

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 277 OF 2021
(Arising from Execution No 84 of 2021)**

PETER VICTOR BYRNE 1ST APPLICANT

KINASI LIMITED 2ND APPLICANT

VERSUS

HASSAN. M. SWALIHU RESPONDENT

17th February 2023

MKWIZU, J

RULING

Applicants are recorded to have filed execution application No 84/2021 against the respondent. The application could not however proceed on merit after failure by the parties to enter appearance ensuing to the dismissal of the application on 31/5/2022. It is then after that dismissal that the applicants lodged this application under Order IX Rule 3 of the Civil Procedure Code,(Cap 33 R.E 2019) seeking for the setting aside the dismissal order issued in execution No. 84 of 2021.

Respondent could not be traced for physical service of the chamber summons; thus, a substituted service was resorted to via publication in one issue of Mwanachi Newspaper dated 19th October 2022. The application was later ordered to proceed *ex-parte* by way of written submissions after failure by the respondent to respond to the service

It is worthwhile to note here that, all the proceedings were handled by my sister, Hon. Mgonya J before her transfer to another working station. It is after the resignation, I learnt that applicant had long ago filed his written submissions in support of the application and the matter was waiting for a ruling date.

The affidavit in support of the application deposes failure by the applicants to trace the case file after several adjournments by the court as the reason for their absence in court on the date the matter was dismissed. The applicant's counsel who swore the affidavit said, they could not trace the file either physically or through the system just to be informed of the dismissal order on 7th June 2022.

This being an application for setting aside the dismissal order, the determinant issue is the sensibleness of the reason(s) for the absence of the applicant on the date the matter was dismissed. This is the essence of order IX rule 3 of the C.P.C which reads

*"Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation)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 for proceeding with the suit.
"*

As stated, the applicant's absence in court is associated with the disappearance of the court file that denied them knowledge of the hearing date set in the file. Nevertheless, my perusal of the records in execution case file no 84 of 2021 reveals a different situation. In terms of this file, the execution application was via Form No CC10 filed in court on 4th

December 2021. It was for the first time and in the absence of the parties mentioned in court on 26/1/2022 with an order to have the parties notified of the matter followed by another mention date on 1/3/2022, 17/3/2022, 28/4/2022, 05/5/2022 and lastly on 31/5/2022 where the matter ended by being dismissed for non-appearance of the parties.

There is no doubt that applicants, are the ones who filed the execution proceedings and therefore they are bound to follow-ups their matter, but the records are silent on how they traced the filed to know the date on which the matter was coming for necessary orders. The information on how and from whom the tracking of the filed was done both physically and electronically remained in their own knowledge. There is no mention of involvement of the court registry, court clerk or even the registrar in that tracking. Thus, the arguments that the applicant was on their toes tracing the lost file is a mere allegation and speculation without any evidential value. After all, the records are clear that the matter was before the executing master mention five times before its dismissal on 31/5/2022.

In total, the applicants have failed to demonstrated sufficient cause for their non-appearance on the date of the dismissal. The application is therefore dismissed. Order accordingly

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



**E.Y. MKWIZU
JUDGE
17/02/2023**

