

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

**DAR ES SALAAM DISTRICT REGISTRY**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 99 OF 2023**

*(Originating from Civil Revision No. 30 of 2022)*

**BETWEEN**

**FIVE STAR TRAVELS (T) LIMITED ..... APPLICANT**

**VERSUS**

**MAKTECH & TEL CO. LIMITED..... RESPONDENT**

*Date of last order: 17/10/2023*

*Date of ruling: 19/10/2023*

**RULING**

**A. A. MBAGWA, J.**

This is an application for setting aside a dismissal order made by this Court (Hon. Pomo J) dated 15<sup>th</sup> day of February, 2023 in Civil Revision No. 30 of 2022 and restoration of the said Civil Revision No. 30 of 2022. The Court has been moved by way of chamber summons made under section 2(1) of the Judicature and Application of Laws Act and section 95 of the Civil Procedure Code. To be specific, the applicant prays for the following orders;



1. That this Honourable Court be pleased to grant an order for restoration of this Court's Civil Revision No. 30 of 2022, dismissed for want of prosecution on the 15<sup>th</sup> day of February, 2023 by his Lordship Hon. Pomo J.
2. Costs to follow the event.
3. Any other order(s) this Honourable Court may deem fit and just to grant.

On the one side, the application is supported by affidavits sworn by Mr. Charles G. Lugaila, the applicant's learned counsel and Mr. John P. Lugaila whereas on the other side, it is strongly contested by the respondent via a counter affidavit sworn by Bivory B. Lyabonga, the respondent's learned counsel.

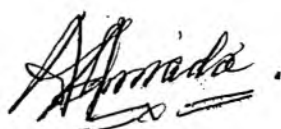
According to the facts as gleaned from the parties' depositions, the case from which this application emanates that is, Civil Revision No. 30 of 2022 was set for hearing on 15<sup>th</sup> February, 2023 before Hon. Pomo, J. The applicant did not enter appearance on that day as such, this Court, upon application by the respondent's counsel one Bivory Lyabonge, dismissed the application with costs for want of prosecution. It is against this background, the

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applicant has brought this application to have the dismissed Civil Revision No. 30 of 2022 restored.

In the affidavit in support of application, Mr. Charles G. Lugaila states that on the material day he was also to appear before the District Land and Housing Tribunal for Temeke in Land Application No. 57 of 2017 between Ezekiel Kapugi vs Abdallah Mombasa and Others. As such, he had to rush the case file to Mr. Mangiteni who had agreed to enter appearance on his behalf so that he, Mr. Charles Lugaila could attend Civil Revision No. 30 of 2022 before this Court. However, when he was on his way back from Temeke, he encountered a traffic jam which delayed him. Realising that he could not appear in Court on time, he instructed his legal officer one John Lugaila to take the case file and ask any counsel to hold his brief. The deponent laments that John Lugaila requested Bivery Lyabonga to hold brief of Mr. Charles Lugaila and the counsel agreed but, to his dismay, when Bivery Lyabonga entered the court room, she changed the position and prayed for dismissal of the application. On the basis of the grounds stated in the affidavit, the applicant prayed the Court to allow the application.

In contrast, the respondent opposed the application via counter affidavit of Bivery Lyabonga. The respondent disputed all the applicant's contentions

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stating that they do not disclose sufficient grounds for the applicant's non-appearance on 15<sup>th</sup> February, 2023. The respondent, added that before dismissing the matter, the Hon. Judge asked the applicant's legal officer as to the whereabouts of the advocate but the said legal officer was not forthcoming. As such, the respondent concluded that the applicant's averments are just afterthought. The respondent thus prayed for dismissal of the instant application with costs.

On 5<sup>th</sup> September, 2023 when this matter was called on for hearing, this Court ordered the application to be disposed of by way of written submissions. I am grateful to both counsel as they duly complied with the filing schedule. I also appreciate their insightful submissions on the subject.

Submitting in support of the application, the applicant's counsel had it that his appearance on 15<sup>th</sup> February, 2023 in Civil Revision No. 30 of 2022 was prevented by sufficient grounds. The counsel submitted that the matter was coming for hearing for the first time and hitherto, the applicant had no record of absence. On this note, he beseeched the Court to take into consideration the applicant's previous conduct before non-appearance. To bolster his argument, the learned counsel cited the case of **Shocked and Another vs**

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**Goldschmidt and Others (1998) 1 ALL ER 392.** In the end, he prayed the Court to allow the application.

In rebuttal, the respondent's counsel was of the view that the application is devoid of merits. At the outset, the respondent's counsel remarked that the application was brought under the wrong provisions of law. He added that the proper provision is Order IX Rule 6(1) of the Civil Procedure Code in the web of this court's decision in **Mek One Industries Limited vs Rungwe District Council and Another**, Misc. Civil Application No. 8 of 2020, HC at Mbeya. Furthermore, the respondent's counsel expounded that traffic jam has never been a good cause for non-appearance. On this, he relied on the case of **Phares Wambura and 15 Others vs Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016, CAT at Dar es salaam where the Court of Appeal dismissed the contentions of traffic jam as ground for non-appearance. In fine, the learned counsel urged the Court to dismiss the application with costs for applicant's failure to adduce sufficient reasons.

I have keenly gone through the applicant's affidavits and reply to counter affidavit as well as the respondent counter affidavit. I have also scanned the rival submissions along with the court record in Civil Revision No. 30 of 2022.



To start with the issue of wrong citation of law, as rightly submitted by the respondent's counsel, the instant application was brought under wrong provisions of the law namely, section 2(1) of the Judicature and Application of Laws Act and section 95 of the Civil Procedure Code. It is the position of law that the above cited provisions are applicable only where there are no specific enabling provisions. I further agree with the respondent's counsel that the relevant provisions in the circumstances of this application were Order IX Rule 6(1) of the Civil Procedure Code. See also the case of Bahati Matimba vs Jagro Enterprises LTD, Misc. Civil Application No. 42 of 2022, HC at Iringa. Nonetheless, it is worthwhile to note that with the advent of the overriding objective principle, wrong citation of law is no longer fatal. As such, much as this court is enjoined to set aside the dismissal order and restore the dismissed case, it goes without saying that the error is inconsequential.

Now coming to the merits of the application, as correctly submitted by both counsel, the germane question for determination is whether the applicant has demonstrated sufficient grounds for his non-appearance when the matter i.e., Civil Revision No. 30 of 2022 was called on for hearing before this Court (Hon. Pomo J.) on 15<sup>th</sup> day of February, 2023.

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According to the applicant's affidavit, the applicant's counsel was very informed of the hearing date. Thus, he had enough time to arrange for his office affairs instead of rushing in the very morning. As such, the deponent's contentions that he was caught up by the traffic jam on his way from Temeke to dispatch the case file to Mangiteni whom he had asked to hold his brief before the District Land and Housing Tribunal for Temeke are unfounded. Common sense dictates that had Mr. Charles Lugaila been serious, he would have come to the High Court to attend Civil Revision No. 30 of 2022 and send someone to dispatch the case file to one Mangiteni. This is for obvious reasons including the seniority of this Court.

It has to be noted that court orders are meant to be complied with and the applicant's counsel, being a court officer, is duty bound to honour and obey the court orders. Non-compliance with the court's orders is tantamount to failure to prosecute the case. See the case of **Maureen George Mbowe Jiliwa and Another vs Sudi Khamis Sudi and 7 Others**, Civil Revision No. 584/16 of 2022, CAT at Dar es Salaam. This Court therefore is not prepared to condone advocates who, without reasonable excuse, disobey its orders.

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In sum, having considered all the obtaining circumstances, I am of unfeigned view that the applicant has failed to establish sufficient grounds for this Court to set aside its dismissal order dated 15<sup>th</sup> February, 2023. Thus, I find the application without merits and consequently, I hereby dismiss it with costs.

It is so ordered.

Right of appeal is explained



  
A. A. Mbagwa

JUDGE

19/10/2023

**Court:** Ruling has been delivered in the presence of Ana Hango, learned advocate holding brief of Mr. Charles Lugaila learned advocate for the applicant and Jerry Msamanga learned advocate for the respondent this 19<sup>th</sup> day of October, 2023.



  
A. A. Mbagwa

JUDGE

19/10/2023