

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM SUB REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 197 OF 2021**

**MWAJUMA MTUNZI ..... APPLICANT**

**VERSUS**

**JANETH NICHORAUS ..... RESPONDENT**

**RULING**

**S.M. MAGHIMBI, J.**

The application beforehand was lodged under the provisions of Order XXXIX Rule 19 of the Civil Procedure Code [Cap 33 R.E.2019] ("the CPC"). The applicant is moving this court to set aside a dismissal order in respect of Civil Appeal No. 100 of 2019, an order dated 30<sup>th</sup> March, 2021. The application was supported by an affidavit dated 23<sup>rd</sup> day of April, 2021 deposed by Ms. Maria Mushi learned advocate representing the applicant.

The respondent opposed the application by counter affidavit deposed by the respondent herself on 14<sup>th</sup> of July, 2021. The application was disposed by written submissions, the applicant's submissions were drawn and filed by Ms. Maria Much, learned advocate and the respondent's submissions were drawn and filed by the respondent in person.

In the affidavit in support of the application and submissions in support thereof of the applicant submitted that on the dates which the case was called for hearing, she was admitted in the hospital. Further that on the 24<sup>th</sup> February, 2020 the advocate for the applicant fell sick and was admitted for

almost two weeks due to miscarriage. She was discharged on the 10<sup>th</sup> March, 2020 while the submissions in chief were to be filed on 05<sup>th</sup> day of March, 2020 hence she was out of time and could not file without a court order. The Applicant attached the copy of discharge form as annexure APP-2 which is medical report, to support her averments.

Ms. Maria went on submitting that the non – appearance was for a good cause. She urged the court to grant the application on the ground that if the appeal is not restored, then justice will not be done on the applicant. She went on submitting that sickness is a good ground as it is not a human choice, but a cause which human have no control. She supported her submissions by citing the case of **Emmanuel R. Maria Vs The District Executive Director of Bunda, Civil Application No. 66 of 2010** (unreported) where the same position was held. She went on submitting that on the 30<sup>th</sup> March, 2020 when the matter came for hearing, it was Advocate Francis who prayed for hearing of the appeal to be by written submissions because she lost her brother. Advocate Francis appeared in court holding her brief and his prayer for leave to file submissions was denied and the case was dismissed for want of prosecution. She hence prayed that this application be granted.

In reply, the respondent brought to the attention of the court, the applicant's tendency to delay the matter because she is the one in possession of the money in dispute which has been in her (applicant's) custody for over seven years. She then argued that the order of the court in filing written submissions have to be counted from the date that the order was last pronounced. Her logic was that upon pronouncement of the schedule of

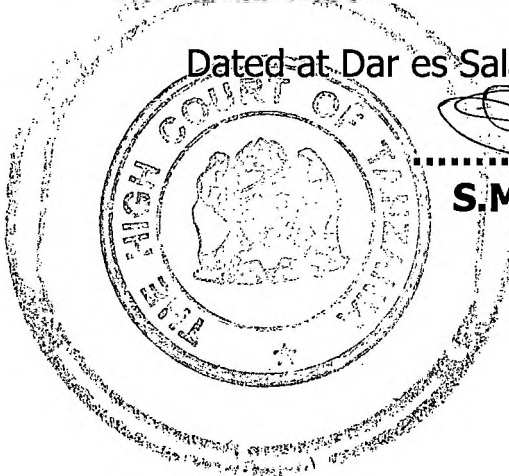
submissions, the dates mentioned therein are to be filed on or before that date hence the applicant had an opportunity to submit the same on the earlier dates. She supported her submissions by citing the case of **Omari R. Ibrahim Vs Ndege Commercial Service Limited, Civil Appeal No. 83 of 2020** (unreported) where the same position was held. She concluded her submissions by a prayer that this application be dismissed with costs.

In rejoinder Ms. Maria submitted that this is not a matter of delay of file submissions rather, it is failure to file the submission. That it is for the applicant to adduce reason for failure to prosecute her case. She reiterated her submissions that the reason explained is the mischief that happened on the applicant's advocate which is a miscarriage. She then went on the lengthy submissions on the pain of losing a child, submissions which I choose not to reproduce because in this application, my duty is to see what schedule of submissions was issued by the court in relations to the dates that the advocate allege to have been admitted at the hospital.

Having heard the submissions of the parties, I have started by re-visiting the annexure APP -2 to the affidavit. The affidavit show that the Advocate appeared in the hospital on the 24<sup>th</sup> day of February, 2021 with pregnancy complications. She was discharged on 10<sup>th</sup> March, a date which she was out of time to file submissions and on the date she was to appear in court, she was out of time. Since the Annexure APP-2 support the averments of the advocate, I find that to be sufficient reasons for the non-appearance of the applicant. That being the case I hereby allow this application.

The order of this court dismissing Civil Appeal No.100/2019 is hereby set aside. The appeal is hereby restored in the court to proceed with hearing on the date that will be scheduled by the Hon. Judge who will be assigned the case. Costs shall follow cause in the outcome of the appeal.

Dated at Dar es Salaam this 08<sup>th</sup> day of May 2023.



  
S.M. MAGHIMBI  
JUDGE