn order of the District Court of Kinondoni at Kinondoni in Misc. Application No. 238 of 2020 following its refusal to set aside an order which dismissed Civil Case No. 178 of 2020 for want of prosecution.

It is discerned from the record that, counsel Jacqueline Rwakabwa, was engaged by Moriah Financial Services Limited, the appellant herein, to institute a suit against, Campaign International Marketing Limited (the respondent). The suit was filed in the District Court of Kinondoni at Kinondoni. However, on 19th November, 2020, the appellant's suit was dismissed for want of prosecution.

Thereafter, the appellant through her advocate, filed an application seeking for an order to set aside the dismissal order. Her counsel deposed, among others, that she failed to appear because she was on maternity leave after giving birth on 15th October, 2020. After hearing both sides, the trial court found the reasons advanced by the appellant insufficient to allow the application. Thus, the application was dismissed.

Aggrieved by the said decision, the appellant appealed to this court on three grounds of appeal as shown hereunder: -

- 1. That the trial magistrate erred in law and fact by deciding the matter which contain irregularities in the trial conduct.*
- 2. That the trial magistrate erred in law and fact for deciding the matter without giving due regard to evidence adduced by the appellant.*
- 3. That the trial magistrate misdirected himself when he took into consideration extraneous matters, thereby reaching to erroneous conclusion.*

When this matter was called on for hearing, the appellant was represented by Ms. Jacqueline Rwakabwa, learned advocate, while Mr. Thomas Massawe, learned advocate appeared for the respondent.

Submitting in support of the appeal, Ms. Rwakabwa opted to consolidate the first and third ground of appeal. In her submission, the

learned counsel faulted the trial magistrate for deciding the matter which had irregularities. Referring to paragraph 2 on page 4 of the trial court's ruling, she contended that the trial court considered extraneous matters. Ms. Rwakwaba expounded that the trial magistrate considered that the appellant's counsel was hospitalized from 15th October to 17th November, 2020, while the amended affidavit in support of the application shows that the said counsel gave birth on 15th October, 2020 and was discharged from the hospital on 17th October, 2020.

The learned counsel went on to submit that the ruling of the trial court did not comply with the provisions of Order XX, Rule 4 of the CPC. Her submission was based on the ground that the said ruling did not consider the facts averred in the amended affidavit, thereby occasioned injustice. To buttress her argument, Ms. Rwakabwa cited the case of **Njile Kilasa vs Diana Sokanya**, PC Civil Appeal No.34 of 2018, HC at Shinyanga (Unreported).

On the second ground of appeal, the learned counsel briefly submitted that the trial court failed to consider the evidence on record that she (the appellant's counsel) gave birth on 15/10/2020 and she was on maternity leave when the case was called for hearing. She further submitted that the appellant's counsel sent her legal officer to follow up

on the matter and that the latter found the suit already dismissed for want of prosecution. That said, Ms. Rwakabwa concluded by praying for this court to quash and set aside the decision of the trial court with costs.

Mr. Massawe did not support the appeal. With respect to ground one and three of appeal altogether, he argued that the appellant's counsel did not advance good cause for non-appearance before the trial court. His argument was based on the fact that the appellant's counsel did not account on what transpired from 17th October, 2020 when she was discharged from the hospital to 19th November 2020 when the case was dismissed for want of prosecution. In that regard, the learned counsel invited this Court to find the two grounds of appeal without merit.

With respect to ground two, Mr. Massawe contended that paragraph 6 of the supporting affidavit shows that the appellant's counsel had a legal officer who made follow up of the matter during her absence. He further contended that the medical documents tendered by the appellant's counsel did not move the court to allow the application. He, therefore, held the view that, the trial court did not ignore the appellant's evidence in support of the application. From the foregoing submission, Mr. Massawe urged this Court to dismiss the appeal with costs.

In her rejoinder submission, Ms. Rwakabwa reiterated her submission in chief in support of the appeal.

I have given due consideration to the learned advocates' submissions for and against the appeal. I shall proceed with my discussion on the grounds of appeal in the same manner as submitted by the learned advocates.

Starting with ground one and three, I have had time to peruse the impugned ruling. Notably, the trial court made a finding that the affidavit in support of the application contained lies. The trial court arrived at the said findings after considering that the appellant's counsel deposed that she was admitted from the 15th October to 17th November 2020 while the medical report annexed thereto shows that the appellant's counsel was discharged on 17th October 2020. The relevant part of the ruling is reproduced as hereunder:

...I am satisfied that the application is without merit. I have reached at this holding on the basis of two main reasons; the first reasons is that, Ms. Rwakabwa's affidavit under paragraph five advances a lie that she was admitted on the 15th of October until 17th of November, 2020 when she was discharged, while the medical reported annexed therewith indicates that she

was discharged on 17th of October, 2020, about 30 days before the date stated in the affidavit.”

At the outset, I agree with the trial court that in terms of the settled law, an affidavit which is tainted with lies is not affidavit at all. Thus, it cannot be relied upon to determine the issue in dispute.

Since the decision of the trial court was based on the facts deposed in paragraph 5 of the supporting affidavit, I find it apposite to reproduce it, as hereunder: -

*That unfortunately I couldn't enter appearance on that date because on **15th October 2020** I was admitted at AGA KHAN Hospital whereby on that day I gave birth to my lovely daughter and I was discharged from the hospital on **17th October 2020**, therefore on that date when the matter came for hearing I could not make it because I was still on maternity leave till now.*

Reading from the facts deposed in the above paragraph, it is clear that the appellant's counsel deposed that she was admitted to the hospital where she gave birth on 15th October, 2020. It is also gathered from the above paragraph that the appellant's counsel was discharged on 17th October, 2020. Indeed, a medical document titled *Well Newborn Discharge Summary* appended to the supporting affidavit shows that the

appellant's counsel gave birth on 15th October, 2020 and that she was discharged on 17th October, 2020 at 12.30.

In view of the foregoing, it is apparent that the affidavit and the medical documents annexed thereto were not at variance. That being the case, I agree with the appellant's counsel that, the trial court erred by misinterpreting the facts and evidence produced before it. The said omission occasioned injustice on part of the appellant. Thus, I find merit in ground one and three.

With regard to ground two, the issue is whether the appellant's evidence was duly considered by the trial court. Since the appellant moved the trial court seeking an order to set aside a dismissal order, she was duty bound to prove that she was prevented by a sufficient cause when the suit was called on for hearing. This is pursuant to Order IX, Rule 3 of the CPC which provides that: -

*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 for proceeding with the suit. (Emphasize supplied).*

See also the case of the case of **Metropolitan Tanzania Insurance Co. Ltd vs Double N Insurance Brokers Ltd**, Misc. Civil Application No.39 of 2021, HCT at Arusha in which this Court (Masara, J) held that:

"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."

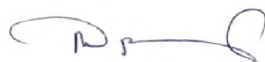
The phrase "good cause" is not defined in the CPC. Therefore, the issue whether a party was prevented by good cause is determined basing on the circumstances of each case.

It was deposed in the present case, that the appellant's counsel defaulted to appear when the case subject to this appeal was called on for hearing on 19th November, 2020 because she was on maternity leave. As indicated earlier, the evidence produced before the trial court shows that the appellant's counsel gave birth on 15th October, 2020 and was discharged on 17th October, 2020. It is my considered view that, the giving birth is one of the medical grounds and thus, a good cause. Considering further that the case came up for hearing one month later on 19th November, 2020, I am of the humble view that, there was a sufficient cause for non-appearance of the appellant's counsel. Had the trial court considered the grounds fronted in the supporting affidavit, it would have

noticed that the appellant had advanced a sufficient cause. Therefore, ground two is found meritorious as well.

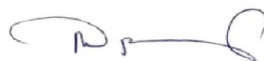
In the end result, I allow the appeal with no order as to costs due the circumstances of this case. I further quash the ruling of the trial court in Misc. Application No. 238 of 2020. In lieu thereof, I make an order of setting aside the dismissal order of Civil Case No. 178 of 2020. It is further ordered that, Civil Case No. 178 of 2020 be determined by the trial court in accordance with the law.

DATED at DAR ES SALAAM this 24th day of May, 2022.



S. E. Kisanya
JUDGE

Court: Judgment delivered this 24th day of May, 2022 in the presence of Jacqueline Rwakabwa, learned advocates appellant and holding brief for Mr. Thomas Massawe, learned advocate for the respondent. B/C Zawadi present.



S.E. Kisanya
JUDGE
24/05/2022