

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
ONE STOP JUDICIAL CENTRE AT TEMEKE
CIVIL APPEAL NO. 42 OF 2022

(Originating from Misc. Civil Application No.02 of 2022 at Kigamboni District Court)

GAIL HILLARY MOLLEL..... APPELANT

VERSUS

PETRO SMITH JESHI..... RESPONDENT

JUDGMENT

Date of last order: 27/02/2023

Date of Judgment: 29/05/2023

OMARI, J.

The Appellant, one Gail Hillary Mollel is appealing against the decision of Kigamboni District Court dismissing her Application to set aside the dismissal order in Matrimonial Cause No. 5 of 2021. Briefly, the Appellant filed a matrimonial cause against the Respondent one Petro Smith Jeshi, which was dismissed for non-compliance with the court's order. Being dissatisfied the Appellant filed an Application to set aside the dismissal order in Misc. Civil Application No.02 of 2022 in which she was not successful hence, this appeal on the ground that the District Court erred in law and fact when it dismissed

the Application for restoration of Matrimonial Cause No. 5 of 2021 which was uncontested.

At the hearing before this court the Appellant was represented by Paul Emmanuel Kisabo, learned Advocate while the Respondent was represented by Kephass Mayenje also learned Advocate.

Submitting for the Appellant, Mr. Kisabo submitted that in Misc. Application No. 02 of 2022 the Appellant sought for a restoration order of Matrimonial Cause No. 05 of 2021 which was dismissed in the presence of the Appellant on the allegation of noncompliance with the court order of paying TZS 200,000. The said order was issued on the 04 March, 2022 when the Appellant's counsel fell ill and vacated the court premises.

Mr. Kisabo submitted further that in that Application, the Respondent filed a Counter Affidavit, a notice of a Preliminary Objection and submissions opposing the Application that the District Court was *functus officio*. In addition to this the notice had an objection with regard to the competence of the person who drew and filed the documents. The person who drew them was disqualified as the name was not in the Roll contrary to section 39(1) (a)-(c) and section 41 of the Advocates Act CAP 341 RE 2019. The

District Court subscribed to the Appellant's objection and expunged the filed documents in opposition of the Application. According to Appellant's advocate, since the documents were expunged the Application remained uncontested, however, the court dismissed the Application for restoration on the ground that it was *functus officio*.

The learned Counsel referred this court to the Black's Law Dictionary, 11th Edition whereby the term *functus officio* is defined and explained that in order for the court to be *functus officio* it must have fully and finally determined the matter before it on merit. The Petition for divorce in Matrimonial Cause No. 05 of 2021 was not finally heard on merit. He asserted that the Petitioner closed her case, and the Respondent had yet to commence hearing. Moreover, the order to pay TZS 200,000 is executable in the same manner as any other civil suit as per Rule 34 of the Law of Marriage Act, (Matrimonial Proceedings Rules) G.N. No. 264 of 1997.

Mr. Kisabo asserted that since the Application before the District Court was uncontested the remedy was to allow the Application as it was held in case of **William Kegege v. Equity Bank and another**, Civil Application No. 24/08 of 2019, Court of Appeal of Tanzania, which is a binding decision. He also went on to add that an Application for restoration may be made before

the same court that dismissed the case. The counsel submitted further that the Appellant was not heard on the said objection contrary to Article 13A of the Constitution. In the case of **Oliver Kabakobwa v. Akiba Commercial Bank (T) Ltd and another**, Land Appeal No. 12 of 2021 the High Court quoting the case of **Elikana Bwenda v. Sylvester Kuboko**, Civil Appeal No. 7 of 2020, High Court held that the said decision held in violation of the constitutional right to be heard cannot be allowed to stand even if it is the same decision which would have been reached had the parties been heard. He emphasized that in the present case the Appellant was not heard on the objection of *functus officio* but on the competence of documents filed by Mr. Mayenje. Basing on his submission the counsel for the Appellant prayed that; the appeal be allowed, the court to quash and set aside the decision of the lower court and remit back the file to the trial court or this court to conduct hearing on the dismissed case. He also prayed for costs to be borne by the Respondent and any other relief the court deems fit and just to grant.

In reply to the submission, it was submitted by the Respondent's advocate that the submission by the Appellant's counsel does not support the ground of appeal in the Memorandum of Appeal filed to this court. He contended that the submission is meritless and should not be considered. The counsel

maintained that even uncontested applications can be dismissed as there is no law compelling the court to grant an uncontested application, it depends on the circumstances of each case. Mr. Mayenje emphatically stated that the court has power to determine an application notwithstanding that it was uncontested.

As regards the submission that the Application was dismissed for noncompliance of the court order, Mr. Mayenje submitted that at page 8 of the trial court's Ruling it can be seen that after expunging the documents the trial magistrate went on and determine the matter. The Appellant was seeking to set aside the order of the trial court for the appellant to pay the costs before the date of hearing. The trial magistrate stated specifically at page 8 that the Appellant was ordered to pay the costs but disobeyed. She did not obey the order that is why the trial magistrate dismissed the Application. That order had a time limit and since the Appellant did not comply the trial court could not vary its own decision by setting aside the order.

Mr. Mayenje submitted further that, the duty to obey the court's orders is essential as it protects the dignity of the courts and confidence of the courts. It also promotes obedience of the procedure and justice to the parties. Thus,

if the parties are to act in total disregard of court orders, then the court's business will be rendered uncertain and that kind of situation is not good for the administration of justice. Therefore, disobedience of court orders should naturally draw sanctions.

With regard to the court being *functus officio* he responded that this was not a ground for appeal and it has no relation on the ground filed by the Appellant thus, should be disregarded by this court. He added that the Appellant should have confined themselves to the ground of appeal.

On the issue regarding payment of costs being executable like other costs, he stated that the submission is misleading the court because the Appellant is challenging the Ruling to set aside the dismissal order and not the Ruling that granted the said costs. Therefore, the submission is also not in tandem with the ground of appeal.

Contesting the applicability of the cases cited by the Appellant's advocate, Mr. Mayenje argued that they are distinguishable in the sense that the established facts and circumstances are different from the appeal at hand especially the **William Kegege v. Equity Bank and another** (*supra*). In the current appeal there was deliberate disobedience of the court's order by

the Appellant, thus, the case cannot be applicable. He claimed that at page 17 of the typed judgement it speaks of peculiar circumstances which means it is different from this appeal.

On the question that the notice of the Preliminary Objection was expunged, Mr. Mayenje submitted that pages 7 and 8 of the criticized Ruling speaks clearly that no Preliminary Objections were considered and determined by the trial court. There is nowhere showing directly that the court considered the objections raised by the Respondent's counsel.

As for the right to be heard, the counsel for the Respondent submitted that there is no ground of appeal in respect of the right to be heard. Also, the trial court when dismissing the Application for setting aside the dismissal order was considering the Affidavit and submissions of the Appellant and the trial magistrate was considering the application on merit when she arrived at the decision. Therefore, **Oliver Kabakobwa v. Akiba Commercial Bank (T) Ltd and another** (*supra*) supports neither the ground of appeal nor the submission on the issue of the right to be heard which are in any case is not a ground of appeal, it was raised when making submission and should therefore not be considered.

Regarding the prayers the counsel objected and submit that there is a hurdle which is the order of the trial court for the Appellant to pay costs. It had a time limit. The Appellant did not obey or challenge it thus this prayer should not be granted as well as other prayers. In conclusion Mr. Mayenje submitted that this appeal is meritless and should be dismissed with costs.

In the rejoinder Mr. Kisabo submitted that the Respondent has not legally objected his submission as there is no legal authority which has been submitted. He stated that the counsel has just spoken mare words therefore their Application for restoration should be heard on the same court to ensure that the court reflects its decision. Regarding the respondent's submission that the court order to pay costs was never challenged he submitted that it has been challenged in Misc. Application No. 02 of 2022 which is the subject of this Appeal.

On the right to be heard not being the ground of appeal he submitted that the said submission is built up on the ground of appeal and is connected to the *functus officio* ground used by the court to dismiss the Application. Also, the order to pay the costs has not been complied with because there is an appeal before this court.

Having heard and considered the arguments by the counsels from both parties in their submissions, the main issue to be determined by this court is whether the Appeal is meritorious.

It is seen in the record that the Appellant did indeed file Matrimonial Cause No. 05 of 2021. The same was dismissed for noncompliance by the Appellant to pay costs to the Respondent. The District Court also dismissed the Appellant's Application for setting aside the dismissal order vide Misc. Civil Application No. 02 of 2022. As stated above in this Appeal the Appellant is seeking to challenge the dismissal of the Application to set the dismissal order.

The ground of appeal as argued by the Appellant's counsel centres on the contention that the District Court made an erroneous decision by dismissing the Application on the basis it was *functus officio*. The question for this court is whether the District Court's decision to dismiss the said Application for restoration of Matrimonial Cause No. 05 of 2021 was correct or otherwise.

It is not disputed that the Misc. Civil Application No. 02 of 2022 was seeking five orders *inter alia*:

1. That this court set aside the dismissal order in matrimonial cause No. 05 of 2021 which was issued on 11 March, 2022;
2. That if the above requested order is answered in the affirmative, Matrimonial Cause No. 5 of 2021 to be restored; and
3. That this court to quash the order of paying Tshs. 200,000 to the Respondent issued on 04 March, 2022.

It is the noncompliance with the 04 March, 2022 order for the Appellant/advocate to pay the Respondent TZS 200,000 that spiralled into the 11 March, 2022 dismissal order. In short, the Petitioner or advocate was ordered to pay the costs on or before 11 March, 2022 which was the next date set for hearing of the Petition, that is Matrimonial Cause No. 5 of 2021. The advocate was absent on the said 11 March, 2022, albeit the Appellant being present in court, however the order to pay the TZS 200,000 was not complied with, which was submitted to be disobedience to a court order by the Respondent and agreed to by the trial court which jealously guarded its powers by giving a thorough analysis the importance of obeying court orders and dismissed the said case.

In its decision for the Application for restoration, the said court was of the view that the Application stems from dismissal of Matrimonial Cause No. 05

of 2021 due to the Appellant's failure to comply with the court's order thus, the matter was determined to the end, consequently according to the trial magistrate the court became *functus officio*. The trial court relied on the holding of the case of **V.G.M Holdings LTD., RE 7** (*sic*) and stated:

'Reliance is placed on the English decision of V.G.M Holdings LTD., RE 7 wherein it was held: "Once a Judge has made an order which has been passed and entered, he becomes functus officio and cannot thereafter vary the terms of his order and only a higher court, can vary it" I find it helpful to quote substantially from Black's Law Dictionary 6th Edition at page 673 as it follows: "having fulfilled the function, discharge the office, or accomplished the purpose and thereafter no further force or authority" Dismissal order being final, the court had completed its purpose.'

In the principle of *functus officio*, when a court determines a matter by rendering a decision, it lacks any authority to re-examine it. This suggests that once a court has determined a matter, there is no further official or legal authority that allows it to further have mandate over it. The Respondent's counsel was in agreement with this view as he argued against this Appeal.

That said, before delving into whether the court was in deed *functus officio*, thus, right in dismissing the Application for restoration. I will comment on two things. First, I seek to differ from the Applicants assertion that since the

Application was uncontested then the court should have granted the same. I will not let this detain me since it has already been decided many times by this court, even where the Respondent does not contest the application it is still the duty of the Applicant to argue his or her case, see for example **Orion Hotel (T) Limited v. Frank Charles Mfuko**, Misc. Labour Application No. 59 Of 2021, High Court (unreported) and **Sakina Issa V. Rashid Juma**, Misc. Civil Application No. 55 of 2021, High Court (unreported).

The second is on the orders made by the District Court in Matrimonial Cause No. 5 of 2021 for the Appellant or her advocate to pay TZS 200,000 as costs to the Respondent for occasioning an adjournment and later making an order to dismiss the matter. It is my considered view that it was not proper for the District Court to dismiss the matter, over the non-payment of costs which were awarded to the Respondent and were to be borne by the Appellant or her Advocate for the Advocate's nonappearance therefore occasioning an adjournment; while the Appellant was in court. The Appellant was also in court on the subsequent date set for hearing which was also the last day for the payment of the said costs. While I am of the view that courts should jealously ensure that court orders are adhered to and respected; this should not be done in a manner that occasions injustice to either party. In **Richard**

Mipawa Manara v. FINCA Tanzania LTD. and Mashoka Auction Mart,

Land Appeal No. 51 of 2021, this court held:

'It is upon considering that the party has not advanced good cause for non- appearance where the issue of compliance to the court's order arises'

Further to that this court has in numerous occasions stated that an Applicant should not be punished for an advocate's negligent acts or incompetence see for example **Judith Emmanuel Lusohoka v. Patory Binyura Mlekule & Others**, Misc. Land Case Application No. 74 of 2018, High Court (unreported) and **Christian Kalinga v. Paul Ngwembe**, Misc. Land Application No. 26 of 2020, High Court (unreported). The Court of Appeal in **William Getari Kegege v. Equity Bank and Another**, Civil Application No. 24/08 of 2019, (unreported) also stated that a litigant should not be made to suffer through the mistake of an officer of the court connected with the administration of justice.

The order for costs was a result of nonappearance of the Appellant's advocate, who also failed to appear on the next date set for hearing. The court could have either ordered an adjournment; being guided with the provisions of Order XVII Rule 1 (3) (d) of the CPC as the time between the date the order was effected, almost 8 days, is rather a short period for the

Appellant to get another advocate, if there was need for her to do that, or it could ordered payment of the said costs before proceeding with the hearing, as the justice of the matter would have required, since the Appellant was present in court.

All the same, it chose to dismiss it; which brings us to the question of whether the District Court was *functus officio* when it was sought by the Appellant to consider her Application to set aside the dismissal order so that Matrimonial Cause No. 05 of 2021 can be restored. An application for setting aside a dismissal order is to be made before the same court that made the said order. The test the court has to apply is provided for under Rule 3 of Order IX of the CPC which states:

*'Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or **he may 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 day for proceeding with the suit.***'
(Emphasis supplied)

From the above, it is clear that an Application for setting aside the dismissal order is in the purview of the court to consider and upon being satisfied that there is good cause. Since the root cause of the dismissal is non-appearance

then the court could not have adjudged itself as *functus officio* without considering the Appellant's Application and finding out whether there was or otherwise good cause. The matter was not dealt with conclusively. The court is not *functus officio* as it can look at the dismissal order and if good reasons are advanced it should be able to set aside the dismissal order.

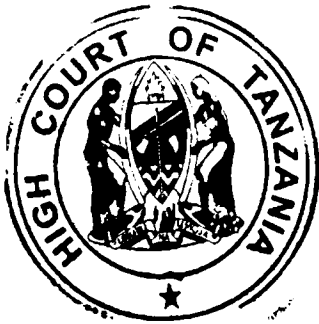
I also find it opportune to add that in this case the dismissal was not occasioned by the inadvertence or inactiveness of the Appellant, she was in court on both occasions it was the Advocate who was absent the second time and had to vacate the court premised the first time; thus, occasioning the adjournment and costs thereof.

Having considered all the above the inevitable conclusion is that I allow the Appeal and also exercise my revisional powers, consequently:

1. The proceedings and judgment of the District Court in Civil Application No. 2 of 2022 are quashed and set aside;
2. The District Court proceed with the proceedings for Matrimonial Cause No. 05 of 2021 from where it stopped preferably before a different Magistrate of competent jurisdiction and in accordance with the law;

3. Vary the order of the District Court for payment of TZS 200,000 by the Petitioner/Advocate to only read Advocate.
4. Being this Appeal has roots in a matrimonial matter, I make no orders as to costs.

It is so ordered.




A.A. OMARI

JUDGE

29/05/2023

Judgment delivered and dated 29th day of May, 2023.


A.A. OMARI

JUDGE

29/05/2023