

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(IRINGA SUB-REGISTRY)

AT IRINGA

CIVIL APPEAL CASE NO. 11 OF 2022

IRINGA MUNICIPAL COUNCIL APPELLANT

VERSUS

EMBALASASA COMPANY LIMITED RESPONDENT

(Being an appeal from the decision of the District Court of Iringa at Iringa)

(Hon. R. Mayagilo (R.M))

Dated the 11th day of August, 2021

in

Misc. Civil Application No. 24 of 2021

JUDGMENT

Date of last order: 19.07.2023

Date of Judgement: 25.08.2023

S.M. KALUNDE, J.:

By a plaint dated the 16th day of May, 2019, the respondent filed Civil Case No. 08 of 2019 against the appellant at the District Court of Iringa at Iringa. The suit at the district court concerned a breach of contract by the appellant. It was alleged that, in 2013 the appellant and respondent entered into a contract for construction of staff house for the appellant at Mawelewele within Iringa Municipality. The respondent alleged that the works for which he was contracted were meant to be excluded from Value Added Tax (VAT). The respondent went on to execute the works as agreed on the contract. He was duly paid. However, it was alleged that the appellant failed to inform Tanzania

Revenue Authority (TRA) that the contract was VAT exempt, as a result Tshs. 15,556,320.00 was deducted from the respondents' accounts. Despite several attempts to have the matter settled amicably, the appellant failed to make sure that the respondent is re-imbursed the stated amount. Subsequently, the respondent issued a Statutory Notice to sue the appellant. After the notice, Civil Case No. 08 of 2019 was filed in which the respondent prayed for judgment and decree against the appellant as follows: payment of Tshs. 55,030,000.00 as specific damages; Tshs. 20,000,000.00 in general damages; costs of the suit and any other remedies as may be appropriate. The appellant filed his defence denying the allegations.

Upon completion of pleadings and preliminaries the matter proceeded to full trial. The plaintiff had one witness, that is **Charles Luka Duma (Pw1)**. He began his testimony on the 03rd March, 2021, and concluded on the same day. On the day his case was marked closed. Defence case was to commence on 10th March, 2021. However, on the respective date, the counsel for the appellant failed to enter appearance. Apparently, he was sick and has been attending medical treatment at Frelimo District Hospital, in Iringa. Being aware of his medical condition, on 08th March, 2021 the Municipal Director wrote a letter notifying the court that the municipal solicitor was sick and requested for an adjournment. In addition to the request, the letter appended medical chits from the respective hospital. Copies of the letter were served Mr. Barnabas Nyalusi, learned counsel for the respondent. The letter was received by the court on the 09th March, 2021. However, on the 10th March, 2021, the counsel for the respondent, who had been served with copies of the letter, prayed for judgment be entered under

Order IX Rule 8 of **the Civil Procedure Code [Cap. 33 R.E. 2019]**. The trial court proceeded as prayed by the counsel for the respondent. Subsequently, on 16th March, 2021 judgment was delivered in favour of the respondent.

According to the records, on the 08th April, 2021, the appellant filed **Misc. Civil Application No. 09 of 2021** which sought to set aside the order dated 16th March, 2021. Following a preliminary objection by the counsel for the respondent, on the 01st September, 2021 the application was struck out. Being out of time to file a subsequent application, on the 17th September, 2021, the appellant filed **Misc. Civil Application No. 19 of 2021** which sought to extend time for the appellant to file an application setting aside the order dated 16th March, 2021. The application was heard on merits and on 29th November, 2021, the application was granted.

Thereafter, on 16th December, 2021, the appellant lodged **Misc. Civil Application No. 24 of 2021** which desired to set aside the ex-parte judgment entered on 16th March, 2021 in Civil Case No. 08 of 2019. According to the available records, the appellant advanced sickness as a ground for non-appearance on the date fixed for hearing. The affidavit filed in support of the application pleaded that; on the 06th March, 2021 and 08th March, 2021, the counsel for the appellant, who was attending the matter, experienced heart problems and attended at Frelimo District Hospital for medical checkup. Medical chits for the respective dates were appended. It was also pleaded that, being aware that the matter was scheduled for defence hearing, on 08th March, 2021, the Municipal Director wrote to the court requesting for an adjournment within the next two weeks up to the 22nd March, 2021. A copy of the

said letter was also appended in the affidavit. The respondent, understandably, filed a counter affidavit objecting the application.

Upon hearing the parties, the learned trial magistrate was satisfied that the appellant had failed to prove that he was sick on the respective date and that his evidence was doubtful and contradictory. The application was, therefore, dismissed with costs for being devoid of merits. It is this decision which infuriated the appellant leading to the present appeal.

The appellants memorandum of appeal outlines two grounds of appeal as follows: **One**, that the learned trial magistrate erred in fact for holding that the Appellant failed to establish good cause of his absence on the date the suit was ordered for defense hearing. **Two**, that the learned trial magistrate erred in considering new issues raised by the Respondent which were not pleaded in the counter affidavit.

The appeal was argued in writing. Submissions of the appellant were drawn and dully filed by **Mr. Nicolaus Mwakasungula**, learned State Attorney while those of the respondent were drawn and filed by **Mr. Barnabas Nyalusi**, learned advocate. Both submissions were dully filed in accordance with the order of the court, hence the present judgement.

Predicating his argument on the first ground of appeal in the desired memorandum of appeal Mr. Mwakasungula contended that the trial court erred in rejecting the application on the basis of authenticity of Annexure IMC2 and IMC3. The learned state attorney argued that the magistrate erred in rejecting IMC2, the National Health Insurance Forms (NHIF) Form on the ground that it had no official stamp from the

respective hospital. In support of his argument the counsel argued that NHIF Forms are issued in duplicate where the patient is given a copy and the original remains with the respective hospital for records. The counsel insisted that the official stamp on the original form could not be reflected on the duplicate copy which is reproduced by way of a carbon paper.

Regarding IMC3, Mr. Mwakasungula argued that the said exhibit contained two documents, that is a Sick Sheet with serial No. 19/20 (21629249) and NHIF Form 2A. He contended that the learned trial magistrate rejected the sick sheet based on a minor discrepancy that it was dated on the 09th March instead of 08th March, 2021 and failed to consider the substance of NHIF Form 2A. In furthering his argument, the counsel implored that the discrepancy in dates was a human error and could not alter the endorsements of the medical doctor who recommended that the learned counsel for the appellant be on bed rest for seven days. Mr. Mwakasungula added that, had the trial magistrate considered the contents of NHIF Form 2A, she would have realized that the patient received medical treatment and was issued with medications. The learned counsel concluded that, the trial magistrate misdirected herself in questioning the authenticity of the sick sheet and NHIF Forms. In support of his argument, the learned counsel cited the case of **Mohamed Iqbal vs Ezrom M. Maryogo** (Civil Application 141 of 2018) [2020] TZCA 1831 (23 October 2020 TANZLII).

As for the failure to notify the court, Mr. Mwakasungula faulted the trial court for failing to consider that the contents of the letter IMC5 were acknowledged and considered and acted upon by the trial court in its ex parte decision dated the 10th March, 2021. His view was that,

despite having been directed to the RM in charge Resident Magistrate Court, the said letter was received by the District Court of Iringa. Having said that, the learned counsel maintained a view that the trial court was properly notified about the absence of the learned counsel on the respective day through a letter from the Municipal Director. In view of the above submissions, the learned counsel prayed that the application be granted with costs.

In response to the submissions of Mr. Mwakasungula, Mr. Nyalusi argued that the trial court did not err in holding that the appellant affidavit contained contradictory evidence. To support his view, the learned counsel argued that annexures IMC2 and IMC3 contained contradictory dates. He contended that while IMC2 was dated 08th March, 2021, IMC3 was dated 09th March, 2021. As for the dates on the sick sheet, Mr. Nyalusi argued that, while the same was prepared on 08th March, 2021 the same was surprisingly signed 09th March, 2021. He also argued the documents forming part of IMC2 were not authentic for lacking the official stamp from Frelimo Hospital. To support his view, the learned counsel cited the provisions of section 69 of **the Evidence Act [Cap. 6 R.E. 2022]** and the decision of this court in the case of **Nitak Limited vs. Onesmo Claud Njuka**, Civil Appeal No. 239 of 2018 (unreported).

As regards to the letter from the Municipal Director (IMC5) Mr. Nyalusi argued that the learned trial magistrate was correct in acknowledging the letter as it was directed to a wrong court. The counsel argued that instead of being directed to the Resident Magistrate In charge of the District Court, the letter was addressed to the Resident Magistrate in charge Resident Magistrate Court and the Chairman of the

District Land and Housing Tribunal for Iringa District. The learned counsel concluded that there was no evidence that the trial court was notified of the appellants absence on the date fixed for hearing. In view of that, Mr. Nyalusi urged the court to dismiss the appeal with costs.

Mr. Mwakasungula's rejoinder was essentially a restatement of his submission in chief. The counsel concluded with a prayer that the appeal be allowed with costs.

I have examined the record of appeal and dispassionately considered the written submissions advanced by the learned counsels from either side as well as the authorities cited therein. In determining the appeal, I propose to preface my determination by setting out the guiding principles in appeals of the present nature. It is common ground that, in terms of Order IX Rule 9 of the CPC, powers to set aside ex parte judgment are discretionary. It is also trite that generally the exercise of discretion by the lower court can rarely be interfered by a superior court. Such an exercise can only be interfered with where it is clear that the decision arrived at was a result of erroneous exercise of discretion through either the omission to take into consideration relevant matters or taking into account irrelevant or extraneous matters and misdirecting itself. That principle was stated by the defunct Court of Appeal for East Africa in **Mbogo and Another vs. Shah** [1968] 1 EA 93 where the Court (Sir Clement de Lestang (VP)) stated thus:

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken

into consideration and in doing so arrived at a wrong conclusion."

Also see **Commissioner General Tanzania Revenue Authority vs New Musoma Textiles Ltd** (Civil Appeal 119 of 2019) [2020] TZCA 284 (9 June 2020 TANZLII); **Kiwengwa Limited vs Alopi Tour World Hotels & Resort Spa & Others** (Civil Appeal 240 of 2020) [2022] TZCA 366 (14 June 2022 TANZLII) and **Lim Han Yung & Another vs Lucy Treseas Kristensen** (*supra*).

In the instant appeal, the appellant is faulting the exercise of discretion by the district court, for that matter, the determination of the present appeal shall be guided by the above authorities. It is also noteworthy to observe that the application at the trial court, which is subject of the present appeal, was grounded on the provisions of Order IX Rule 9 of the CPC. The respective provision reads:

"9. In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

[Emphasis is mine]

Going by the dictate of the above reproduced provision it is clear that the remedy for setting aside an ex parte judgment is available if the defendant or judgment debtor shows "**sufficient cause**" to justify his failure to enter appearance on the date the suit is called on for hearing or file a written statement of defence. See **Lim Han Yung & Another vs Lucy Treseas Kristensen** (Civil Appeal 219 of 2019) [2022] TZCA 400 (28 June 2022 TANZLII). Mindful of the above guidance, the next question for consideration is whether, at the trial court, the appellant demonstrated "sufficient cause" to justify his non-appearance on the date fixed for defence hearing.

For purposes of determining the present appeal, I find it apposite to reproduce the relevant paragraphs of the affidavit filed in support of the application which outlined the reasons for non-appearance. They state as follows:

- "10. That going to the court records on 3^d March, 2021 when the abovementioned Civil case in paragraph 2 of this Affidavit come up for prosecution hearing before the honourable Hon. Magolyo Paul SRM, (as he then was) this Hounarable Court on 10th March 2021 fixed for defense hearing in the presence of the disputants.*
- 11. That prior to a day of fixed defense hearing, unfortunately on 6th March, 2021 the Application's Solicitor felt sick and was rushed to Frelimo Hospital situated in Iringa District for medical checkup and was diagnosed to have faced with heart pain. A copy of outpatient claims from (herein after referred to as NHIF form) is attached herewith and marked "**IMC3**".*
- 12. That on 8th March, 2021, the Applicant solicitor was rushed again to Frelimo Hospital for further medical checkup whereby he was diagnosed to*

have persistence pain on heart led the medical officer suggest the patient to have rest or excuse from duty for seven consecutive days. A copy of NHIF form is hereto attached and marked "IMC 4".

- 13. That since the Applicant has only a sole solicitor in his office and due to aforementioned reasons in paragraphs 11 and 12 of the Affidavit, on 8th March, 2021, the Applicant wrote a letter to the Resident Magistrate Court of Iringa as well as Hon. Chairman of District Land and Housing Tribunal at Iringa informing them nonappearance of his Solicitor on a date fixed for defense hearing. further requested the matters to be adjourned until 22nd March, 2021. A copy of a letter of request is herewith attached and marked "IMC 5".*

In response to the above averments the respondent contradicted the same through paragraphs 10 to 13 of the counter affidavit dully sworn by Ms. Ritha Beniel Massamu, learned counsel for the respondent. The respective paragraphs read:

- "10. THAT, the contents of paragraph 10 of the applicant's affidavit are disputed and is put into strict proof thereof.*
- 11. THAT, the contents of paragraph 11 of the applicant's affidavit are vehemently denied hence applicant is put to strictly proof thereof.*
- 12. THAT, the contents of paragraph 12 of the applicant's affidavit are strongly disputed and the applicant is put into strict proof thereof.*
- 13. THAT, the contents of paragraph 13 of the Applicant's affidavit are strongly dispute and the applicant is put into strict proof thereof."*

I have taken a liberty to reproduce the respective paragraphs because both parties adopted their respective affidavits and placed heavy reliance on the sworn testimony in the said affidavits. For her part, having heard the respective counsels for the parties and deliberated the application in light of the records, the learned trial magistrate made the following observations:

"Not only that the applicant claimed that he notified this court in his absence through a letter annexure IMC 4 which I could not come across the said letter marked annexure IMC 4 but there is another letter which was addressed to the Magistrate in charge of the Resident Magistrate Court and chairman of the tribunal. The case was filed in the District Court and not Resident Magistrate Court do if at all it was filled then it was directed to the wrong court. Not only that but also the said letter does not show if it was received in court, if at all was filled the there could be a stamp showing that it was received in this court.

*Through the solicitor for the applicant claimed that he was sick on the date set hearing, still he has failed to prove the allegation on the reason that the evidence attached to the affidavit leaves doubts and are contradictory. There is no evidence that the was notified on the same, the NHIF forms do not have official stamps and even the sick sheet is contradictory on when exactly it was stamped. In the case of **Jeremiah Shemweta v. Republic** (1985) TLR 228 it was held that, "where doubts are created in evidence, the same should be resolved in favour of the opposite party". Having said that this application lacks merit and it is hereby dismissed with costs."*

I have carefully considered the affidavits filed in support of the application as cited above, the decision of the trial court and the

submissions of the parties, the issue for my determination is whether, in terms of Order IX Rule 9 of the CPC, the appellant demonstrated "sufficient cause" to justify his non-appearance on the date fixed for defence hearing.

It is common cause that there are no hard and fast rules in determining what amounts to "sufficient cause or good cause". The rule is that, courts have a discretion to determine whether or not an applicant has demonstrated "sufficient cause". However, that discretion has to be exercised judiciously, according to the rules of reason and justice, and not according to private opinion or arbitrary. In **Zuberi Mussa v. Shinyanga Town Council**, TBR Civil Application No. 3 of 2007 (unreported) the Court of Appeal (Massati, J.A.) stated:

"This rule calls for exercise of the Court's discretionary powers. This is judicial discretion and has to be applied judiciously. In so doing one has to look at the circumstances in each case guided only by principles of justice, equity and common sense. As such it is not possible nor desirable to lay down and follow any hard and fast rules."

In the case under scrutiny, the records show that the counsel for the appellant alleged that he was sick in the days lead-in to the date for hearing. The argument is that he attended for medical treatment at Frelimo Hospital and was issued with a seven days sick sheet. To support the argument, he appended various NHIF Forms and the sick sheet. Together with the said forms the learned counsel argued that his office, the Municipal Director, wrote to the court and the respondent to notify them of his non-appearance. The respondent and the trial court

disbelieved the appellant on the basis of authenticity of the said documents.

On my part, I have judiciously gone through and considered the contents of the affidavits and submissions of the parties. There is no denying that IMC2 and IMC3 contains NHIF Health Provider IN/OUT Patient claim Form dated 06th March, 2021 and 08th March, 2021. The said forms are Form NHIF 2A No. 21878847 and 21629249 both made under Regulation 18(1). The said forms contain the name of Nicholas Mwakasungula as the name of the patient. They also contain his personal particulars including his date of birth, occupation, file number and NHIF ID Number and the employers Vote number. The drug prescription administered to the patient is also indicated on the respective forms. Together with the above details, the forms contain the name of the hospital which they were issued. In addition to the above details the forms contain the particulars of the hospital personnel who carried out the services. Those individuals are **Leopoda Chongelo** and **Dr. Martin Maige (MD)**. The registration number and mobile communications of the Medical Doctor are also included. Both employees also appended their signatures. On top of that the patient also appended his name, signature and mobile number. As it were, these details were found to be insufficient by the respondent and the learned trial magistrate.

At this juncture, I wish to agree with the learned state attorney that this situation is akin to what existed in the case of **Mohamed Iqbal vs Ezrom M. Maryogo** (supra). In the said case, sickness was pleaded as a ground for failure to appear before the court on a date fixed for hearing. A Medical Form No. A005 belonging to Muhimbili

National Hospital was attached as evidence. The respondent on the other hand argued that the said form was not authentic as it lacked the doctor's signature. Having confirmed that the details in the form including the logo, postal address and telephone number from Muhimbili Hospital, the Court of Appeal (Wambali, J.A) stated at page 7:

"From what we have stated above concerning the contents of the Medical Form, we are of the settled opinion that lack of the doctors' signature cannot invalidate the said Medical Form as the omission might have been caused by a human error."

In the present case, having established that Form NHIF 2A contains the details of Frelimo Hospital and that of the patient. Given that the said form contains personal particulars of the patient and names of the medical personnel who attended the said patient I am satisfied that the said form is authentic and was issued by the said Frelimo Hospital. I wish to point out at this juncture that NHIF forms are issued in triplicate. This is indicated at the bottom of the form which is inscribed with the note:

*"Original form to be submitted to NHIF Offices by the treating Health Facility (Yellow) * 1st Copy to be retained by the treating Health Facility (Pink) * 2nd Copy to be given to NHIF beneficiary (Blue)"*

It is clear from the above directive that the patient is handed a second copy of the said forms. In the circumstances of the present case, the official stamp might have been affixed on the original copy and failed to reflect on the triplicate copy. That said, lack of an official stamp in a triplicate copy cannot invalidate the said NHIF Form as the omission might have been caused by a human error of the medical personnel who

omitted to affix the stamp on the triplicate copy. I am mollified that, had the trial court considered these circumstances It would have arrived at a different conclusion.

The other piece of evidence discredited by the respondent as well as the trial court was the sick sheet (Form LGS AA) which constituted annexure IMC3. The said form indicated that the patient Nicholas Mwakasungula a municipal solicitor was treated at Frelimo Hospital and was to rest for seven days. The form was prepared on the 08th March, 2021 at around 03:18 pm by the officers responsible at the office of the Municipal Director, signed and stamped with an official seal. The records show that the form was filled at Frelimo Hospital on the 08th March, 2021 at around 10:50 am. It also contains a signature and seal of the hospital dated the 09th March, 2021. The trial court made a finding that the discrepancy in the dates rendered the said form untrustworthy. However, a closer scrutiny of the said document indicates that the form was prepared on the 08th March, 2021 in the evening by the responsible municipal officers and handed to the patient for submission to the hospital. Looking at the timelines, one may notice that at the hospital the form was filled and prepared the next day on 09th March, 2021 at around 10:50 am and not on 08th March, 2021. The issue here is on the hand written date and not the stamp. I wish to note here that the said discrepancy might also be a human error and cannot, by itself, be sufficient to disbelieve the said sick sheet. It is also common knowledge that the hospital stamps are hosted at the open registry while the sick sheet might have been prepared by the medical officer in charge on 08th March, 2021. The sick sheet might have been delivered to the open registry the next day on 09th March, 2021 and hence the difference in

dates. This also another reason why the said discrepancy should not have affected the weight of the sick sheet.

Next, I will consider the letter (IMC5) dated 08th March, 2021 from the Municipal Director to the Resident Magistrate In charge, RMs Court and the Chairman of the District Land and Housing Tribunal for Iringa District. The trial court rejected the letter for two reasons. First, that I was wrongly directed to the RMs court instead of the Resident Magistrate In charge, District Court.; and second, that there was no proof that it was received by the court.

I shall start with the proof of receipt. Upon examination of records, I must say here that, with respect to the learned trial magistrate, her finding that the letter was not received by the court are not founded on the records. In fact, my examination of the records paints a different picture. I say so because available records show that the said letter was actually received by the court on the 09th March, 2021. This is evidenced by a seal of the office of the Iringa RMs Court dated 09th March, 2021. Contrary to what was stated by the learned trial magistrate, there is therefore evidence that the document was received by the court.

On another limb, the learned trial magistrate discredited the letter from Municipal Director on the ground that was directed to the RMs court instead of the district court. The argument here seems to be that, since the letter was directed to the RMs' court the district court was not properly notified of the solicitor's absence. Before proceeding further, I pose here and ask myself what is the objective of Notices of Absence. I wish to state here that whilst there are no clear and articulate rules regulating notices of absence or unavailability of a party or his advocate

on the date scheduled for hearing or for any other proceeding, issuance of such notices has developed to be a legal custom and legal practice within our jurisdiction. The Notice of Absence most often is used to alert or notify the court, parties or the opposite counsel (s) that a particular party or advocate will not be available during a certain date(s) or time period to appear or answer pleadings or otherwise attend for a motion of hearing, or other actions requiring the response of such party or counsel. It should also be noted that courts in our jurisdiction, through the Deputy Registrar and RM In charges, issue similar notices regarding notices of judges or magistrates as the case may be.

The best practice is for all parties to honor notices of absence unless there are valid reasons for not doing so. The rationale here is ensure that all parties are guaranteed and afforded their constitutional right of representation, fair trial and right to be heard. It is therefore not a good gesture or practice that a party or counsel who receives or is aware of a notice of absence of his fellow counsel or party deliberately conceals the same or proceeds to schedule a hearing or any other matter requiring the attention of the absent attorney or party; or insists on the dismissal of the matter or prays for any disadvantageous order. All things equal, a party issuing a notice must be given a benefit of doubt. I must, however, underline here that, Notices of Absence are not meant to be used in order to avoid or delay dispensation of justice. The underlining guiding principle in considering such notices is that the parties' substantial rights and interests, and the court's need to manage its docket scheduling, overrides attorneys' schedules. The absent party therefore bears an equal responsibility to ensure that he is available on

every date scheduled by the court for particular proceedings and not to deploy notices of absence as a means to delay cases.

In light of the above observation, I am of a considered view that, in view of paragraph 13 of the affidavit, the issue in the present case is whether the trial court was properly notified of the absence of the counsel for the appellant. There is no denying that the letter with reference No. IMC/F.20/113/VOL.II/17 dated 08th March, 2021, (IMC5) from the Municipal Director was addressed to the Resident Magistrate In charge, Iringa RMs Court and the Chairman of the District Land and Housing Tribunal for Iringa District. Copies of the said letter were also served on Mr. Barnabas Nyalusi, learned counsel for the respondent and Mr. Stapha Y. Oganga, learned advocate.

The title to the said letter clearly indicates that it concerned **Civil Application No. 09 of 2019** between Embalasasa Co. Ltd vs Iringa, Municipal Council. The title to the said letter states:

***"YAH: 1. SHAURI LA MADAI NA.9/2019 KATI
YA EMBALASASA CO LTD***

NA

IRINGA MUNICIPAL COUNCIL

***2. MAOMBI NA. 148/2019 KATI YA ANDREW
KILIBIKA NA WENZAKE SABA***

NA

***IRINGA MUNICIPAL COUNCIL NA WENZAKE
WANNE"***

[Emphasis is Mine]

In its content the Municipal Director took note that the matter was scheduled for hearing on 10th March, 2021. He also notified the addressee of the staff deficiency the legal department of the municipal.

Specifically, the director stated that the department has one solicitor who is responsible and oversee all the legal functions in the municipal, including appearance in courts and tribunals. Concerning the absence of the municipal solicitor on the respective dates for hearing, the municipal directors stated that:

"Tarehe pangwa ya kusikiliza mashauri tajwa hapo juu Afisa sheria wangu hatakuwepo Mahakamani au barazani kwa kuwa ana tatizo la kiafya na amepewa pumziko la siku saba kuanzia tarehe 09/03/2021 kama ilivyo kwenye taarifa za kitabibu ambayo nakala durufu yake imeambatanishwa na barua hii kwa rejea.

Hivyo basi, ninaomba/ninapendekeza mashauri tajwa hapo juu yapangwe kwa usikilizaji kuanzia tarehe 22/03/2021 na kuendelea. Natanguliza samahani kwa usumbufu utakao jitokeza."

Essentially, the Municipal Director notified the court that the municipal solicitor would not attend in court on the date fixed for hearing because he was sick. The letter added that the solicitor has been kept on bed rest for a period of seven days from the 09th March, 2021. In addition to that, the letter appended the medical chits including the sick sheet part of IMC3. By way of conclusion, the municipal director requested for an adjournment up to the 22nd March, 2021.

In view of the above contents, I am satisfied that the letter sufficiently disclosed the matter in which it was related to, that is **Civil Application No. 09 of 2019** between Embalasasa Co. Ltd vs Iringa, Municipal Council. I am also content that the letter disclosed the reasons for absence and attached evidence thereto. In addition to that the appellant intimated their willingness to attend trial on any other given

date after the expiry of the sick sheet. As I have stated above, parties are, by law, required to be present in court. Like judicial officers, parties and advocates are human beings and they may be precluded from attendance by several factors or reasons. It should therefore be noted that where a party or advocate is not able to be physically present at the trial for one or more reasons; and if such inability to attend necessitates an adjournment of the trial, such party or advocate may issue a notice of absence to the court stating the reasons for absence and where necessary their nearest date of availability for trial. Such notice may be issued orally by a representative, be it a family member or friend, or by a letter, or a mobile phone call to the relevant judicial officer provided that there is evidence of such call or an email. These modes of communication are all acceptable given the present developments in technology. The most important thing here is that there must be evidence that the information got to the attention of the court. If there is evidence that, or it is established that the information made it in court, then the court is notified. In my considered view, it is not really very material whether the letter was directed to a proper address or not. As I have stated earlier, the most important thing is whether the notice relates to the matter in issue and it got to the attention of the respective court.

The next question now is whether, before exercising its powers under Order IX Rule 8 of the CPC, the trial court received the notice of absence. The answer here is a straight forward yes. As I have demonstrated above the said letter was prepared on 08th March, 2021 and communicated to the court. The records show that the letter was received and stamped as received on 09th March, 2021. In addition to

that in its ruling dated 10th March, 2021, in Civil Case No. 8 of 2019, the trial court acknowledged that the letter was received on the 09th March, 2021. The trial court took note that the letter contained a sick sheet to the effect that **"the said solicitor is sick and he has been medically advised to have bed rest for seven days from 9/03/2021"**. However, the trial court rejected the same for being signed by **"District Executive Director instead of the In charge of Legal Department"**.

In view of the above analysis, I am of a considered opinion that if the trial tribunal had carefully studied and analyzed the contents of the affidavit and submissions of the parties it would have made a finding, as I have in the present case, that the appellant had demonstrated "sufficient cause" for his non-appearance on the date fixed for defence hearing. It seems to me that by considering extraneous matters, the trial court skidded into the same error that befell it when proceeding ex parte and thus resulting into an erroneous conclusion. I think this fits those cases where this court can validly interfere with the exercise discretion by an inferior court.

The upshot of the matter is that, the appeal is allowed. The proceedings and decision of the trial tribunal in Misc. Civil Application No. 24 of 2021 are quashed and the consequential decision and orders are set aside. Regarding the proceedings in Civil Case No. 8 of 2019, I proceed to quash and set aside the ruling and orders of the trial court dated 10th March, 2021. In the same vein, the ex parte judgment and decree dated 16th March, 2021 are quashed and set aside.

The effect of the above orders is that Civil Case No. 8 of 2019 is restored and shall proceed with the defence case. Under these circumstances, interests of justice dictates that the matter be dealt with a different magistrate. I accordingly order so. Given the age of the mater I order that the same be disposed within six months upon receipt of this decision and records. Costs to be in cause.

It is so ordered

DATED at IRINGA this 25TH day of AUGUST, 2023.



A handwritten signature in blue ink, appearing to read "S.M. Kalunde", is written over the printed name.

S.M. KALUNDE

JUDGE