

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 191 OF 2022

(Arising from the High Court of Tanzania - Dar es Salaam District Registry in Misc. Civil Application No. 339 of 2021)

MADRASAT HUSNAL BARAKAT APPLICANT

VERSUS

AHMED MOHAMED.....RESPONDENT

RULING

21st July, & 18th August, 2023

BWEGOGGE, J.

The above-named applicant instituted an application herein praying this court to vacate its order dated 21st April, 2022 which dismissed the Civil Application No. 339 of 2021 for want of prosecution. The application is brought under the provision of Order IX, rule 6(1) of the Civil Procedure Code [Cap. 33 R.E 2019] and supported by the affidavit of one Paul Elias, the applicant's counsel.

The background of this matter, as depicted by the pleading filed hereto, is thus: The applicant filed (PC) Civil Appeal No.179 of 2020 in this court seeking to defeat the decisions of the lower courts (the Primary Court and District Court of Kinondoni). The appeal was dismissed on merit. The applicant was aggrieved by the decision of this court; hence, he filed Misc. Civil Application No. 339 of 2021 praying for the certificate on point of law to appeal to the Court of Appeal. The said application was scheduled for hearing on 21st April, 2023. On fateful day, the applicant's counsel was absent in court without notice to that effect. Consequently, the application was dismissed for want of prosecution. Hence, this application.

Mr. Paul Elias, learned advocate, represented the applicant herein whereas Mr. Amin Mohamed Mshana represented the respondent. The application was argued by written submissions. The substance of the submissions made by the counsel herein is briefly recounted hereunder.

Mr. Elias argued that the trial judge dismissed the relevant application for want of prosecution while both parties were present in court. That the trial judge dismissed the application without considering other remedies which she had discretionary power to grant, such as allowing the application to be

argued by written submissions as both parties were present in court

In the same vein, the counsel asserted that the previous applicant's counsel, Mr. Denis Simon David, regularly appeared in court until he found alternative employment. Later on, the counsel herein was engaged to represent the applicant on 8th February, 2023, the date on which the matter herein was scheduled for hearing whereas he failed to appear in court but he was duly held brief by his colleague. Thereafter, the matter was scheduled for hearing on 21st April, 2021. Unfortunately, on 20th April, 2021 the applicant counsel fell sick and attended medical care whereas he was given two days leave from duty; hence, failed to appear in court. Consequently, the case was dismissed for want of prosecution.

The counsel opined that as the applicant and the respondents were present in court, it was erroneous on part of the court to dismiss the application for want of prosecution as his alleged non-appearance was beyond his control. Further, the counsel argued that it is trite law that a party to the case should not be punished for inaction or mistake of his advocate. In buttressing the point, the counsel cited the case of **Off Grid Electric Tanzania Ltd vs Cecilia Manu**, Revision Application No. 57 of 2018 HC (unreported) and

Fredrick Selenga and Another vs Agnes Masele [1983] TLR 99.

Lastly, the counsel submitted that the illegality of the previous decision entered against the applicant was the reason for instituting the application for leave of this court. That illegality is a sufficient ground to allow the application herein so that the alleged irregularity may be addressed.

On the other hand, Mr. Mshana countered that the application in question was dismissed under Order XVII, Rule 3(d) and this court lacks jurisdiction to entertain this matter under the principle of *functus officio*. The counsel cited the case of **Fathia Bomani vs the Commissioner for Land**, Misc. Land Application No. 378 of 2022 HC (unreported) to bring his point home. The counsel charged that the application herein is brought under Order IX, rule 6(1) of CPC which is not applicable in the circumstances of this case.

In tandem with the above, the counsel charged that the applicant's counsel herein is an alien to the proceedings he is seeking to restore, as he never appeared in court on 7/10/2021, 29/10/2021 and 8/02/2022. That the last legal representative for the applicant in the record of the trial court is namely, Theopista Chang'a, who, upon appearance, prayed for adjournment on the

ground that she was recently engaged. That the above-named counsel didn't represent herself as holding brief for any other advocate. And, the trial court granted the prayer whereas the matter was scheduled for hearing on 21st April, 2022. On fateful date scheduled for hearing, the counsel for the applicant defaulted to appear whereas her absence was not explained.

Therefore, opined the counsel, whether the applicant counsel herein was sick or not, could not be the reason for adjournment as he was not in the record of the trial court. That the case was dismissed for the absence of Ms Theopista Chang'a, the counsel for the applicant who was in the record of the trial court, not the counsel who is representing the applicant herein. The counsel charged that the proof of sickness by the hospital chit annexed the pleadings filed hereto is an afterthought.

Lastly, the counsel for the respondent argued that the plea of illegality of the judgment sought to be challenged is not a valid ground for restoration of the case, and or grant of the application herein. That the dismissal order entered by this court cannot be challenged by seeking restoration as the court is *functus officio*.

The point of determination is whether the application herein is meritorious.

From the outset, I find it pertinent to respond to the argument by the counsel for the respondent in that this court is *functus officio* in this matter. In a strict legal sense, the court becomes *functus officio* having entered a verdict or orders finally disposing of the case. See the cases of **Kamundi vs R** [1973] EA 540; and **Maliki Hassan Suleiman vs SMZ** [2005] TLR 236. The question arising herein is whether, this court, having entered the impugned dismissal order is rendered *functus officio*.

As rightly contended by the counsel for the respondent, the impugned dismissal order for want of prosecution was entered having the applicant's representative, one Saad Idd Rajab, failed to proceed with the hearing of the case as scheduled and the prayer for adjournment refused. The prayer for an adjournment was premised on the reason that the applicant's counsel was sick which was refused under the provision of Order XVII, rule 1 (3) (d) of CPC. Therefore, in substance, the suit was dismissed under Order VII, rule 3 of the CPC.

In the case of **Barclays Bank (T) Ltd vs Tanzania Pharmaceuticals Industries Ltd & Others** (Civil Application 231 of 2019 [2022] TZCA 520, the Apex Court, quoting the case of **Salem Ahmed Hasson Zaidi vs Fuad Hussein Hemeidan** [1960] 1 EA 92, had this to say:

*"It is well settled.....that the dismissal of the claim under Order X V II Rule 3 **on account of the plaintiff's default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence**, and that the the subject matter of such a claim will be res judicata."* (Emphasis added).

Further, the court expounded:

*"The consequences of such **dismissal order resulting into a matter be dubbed res judicata** have been further exemplified in the case of **Ally Khalfan Mleh** (supra), where the Court observed:*

*.....the applicant cannot institute another petition claiming the same reliefs **unless and until the dismissal order has been quashed or vacated either on appeal by this court or on review by the trial High Court**. It goes without saying, therefore, that the dismissal order dated 28th March, 2012, **amounted to a decree in terms of section 3 of the CPC**. (Emphasis added].*

In the same vein, in the decision of this court in **Fathia Bomani vs the Commissioner for Land** (supra) whereas the case having been dismissed for want of prosecution after the applicant declined to proceed with hearing as scheduled, and later lodged an application for restoration of the case, my learned sister, Lady Justice Makani, observed as thus:

"Considering the arguments presented herein, I am inclined to agree with the learned State Attorney that this court is functus officio. This is because the order of the courtwas final and conclusive as all the parties were present but unfortunately, the plaintiff could not prosecute her case. This court cannot turn around and set aside its own decision conclusively determined.

Further, it was expounded;

"In other words, determining this application as suggested by the applicant would be re-opening the matter and/or sitting as an appellate court in respect of the decision already given by this very same court.... therefore, this court is functus officio."

In tandem with the above, I am of the considered opinion that this court having dismissed the case for want of prosecution after the applicant's representative who was present in court was unable to proceed with hearing as scheduled, the order was final and conclusive. It amounted to a decree.

It could only be waived by this court on review and or in appeal by the Apex Court, not by filing an application for restoration. I am on all fours with counsel for the respondent in that this court is *functus officio* in this respect. It is needless to state that the cases cited by counsel namely, **Off Grid Electric Tanzania Ltd vs Cecilia Manu**, Revision Application No. 57 of 2018 HC (unreported) and **Fredrick Selenga and Another vs Agnes Masele** [1983] TLR 99 in validating the argument that a litigant should not be punished by mistakes/ ignorance of his counsel, don't fit in the circumstances of this case. Likewise, I find it needless to point out that the plea of illegality was erroneously invoked in the circumstances of this case.

In the same vein, the impugned order of this court having been entered under Order VII, rule 3 of the CPC could not be sought to be vacated by virtue of the provision of Order IX, rule 6(1) of CPC, as the respective provision is invoked in the case where the case is dismissed for non-appearance under Order IX rule 5 of the CPC. I, therefore, purchase wholesale the argument by the counsel for the respondent in that the enabling law was faulted.

It suffices to say that the above discussion, in my opinion, disposes of this

application in its entirety. However, in passing, I find it pertinent to address one issue as thus: the counsel for the applicants argued that on previous date, on 8th February, 2023, the date on which the matter herein was scheduled for hearing, having been engaged to represent the applicant, he failed to appear in court but he was duly held brief by his colleague, Ms. Theopista Chang'a. Likewise, the counsel lamented that on 21st April, 2022, the date on which the case was dismissed, it was brought to the attention of this court that he was sick; hence, failed to appear for the scheduled hearing. That sickness was a condition out of his control.

Upon scrutiny, I found that the last legal representative for the applicant in the record of this court is namely, Theopista Chang'a, who, upon appearance in court on 08th February, 2022 informed the court that she was recently engaged; hence, could not proceed with hearing as scheduled. The record entails that the trial court granted adjournment prayed for and scheduled the matter for hearing on 21st April, 2022 whereas the counsel for the applicant defaulted to appear. No plausible explanation was given for her absence.

It suffices to point out that Ms. Theopista Chang'a didn't represent herself

as holding brief for the applicant's counsel herein. Therefore, the applicant's counsel herein was not in the record of the trial court. Hence, his sickness could not be the reason for the adjournment of the case. It follows that the complaint registered herein is unfounded.

In view of the foregoing, I find the application herein untenable. Consequently, the application herein is hereby dismissed. The respondent shall have his costs.

So ordered.

DATED at DAR ES SALAAM this 18th day of August, 2023.



A handwritten signature in blue ink, appearing to read "O. F. Bwego", is written over the judge's name.

O. F. BWEGOGUE

JUDGE