

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB - REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 33 OF 2022

XAVERINA FRANCIS.....APPELLANT

VERSUS

SIGFRID TEMBA.....RESPONDENT

(Appeal from the decision of District Court of Temeke, One Stop Judicial Centre at Temeke)

(Jacob, RM)

1st June 2022)

in

Misc. Application No. 48 of 2022

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JUDGMENT

20th July & 4th August 2023

Rwizile, J.

The appellant was aggrieved by the decision of the District Court of Temeke one Stop Judicial Centre. He has now filed this appeal advancing the following grounds;

- i. That, the trial Magistrate erred in law and fact by dismissing miscellaneous application brought by the appellant based on the wrong statements brought by the respondent.*

ii. That, the trial magistrate erred in law and fact by making a decision without taking into consideration oral and documentary evidence brought by the appellant.

The appeal was heard by way of written submissions. Submitting on the first ground, the appellant stated that the Magistrate erred in law and fact by dismissing the application based on misguided information brought by the respondent. She said the trial court made a totally wrong conclusion and decision. It was further submitted that the appellant filed her submission on 19th May 2022, but it was not admitted, instead, she was told by the court clerk to pay 20,000.00 TZS as court fees. Because she did not have enough money. She said she went back home to look for some more cash. It was her submission that, on the next day, she paid the fees, and her submission was accepted. This, according to her, was on 20th May 2022 which is a slight delay of one day.

The appellant argued the court should have considered that the appellant is a layman and an old woman and therefore apply the case of **Alliance One Tobacco Tanzania Limited & Another v Mwajuma Hamis**, Miscellaneous Application No. 803 of 2018 (unreported) and section 3A and B of the Civil Procedure Code, on the principle of the overriding objectives.

On the second ground, it was submitted that the trial court decided the matter without taking into consideration oral and documentary evidence brought by the appellant. It was submitted that the appellant's evidence was not considered because the court had ordered her to file it before 19th May 2022. It was her further statement, that she was prevented to file the same because she did not have enough funds to pay for court fees on the same day but did so on the following day that is 20th May 2022, and produced the receipt as the evidence. Thus, the appellant prayed, this appeal be allowed with costs.

Resisting, the respondent submitted that, the district court was right to dismiss the application. It was the view of the respondent that she failed to file her submission within time as ordered by the court. Further, he stated that the appellant admitted filing the submission out of time for the reason that she had no money to pay. The parties, it was added, agreed to prosecute the case by written submissions and so was sure to meet the cost of filling submissions. The appellant was supposed to apply for an extension, and the court could have extended the time for her to find money to pay for the same.

The respondent further submitted, the fact that she is a layperson and an old woman does not hold, since the respondent is also a layman and older than the appellant. According to him, the principle of overriding objectives cannot be applied blindly against the mandatory provisions of the law, and asked this court to refer to the cases of **Eric Raymond Rowberg & 2 Others v Elisa Marcos and Another**, Civil Application No. 571/02 of 2017 on page 8 and **Mariam Samburo (legal Representative of the Late Ramadhan Abas) vs Masoud Mohamed Joshi and 2 Others**, Civil Appeal No. 109 of 2016. It was submitted, the principle could only be applied, if the appellant could have filed an application for an extension of time. Instead, it was added, she filed the submission out of time. It was his view that the Principle of Overriding Objectives cannot be blindly applied.

It was further submitted that the effect of failing to prosecute the case, was, in the view of the respondent, to dismiss it as held in the case of **Tanzania Breweries v Edson Dhobe & 19 Others**, Misc. Application No. 96 of 2000. On this point, the respondent further cited cases where the courts have dismissed cases for failure to file submissions.

These include the case of **Famari Investment (T) Ltd vs Abdallah Seleman Komba**, Misc. Application No. 41 of 2018, **Fair Deal Autopvt Limited vs City Boy Electronics C Ltd**, Civil Case No. 187 of 2019, and **P3525LT Col. Idahya Maganga Gregory vs Judge Advocate General**, Court Martial Criminal Appeal No 4 of 2002.

Submitting on the second ground, it was stated that there is no affidavit of the court clerk who told her that she has to come tomorrow for payment. Thus, it was stated there was no evidence to evaluate as the appellant failed to prosecute her case. Therefore, the application ought to be dismissed as it was done.

On a rejoinder, the appellant added simply that the overriding objectives principal wants the court to employ available means to dispose of the dispute justly and timely. She added, the trial court did not consider the chance of the appellant to win her case or how to provide a chance to a divorcee who lost everything in a trial in which she was basically denied her right to speak.

Having considered the arguments of the parties, it is important to note that the dispute between the parties has its roots in 2014. The respondent petitioned for divorce in Matrimonial Cause No.29 of 2014, at Manzese/Sinza Primary Court.

The matter was heard ex parte. On 4th August 2014, the court pronounced ex parte judgment in favour of the respondent.

Dissatisfied with the decision, the appellant preferred an appeal, but because she was out of time, she applied for the extension of time vide Miscellaneous Application No. 48 of 2022, at the District Court of Temeke, one Stop Judicial Centre. On 1st June 2022, the court dismissed her application hence this appeal.

From the impugned ruling, it is clear that the application was scheduled for filing written submissions. The appellant was to file her submission on or before 19th May 2022 and the respondent was to file his, on or before 26th May 2022, and a rejoinder if any on 31st May 2022, it is as well manifested in the proceedings of the court dated 12th May 2022.

On 1st June 2022, the respondent asked the district court to dismiss the application for want of prosecution. The appellant admitted having filed her submission on 20th May 2022 instead of 19th May 2022 because she had only 10,000.00TZS which was not enough.

It is trite law that failure to file submissions is failure to prosecute a case as held in the case of **National Insurance Corporation of (T) Ltd & another v. Shengena Limited**, Civil Application No. 20 of 2007(unreported) where it was observed that:

"The Applicant did not file submission on due date as ordered. Naturally, the court could not be made impotent by a party's inaction. It had to act. ... it is trite law that failure to file submission(s) is tantamount to failure to prosecute one's case".

From the foregoing, I find no merit in the first ground of appeal. It is dismissed.

Dealing with the second ground of appeal, it can be gathered from the proceedings that, the appellant was given a chance to state why delay filing the submissions, which she did. The court upon considering the submission of both parties, dismissed the case for failure of the appellant to prosecute her case. The record shows the appellant was resilient in prosecuting her case. She procured enough evidence which was in fact not disputed. She indeed filed her submissions out of time, but having explained what befell her when she appeared before the District Court, it was the duty of the court not to construe her failure to prosecute the case radically.

The reason was sufficient to allow her to file her submissions. It was not therefore proper for the district court to dismiss her case based on the delay of just a day with such sufficient reason. I think, the court when acting on a case with the laypersons should not for the sake of justice apply the radically as it was in this case.

The appellant having appeared to file the appeal in time but was told had insufficient funds to do, she had to look for the same as she did and properly, she filed her appeal on the next day. This is an old woman. She laboured, she hustled, she fought, she ought not to be thrown out of this court through the window. Doing so as the district court did was to apply the authorities cited by the respondent upside down.

The court has such powers but each case has to be decided on its own merits even though past experience is good.

Having said that, I hereby quash and set aside the dismissal order of the District Court made on 1st June 2022. The matter is remitted to the same court for considering the submissions of both parties and making a judgment. I make no order as to costs.




A.K. RWIZILE
JUDGE
04.08.2023