IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

CIVIL REVISION NO. 10 OF 2022

(Originated from Civil Case No. 3 of 2021 from Arusha District Court at Arusha)

STANLEY MANIMO _____ **APPLICANT**

Versus

STANBIC BANK TANZANIA LIMITED _____ **1ST RESPONDENT**

JOHN MSANGI _____ **2ND RESPONDENT**

18/07/2023 **&** *15/09/2023*

RULING

BADE, J.

This is an application to set aside and revise the dismissal order by Hon. B.I. MWAKISU dated 18/10/2022 and order for restoration of Civil Case No. 3 of 2021 before Arusha District Court, at Arusha. The application is supported by an affidavit sworn by Emanuel Anthony, advocate for the applicant. Meanwhile, the 1st Respondent filed its counter affidavit in opposition deponed by Antipas Lakam, advocate for the 1st Respondent, whereas advocate Bashir Ibrahim Mallya also had deponed and filed a counter affidavit for the 2nd Respondent.

The 1st Respondent also filed a notice of preliminary objection to the effect that:

> *"The application is incompetent for being preferred prematurely to this Court without exhausting remedies available to the lower court"*

The learned advocate Emmanuel Antony appeared for the applicant, meanwhile learned advocate Antipas Lakam appeared for the 1st Respondent. The point of preliminary objection was disposed of by way of written submissions, with both parties adhering to the filing schedule as ordered.

Supporting the point of preliminary objection, Mr. Lakam was of the view that it is an established position of the law that the remedy for a suit dismissed by the court for want of prosecution is to set aside the dismissal order as provided under Order IX Rule 6 of the Civil Procedure Code, (Cap 33 R. E 2019) ("the CPC") where it is provided:

> *"6 (1) where a suit is wholly or partly dismissed, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of the action, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was*

sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit".

Moreover, Mr. Lakam submitted that from the above position of the law, the applicant had to make an application to set aside the dismissal order to the District Court first before invoking the revision powers of this Court. To support his position, he cited the case **of Ntuta Loid vs Magreth Paul,** Misc. Land Appeal No. 15 of 2021**,** where it was held:

"Since the matter was dismissed for want of prosecution, the remedy available is for the applicant to make an application to the same tribunal praying for the restoration of her case. In the case the Tribunal refuses, then she can resort to an appeal. In essence, this appeal was prematurely filed. Accordingly, I dismiss it".

Mr. Lakam insisted that the remedy of the setting aside is the discretion of the Court, such discretion can only be exercised by the Court that had dismissed the matter which is the District Court in the instant case. On the other hand, he maintains that it is the power of this Court to ascertain whether the discretion of the trial court has been exercised judiciously. It is Mr. Lakam's further contention that the trial court had

not been moved to exercise its discretion of the dismissed matter by way of application to set aside the dismissal order so this Court is not in a position to oversee whether the trial court did exercise its discretion properly by way of Revision.

Moreover, Mr. Lakam submitted that the requirement to exhaust available chances in the lower courts is not only a matter of procedure but also guarantees a speedy trial of the case as much as possible, reduces the backlog of matters in the Higher Courts, and widens the chances for litigants to have more forum to appeal on the serious matters that has been dealt with by the lower court if one party is aggrieved with the decision of the lower courts. To support his position, he cited section 13 of the Civil Procedure Code which provided that;

> *"Every suit shall be instituted in the Court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade. Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court".*

It is Mr. Lakam's contention that the Applicant has the remedy to challenge the decision dismissing his suit in the trial court, the law

requires such aggrieved party to exhaust remedies available in the lower courts before facing this Court of record for a verdict advancing reasons that ought to have been advanced at the lower court. He cited the case of **Yara Tanzania Ltd vs DB Shapriya & Co. Ltd, Civil Appeal No. 245 of 2018** to cement his position where it was held that:

> *"We think the law is settled that a party can only come to this court on appeal or revision after exhausting the remedies that are available in the High Court. In light of the above discussion, we do not hesitate to hold that a default judgment like a summary judgment, is essentially an ex-parte judgment in as much as it is entered without hearing an adverse party. In the premises, the position of the law articulated above respecting summary and ex-parte judgments, is applicable to default judgments as well".*

In rebuttal, Mr. Emanuel submitted that the applicant had filed this revision application after his suit was dismissed for want of prosecution. He further argues that it was the trial magistrate's view that if the advocate for the applicant had nothing in their hands to substantiate the validity of Civil Revision No. 7 of 2022, it meant he had failed to prosecute the case. The order of dismissal was issued while the Advocate for the Applicant was present before the trial magistrate.

Moreover, Mr. Emmanuel pondered on the applicability of Order IX Rule 6 (1) of the Civil Procedure Code in the circumstances of this matter. In his opinion, it is not applicable because **one,** the provision cited by counsel for the 1st respondent only precludes the bringing of a fresh suit with the same cause of action and does not apply for revision, and **two,** the application for setting aside a dismissal order is made to show as to why the applicant was not able to appear on the date fixed for hearing. In his view, the second condition is quite different from the situation of the case at hand considering that there was an application for revision and the trial magistrate was already notified of the pendency of the Revision Application, and that in his opinion, prudence dictates for him either to wait or, if he was not believing the information from the advocate, he could have easily communicated to the High Court Registry and find the truthfulness of the information.

Mr. Emanuel further argues that with failure to implore one of the measures above the applicant found that the trial magistrate had acted in material irregularity hence his decision is subject to revision under section 79 (1) (C) of the Civil Procedure Code. Looking at cases cited by learned counsel for the first respondent one will find that they are not supporting his preliminary objection, where he thinks in the case of

Yara Tanzania Ltd (supra) on page 8 the Court of Appeal was only discussing summary judgment and default judgment and held:

> *"The only issue on which learned counsel for both sides have locked jaws is whether the impugned ruling or judgment is a default judgment....."*

Mr. Emanuel further argues that the Court of Appeal went on to point out what was the issue before it by saying;

> *"As good luck would have it, the law on what should be done in case a party is aggrieved by an ex-parte or default judgment is fairly settled".*

It is Mr. Emanuel's contention that the case of **Ntuta Loid** (supra) is cited by the counsel for the first respondent, but in his view, this case is distinguishable from the case at hand since in the cited case the appellant was appealing against the dismissal order while in the case at hand the applicant is questioning the validity of the dismissal order disregarding that there was a pending Revision Application before this Court. In addition, it is the counsel's opinion that the case of **Ntuta Loid** (supra) was decided in contravention of the decision of the Court

of Appeal in the case of **Dangote Industries Limited vs Wanercom (T) Limited,** Civil Appeal No. 13 of 2021 where it was held that:

> *"..... thus, the requirement that an aggrieved party should not appeal before attempting first to set aside an ex-parte judgment does not apply where the appellant is not interested to challenge the order to proceed ex-parte ....."*

His further argument is that in the case of **Nosaccu JCE Ltd vs Joyce Paul Lorry,** Labour Revision No. 83 of 2021 (unreported) citing the decision in **Dangote's case** (supra) it was held:

> *"Therefore, the determinant factor on whether or not the point of preliminary objection in hand has merit is the intention of the applicant....."*

Mr. Emanuel insisted that looking at the application at hand one will find that the intention of the applicant herein is to inform this Court that the trial court had materially erred to dismiss the case while there was a pending application against its order/ruling which is not proper, asking to have this error corrected.

In rejoinder, Mr. Lakam reiterated his submission in chief adding that the applicant has demonstrated the reason upon which the dismissal

order of the trial court was issued, which is the absence of proof that there is the existence of Civil Revision no. 7 of 2022 warranting the refusal to continue prosecuting the matter at the trial court. That the trial court was correct to dismiss the suit since Civil Case no. 2 of 2021 was constantly adjourned severally causing unnecessary backlog at the trial court without justified grounds. He further argues that the applicant had a duty to present evidence of the existence of Civil Revision No. 7 of 2022. If he failed to present the same to the trial court due to the non-availability of the documents at the time requested by the trial court, then after obtaining the documents, that was fit and proper reason upon which the application to set aside the dismissal order could be preferred rather than invoking the revisional power of this court.

In responding to the argument by counsel for the applicant that Order IX Rule 6(1) of the CPC does not apply since it deals with a matter dismissed for want of prosecution while at the trial court the applicant was present, Mr. Lakam submitted that this argument is without merit since as he stated in his submission in chief, it is the law that the jurisdiction to set aside dismissal order is of that court which dismissed the matter, and for this case, the District Court.

His further views are that, if the applicant finds that Order IX Rule 6 was not applicable, then he could have used section 95 of the CPC to move the court to set aside the impugned order of the trial court. Mr. Lakam further submitted that the argument by the applicant that the trial court could inquire the High Court Registry to establish the truthfulness of the existence of Civil Revision No. 7 of 2022, and that he could, on his own accord, ascertain the facts presented before the court does not hold water on reason that our court system follows an adversarial order. It is well known that the parties in the case have a duty to prove the existence of facts that they would want the court to believe to be true. That the applicant had a duty to prove the existence of Civil Revision No. 7 of 2022. To support his position, he cited section 112 of the Tanzania Evidence Act, Cap 6 RE 2022 which provides:

> *"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person".*

Faulting the submission by the applicant's counsel regarding the case of **Yara Tanzania** (supra) that it is about a default judgment, not a dismissal order is devoid of merit and demonstrates the inadequacy of

the learned counsel's understanding of the legal principle pointed out in the case as they apply in the current matter before the court.

On the argument that this Revision Application is intended for this Court to look at the legality of the dismissal order, he maintains that argument to be without any merit since the prayers in the Chamber Application are clear that the Applicant intends and has moved this Court to set aside the dismissal order and restore Civil Case no. 3 of 2021 before another magistrate, by way of Revision. He insisted that the case of **Ntuta Loid** (supra) is applicable to the situation at hand since the applicant has not moved the trial court to exercise its discretion in setting aside the dismissal order.

Mr. Lakam further submitted that the case of **Dangote Industries Ltd Tanzania** (supra) did not overrule the case of **Ntuta Loid** (supra) or distinguish the principles created in the said case, rather, it provides a correct interpretation of the law which states that if the person is aggrieved by a decision ordering a case to proceed ex-parte, then the remedy is to set aside that particular order, as opposed to preferring an appeal or a revision application; contrasting with a situation where a party is aggrieved by a decree arising out of an ex-parte judgment, at which point a party has the right to appeal because the case has been

heard on merit and the party is aggrieved by the outcome of the decision.

In finalizing his rejoinder submission, he insisted that the case of **Dangote Industries Ltd Tanzania** (supra) supports the preliminary objection as well as the position that the Applicant would have had to move the trial court to set aside the dismissal order.

After perusing the court record and passing through the elaborate rival arguments between the parties, I think the issue for determination before the court is whether this preliminary objection has merit.

Counsel for the 1st Respondent cited Order IX Rule 6 (1) to support his preliminary objection. While I grasp the legal principles as correctly positioned, I do not agree with the consequences that these are placed against the circumstances of the matter at hand.

As a matter of fact, I am of the considered opinion that the whole line of argument is erroneously inapt. With due respect to the counsel for the 1st respondent, the legal provision on the preliminary objection is incorrect as the cited Rule does not support his contention. The right provision that would have suitably carried the preliminary objection in my view, should have been Order IX Rule 9 (1). The provision of Order

IX Rule 9 (1) applies where the suit is wholly or partly dismissed for **default by the plaintiff** when the suit is called on for hearing, and it emanates from Rule 8. While the effect is still dismissal for want of prosecution, it is dismissal as a consequence of defaulting appearance by the Plaintiff. In any case, it is an undisputed fact that this too was not what transpired at the trial court. I am respectfully of the view that the provision would not apply when the suit is dismissed for want of prosecution upon failure to produce some evidence or have some act done to progress the matter before the court as was the case on the instant matter, admittedly argued by the counsel for the 1st respondent and the applicant. As a matter of fact, both sides see the action that caused the dismissal order, but each side has its own view on how to proceed against it.

I am of the firm view that dismissal of a suit for want of prosecution for failure to proceed with prosecuting a matter is governed by Order XVII Rule 3 of the CPC which provides:

> *"Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses,* ***or to perform any other act necessary to the further progress of the suit, for which time has been allowed****, the*

court may, notwithstanding such default, proceeded to decide the suit forthwith".

In the matter at hand, the court then proceeded to dismiss the suit since the Plaintiff was called upon to furnish evidence on the existence /pendency of Revision No. 7 as alleged. As per the submission of Mr. Emmanuel, the counsel for the Applicant was right there in Court when the Trial Magistrate dismissed the suit. So, the argument that the applicant was required first to apply for an order to set aside the dismissal order before making an application for revision is devoid of merit, since the suit was not dismissed for the non-appearance of the plaintiff under Order IX Rule 9(1) of the CPC, rather the suit was dismissed for want of prosecution on failure to progress the matter under Order XVII Rule 3 of the CPC.

Numerous cases have decided that the order made under Order XVII Rule 3 is a decree subject to an appeal. In the case of **Diamond Trust Bank Tanzania Limited vs Puma Energy Tanzania Limited,** Civil Application No.40 of 2016 the Court of Appeal held:

"Deciding that the order dismissing the suit for want of prosecution did not result into a decree was in the light of the

authorities cited herein above an unhappy situation which we cannot support".

In the case of **Barclays Bank (T) Ltd vs Tanzania Pharmaceuticals Industries Ltd & 3 others,** Civil Application No. 231/16 of 2019 cross-referring the decision in the case of **Salem Ahmed Hassan Zaidi vs Fuad Hussein Hemeidan (1960) 1 CA 92 (CAA)** the court held:

"It is well settled in India that the dismissal of the claim under Order XVII 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 ..... (Chitaley and Rao, Civil Procedure Code (6th Edn.), p 446....."

From the above discussion, it is clear that the dismissal of the suit for non-appearance of the plaintiff under Order IX Rule 9(1) is different from a dismissal of the suit for want of prosecution under Order XVII Rule 3. On the former, if a party is aggrieved by the dismissal order he/she is required to apply to set the dismissal order aside, and normally it is done at the Court which passed the order as correctly argued by the counsel for the 1st respondent. Ultimately, the cases of **Yara Tanzania Ltd and Ntuta Loid** (supra) cited by the counsel for the 1st respondent are still good law, but distinguishable from the case at hand as the cited

cases are about dismissal for non-appearance which is not the case here.

In any case, I must point out lucidly that the crux of the arguments of the learned counsel for the Applicant that the Trial Magistrate should either wait further or take it upon himself to find out the truth about whether Revision No. 7 exists or not is a flawed and misconceived argument. If the Applicant was serious about pursuing, progressing, and prosecuting his case, then it was their sole responsibility and obligation to produce the evidence that Revision No. 7 spoken about does exist so that the case may be stayed to await the outcome of and proceed with Civil Case No. 3 on merits.

Certainly, no burden can be shifted upon the court to ascertain the existence or otherwise or truthfulness of the allegation that there was pending in court Revision No. 7 when there was specifically allowed reasonable time by the court, for the applicant / their attorney to produce the said evidence and to proceed in prosecuting their case. This burden to prosecute the case or produce evidence is never shared with the court and parties. It is squarely on the parties. Never on the court.

Now on obiter, whether the dismissal of the suit for want of prosecution as done in this case is subjected to an appeal even though the order did

not decide the rights of parties on merits can be considered a decision under Order XVII Rule 3 of the CPC is not a matter for this forum or this ruling. I am simply voicing an observation reiterating that the suit was dismissed on default and or non-producing of some evidence to progress the matter before the trial court.

Having said so based on the foregoing analysis, this point of preliminary objection is dismissed for lack of merit.

It is so ordered.

A. Z. BADE
JUDGE
15/09/2023

Ruling delivered in the presence of parties/their representatives, this **15th** day of **September 2023** in chambers.

HIGH COURT OF TANZANIA

A. Z. BADE
JUDGE
15/09/2023