

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**ARUSHA DISTRICT REGISTRY**

**AT ARUSHA**

**LAND APPEAL NO. 206 OF 2022**

*(C/F Land Application No. 11 of 2019 District Land and Housing Tribunal of Arusha at Arusha)*

**WAZIRI MATOGOLO ..... APPELLANT**

**VERSUS**

**THE SCHOOL OF ST. JUDE LTD ..... RESPONDENT**

**RULING**

23<sup>rd</sup> August & 13<sup>th</sup> September, 2023

**TIGANGA, J.**

On 12<sup>th</sup> July 2023, this Court gave the following orders in respect of hearing of this appeal;

**"Court:-** *Prayers are granted. The appeal be heard by way of written submissions on the following schedule;*

- (i) Submission in chief be filed within 14 days, ending on 26/07/2023.*
- (ii) Reply be filed within 14 days from the date of filing submission in chief that is on or before 09/08/2023.*
- (iii) Rejoinder on 16/08/2023.*
- (iv) Mention on 16/08/2023 at 09:00hrs.*
- (v) Submission be limited to 5 pages.*

**Sgd. J.C. Tiganga**  
**Judge**  
**12/07/2023"**

When the matter was called for mention on 16<sup>th</sup> August 2023, for necessary orders, Ms. Rachael Mwenyekule, learned advocate for the appellant told the court that, they had failed to file their submission timely because she filed a letter requesting the matter to be adjourned because she had family emergency that, she had to attend to. She thus prayed to be given time so that she could file the same. Ms. Rehema Kitali, learned Advocate for the respondent objected to this request on the ground that, they were not aware of the request for adjournment filed in this Court and that, they had already filed their reply and were waiting for a rejoinder. She argued that the failure of the appellant to file the submission in chief timely is an abuse of court process and the same should not be condoned.

Following such arguments, this Court asked both parties to address the issue of whether the respondent's submission in opposition to the appeal was proper. The appellant had the legal services of Ms. Rose Lyimo, Advocate whereas the respondent had the representation of Ms. Neema Mutayangulwa assisted by Ms. Rehema Kitali both learned counsel.

Supporting the contention that the respondent's submission was proper, Ms. Kitali submitted that, the respondent filed her submission in compliance with the scheduling orders. She referred the Court to a

number of case authorities such as the decision in the cases of **Famari Investment (T) Ltd vs. Abdallah Selemani Komba**, Misc. Civil Application No. 41 of 2018 which quoted with approval the case of P.3525 **Lt. Idahya Maganga Gregory vs. the Judge Advocate General**, Court Martial Criminal Appeal No. 02 of 2002 (unreported) where it was held that failure to file submission on the scheduled date is as good as non-appearance on the date fixed for hearing. The other cases cited in support of that position was the case of **Paliculis Sinjore Tongoli Makaoli @ Tongoli Sinjore Mellaa & 2 Others vs The Republic**, Criminal Appeal No. 19 of 2020 decided by this Court, (Masara, J) where the court refused the prayer for extension of time for filing the submission which was not filed on the date scheduled, and consequently dismissed the matter for want of prosecution. The consequence for such failure is dismissal of appeal for want of prosecution which this Court should do as provided under Order XXXIX rule 17 (1) of the **Civil Procedure Code**, [Cap 33, R.E 2019] (the CPC). She submitted that the fact that what the respondent filed misses the word Reply does not matter, what is important is that what they filed is a submission. In further support of that contention, they cited the case of **Olam Tanzania vs. Halawa Kulabya**, DC. Civil Appeal No. 19 of 1999 in which the court insisted on the

importance of respecting the court order. Court orders need to be respected and should not be disregarded without consequences, she said.

In addition, Ms. Mutayangulwa submitted that the respondent's reply submission in the absence of the appellant's submission in chief is an acceptable procedure in our jurisdiction because the same was done in compliance with the Court Orders which ordered the respondent to file their reply on or before 09/08/2023. Therefore, the respondent was obliged to file her submission in compliance with the court order. Thus their submissions were proper in law.

In reply, Ms. Rose Lyimo submitted that written submissions are as good as a normal hearing hence, all procedures regulating the normal hearing apply to the written submissions. In that regard, since the respondent was not served with the appellant's written submissions, she should have not hurried to file his reply. According to her, since they failed to file submission in chief timely, both parties ought to have appeared in Court on the day scheduled for the continuation of the hearing, addressed the Court, and waited for necessary orders. She further argued that all cases cited by the appellant are distinguishable from the matter at hand. She prayed for the respondent's objection to be overruled and the

appellant to be given extension of time so that he could file his submission in chief.

In rejoinder, the learned counsel insisted that they addressed the issue of the appellant's failure to file this submission in chief timely before they proceeded to file and argue the merit of the appeal. She further reiterated her submission in chief and insisted that this appeal be dismissed with costs for want of prosecution.

Having heard what has been submitted by both parties, this Court is now tasked to determine whether it was proper for the respondent to file the submission in reply without being served with the submission in chief by the appellant. It is a principle of law and on that counsel for both parties agree that, once the court makes a schedule for filing written submissions in lieu of the hearing *viva voce*, that mode of hearing is in every respect similar to an order for a person to appear and address the court *viva voce*. Failure to file the submission on the date ordered is tantamount to nonappearance on the date when the case is called for a hearing. The consequences for non-appearing on the date fixed for the hearing and failure of the appellant to file a written submission on the date fixed for filing the same, without notice and reasonable excuse attracts the adverse order against the appellant. Now since that is the

position of the law, then where the appellant fails to appear or file the submission in chief, the expected reaction is for the respondent to address the court that there is such a failure by the appellant and the court will take action. It is an uncommon practice for the respondent to file the reply submissions where he has not been served with the submission in chief, as what he files cannot be termed the reply in the real sense because he has nothing to reply without there being the submission in chief. What he file can be termed as the address to the court normally informing the court that the other party (the appellant) did not file the submission in chief without reasons and lawful excuse, just like he would have addressed the court where the applicant had failed to appear and argue the appeal and asked for the dismissal of the appeal. That means what the respondent filed is not a reply in the actual sense, but the address to the court informing the court that the appellant did not file the submission in chief on the date scheduled and that he did not do so without reasons and lawful excuse.

The fact that the appellant failed to file the submission in chief on the date scheduled is not in dispute. The fact that the respondent addressed the court on that failure is not also in dispute, the issue remains whether the failure by the appellant was without lawful excuse? On this, the counsel for the appellant submitted that on 26<sup>th</sup> July 2023 Ms. Rachel

Mwainyekule, Advocate filed a letter posing a request that she had a sick sister who was in a serious condition and admitted at KCMC Hospital, and she was the one nursing her and that since she had no enough time to sit in office, then she could not prepare the written submission and file them on time. I took the liberty of perusing the record in the case file and found that, the applicant filed her letter dated 26<sup>th</sup> July, 2023 which was received by this Court on the same day, requesting for adjournment. The reason for her request was the fact that she was assisting her sister who was in a critical condition admitted at KCMC Hospital after being involved in a motorcycle accident. The respondent's Advocates have challenged this request on the ground that, they were not served with such letters. Looking at the said letter, the same does not show if there was another copy to be served to the respondents, hence, their claims that they were not aware is founded.

However, this does not negate the fact that the applicant's counsel showed due diligence in informing the Court of the emergency that befell her, thus she deserves leniency. I have weighed, both parties' submissions on the subject, I am satisfied that the one given by the applicant's counsel is heavier than that of the respondent's objecting to the extension. I am also satisfied that, the grant of the order will be in furtherance and

embrace the constitutional right to a fair hearing and there is no indication that the grant of the order will in any way prejudice the respondent.

Further to that, it should be noted that cases are for the parties, Advocates are normally engaged and instructed by the parties to represent them. This means that even if we find for the sake of argument that, filing the letter on the last date when the time which the appellant was given to file the submission in chief and without giving the copy to the respondent amounts to a lack of diligence, which is not the case in the appeal at hand, it is apparent that any order refusing the extension will be punishing the appellant by taking away his right to be heard for the fault he did not personally commit.

That said, I do grant the appellant's request by vacating the previous schedule of filing the submission in support and against or in opposition to the appeal and make the following new scheduling orders;

- i. The applicant is to file his submission in chief within seven (7) days from the day of this ruling i.e. by 20<sup>th</sup> September, 2023.
- ii. The respondent is given fourteen (14) days to file his Reply i.e. by 4<sup>th</sup> October 2023.
- iii. Rejoinder if any, within seven (7) days i.e. by 11<sup>th</sup> October 2023.
- iv. The matter will be mentioned on 11<sup>th</sup> October 2023 for necessary orders.



v. Submissions be limited to five pages.

It is accordingly ordered.

**DATED** and delivered at **ARUSHA** this 13<sup>th</sup> day of September 2023



A handwritten signature in black ink, appearing to read "J.C. Tiganga", written over a horizontal line.

**J.C. TIGANGA**

**JUDGE**