

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MOSHI DISTRICT REGISTRY  
AT MOSHI**

**CIVIL APPEAL NO. 14 OF 2022**

*(Arising from Moshi Resident Magistrate court at Moshi in Misc. Civil Application no. 4 of 2022)*

**KILIMANJARO STAR SUPERMARKET CO. LTD..... APPELLANT**

***VERSUS***

**SAID SALIM BAKHRESA & CO. LTD .....1<sup>ST</sup> RESPONDENT**

**LRM INVESTMENT COMPAMNY LIMITED.....2<sup>ND</sup> RESPONDENT**

**DIDAS PATRICE MUSHI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1<sup>st</sup> March & 5<sup>th</sup> April 2023

**A.P.KILIMI, J.:**

The appellant named hereinabove filed an application in the Resident Magistrate court at Moshi in Misc. Civil Application no. 11 of 2011 praying the court to investigate the properties attached in execution of the decree in Civil case no. 67 of 2020 that belong to appellant and not the Judgment debtor of the said case to be executed. The said court being executing court

acceded to parties' prayers on the way to take through the prayer sought, ordered the said application be argued by way of written submission. Then the scheduling order of filing the same was issued. Later on 9/5/2022 when the case was for mentioned to ascertain its orders issued, the court revealed that the appellant did not filed any submission as ordered. After hearing the reasons for not doing so by the appellant, the court dissatisfied and proceeded to dismiss the application for want of prosecution.

The appellant dissatisfied with the above dismissal order filed an application on the same court which is Misc. Civil Application no. 4 of 2022, praying the same court to set aside its order which dismissed the earlier application. After the hearing again of both parties, the executing court ruled out that the appellant has failed to advance sufficient reasons to warrant its previous dismissal order be set aside, consequently dismissed the application.

Still aggrieved by the decisions of the said court, the appellant has now stepped in this court by the way of appeal basing on the following grounds:-

1. That, the trial Magistrate erred in law and in fact by dismissing the Application without considering the fact that Advocate Dickson Matata was sick hence he was forced to instruct Advocate Oscar Mallya to hold his brief who inadvertent did not

communicate about the scheduling order of the submissions which was made by the Court.

2. The trial Magistrate erred in law and fact by misdirecting himself on the applicability of the propounded principle of law in the case of **Lin Han Yung & Another Versus Lucy Treseas Kristensen**, Civil Appeal No. 219 OF 2019 CAT (unreported).
3. The trial Magistrate erred both in law and fact by ignoring the point of illegality of Respondents attaching the Applicant's properties which are not subject of execution as the petitioner in this Appeal was not party to Civil case no.67/2020 which this execution application emanates.
4. The trial Magistrate erred in law and fact for failure to consider that unless there are special reasons, cases should be heard on merit.
5. The trial Magistrate erred in law and fact for failure to consider that the Respondent did not show how they could be prejudiced if the dismissal order is set aside.
6. The trial Court erred in law and in fact for failure to look the previous conducts of the Applicant before dismissing the Applicant's Application.
7. The trial, Court erred in law and fact for failure to consider the immediate steps which was taken to re-institute the case or restore the case.

From these grounds then the Appellant is praying this Court be pleased to quash and set aside the entire ruling which is the subject of this Appeal and therefore be pleased to grant for an order restoring Misc. Civil Application No. 11 of 2021 between the parties which was dismissed on 16th June, 2022.

It was agreed before me that this appeal be argued by way of written submissions wherein the appellant was represented by Mr. Dickson Matata learned advocate while the Respondents were represented by Mr. Mashaka Ngole learned advocate.

In respect to the first ground of appeal Mr. Matata started by submitting that, on the date the matter was scheduled to be disposed by way written submissions advocate Dickson Matata was sick as it was evident by the medical chit that was presented before the court, then he instructed advocate Oscar Mallya to hold his brief but he never communicated the scheduling order to Advocate Dickson Matata and in result the submissions in chief was never presented within the time frame of the court hence the matter had been dismissed. Also stated that sickness amounts to sufficient reasons and that unless there is a probable cause suits should always be determined on merits. To fortify his view, he has cited the case of **Sadru Mangalji Versus Abdul Aziz Lalani**, Misc. Commercial Application No. 126 of 2016.

Mr. Matata in regard to second ground submitted that, the facts of the case of **Lin Han Yung & Another Versus Lucy Treseas Kristensen** Civil

Appeal NO. 219 of 2019 CAT (unreported) relied by the trial court are distinguishable to this case, because in that case the party failed to present the written statement of defense despite the fact that they had been duly served with the copies of plaint and summons to file the same within the period prescribed by law, the party blamed there advocates not to have filed the same on the reason that they had withdrawn instructions and the failure to file the statement of defense was concealed from them by their previous advocates. In the case at hand, it is the advocate who instructed his fellow counsel to hold his brief and the affidavit of one Dickson Matata was filed in court to substantiate the matter, wherefore, the Appellant cannot be blamed and be caught on the web of the applicability of the principle laid therein.

He further submitted that; justice will smile if the Appellant is availed with an opportunity to prosecute his case, and no anyway whatsoever that the Respondents will be prejudiced if the prayers sought are granted, other than, this court will be acting upon the principles of natural justice by availing the Appellant a right of being heard, to buttress this he has referred the case of **Ghania J. Kimambi Versus Shedrack Ruben Ng'ambi**,

In his submission regarding ground number three, the learned counsel argued that it is the duty of the court to examine if the property which has been attached belongs to the judgment debtor, the magistrate of the court had ignored such point of illegality hence reached in a wrong decision even after being notified by the Appellant. He thus referred the case of **Bukoba Municipal Council Versus Mantrac Tanzania Limited and 3 Others** Miscellaneous Commercial Application No. 92 of 2019, to support this assertion.

Further, in respect to ground number four, the counsel argued that, the trial Magistrate erred in law and fact for failure to consider that unless there are special reasons, cases should be heard on merit. He added that there was no valid reason for not determining the matter on merit, the courts of law have always engineered for matters to be determined on merit. To buttress this point he referred the case of **Waziri Msigiri Versus Kisage Ginghe Marwa** Misc. Land Application No. 348 of 2021.

Submitting to the fifth ground of appeal, counsel for appellant stated that no anywhere the Respondent had shown how they will be prejudiced if

the orders sought by the Appellant would be granted. He urged this court to consider the case of **Waziri Msigiri vs. Kisage Ginghe Marwa** (supra).

Mr. Matata concluded by arguing ground number six and seven together by submitting that the trial Court erred in law and in fact for failure to look the previous conducts of the Applicant before dismissing the Applicant's Application and failed to consider the immediate steps which was taken to re-institute the case or restore the case. He also referred the case of **Waziri Msigiri vs. Kisage Ginghe Marwa** (supra) holdings which stated that the appellant missed only one hearing and after dismissal order he took various steps to reinstitute the appeal. Thus, he prays this court to see it is of the best interest of justice that the decision in Misc. Civil Application No. 04/2022 of Resident Magistrate Courts of Moshi at Moshi be quashed and set aside with orders as to costs.

In reply to the above submission Mr. Mashaka Ngole contended that there was no sufficient cause demonstrated by the Appellant advocate as to why he never complied with the Scheduling Order and the alleged sickness is an afterthought to wit, Advocate Oscar Mallya ought to communicate the scheduling orders made by the trial Court to the Appellant's Advocate. What this Court should ascertain is not at all linked to sickness but rather an event

where the Advocate who held the brief of the Appellant's advocate and who by law and practice, takes up the locus of the Appellants Advocate, Ought to communicate to the Adv. Dickson Matata and since there was indolence on part of the Advocates and the Appellant himself. He further stated the cited case of **Sadru Mangalji vs. Abdul Aziz Lahani** (supra) the principle laid therein is distinguishable from the material facts of this case and therefore irrelevant. He added the cases cited indicates that the presiding Counsel was prosecuting his case and, on a few occasions, he had sent another Advocate to hold his brief while in this case, Advocate Oscar Mallya held a brief for Advocate Matata and a scheduling Order was made and the Submissions were not presented as scheduled.

In respect to the second ground the learned counsel for respondent contended that the Appellant is wrongly taking advantage of the principle established in the case of **Lin Han Yung And Another vs. Lucy Treseas** (supra), the Appellant was under obligation to demonstrate before the trial Court by giving a sufficient reason as to why the submissions were not presented, and further submitted that, this Court be guided by the Provisions of Order IX, Rule 9(1) of the Civil Procedure code, Cap, 33, R.E, 2019 and



the case of **Mwidini Hassani Shela and 2 others Vs. Asinawi Makutika and 4 others**, Land Appeal No. 4/2019 ( Unreported).

Mr. Ngole in respect to ground number three insisted that, this ground of appeal is directly linked to Misc. Civil Application No.11/2021 and not Misc. Civil Application No. 4/2022, which is being appealed against, since the Appellant failed to prosecute his own application which would create a spectrum where the alleged illegality would be raised and this was upon his failure to present written submissions in support of the Application, the illegality cannot be ascertained at all. Therefore, the fact that proposition was dismissed for want of merit and there is no illegality alleged off, thus, the cited case of **Bukoba Municipal Council Versus Mantrac Tanzania Limited and three others** (supra) is distinguishable.

In another hand Mr. Ngole in respect to ground number four submitted that Application No. 4/2022 which was dismissed for lack of merit was in conformity with the principle established in **Waziri Msigiri vs. Kisage Ginghe Marwa** ( supra), and this was rightly upheld by the trial Court when determining the Application, he further submit that, the Appellant in said application was given a right of audience and the scheduling order was set,

it was defaulted and consequently his application was dismissed for want of prosecution.

In respect to fifth ground, the counsel for respondent contended that, the Respondent was not under any obligation to ascertain whether the setting aside of the dismissal order would prejudice its interests in the Application but rather, this would be ascertained within the parameters of the discretion of the Court as it was held in the case cited by the Appellant Counsel, drawing a view from the case of **Waziri vs. kisage Ginghe Marwa**. (Supra).

Mr. Ngole lastly, in respect to sixth and seventh grounds of Appeal, submitted that, the previous conduct of the Counsel of the Appellant in the conduct of Misc. Civil Application No. 4/2022 was not an issue in the determination of the said Application. The issue before the trial Court was failure by the Appellant and its counsel to adduce sufficient reason as to why submissions were not presented as scheduled. Mr. Ngole then concluded this appeal be dismissed for lack of merit with costs.

In rejoinder the appellant briefly insisted on what he has submitted in chief and expounded that the erroneous occurred was in the affairs of the advocates and not the Appellant. Because, firstly, the matter was an application for objection proceedings and the Appellant had at all times had legal representations. Secondly, upon institution and prosecution of the matter, the Appellant had never been personally summoned hence all the affairs of the matter were totally within the affairs of their legal representatives. Thirdly, it is upon him making follow ups that the court file was perused and it was observed that the matter was dismissed for want of prosecution. And lastly concluded that it is of the best interest of justice that the decision in Misc. Civil Application No. 04/2022 of Resident Magistrate Courts of Moshi be quashed and set aside with orders as to costs. He then added that, if the said ruling will still be left in life, the Appellant's avenue shall be to institute a fresh suit something which shall be prolonging justice, hence justice delayed justice denied.

I have considered the rival submissions of both learned advocates, in my view it has been convenient to me to assemble ground number one, four, six and seven to be determined together because in my view they deal with

the obligation of the advocate in prosecuting case, these will be discussed and decided at the end of this judgment.

In regard to the second ground of appeal, I concede with the argument of Mr. Matata on the facts of the said case of **Lin Han Yung & Another vs. Lucy Treseas Kristensen** (supra), but though in that was an application to set aside expert judgment, however I think the trial court perceived the *ratio decidendi* therein when the highest court in this land observed that;

*"We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, **cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case.....**"*

[Emphasis supplied]

Also under this ground although it was not pleaded specifically as ground, the counsel for appellant proceeded to state that by doing so to the appellant is a denial to his right to be heard which is against principle of natural justice, I have scanned the records, though it was not raised at the trial court when considering its dismissal order to be set aside which means is not fit to be discussed in this appeal because is an afterthought, it is my view the right

to be heard was exercised at the trial court, since all the time he was represented by advocate who prayed reliefs to the trial court as the record shows.

However, I must say that, 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. Also, cases will not come to an end if mandatory requirements obeying court order are not adhered to. That said, it is my opinion, the appellant excuses in lieu of the right to be heard cannot find any justification.

Stepping in the third ground of appeal, I am in agreement with Mr. Ngole and my take off is that the allege illegality is not apparent, it is upon the hearing of the alleged objection which will uplift it. The fact that the same was not investigated in view cannot be assumed that there was illegality existed. Even in the case referred by the appellant counsel of **Bukoba Muncipal Council vs. Mantrac Tanzania Limited and 3 Others** Miscellaneous Commercial Application No. 92 Of 2019 observed that illegality in attachment need to be proved. The said case went on to refer

the case of **Harilal & Co vs. Buganda Industries Ltd (1960) EA 318**,  
faced with the similar scenario and the Court held that:

*"The court **should investigate** the question of possession of the attached property and if satisfies that the property was in the possession of the objector it **must be found whether he held on his own account or trust for the judgment debtor**"*

[Emphasis supplied]

In respect to the allegation raised on fifth ground that the respondent did not show how they could have been prejudiced if the dismissal order could have been set aside, I shoulder with the argument of Mr. Ngole in this respect that the Respondent was not under any obligation to ascertain whether the setting aside of the dismissal order would prejudice his interests.

Now, back to the group of grounds seized above, I now proceed by stating that, the case of **Sadru Mangalji Versus Abdul Aziz Lalani**, (supra), I acknowledge with Mr. Ngole that the facts are different with this case at hand while in this case the counsel appear to hold brief, in the said case applicants counsel failed totally to appear when the matter was called due to sickness of running stomach, so when the case was called he was in

the toilet. Thus, in applying for setting aside dismissal order he appended the medical chit to that effect. In this case appellant counsel appeared when the date scheduling order was issued by the trial court, he did not comply, and again he appeared on the mention date and proceeded to pray for extension of time.

Moreover, in respect to the facts of the case of **Waziri Msigiri vs. Kisage Ginghe Marwa** (Supra) which the counsel for appellant has referred to bolster his three grounds of appeal above, also in my view the facts on that case are distinguishable with the facts of this case, in that case, on the date scheduled for hearing it the applicant appeared in court in the absence of his Advocate. But the advocate before the hearing date wrote a letter to the Registrar for verification and the letter was endorsed on 28th day of August, 2017 conforming that the learned Advocate for the applicant is attending a criminal session. The Judge saw the letter and realized the applicant's Advocate did not mention to whom he was appearing before. Therefore, Hon. Judge directed the client to proceed arguing his case but he could not proceed. Then, Hon. Judge decided to withdraw the application on the condition that after confirming that the criminal session was in progress then she will reinstate the application. Thus, in my opinion the *ratio decidendi*

therein cannot be used in this case which advocate for appellant is the one appeared and prayed for necessary orders.

The above differences can be substantiated as follows, according to the trial court record as it appears on 31/03/2022 Mr. Oscar Mallya learned advocate entered appearance holding brief of Mr. Dickson Matata and he was the first to address the court, for the purpose of clarity I reproduce what happened; -

**" Mr. Oscar Mallya (Adv) – I pray that the application be  
heard by way of Written  
Statement.**

**Mr. Gideon Mushi (Adv) No objection.**

**Court: W.S by applicant on 14/4/2022, Reply on 28/4/2022,  
Rejoinder if any on 9/5/2022**

**Order: Mention on 9/5/2022"**

Later on 9/5/2022 when the case came for mentioned as ordered, again Mr. Mallya appeared holding brief of Mr. Matata and had this to say;-

*"Your honour considering the facts that the records were not clear in regards who is to submit first and due to the fact that advocate who is in conduct if the case is sick and he did not*



*avail me with the proper records, the things which led to the confusion and prayers of the matter to proceed bearing by filing written submissions. We pray for extension of time to file our submission. The other thing is that, the respondent did not admit objection proceedings since the matter ought to have been filed at Kisumu Rm's court. Your honour if it may please you I pray for extension of time to file submission in regards to objection proceedings. That's all."*

Before I proceed with above, I must insist that. It is a trite law, court orders should be respected and complied with, Court should not condone such failures. To do so is to set a bad precedent and invite chaos. This should not be allowed to occur. Always court should exercise firm control over proceedings. (See the case of **Tanzania Breweries Ltd v. Edson Dhobe & 19 Others**, Misc. Civil Application No. 96 of 2000 (HC-unreported).

According to the above transpired in the trial court record, first, it appears with no doubt that Mr. Mallya was holding brief with instruction to proceed in all two occasions he appeared at the trial court, that is why he sought the above reliefs, second the scheduling orders above stated by the court was very clear who was required to file first written statement, obvious is the applicant and in case of objection is the objector, with respect, the experienced advocate cannot say he was misinformed that the objector is

the applicant in objection proceeding. Third he did not prove by the evidence his allegation that Mr. Matata was sick as ground when he prayed for extension of time on 9/5/2022.

Moreover, in my view the counsel holding brief with instruction to proceed must not be taken lightly, this is a serious business, because he or she steps in the shoes of the advocate with instruction from the client, therefore he must be acquainted with the case in its entirety and diligently to the proceeding. Thus, anything happened to the contrary court cannot rely on any defense that fellow advocate who gave instruction to him has failed to cooperate due to any reasons unless there are special circumstances, otherwise it would be mockery of justice.

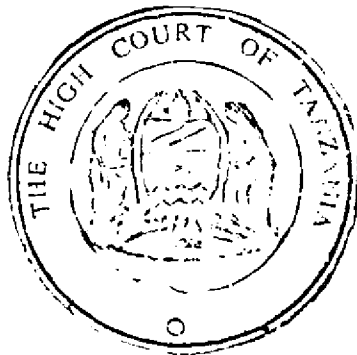
In this matter according to scheduling order which was not complied with and the medical chit showing the date when Mr. Matata was sick as attached on affidavit as evidence during the application to set aside, in my view it was inadvertence which cannot be condoned by this appellate court. Moreover, in respect to appellant's counsel previous conduct and steps he took after application dismissed, it is my considered opinion both does not follow under special circumstances as I have endeavored above. Having

observed so, all reasons stated by the appellant therefore does not amount to good cause. Thus, all grounds fail.

On the premises and from what I have endeavored to discuss above, this appeal is devoid of merits, is accordingly dismissed with costs forthwith.

It is so ordered.

**DATED at MOSHI** this 5<sup>th</sup> day of April, 2023.



A handwritten signature in black ink, appearing to be "A. P. KILIMI", is written over a horizontal line.

**A. P. KILIMI**  
**JUDGE**

**Court:** - Judgment delivered today on 5<sup>th</sup> day of April, 2023 in the presence of one Director of appellant, Advocate for Appellant and Respondent absent.

**Sgd: A. P. KILIMI**  
**JUDGE**  
**5/04/2023**

**Court:** - Right of appeal explained

**Sgd: A. P. KILIMI**  
**JUDGE**  
**5/04/2023**