

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

AT DAR ES SALAAM

CIVIL REVISION NO. 14 OF 2022

FREDRICK MBOMA.....APPLICANT

VERSUS

UBER TANZANIA LIMITED.....RESPONDENT

RULING

Date of last Order 13th Dec, 2022

Date of Ruling 17th February, 2023

E. E. KAKOLAKI J

In this revision application this Court is invited by the applicant to scrutinise record of the Resident Magistrates Court of Dar es salaam in Civil Case No. 77 of 2019 with view of satisfying itself as to the correctness and propriety of its decision delivered on 11/04/2022 dismissing his suit for want of prosecution. He is pleading the Court to set aside the said dismissal order and remit the case to the trial court for continuation with hearing before another competent magistrate. The application has been preferred under section 79 of the Civil Procedure Code, [Cap. 33 R.E 2019] (the CPC), sections 43(3) and 44(1) of the Magistrates Courts Act, [Cap. 11 R.E 2019]

and any other enabling provisions of the law, supported by two affidavits one sworn by the applicant and the other by one Adolf Evarist Polepole.

Before venturing into determination of the application on merit I find it imperative to narrate albeit so briefly the background story of the contentious issue in this matter. In the trial Court the applicant herein sued the defendant for breach of contract claiming damages of Tshs. 200,000,000/ and the case had reached of hearing. After the applicant was done with his testimony he called in his witness (PW2) who on 23/03/2022 when testifying sought to tender electronic evidence which was objected hence the Court reserved its ruling until 11/04/2022. On that date the said ruling was delivered sustaining the respondent's preliminary objection before the applicant prayed to go through the said ruling hence was not ready to proceed with hearing of the case as his witness was absent too on that day. Following that prayer by the applicant, the respondent's advocate moved the Court to act under Order XVII Rule 3 of the CPC, due to applicant's failure to cause attendance of his witness. Having convinced itself that the applicant's prayer for perusal of the ruling delivered on the same day did not constitute good cause for adjournment, the learned trial magistrate proceeded to dismiss the case for want of prosecution under Order XVII Rule 3 of the CPC.

Unhappy with the said decision the applicant is now before this Court challenging the legality of the said order. Upon the application being filed summons were issued and served to the respondent on 16th June 2022, signed and stamped by the official stamp.

Despite of being effectively served the respondent defaulted appearance in Court the result of which an order was issued on 11/10/2022 by this Court for the application to proceeded ex-parte. Hearing proceeded orally and the applicant appeared in person unrepresented.

It was applicant's submission in support of the application that, the trial court's decision was unjustified and unprocedurally arrived at as on 11/04/2022 soon after delivery of the ruling on the raised preliminary objection, he prayed the trial magistrate to recuse himself from the conduct of that matter but his prayer was ignored and ridiculed. That aside, he argued the decision to dismiss his case for want of prosecution was illegally arrived at as on that day he had also prayed for time to read the ruling of the Court before proceeding with hearing of the matter, but his prayer was turned down and had his matter dismissed unjustifiably and in contravention of the law. He submitted further that his submission is supported by the affidavit of Adolf Evarist Polepole who was also his witness in Court before

the case was dismissed. With the above submission he implored the Court to find the dismissal order was tainted with irregularity, illegality and injustice hence the same be set aside and an order for remission of the case file before the trial Court be made for the same to be heard on merit before another magistrate.

I had time to consider the applicant's submission and peruse the record of the trial court with view of satisfying myself of the applicant's complaint. The issue placed before this Court for determination therefore is whether the trial court's decision of 11/04/2022 was correctly arrived at. The applicant has raised two grounds for consideration. One, that he prayed for recusal of the trial magistrate but his prayer was ignored and ridiculed. Second, that there was no justification for dismissal of the case for want of prosecution in the situation where he had asked for adjournment to avail him with time to peruse the ruling delivered on the said date of 11/04/2022.

To start with the first ground, I think the same need not detain me much as the same is not supported by any evidence apart from the assertions raised in the affidavit. I so view as the allegation seeks to impeach the court records in which the law treats it to be a very serious documents which cannot be lightly impeached except with strong evidence. The treatment is premised

on the presumption of sanctity of such record to the extent that it accurately represents what happened in court. See the cases of **Halfan Sudi Vs. Abieza Chichili** (1998) TLR 257, **Shabir F. A Jessa Vs. Rajkumar Deorga**, Civil Revision No. 12 of 1994 and **Registered Trustees of Movimento Popular De Libertacao De Angola (MPLA) Vs. Hamisa Mohsin and 5 Others**, Civil Revision No. 1 of 2018 (both CAT-unreported). In this matter having revisited the trial proceedings of 11/04/2022 there is nothing indicative that, the applicant prayed for recusal of the trial magistrate. As the compliant is not supported by any viable evidence I find the same to be unfounded and dismiss it.

Next for consideration is the second ground which allegedly is the reason for dismissal of the applicant's case for want of prosecution under Order XVII Rule 3 of the CPC, where he contends he had prayed for adjournment to allow him peruse the ruling first. The sub-issue here is whether the said provision of the law was properly applied or not. The provisions of Order XVII Rule 3 of the CPC goes thus:

3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act

*necessary to the further progress of the suit, **for which time has been allowed**, the court may, notwithstanding such default, proceed to decide the suit forthwith. (Emphasis supplied)*

From the exposition of the law above cited, I entertain no doubt that the law empowers the Court to proceed to decide the suit forthwith including dismissal of the suit for want of prosecution upon satisfying itself that two conditions have been met. One, a party has been granted or allowed time to bring evidence or secure attendance of the witness in court or perform any other action as directed by the court. Second, he has failed to bring such evidence or secure attendance of the witness in court or perform a certain action as directed by the Court. The two conditions presupposes that, the party had prayed before for time to bring evidence or procure evidence or perform a certain function or action and granted before the trial court dismisses the case for failure to prosecute it. The Circumstances under which Rule 3 of Order XVII of the CPC can be applicable was also adumbrated by the Court of Appeal in the case of **Khamis Muhidin Musa Vs. Mohammed Thani Mattar**, Civil Appeal No, 237 of 2020 (CAT-unreported) when made reference to the case of **Zabron Pangamaleza Vs. Joachim Kiwaraka and Another** [1987] T.L.R. 140, the Court had observed thus:

"... This rule is meant to deal with a situation where a party for one reason or another has asked the court on a previous occasion to give him more time or order to do or complete something in the case and fails to do it within the time given. In the present case the appellant had not asked for more time to do anything and failed to do so and was thus asking for more time." (Emphasis supplied)

Applying the above interpretation of the law to the circumstances of this case it is gathered from the record that trial court dismissed the applicant's case without first granting him time to either read the ruling as prayed or bring the witness who was under examination in chief or any other witness. To appreciate what transpired in Court on 11/04/2022 I quote the excerpt from the typed court proceedings that reads:

Court: *Ruling is delivered in chamber in presence of the parties to the suit this 11/04/2022.*

Sgd. F. Mhina – SRM
11/04/2022

Mr. Kameja Adv: *Your honour I would like to move this Court under Order XVII Rule 3 of the CPC [Cap. 33 R.E 2019] for failure to cause attendance of the witness.*

Plaintiff: Your Honour I pray to read the order in question. I am not able to proceed because I want to read the ruling delivered before this Court. That is all.

Mr. Kameja Adv: Your honour since the second witness is absent, the court should order to call his third witness or to close the plaintiff's case if he has no witness.

COURT: Having considered the prayer by the defendant's advocate and the submission by the plaintiff, I find that the plaintiff's argument that he wants to read the contents of Order XVII Rule 3 or that he wishes to read the contents of the ruling delivered in his presence today does not hold water in justifying why he cannot proceed with hearing.

In the event, I hereby apply the provision of order XVII Rule 3 and I dismiss the case for want of prosecution, with costs.

Sgd. F. Mhina – SRM
11/04/2022

It is learnt from the above excerpt of the Court proceedings that, apart from moving the Court to apply the provision of Order XVII Rule 3 of the CPC against the applicant (Plaintiff) for failure to bring the witness after delivery of the ruling, after the applicant's prayer, the respondent's advocate asked

the court to order the applicant to call the third witness if the second one was not present or to close the case the applicant's case. None of the two prayer by the respondent's advocate was considered by the Court which in my opinion would have granted or allowed time to the applicant to procure a witness or peruse the ruling as per the requirement of the law in sub rule 3 of Order XVII of the CPC, before dismissing his case for want of prosecution. Had the learned trial magistrate gave a proper interpretation of the above cited provision, I have no doubt he would not have arrived to the conclusion he reached. It is from that premises I shoulder up with the applicant's submission that the dismissal order entered by the trial court was illegally arrived at. Hence the issue is answered in affirmative.

In the premises and for the fore stated grounds and reasons I find merit in this application and allow the same. I proceed to quash and set aside the order of the trial court dated 11/04/2022 in Civil Case No. 77 of 2019 dismissing the applicant's suit. Further to that I remit the case file to the trial court for the case to continue with hearing of plaintiff's case before another competent magistrate.

I order each party to bear its own costs.

It is so ordered.

Dated at Dar es salaam this 17th day of February, 2023.



E. E. KAKOLAKI

JUDGE

17/02/2023.

The Ruling has been delivered at Dar es Salaam today 17th day of February, 2023 in the presence of the applicant in person and Ms. Tumaini Kisanga, Court clerk and in the absence of the respondent.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

17/02/2023.

