

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 153 OF 2023**

*(Originating from the District Court Mafia in Misc. Civil Application No. 05 of 2022)*

**MAFIA DISTRICT COUNCIL ..... APPELLANT**

**VERSUS**

**AISHA d/o MOHAMED JUMA ..... RESPONDENT**

**RULING**

*02<sup>nd</sup> August & 19<sup>th</sup> October, 2023*

**BWEGOGGE, J.**

This is an appeal against the decision entered by the District Court of Mafia in Misc. Civil Application No. 05 of 2022 which refused the application for setting aside the dismissal order entered in respect of Civil Case No. 2 of 2022.

The facts of this case entails that the appellant herein was the plaintiff in Civil Case No. 2 of 2022 whereby the same claimed against the respondent herein a total of TZS 2,672,159/= among others, as the revenue collected by the respondent herein which was supposed to be remitted to the appellant. The said case was dismissed on 4<sup>th</sup> July,2022 for non-appearance of the plaintiff on the date scheduled for hearing. The appellant herein instituted Misc. Civil Application No. 05 of 2022, seeking restoration of the case. Eventually, the application was dismissed for want of substance. Hence, this appeal.

The appellant herein has advanced two (2) grounds of appeal in this court as here under rephrased: -

- 1. That, the Honorable Resident Magistrate erred in law and facts by not considering the reasons for non-appearance advanced by the appellant.*
- 2. That, the Honorable Resident Magistrate erred in law and facts for holding that the appellant was not the state attorney responsible prosecution of the case sought to be restored.*

The appellant was represented by Ms. Lucy Kimaryo, learned state attorney. The respondent absconded to appear in court having been notified; hence, the case proceeded exparte against her.

In respect to the 1<sup>st</sup> ground of appeal, Ms. Kimaryo admitted the fact that the attorney whom was responsible to prosecute the case sought to be restored arrived belatedly in court and found that the case had been dismissed. However, Ms. Kimaryo argued that the failure by the appellant's counsel to arrive in court early was attributed by heavy rain. That, taking into consideration the fact that the means of transport available to the respective attorney was the motorcycle, the trial court ought to have acted reasonably. And, Ms Kimaryo opined that, on account of heavy rain, the appellant's counsel couldn't ride to the court without endangering his life. That this ground alone suffices to be a sufficient reason for grant of restoration order of the case in terms of the provision of Order IX, rule 3 of the Civil Procedure Code [Cap. 33 R.E. 2019]. It was further asserted that failure to appear in court for reason of safety amounts to sufficient reason to warrant grant of the application for restoration of the case.

In substantiating the 2<sup>nd</sup> ground of appeal, Ms. Kimaryo argued that, Mafia District Counsel has a liberty to assign any of her legal counsel to handle the matter either to its finality or on a particular day. Therefore, it was wrong for the trial magistrate to hold that the counsel who represented the appellant in Misc. Civil Application No. 05 of 2022 was not the actual attorney

who prosecuted the case sought to be restored. Ms. Kimaryo concluded her argument by asserting that the appellant had a valid claim against the respondent; therefore, it is in the interest of justice that the matter be restored so that the suit be heard and determined on merit.

The issue for determination is whether the appeal is merited.

I proceed to canvass the 1<sup>st</sup> ground of appeal. The appellant's counsel admitted that the appellant's attorney who prosecuted the case sought to be restored was not present in court on the date the case was brought for hearing. And, the safety of the respective attorney who used motorcycle as a means of transport during the rainy day was fronted as the justification for lateness in court. The same ground was advanced as the sufficient reason to warrant grant of the application for restoration of the case.

Primarily, I find it pertinent to reproduce the provision of Order IX, rule 6 of the Civil Procedure Code which provides guidance to this court as follows:

*"Where a suit is wholly or partly dismissed under rule 5, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of 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..... (Emphasis mine).*

Based on the above reproduced provision, the obligation on part the applicant to furnish sufficient cause for non-appearance is a condition precedent for the court to exercise its discretionary power to set aside the dismissal order. See also the case of **Victoria Real Estate Development Limited vs. Tanzania Investment Bank & Three Others** (Civil Application 225 of 2014) [2015] TZCA 354.

Arguably, what constitutes good cause have not been specifically codified. Therefore, what amounts to good/sufficient cause depends on the circumstances of the case. In the case of **Oswald Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, CA (unreported) cited in **Victoria Real Estate Development limited case** (supra), the Apex Court observed thus:

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is a relative one and is dependent upon the party ..... to provide the relevant material in order to move the court to exercise its discretion."*

Further, in the case of Jumanne **Hassan Bilingi vs. Republic**, Criminal Application No. 23 of 2013, CA (unreported) the Apex court said:

*"...what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically, various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time."*

Having revisited the law above, I revert to the case at hand. As aforesaid, it is uncontroverted fact that the attorney who prosecuted the relevant suit sought to be restored was not present in the trial court on the date the case was brought for hearing. The relevant suit was dismissed for non-appearance of the plaintiff on the date scheduled for hearing. And, the safety (and, or self-preservation) of the respective attorney who used motorcycle as a means of transport during the rainy day, was fronted as the justification for non-appearance in court. The same ground was advanced in the trial court as the sufficient reason to warrant grant of the application for setting aside dismissal order and restoration the suit.

In refusing the ground furnished to support the application, the trial resident magistrate opined that all of them resided in the same environment and exposed to the same challenge which was fronted to justify plaintiff's non-appearance in court on the date scheduled for hearing. It is gleaned from the record of the lower court that the defendant was present in court as scheduled, but the plaintiff (applicant herein). Based on the above factual matrix, I find no cogent ground to fault the opinion of the trial resident magistrate.

Further, upon perusal of the record of the trial court in respect of the suit (Civil Case No.02 of 2022) sought to be restored, with respect, I found that abscondments in court, including scheduled dates for hearing, was the hallmark of the plaintiff (appellant herein) in the trial court. This fact speaks volumes why the trial resident magistrate was constrained to dismiss the suit and refused the application for restoration of the same. The 1<sup>st</sup> ground of appeal is found without substance.

In the 2<sup>nd</sup> ground of appeal, it is charged that the trial Resident Magistrate erred in law and fact for holding that the attorney who prosecuted the application subject of this appeal was not the responsible prosecutor of the

case sought to be restored. This ground of appeal need not detain me. It is in record of the trial court that, in passing, the trial resident magistrate observed that the attorney who prosecuted the application which is subject of this appeal was not the actual attorney whose non-appearance occasioned dismissal of the suit sought to be restored.

As rightly opined by the appellant's counsel herein, the observation made by the trial resident magistrate was unwarranted. It doesn't matter who, among the state attorneys, appeared in court to prosecute the case for the appellant herein. I, therefore, find substance in the charge made by the appellant's counsel in the 2<sup>nd</sup> ground of appeal.

However, my finding notwithstanding, the impugned decision which is subject of this appeal was premised on the wanting sufficient cause to warrant grant of the application for the restoration of the case sought, not on any other extraneous matter. In fact, the dismissal of the application for grant of the prayer for restoration of the case had been entered before the impugned observation made by the trial resident magistrate. Therefore, it had no effect in the decision appealed against.



In view of the foregoing reasons, I find the appeal herein devoid of merit. The appeal herein is hereby dismissed. The decisions and orders entered by the subordinate courts remains undisturbed. Taking into consideration that the respondent absconded to appear in this court, I enter no order as for costs.

So ordered.

**DATED** at **DAR ES SALAAM** this 19<sup>th</sup> October, 2023.



A handwritten signature in blue ink, appearing to be "O. F. Bwegoge", with a long horizontal flourish extending to the right.

O. F. BWEGOGUE

**JUDGE**