

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR-ES-SALAAM SUB REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL REVISION NO. 03 OF 2023

(Originating from Application 167 of 2022 before Hon. Ruboroga – PRM)

SUSAN THEOPHIL MBILINYI @ MRS SUSAN MBILIYIAPPLICANT

VERSUS

IVANUNE JERU MBILINYI.....RESPONDENT

RULING

19th June & 23rd June, 2023

S. M. MAGHIMBI, J:

This application is lodged under the provisions of section 79 (1) (c) and section 95 of the Civil Procedure Code [Cap. 33 R. E. 2019]. The applicant before this Court prayed for orders that: -

- 1. This Honourable Court be pleased to grant an order to call for and examine the records of the proceedings in application No. 167 of 2022 and the ruling made thereof on 20th day of December 2022 by Hon. Y. R Ruboroga, PRM in the Resident Magistrate Court of Dar es Salaam, at Kisutu so as to satisfy itself as to its legality or irregularity and thereby revise them.*

2. Costs of the application to follow the event.

3. Any other reliefs this Honourable Court deems just and fit to grant.

The application is supported by an affidavit sworn by Susan Theophil Mbilinyi @ Mrs. Susan Mbilinyi. When the matter was scheduled for hearing, the applicant was represented by Mr. Ngasa Ganja learned advocate and the respondent was represented by Mr. Martin Sangila, learned advocate.

Brief fact of this matter is that the applicant had filed before this Court for revision of the decision that was delivered before the Resident Magistrate's Court of Kisumu. This Court, in entertaining the application, ordered the matter to be heard by way of written submission whereas the schedule for filing submissions was issued to the parties. In the course of complying with the scheduling order, the Counsel for the applicant failed to comply with the order and hence the Respondent's Counsel objected a prayer for extension of time for the applicant's Counsel to file his written submission.

When the matter was scheduled for mention on the 19/6/2023, Mr. Ngasa, advocate for the applicant addressed the Court that the matter is for hearing and that on the previous appearance the applicant had applied for extension of time to file submissions out of time before Hon. Fimbo

DR, who ordered the application be made before the presiding Judge. The reason is that they were given seven days to file submission but the Counsel for the applicant got an emergency and travelled to Shinyanga with his private car. That by the time he returned it was already late to file the document he thus prayed for leave to file his submission out of time on that material day.

Replying to the applicant's submission Mr. Sangila stated that it is obvious that the schedule for submission was not complied with. The reason that the applicant's Counsel had travelled to Shinyanga is not sufficient. He contended that when appearing before Hon. Fimbo DR, the latter stated to have travelled but did not say to where. His argument was that the Counsel for the applicant could not comply with the order of the court.

Mr. Sangila further submitted that it is the position of law that failure to file submissions equals to failure to prosecute the case, supporting his submissions by citing **Civil Appeal No. 41/2014 Godfrey Kimbe vs Peter Ngonyani** whereby the court held at page 3 of the ruling of the court where the court held:

"The applicant could not file submission on due date as ordered. It is trite law that failure to file submission is tantamount to failure to prosecute one's case."

Mr. Sangila added that on that premise, they pray that the applicant's prayer be rejected. On the reliance of overriding objective, where the Counsel for the applicant has averred that for the interest of justice the application should be granted; his argument was that the same should not be used to circumvent the ends of justice. With that, Mr. Sangila prayed that the court find it prudent to reject the prayer as the applicant has failed to prosecute her case.

Rejoining to the submissions, Mr. Ngasa submitted that in the last session he had not stated his destination. He however argued that the principal on failure to file submissions is not applicable to the situation at hand. That written submissions are of two kinds, those which go to the root of the matters and failure to file submissions constitute a failure to prosecute the matter. That a good example is written submission to support an appeal and written submission to support an objection. These circumstances are such that written submissions are vital to determine the matter.

He went on submitting that the second set are those which by themselves failure of the party to make submission does not affect determination of the matter meaning that it does not constitute failure of the party to prosecute the matter. Good example he pointed, is final submission at the conclusion of the suit and submission on an application

which is supported by an affidavit. When there is an application, affidavit in support of the application is evidence in support of the application.

He then cited the case of ***ex – parte Matovu Uganda Vs Commissioner of Prisons Ex – parte Matemu, 1966 1 EA 594*** where it was provided that an affidavit filed in Court is a substitute of evidence. On that basis, he argued, the present matter falls within the second category therefore even if there is no submission, the court may proceed to make decision in the absence of submissions since submission are mere aids under the circumstances. On the cited case of ***Godfrey Kuvibe*** cited by respondent, he argued that it is unapplicable under the circumstance and the party failed to file written submission in support of the nature of Preliminary Objection.

Counsel for the applicant further averred that the Court in the above case stated very clear at page 3 – 4 that after failure to file submission, that Court is entitled to proceed with the ruling and the quoted citation was a principle from another case. On that basis it was his humble prayer that considering seven days given and the circumstances, it is just for this Court to grant the leave or on alternative the court undertake remedial measure to make a decision on the basis of the available evidence which is the affidavit and eventually that entails substitute justice.

Having considered submission by both parties before me I will directly distillate into determination of the objection by the Respondent's Counsel. The applicant's Counsel has before this Court stated to have failed to file written submission on time basing on the reasons that he had travelled. And that upon his return, time scheduled for filing his submission had lapsed. He claims that he is aware of the principle and effects of not filing submissions when ordered to, but the same depends on what kind of a matter is before the Court.

Mr. Ngasa stated that the demand to file written submission is not mandatory, it depends with the nature of the matter in Court. He based his argument on two aspects **One**, there are matter where failure to file submissions the effect goes to the root of the question and **two**, there are those matters where failure to file submission do not constitute a failure to prosecute the matter. He gave examples that where written submissions are to support the appeal and objection the submissions are vital, failure to file submission amount to failure to prosecute the matter. Another example was that there are submissions that do not affect determination of the matter. He stated these submissions are like final submission and in matters where an affidavit is in support of an application filing written submission does not become mandatory; since an affidavit itself is evidence in support of the application. Failure to file

a submission still leaves room for the Court to determine the matter before it.

The respondent had no agreeable argument in supporting what was expounded with examples by the applicant's Counsel. His firm submission was that failure to file written submission amounts to failure in prosecuting one's matter and the latter has no reasonable cause for not complying with the Court's order.

Having heard parties, I must make it clear that written submission is a legal requirement for one to file before the Court after an order has been given, it is an alternative to oral submissions which would have been made on the date set by the court for hearing of a matter. It is not a matter of choice to file or not file. Because failure to file submissions as scheduled by the court is like refusing to speak or failure to make oral submissions before a judicial officer when the matter is coming for hearing. Therefore Mr. Ngasa's argument that filing written submission would depend on the nature of the matter before the Court is without basis. It has been established and held in a plethora of cases that written submission is a way of prosecuting one's case. In the case of **P3525 LT Maganga Gregory vs The Judge Advocate General, Court Martial**, Criminal Appeal No. 2 of 2002 (unreported), the Court held that:

*"It is now settled in our jurisprudence that the **practice of filing written submission is tantamount to a hearing and; therefore, failure to file written submission as ordered is equivalent to non-appearance at a hearing or want of prosecution.** The attendant consequences of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound...similarly, Court have not been soft with the litigants who fail to comply with orders, including failure to file written submission within the time frame ordered. Needless to state, here that submissions filed out of time and without leave of the Court are not legally placed on records and are to be disregarded". (Emphasis supplied)*

The records before me reveal that there is no written submission filed by the applicant's Counsel and the latter clearly admits on not filing the same as ordered. I find it of essence to state as a reminder that Court orders or various requirements of law or practice that have been established by law or case law are not in existence to be ornaments of the legal procedure. The same ought to be complied with. If filing of written submission depended on nature of matters filed before the Court then jurisprudence in that effect would have stated so. More so important, if the applicant thought it wise that he should not file any

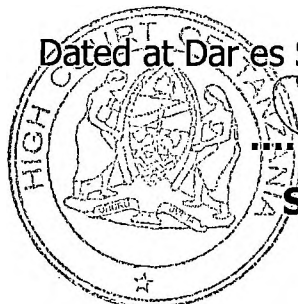
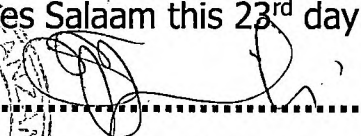
submissions then he should have done so and not styling himself in a trial and error drama where he seeks refuge to justify his failure to comply with the court order.

In the case of **Director of Public Prosecutions vs Said Saleh Ali, Criminal Appeal No. 476 of 2017, TZCA** at page 18, the Court stated that:

"Before we conclude our decision, we think, it is worthy note that arguing application/appeal by way of written submission is synonymous with presenting oral submissions before the Court. Thus, if a party fails to file his/her submission on a scheduled date it is equated as if he/she failed to appear on hearing date with a consequence of dismissing the matter before the Court".

From the above principle and the records and having said all of the above, it is conclusive that the applicant's failure to file written submission as ordered by the Court amount to non-appearance on the date of hearing. The remedy is the dismissal of the matter which I hereby proceed to so do. This application is hereby dismissed with costs.

Dated at Dar es Salaam this 23rd day of June 2023



S. M. MAGHIMBI
JUDGE