

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA REGISTRY

AT IRINGA

MISC. CIVIL APPLICATION NO. 42 OF 2022

*(Originating from Misc. Civil Application No. 5 of 2022 from the
High Court of Tanzania at Iringa)*

BAHATI MATIMBA APPLICANT

VERSUS

JAGRO ENTERPRISES LTD RESPONDENT

RULING

Date of Last Order: 09.05.2023

Date of Ruling: 19.05.2023

A.E. Mwipopo, J.

This is an application for setting aside the dismissal order and restoration of Misc. Application No. 5 of 2022, which was dismissed for want of prosecution. The application was preferred under Order XLIII Rule 2, Order IX Rule 6(1) and Section 95 of the Civil Procedure Code Act, Cap. 3 R.E. 2019. The application is made by chamber summons supported by an affidavit of the applicant's advocate, Cosmas Kishamawe. The applicant is praying for the following orders:-

- 1. That this Honourable Court be pleased to set aside the dismissal order dated 06.10.2022 against a Misc. Civil Application No. 05 of 2022.*
- 2. That this Honourable Court be pleased to order the trial to proceed between parties.*
- 3. Costs of this application be provided for.*
- 4. Any other relief as may be deemed just to grant.*

The respondent filed a counter affidavit affirmed by Maulid Khamis Issah, its managing director, in opposition to the application.

In this case, the applicant was represented by Mr. Cosmas Kishamawe, a learned advocate, whereas Mr. Antony Mwashubila, a learned advocate, represented the respondent. The application was heard by way of written submissions.

It was the applicant's submission that he filed application No. 5 of 2022 in this Court seeking the leave to appeal to the Court to Appeal against the judgment of this Court delivered by Hon. Mlyambina, J., on 15.12.2021 in Civil Appeal No. 10 of 2019. The application was before Hon. Utamwa, J., as he then was. The Court ordered the application to be disposed of through written submissions. The advocate holding brief for the applicant's counsel informed the applicant's advocate that the submission in chief was scheduled

to be filed on or before 05.05. 2022 and a reply be on or before 18.05.2022, and a rejoinder, if any, will be filed before 25.05.2022. The applicant's advocate filled his submission on 05.05.2022, but when a matter came on for mention, they were informed by this Court that the submission in chief was filed out of time. Instead of filling the same on or by 04.05.2022, the submission was filed on 05.05.2022. The counsel said that he did not intend to file the submission in chief out of time. He was unaware of the schedule ordered by the Court as he was absent when this honourable Court made the schedule. Advocate Omary held his brief when the Court scheduled the filing dates of written submissions but advocate Omary gave him the wrong date for filing submission in chief. The application was dismissed for want of prosecution because a delay in filing a written submission is a failure to prosecute or defend the matter in Court.

The applicant said he expected this honourable Court to consider the evidence found in the applicant's affidavit and decide the matter on merit instead of dismissing it for want of prosecution for failure to file submission in chief. To support the argument, he cited the case **of East African Cables (T) vs. Spenncon Service Limited**, Misc. Application No. 61 of 2016, Court of Appeal of Tanzania, at Dar es Salaam, (Unreported), acknowledged

in the case of **Stephen Ngalambe vs. Onesmo Ezekia Chaula and Songea Municipal Council**, Misc. Land Application No.5 of 2022, High Court of Tanzania at Songea, where it was held that:-

"It is improper to dismiss an application whose evidence forms part of the court records."

The Court was supposed to consider that affidavits are substitutes for oral evidence, as stated in the cases he cited above. The applicant's failure to honour the schedule ordered does not mean in any way to disobey the order of this Court. Instead, it happened due to wrong information supplied to the applicant. The Court has to set aside the dismissal order, restore the dismissed application and determine it on merit.

In reply, the respondent submitted that what the applicant has abused the court process and failed to prosecute his case. The applicant was supposed to apply for the leave to file his submission out of time and not take the law into his hand by filing his submission out of time. The respondent was dragged into the applicant's trap by filling the reply submission without observing the applicant's non-compliance with the court's order. The advocate holding brief for the applicant's advocate informed the Court that he has instruction from the advocate of the applicant

to proceed. It was agreed by both counsels that the hearing of this application be argued by way of written submissions. The Court ordered the application hearing to be by way of a written submission, and a schedule was made accordingly.

Regarding the cited case of **East African Cables (T) Limited versus Spencon Service Limited**, (supra), the respondent said that the principle that it is not proper to dismiss an application whose evidence forms part of the court records was misconceived by the applicant. The affidavit is one of many evidence to be adduced in the Court. The applicant should comply with the schedule of the Court to prosecute their case.

The respondent further submitted that the applicant has not advanced sufficient cause as per Order IX rule 6(1) of the Civil Procedure Code Act, which provides that for the matter to be restored the applicant must show sufficient cause as to why he did not enter an appearance or prosecute his case. It is a settled principle of law that the term sufficient reasons are not defined in our legislation as it depends on the circumstances of each case. In the case of **Fred Robi Chacha vs. Lidya Marwa Kitengwe**, Civil Appeal No.16 of 2022, High Court of Tanzania, Mwanza Registry, (unreported), quoted with authority from the case of **Felix Tumbo Kisima vs. TTCL**

Limited and Another, Civil Application No.01 1997 (unreported), where it was held that:-

"It should be observed that the term "sufficient cause" should not be interpreted narrow but should be given a wide interpretation to encompass all reasons or causes which are outside the applicant's power to control or influence, resulting in the delay in taking any necessary step."

From the cited case above, the applicant was supposed to give sufficient reasons for failure to prosecute his case. This position was illustrated in the case of **Jamal S. Mkumba and Abdallah Issa Namangu & 359 Others vs. Attorney General**, Civil Application No. 240 of 2019, Court of Appeal of Tanzania, at Dar es Salaam, (unreported), where it was held that:-

"In the end, we find and hold that the appellant has neither shown the sufficient cause for the non-appearance nor a point of law of sufficient importance to persuade us to exercise our discretion to restore the appeal, we find this application with no iota of merit and dismiss it with costs."

Relying from the reasons in the case mentioned above, the respondent was of the view that the applicant has failed to advance any sufficient cause

for the restoration of their application. What was stated by the applicant is an afterthought.

Having read the respective submissions by the parties, the issue to be determined is whether the applicant has demonstrated sufficient reasons to warrant this Court to set aside its dismissal order and restore the dismissed application.

For the dismissal order to be set aside, it must be proved that the applicant was prevented from prosecuting his case by sufficient cause. Order XLIII Rule 6 (1) of the Civil Procedure Code Act, Cap. 33 R.E. 2022 provides that where a suit is wholly or partly dismissed for non-appearance, the applicant/plaintiff shall be precluded from bringing a new case regarding the same cause of action. Still, he may apply for an order to set the dismissal order aside and, if he satisfies the Court, that there was sufficient cause for his non-appearance when the suit was called on for hearing. In the case of **Sadru Mangaiji vs. Abdul Aziz Lalani and 2 Others**, Misc. Commercial Application No. 126 of 2016, High Court of Tanzania, Mwanza Registry, (Unreported), it was Court held that:-

"It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, he has to

furnish the court with sufficient reasons for non-appearance when the suit was called on hearing.”

Also, in the case of **Mwidini Hassani Shila and 2 Others vs. Asinawi Makutika and 4 Others**, Land Appeal No. 04 of 2019, High Court (unreported), it was held that:-

“It is trite law that powers to set aside dismissal order are in the discretion of the court, however, the applicant should furnish sufficient reasons to enable the court exercise its discretionary power.”

In the application at hand, the applicant's first reason for failure to comply with the filing schedule order of this Court is that advocate holding for his advocate's brief did not adequately inform his advocate on the date of filing the submission in chief. The 2nd applicant's reason is that he filed a chamber summons and affidavit, which is the evidence. The Court was supposed to consider the evidence from the affidavit in the record and determine the matter on merits instead of dismissing it for want of prosecutions.

The 2nd reason stated by the applicant has no merits. As discussed above, the law clearly states that the Court has the discretion to set aside its dismissal order for non-appearance and restore dismissed application where the Court is satisfied that there was sufficient cause for applicant's non-appearance when the suit was called on for hearing. Sufficient cause for

non-appearance is the only acceptable reason for the Court to exercise its discretion to set aside dismissal order for respective non-appearance. The dismissal of the case for non-appearance is provided by the law. The remedy where the party who instituted the case fails to appear on the hearing date is to dismiss the case for failure to litigate/prosecute.

The first reason for the application to set aside a dismissal order is that the applicant's advocate was given the wrong date by the advocate holding his brief. The applicant is saying that his advocate was misinformed by the advocate who held his brief on the date for filing the submission in chief. It is deposed in paragraphs 7 to 11 of the applicant's affidavit that the applicant's advocate was informed by the advocate holding his brief that the submission in chief was to be filed by or on 5.5.2022, reply submission be filled by or on 18.05.2022 and rejoinder, if any, be filled by or on 25.05.2022. He filed the written submission in chief on 05.05.2022, but the same was found to be filed out of the time scheduled by the Court.

The affidavit of advocate Omary Hatibu who held a brief of the applicant's advocate was attached to support the deposition. In his affidavit, advocate Omary Hatibu deposed that he did not hear well the filling date of submissions ordered by this Court, and he informed the applicant's advocate

that the submission in chief was supposed to be filed by 05.05.2022. As a result, the applicant's submission in chief was filed on 05.05.2022 instead of 04.05.2022, the date which Court ordered. The reason stated by the applicant is reasonable, and I find it to be a good reason for the applicant's failure to file submission in chief within the time ordered by this Court. As the advocate holding brief of the applicant's advocate deposed to be the cause for the failure of the applicant to file his submission in chief within time, it proves that the applicant was not negligent in filing the submission out of the scheduled date ordered by the High Court.

Therefore, the application is found to have merits, and I allow it. The dismissal order made by this Court on 06.10.2022 in Misc. Civil Application No. 05 of 2022 is set aside, and the case is restored accordingly. Each party has to bear its own costs. It is so ordered.



A handwritten signature in blue ink, appearing to read "A.E. Mwiipo", written over a horizontal line.

A.E. MWIPOPO

JUDGE

19/05/2023