

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

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 235 OF 2023

**MAMMUT HOLDING INTERNATIONAL LTD APPLICANT
VERSUS**

FM CARGO LTD RESPONDENT

(Arising from Misc. Civil Application No. 526 of 2022, carried forward from Judgment and decree of the High Court in Civil Appeal No. 100 of 2020, originating from Civil Case No. 23 of 2019 in the District Court of Kinondoni at Kinondoni)

RULING

Date: 07/08 & 07/09/2023

NKWABI, J.:

The respondent had sued the applicant herein in the District Court for breach of contract. The applicant was ordered to pay the respondent T.shs 117,000,000/= by the trial court. Her appeal to the High Court partly succeeded. She was still unsatisfied, thus, lodged a notice of intention to appeal to the Court of Appeal. Before appealing to the Court of Appeal, she has to seek and obtain leave to appeal to the Court of Appeal. She filed an application for leave but it was dismissed for want of prosecution hence this application for setting aside the dismissal order.

The applicant has preferred the application under the provisions of Order IX Rule 3, and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2022.

The applicant is seeking for the upcoming reliefs:

1. *That this Honorable Court be pleased to set aside the dismissal order dated 24th April 2023 before Hon. Nkwabi J., and restore the application No. 526 of 2022 for hearing on merits.*
2. *Costs be provided for; and*
3. *Any other and further order(s) and/or reliefs) as the Honorable Court may deem just and equitable to grant.*

The application has been taken at the instance of Rajal Law Attorneys and is supported by the affidavit duly sworn by Mr. Ali Jamal, learned counsel for the applicant. Anyhow, the respondent lodged a counter-affidavit to contest the application.

The application was heard by way of written submissions. The applicant was represented by Mr. Ali Jamal, learned advocate, while respondent was represented by Deogratius Ogunde, learned advocate. The learned counsel of both parties duly filed the respective submissions.

Building up his viewpoint in his submission in support of the application, Mr. Jamal asserted that failure to appear when the matter was called on 24th April, 2023 was not actuated by any negligence on part of the

applicant or his advocate rather human error on mistakes as to the time scheduled for commencement of the cases. To buttress his argument, he cited the case of **Charles Moses v. Shamte Khatibu**, PC. Civil Appeal No.1 of 2002 (unreported). He argued that on 18th April 2023 he made follow up to the Court registry and was informed that the Miscellaneous Civil Application No. 526 of 2022 has been assigned to Hon. Nkwabi, J. and that it was fixed for mention on 24th April, 2023.

Further, the counsel for the applicant contended that on 24th April, 2023 he arrived at the first-floor advocates waiting corridor at the court premises around 8:50 am. He waited for the case to be called at 9:00 am. He also remarked that he was there from 8:50 am to 10:30 am and that only single case was called to appear before the trial judge.

Mr. Jamal further stated that he stayed up to at 10:30 am without his case being called. He therefore made follow up to the Court registry officer who called the cases before Hon. Nkwabi, J. who identified herself as Somoe Ahmad. The Record Management Assistant informed him that all mention cases were called at 8:30 am including the Miscellaneous Civil Case No. 526 of 2023 had been called and dismissed for reasons of non-appearance. He therefore urged the Court to set aside the dismissal order and restore the application.

In response, while making a reply submission against this application, Mr. Ogunde maintained that the applicant has not furnished sufficient reason to enable the Court to exercise its discretionary powers. He elaborated that the applicant's counsel has not proved at all that he was present in Court on 24th April, 2023 when Miscellaneous Civil Application No. 526 of 2022 was dismissed for want of prosecution. Mr. Ogunde expanded that the applicant's counsel has not placed any material before the Court to show that on the said date, the case was called on at 8:30 am as alleged.

He further argued that applicant's counsel purported claim that one Somoe Ahmed, the court clerk, informed him that on the date when it was dismissed it was called on at 08:30 am. but since there was no affidavit from the purported Somoe Ahmad the contention that the applicant's counsel was in Court has not been established in evidence. He exemplified the case of **Dianarose Spareparts Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021 CAT (unreported), at page 9 where it was ruled that:

"The stance of the law is that, where an affidavit mentions another person on a material point, that other person should also take an affidavit."

Finally, the counsel for the respondent implored this Court to dismiss the

application in its entirety with costs.

Restating his opinion in rejoinder submission, the counsel for the applicant stressed that it was human mistake on the time the matter was scheduled for orders which is beyond the applicant's control, that non-appearance was not intentional. That the counsel for the applicant made several follow-ups and was notified that Hon. Ismail, J. was on leave and the date for the matter will be fixed after his return. Further, on 29th March, 2023 he was informed that Hon. Ismail was transferred and the matter was pending before him will be re-assigned to another judge. It was on 18th April 2023 upon inquiry at the Civil Registry, he was informed that the matter was assigned to Nkwabi, J.

The counsel for the applicant further explained that he did not serve the summons because he was waiting to be given summons so that he can serve the respondent. Also, the counsel for the applicant tried to distinguish the cases cited by the counsel for the respondent while insisting that the case he cited in submission in chief are relevant to the present application. He thus, reiterated his prayer that the application be allowed and the dismissal order be set aside while restoring Miscellaneous Civil Application No. 526 of 2022 for hearing and determination on merits.

Having considered the affidavit in support of the application and the counter-affidavit, as well as the submissions of both counsel. I am of the considered view that this application is bound to fail for the underneath reasons.

The first reason is the one lucidly pointed out by the counsel for the respondent which I accede to. It is the naked fact that the applicant has failed to put forward materials necessary for proving the averments in the affidavit in support of the application. Though the counsel for the applicant claims to have made several follow-ups of the application at the registry office, the counsel for the applicant has failed to attach an affidavit of the Registry Management Assistant one Somoe or that of the Deputy Registrar who attended to his follow-ups. That clearly violates the established law in the cases of **Dianarose** (supra) and **Jamal S. Mkumba & Abdallah Issa Namangu & 359 Others v. The Attorney General**, Civil Application No. 240/01 of 2019, CAT, (Unreported) at page 8 of the Ruling it was stated that:

"...Worse still, he also did not procure any affidavit from the Court clerk or Deputy Registrar of the Court of Appeal who were in Court when he entered the Courtroom".

The above discussion is sufficient to dispose of the application in favour of the respondent.

Nevertheless, another reason which would have left the application fatally crushing to the ground, is the truth that the affidavit in support of the application is tainted with falsehoods. The first falsehood is in respect of the suggestion of the counsel for the applicant in the affidavit in support of the application and submissions that, when the application was lodged, Hon. Ismail, Judge, as he then was did not attend the application prior to going for leave. But the truth is that his lordship attended the application promptly. The filing process was completed on 18th November, 2022 upon payment of filing fee. Hon Ismail, attended that application on 23/11/2022 and gave necessary orders of fixing a date for hearing and parties be notified, whereby it appears that the chamber summons was signed by the Deputy Registrar and sent to the front desk for service. It appears that the applicant and her counsel did not pick the same to serve the respondent.

Secondly, it is on the re-assignment. According to the record, the application was re- assigned to me on 03/02/2023 well before the date for hearing that was fixed by Ismail, J. where it was fixed to be called on for

hearing on 15/03/2023. On that date, the file was tabled before me and I attended it and the applicant and her counsel did not appear. Thus, the Court would have not known that there was any attempt to serve the respondent. The matter was adjourned to 24/04/2023 when the applicant and her counsel did not appear again. So, it was not a matter of human error in respect of the time the application was called on for further orders. Thus, it is falsehood to suggest that the omission to appear occurred only once on the date the application was dismissed for want of prosecution. It is trite law that an affidavit that is to be used as evidence which is tainted with falsehood cannot be relied upon to make a decision. That position was underscored in **Ignazio Messina v. Willow Investment SPRL**, Civil Application no. 21 of 2001, CAT (unreported) where it was stated that:

"An affidavit which is tainted with untruth statements is not an affidavit at all and cannot be relied upon to support an application."

It is mundane law that a party who wishes a court of law to avail him with reliefs has a duty to make follow-up. Though stated in a different context, it is still relevant in the matter under consideration. That duty was stated in **Mohamed Salimini v. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2019 CAT (unreported) where it was stated that:

"... there is also a duty to apply for a decree within the time prescribed for appeal. In the present case, after the trial court decree was struck out by the Court, the duty to procure a correct and proper decree was upon the appellant, and this duty was expected to be exercised within reasonable time while mindful of the time."

In the premises, I find and hold that the applicant has neither shown sufficient cause for his non-appearance and inaction to persuade this Court to exercise its discretion to set aside its dismissal order in Miscellaneous Civil Application No. 526 of 2022.

In the end, I find the application has no merits. I dismiss it with costs.

It is so ordered.

DATED at DAR ES SALAAM this 7th day of September 2023.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI

JUDGE