

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 150 OF 2023

(Arising from Civil Case No. 166 of 2020)

ALLEN MAGESA T/A ALLCOT TANZANIA.....APPLICANT

VERSUS

DARCO NEGOSE SA.....1ST RESPONDENT

CRDB BANK PLC.....2ND RESPONDENT

RULING

Date of last Order: 3th April, 2023

Date of Ruling: 19th May, 2023

E. E. KAKOLAKI, J.

Pursuant to Order VIII Rule 20(2) of the Civil Procedure Code, [Cap. 33 R.E 2019, (the CPC), the applicant is seeking for an order to set aside the order striking out his Written Statement of Defence in Civil Case No. 166 of 2020 dated 13th October, 2022, when the case was called for 1st PTC. The application is supported by his own affidavit and the affidavit of his advocate one Ms. Jacqueline Rweyongeza, disclosing two reasons for non-appearance in Court on 13th October, 2020, as his sickness and appearance of his advocate before the superior Court on that date.

The application is opposed by the 1st respondent through the counter affidavit sworn by Alfred Rweyemamu, in that no reasons disclosed to warrant this Court grant the order sought. As for the 2nd respondent no counter affidavit was filed since she was conceding to the application.

Disposal of the application took the form of oral submissions in which, Mr. Peter Majanjala, learned advocate appeared for the applicant, while Mr. Alfred Rweyemamu and Mr. Kamanda Fundikila, represented the 1st and 2nd respondents respectively.

In support of the application Mr. Majanjala adopted the affidavits of applicant and his advocate Ms. Jacqueline Rweyongeza and proceeded to submit that, the reasons as to why the applicant defaulted appearance in Court on 13th October, 2022 were two. One, that, the applicant fell sick while at Morogoro as deposed in paragraph 2 of his affidavit and the annexed medical chit annexure JR1 hence unable to attend court session in person. And that, when attempted to reach the 2nd respondent's advocate to hold brief of his advocate the attempt failed and that fact is not disputed by the 1st respondent in her affidavit. Secondly, he submitted, Ms. Jacqueline Rweyongeza, applicant's advocate on that date was appearing before the Court of Appeal sitting at Moshi as evidenced in the summons annexed to

paragraph 3 of Jacqueline Rweyongeza's affidavit. As the law allows this Court under Order VIII Rule 20(2) of the CPC to set aside its order upon the terms it considers fit and since under Order XVII Rule 1(3) of the CPC, appearance of the advocate in the superior Court constitute a good ground for adjournment, this Court be pleased to find the applicant has shown sufficient reasons for his absence in Court on the date when his WSD was struck out and proceed to grant the application by setting that order aside. In rebuttal Mr. Rweyemamu argued that, the reasons of sickness of the applicant and appearance of his advocate in the superior court were reasons fit to be raised on the date when the case was set for 1st PTC and not now in which they remain to be afterthought. He said the law firm in which Ms. Rweyongeza comes from, being constituted with a number of advocates ought to have asked one to hold her brief. As such he argued, she had a duty of informing the Court in writing prior to her travel to Moshi to attend the Court of Appeal session in which she failed to do, since the summons was not an emergency for being issued 14 days prior. To him that was negligence of the advocate which in law does not constitute good cause to justify her non-appearance in Court. In view of the above submission Mr.

Rweyemamu, implored this Court to dismiss the application with costs for want of merit.

For the 2nd respondent as hinted above, Mr. Fundikila notified the court that she was conceding to the application. In rejoinder, Mr. Majanjala, countered the submission by the 1st respondent submitting that, the two reasons advanced by the applicant for his absence in court were not afterthought but pure facts which explain why his advocate and himself failed to attend in Court on that date. He added that, should this court find non-appearance of the applicant to be of his advocate's mistake, then that should not affect his substantive right of defending his case. He otherwise reiterated his submission in chief and the prayers thereto made.

I have carefully considered the fighting submissions by the parties as well as perused the both affidavits and counter affidavit by the 1st respondent. Admittedly under Order VIII Rule 20(2) of the CPC, this Court has discretionary powers to set aside its order of 13/10/2020 striking out the applicant's WSD, upon him demonstrating good reasons which the Court considers to be just. The said Order VIII Rule 20(2) of the CPC provides:

(2) An order made by the court in the absence of a party concerned or affected by the order may be set aside by the

*court, on the application of that party within fourteen days
from the date of the order, on such terms as it considers just.*

In discharging his duty of demonstrating good reasons for his non-appearance in court on 13/10/2020, the applicant advanced two reasons of his sickness while in Morogoro and appearance of his advocate before the Court of Appeal at Moshi on that date, the reasons which Mr. Rweyemamu says are afterthought as ought to be raised on that date and not now. To start with sickness of the applicant the same is supported by medical chit as annexure AM1 to paragraph 2 of applicant's affidavit, in which the 1st respondent terms it an afterthought in paragraph 3 of the counter affidavit on the ground that, there are two advocates who have been appearing in court for the applicant and could have appeared on the date fixed for 1st PTC. It is true as per the Court record in the main suit that, at two occasions different advocates appeared for the applicant apart from Ms. Rweyongeza who is legally representing him. Much as there is no evidence proving that the applicant withdrew instructions from her, I find his sickness to be genuine reason for his failure to appear in Court in person in the absence of his advocate, despite of fruitless efforts to ask the 2nd respondent's advocate to hold brief of his advocate. As regard to appearance of Ms. Rweyongeza before the Court of Appeal at Moshi on 13/10/2022, being alive to the

provision of Order XVII Rule 1(3)(c) of the CPC, I would find it to be a good reason for her non-appearance had the said summons been communicated to the Court in writing or through another advocate holding her brief, prior to the date scheduled for 1st PTC as rightly submitted by Mr. Rweyemamu, since she owed that duty to the Court. Since she failed to do so I am in agreement with Mr. Rweyemamu that her conduct constituted a mistake or negligence and lack of diligence in prosecuting the case against her client/applicant. It has been held by courts in a number of cases that advocate's mistake or negligence does not constitute good cause for allowing performance of certain action. See the cases of **Umoja Garage v. National Bank of Commerce**, [1997] TLR 109, **William Shija Vs. Fortunatus Masha** (1997) TLR 213 and **Omari R. Ibrahim Vs. Ndege Commercial Services LTD**, Civil Application No 83/01 of 2020 (CAT-unreported). In view of the negligence and lack of diligence shown by the applicant's advocate, I would have found the application is lacking in merit but for the applicant's sickness which is justified I refrain from so doing. I do so as health matters when sufficiently established have been held to constitute good cause, on the grounds that in most cases, are not the choice of human being, hence a blame cannot be shouldered on the party when they strike. See the case of

Emmanuel R. Maira Vs. The District Executive Director, Bunda District Council, Civil Application No. 66 of 2010 (CAT-unreported).

In the event, this court is satisfied that applicant has demonstrated sufficient and justifiable reasons for non-appearance in Court on the 13th October, 2022 when the main suit was set for 1st PTC. This application is therefore allowed as the order of this Court in Civil Case No. 166 of 2020 dated 13th October, 2022, striking out applicant's Written Statement of Defence is hereby set aside and the said WSD restored.

Costs be in the cause.

It is so ordered.

DATED at Dar es salaam this 19th May, 2023.



E. E. KAKOLAKI

JUDGE

19/05/2023.

The Ruling has been delivered at Dar es Salaam today 19th day of May, 2023 in the presence of Mr. Alfred Rweyemamu ,advocate for the applicant, Mr. Kamanda, advocate for the 1st respondent, Mr. Peter Majanjala, advocate for the 2rd respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
19/05/2023.

