

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 443 OF 2023

(Originating from Civil Case No. 164/2022)

TEMEKE MUNICIPAL COUNCIL.....APPLICANT

VERSUS

BAMM SOLUTIONS (T) LTD.....RESPONDENT

RULING

Date of last order: 18/10/2023

Date of Ruling: 27/10/2023

A.A. MBAGWA, J.

This is an application for setting aside a dismissal order made by this Court (Hon. Nkwabi, J) dated 18th day of July, 2023 in Civil Case No. 164 of 2022 and restoration of the said Civil Case No. 164 of 2022. The Court has been moved by way of chamber summons made under Order XLIII Rule 2 and Section 68 (e) 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 Case No. 164 of 2022, dismissed for want of prosecution on the 18th day of July, 2023 by his Lordship Hon. Nkwabi 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 an affidavit of the applicant deponed by Mr. Crispin Ishengoma Rwiza, State Attorney whereas on the other side, it is strongly contested by the respondent via a counter affidavit affirmed by Rashidi Juma Kasisiko, 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 Case No. 164 of 2022 was set for Final Pre Trial-Conference (FPTC) on 18th July, 2023 before Hon. Nkwabi, J. The applicant did not enter appearance on that day as such, this Court, upon application by the respondent's counsel one Rashidi Kasisiko, dismissed the case with costs for want of prosecution. It is against this background; the applicant has brought this application to have the dismissed Civil Case No. 164 of 2022 restored.

In the affidavit in support of application, Mr. Crispine Ishengoma Rwiza states that on the material day when he was on the way to this court to attend hearing around 08:00am, he received a call from his son's school, Fountain Academy Tabata, that there was fire on the hostel, he was



devastated and confused, thus, he immediately rushed to Tabata where the school is located.

Further, while on his way to Tabata, he informed his immediate boss (the applicant's Head of Legal Services Unit) to assign the matter to another state attorney to appear in the court for proceeding with the matter. However, by the time the newly assigned state attorney reached the court premises, the matter was already called before the trial judge.

Being vigilant, Mr. Rwiza made follow ups on the matter on 19th July, 2023 and he found out that the matter was dismissed on 18th July, 2023 for non-appearance of the applicant.

Consequently, on 28th July, 2023 the applicant wrote a letter to the Deputy Registrar of this court (**Annexure TMC-1**), requesting for copies of ruling and drawn order dismissing Civil Case No. 164 of 2022 for the purposes of filing this application. The Applicant received the requested documents on 11th August, 2023 and lodged this application on 18th August, 2023.

On the adversary, the respondent contested the application through a counter affidavit of Mr. Rashid Juma Kasikiko, learned advocate for the respondent. In the counter affidavit, Mr. Kasikiko deposed that, the applicant has not been prudent in prosecuting her case; consecutively during the pendency of Civil Case No. 164/2022, the applicant did not



enter appearance precisely on 22/11/2022 and 09/03/2023 without giving any reason(s) or notifying the Court in advance.

Noteworthy, before this application was called on for hearing, the respondent filed a notice of preliminary objection comprising of one ground to the effect that, the application is time barred. On 18th October, 2023, when the matter was called on for hearing, Mr. Shaffii Mshamu and Crispin Rwiza, learned State Attorneys appeared for the applicant whereas Mr. Rashid Kasisiko, learned advocate represented the respondent. By consent of the parties and for purpose of saving this court's time, I directed the counsel for the parties to submit on both the preliminary objection and the application on merits.

I have gone through the rival submissions both on preliminary objection and merits of the application. As a matter of practice, I shall start my deliberations with the preliminary objection.

It was Mr. Kasikiko's contention that, in terms of section 3, part three item 4 of the Law of Limitations Act, Cap 89 R.E 2019 (the LLA), the application should have been filed within 30 days. He submitted that the order dismissing Civil Case No. 164 of 2022 was available since 18/07/2023. As such, he contended the applicant was negligent to apply and get copy of the order. He thus prayed for the preliminary objection to be sustained and the application to be dismissed for being time barred.

A handwritten signature in blue ink, appearing to read 'Aminda', with a horizontal line underneath.

In rebuttal, Mr. Rwiza contented that, in terms of section 19(2) and (3) of the LLA, the time taken when waiting to be supplied with copy of the order is excluded. He referred the Court to paragraphs 5 and 6 of the affidavits in support of the application to which the letter dated 28th July, 2023 requesting for certified copies of the order (Annexure TMC-1) was received by the court on 31st July, 2023 but the requested document was availed to the applicant on 11th August, 2023. It was Mr. Rwiza's further submission that, the application was filed in Court on 18th August, 2023. Thus, from 11th August, 2023 when the order was furnished to the applicant up to 18th August, 2023 when this application was filed, it is only seven (7) days hence the application was filed within the statutory time of thirty (30) days. To bolster his submission, he relied on the case of **Bukoba Municipal Counsel vs New Metro Merchandise**, Civil Appeal No. 374 of 2021, CAT at Bukoba (unreported) at page 13 and 14, wherein the Court of Appeal held that, exclusion of time under section 19 (2) and (3) of LLA is automatic and is not subject to the court order. He thus, prayed for the preliminary objection to be dismissed.

The respondent contends that the impugned order was available since 18/07/2023, as such, the applicant was negligent to apply and get copy of the order. On the contrary, the applicant, with aid of annexures, told



the Court that he wrote a letter to this court on 28th July, 2023 requesting to be supplied with certified copy of the order and the said letter was received by the court on 31st July, 2023. Moreso, the requested document was availed to the applicant on 11th August, 2023. The respondent could not furnish the Court any evidence to support his averment that the certified order was ready and available for collection since 18/07/2023 apart from his mere word. On that regard, it is my findings that the applicant's contention that she was supplied with the copy of the dismissal order on 11th August, 2023 is true. Thus, reckoning from 11th August, 2023 when the applicant was supplied with the certified dismissal order up to 18th August, 2023 when the present application was filed in Court is seven (7) days. As rightly submitted by Mr. Rwiza, learned State Attorney, in terms of section 19 (2) and (3) of LLA, the time spent for obtaining the requisite copy of the order sought to be impugned is automatically excluded. In the case of **Bukoba Municipal Council** (Supra), the Court of Appeal at page 13-14 had this to say; -

"It follows then that the High Court erred when it held that the appellant was supposed to lodge an application for extension of time under section 19 (2) of the LLA to plead that the delay was caused by belated supply of the copy of judgment. Here, we, once again,



stress that the exclusion under section 19 (2) and (3) of the LLA is automatic and it is not subject to a court order. Therefore, the period between 27th September, 2016 when the judgment was delivered to 15th May, 2017 when the copy of the judgment was supplied is automatically excluded in computing the ninety days period prescribed under item number 1 of the Schedule to the LLA. Counting the period from 15th May, 2017 to 6th July, 2017, the appeal was lodged on the twenty third day. That is, it was well within the prescribed ninety days period. Accordingly, we find the appellants appeal was lodged in time.”

See also **Grace C. Rubambey vs CMC Automobiles Limited**, Civil Appeal No. 316 of 2020, CAT at Dar es Salaam at page 7 and 8

In view thereof, it goes without saying that the application was filed within the statutory period of thirty (30) days. Consequently, I overrule the objection.

Coming to the merits of the application, it was Mr. Rwiza’s strong submission that the application is meritorious as such, it should be allowed. He stressed that as per paragraph 4 of the applicant’s affidavit, the matter was dismissed at the final pre- trial conference stage. The applicant’s counsel lamented that the law is silent on whether the Court



is enjoined to dismiss the suit at final PTC on account of non-appearance of the plaintiff. On the basis of grounds contained in the affidavit, the learned applicant's counsel prayed that the Court to allow the application.

In reply, Mr. Kasikiko, learned counsel for the respondent had it that, the applicant has failed to furnish sufficient cause for the court to set aside the dismissal order. He contended that, the applicant has failed to adduce evidence of what he alleged in the affidavit. The learned counsel pointed out that there is no proof of fire at the affiant's son school. He strongly submitted that, applicant ought to file an affidavit of a teacher who allegedly informed Mr. Crispin Rwiza on the occurrence of fire. Further, the respondent's counsel submitted that, there is no affidavit of the State Attorney in Charge to the effect that Mr. Rwiza informed him of the incident at his son's school and his excuse to attend the matter. In addition, the learned counsel challenged that, there is no proof to the effect that there was a State Attorney who came to court but found the case already dismissed. He, thus prayed the court to dismiss the application for want of merits.

I have accorded due consideration to the parties' depositions and the rival submissions. It is noteworthy, at the outset, that the domain of this Court in the application of this nature is to determine whether the applicant's



appearance on the date when the matter was dismissed was prevented by sufficient cause. As to whether the trial judge was right to dismiss the suit at the final pre-trial conference stage is exclusively outside the ambit of this Court. I therefore decline the applicant's invitation to take into account matters relating to the correctness of the dismissal order. In view of the above, the germane question is whether the applicant has demonstrated sufficient cause to convince this court to set aside its dismissal order dated 18th July, 2023.

It is the law that court orders are meant to be complied and non-compliance is construed as failure to prosecute the matter. 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.

According to the record in Civil Case No. 164 of 2022, on 27th June, 2023 before Hon. Maruma J. when the mediation was marked failed and consequently scheduled for final PTC on 18th July, 2023, the applicant was present through Shuhuda Mvungi, learned State Attorney. Further, the applicant is a government department with more than one state attorney thus, even if Mr. Crispin Rwiza got an emergency as he contends, another attorney ought to appear and inform the court of Rwiza's excuse. Non-



appearance of the applicant without notice is, in my view, disrespect to the court orders and gross negligence on the part of the applicant.

Besides, the applicant's affidavit is contradictory and therefore unreliable.

On the one hand, the deponent states that another State Attorney assigned but when he arrived in Court, he found the suit was already dismissed. On the other hand, the same deponent states that he got to know of the dismissal on 19th July, 2023 when he made a follow up. These are two irreconcilable versions which dent the applicant's affidavit.

Having holistically assessed the contents of the applicant's affidavit and that of the respondent, I am of the considered view that the applicant's appearance was not prevented by sufficient cause. In the event, I find the application without merits and consequently, I dismiss it. However, I order each part to bear its own costs.

It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 27th day of October, 2023

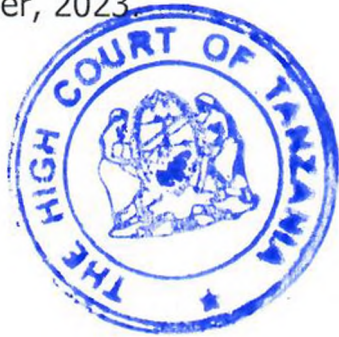


A. A. Mbagwa
A. A. Mbagwa

JUDGE

27/10/2023

Court: Ruling has been delivered in the presence of Shafii Mshamu assisted by Crispin Rwiza, learned State Attorneys for the applicant and Rashidi Kasisiko, learned advocate for the respondent this 27th day of October, 2023.



A. A. Mbagwa
A. A. Mbagwa

JUDGE

27/10/2023