

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 198 OF 2023

(Originating from Civil Case No.157 of 2022)

LONGINO LAZARO@KASONTA.....APPLICANT

VERSUS

MOHAMED SUMAR.....RESPONDENT

EXPARTE RULING

Date of last Order: 23/10/2023

Date of Ruling: 27/10/ 2023

HON.GONZI,J.;

On the 23rd October 2023 when the matter was called for hearing, Mr. Hezron Mwankenja Advocate for the Applicant appeared for the Applicant. The Applicant was also personally present in court. The Respondent did not appear. Mr. Mwankenja informed this Court that pursuant to the orders previously made by this Court (as per Hon. Nkwabi, J.) on 17th August 2023, the Applicant had already effected substituted service to the Respondent via two local Newspapers namely Habari Leo and The Guardian both dated 30th August 2023. The Court took notice of the two newspapers duly filed in the court file bearing the said service by publication directed to the Respondent.

The Court being satisfied that the Respondent was properly and sufficiently notified of the case against him in the circumstances, decided to proceed with the hearing of the application exparte. The Court ordered notice of the date of exparte Ruling to be served upon the Respondent by the Applicant, once again via the Guardian Newspaper. This was done so that the Respondent might be able to attend the date of the Exparte Ruling. Pursuant to my Order, the Applicant served the Respondent by Publication via the Guardian Newspaper dated 24th October 2023 and presented a copy thereof to the court.

During the Exparte hearing, Mr. Mwankenja for the Applicant adopted the Applicant's affidavit and submitted that the application at hand is not contested as the Respondent has not filed a counter affidavit. Therefore, the learned Advocate prayed for this Court to grant the prayers contained in the Chamber summons namely restoration of Civil Case No.157/2022 which was dismissed on 30th March 2023 before Hon. Nkwabi, J., for non-appearance of the Plaintiff. The Applicant's Counsel also prayed for costs.

It is borne out from the court records that through the services of his former advocates - Chief's Law Chambers, the Applicant sued the Respondent for the tort of malicious prosecution vide Civil Case No.157/2022 in this Court. The Applicant who was the Plaintiff in Civil Case No.157/2022, was directed by the Court to serve summons to the Respondent to file Written Statement of Defence and to appear in Court. The case was scheduled for mention on 30th March 2023. What transpired in Court on the 30th March 2023 can be summed up succinctly by the order of this Honourable Court dated 30th March 2023 as per Hon. Nkwabi, J., which reads:

'I gave a last adjournment for the Plaintiff to serve the summons to the defendant, the Plaintiff and his Counsel have failed to appear thus I do not know if service was effected. For that reason, I dismiss the case.'

It is consequent to the above dismissal Order that the Applicant has approached this Court with an application to set aside the dismissal order dated 30th March 2023 and to restore Civil Case No.157 of 2022. The application is brought under Order IX Rule 3, Sections 95 and 68(e) of the Civil Procedure Code, Cap 33 (R.E 2019) and is supported by the grounds set out in the affidavit of the Applicant Longino Lazaro @Kasonta.

In the affidavit in support of the application, it is deponed by the Applicant that all his efforts to effect personal service to the Respondent in respect of this application proved futile. The Applicant has attached in his affidavit annexure LLK.1 which is a certified copy of an Affidavit of service deponed by one Alhaji Idd Almas, a Court Process Server. The Court Process Server has deponed in his affidavit that he took the summons to the Respondent's place of business in order to serve him but that he could not be allowed to meet the Respondent and that the Respondent's employees repeatedly rejected and avoided to accept service of the summons pretending not to know the Respondent's whereabouts. The Applicant deponed that it was from these circumstances that the Court on 17th August 2023 ordered substituted service of this application through publication in two newspapers.

To substantiate the application for restoration of the suit, the Applicant deponed in the affidavit that on the 30th day of March 2023 when the Civil Case No.157/2022 was set for mention, he fell sick and attended hospital at Kibaha where he lives. The Applicant proved this fact of illness and treatment through a medical chit attached to the affidavit as annexure LLK.2. Further, the Applicant in his affidavit stated that he had left it upon his previous Advocate to appear in Court on 30th March 2023 but that his Advocate in

turn had sent another Advocate called Andrew Chima to hold his brief. The Applicant deponed further that, as fate had it, the said Advocate Andrew Chima did not make it to Court on time to hold the brief for the Applicant's Advocate whereby the said Advocate Andrew Chima arrived in Court after 8:30am only to find the Civil Case No.157/2022 had already been dismissed by the trial Judge for non-appearance of the Plaintiff or his Advocate. The Applicant attached to his affidavit a copy of the Order that dismissed his Civil Case No.157/2022 as Annexure LLK.3.

The Applicant prayed for re-admission of the Civil Case No.157/2022 on account that his absence in Court on the date when the case was dismissed, was not due to his negligence nor was it deliberate but it was due to his own sickness and his Advocate arriving late in court. He also alleged an irregularity on the part of the court in dismissing the civil case No.157/2022 at the stage of a mention which was not hearing.

It is from that background that the present application has been placed before me as a successor Judge stepping in the same shoes of the predecessor Judge (Hon.Nkwabi,J.,) for determination of the applicant's application to set aside the dismissal order and restore the Civil Case No.157/2022.

I will start by revisiting the relevant law under which the relief is sought in the Chamber Summons. This application is essentially brought under Order IX Rule 3 of the Civil Procedure Code. Sections 95 and 68(e) of the Civil Procedure Code Cap 33 of the Laws of Tanzania (RE 2019) which are also cited in the Chamber Summons are unnecessary in my view as there is a specific enabling provision of the law in respect of the matter at hand. Rules 2 and 3 of Order IX of the Civil Procedure Code Cap 33 (RE 2019) are both relevant and are reproduced thus:

2. Where neither party appears when the suit is called on for hearing the court may make an order that the suit be dismissed.

3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.

It is clear from the provisions of Order IX Rule 3 of the Civil Procedure Code Cap 33 (RE.2019) that there is one test which an applicant must pass in order to succeed in an application to have a dismissed suit restored, where the suit was dismissed for non-attendance of both parties on the date when the suit was called for hearing. The test is "***if the Applicant satisfies the***

court that there was good cause for his non-appearance when the case was fixed for hearing.”

The next question is whether or not the Applicant has advanced via his affidavit a good cause for his non-appearance on 30th March 2023? In the present case, the Applicant has relied on two major causes namely his own sickness and lateness of the advocate sent by the Applicant’s former affidavit to hold his brief. These are presented as the causes for the Applicant’s non-appearance in Court on the 30th March 2023 when the **Civil Case No.157/2022** was called before the Court for mention. I will now proceed to consider whether the two excuses are substantiated and if they constitute a good cause in the context of Order IX Rule 3 of the Civil Procedure Code?

With regard to the Applicant’s sickness, the Applicant has produced in Court a copy of a medical chit as annexure LLK.2 showing that on 29th March 2023, just a day before the case was scheduled to come in Court, the Applicant attended a Health Laboratory at Kibaha where he was diagnosed of some illness as prescribed in the medical chit. As it is, there is no counter affidavit from the Respondent to dispute the factual allegations of sickness in the present application. It is settled in law that failure by the respondent

to file a counter affidavit, signifies that he does not dispute the factual allegations contained in the affidavit. In other words, it constitutes an admission of the facts deposed in the affidavit, even though the Respondent may appear in court and still contest the application on other grounds of law without challenging or contesting matters of facts contained in the affidavit.

In Finn Von Wurden Petersen and another versus Arusha District Council, Civil Application No.562/17 of 2017, the Court of Appeal reaffirmed the position that where a party to an application does not file a counter affidavit, he is taken to have admitted the factual allegations contained in it; but still he may appear in court and oppose the application on matters of law and not of facts. Therefore, as the Applicant has attached to his affidavit a medical chit and as there is no counter affidavit to dispute the alleged sickness, this Court takes it as an undisputed fact that on 29th March 2023 just one day before the Civil Case No.157/2022 was due in Court, the Applicant fell ill and attended medical laboratory where he was diagnosed of some illness as shown in the medical chit.

Having established that the Applicant was sick on 29th March 2023 and reasonably still ill and under medication on the next day that is the 30th March

2023, I now proceed to consider whether or not sickness is a good cause for his non-appearance in Court as to convince the court to set aside its own dismissal order and restore the dismissed suit. In my considered view the answer is in the affirmative. I stand guided by the decision of the Court of Appeal in the case of **Christina Alphonse Tomas Versus Saamoja Masingija**, Civil Application No.1 of 2014, Court of Appeal of Tanzania at Mbeya. In that case the Applicant's Counsel orally raised a ground of sickness of the Applicant namely gout as a reason for non-appearing in the Court. The Court of Appeal refused the prayer on account that there was no affidavit nor medical proof for the alleged sickness. It was stated that:

"The court has always discouraged adjournments on grounds of sickness not supported by medical proof".

I find that in the above cited case the court of appeal was establishing a rule that where a party pleads sickness as an excuse of not attending the court, he should supply medical proof thereof. In the present case, the Applicant has supplied medical proof of his sickness. He has attached a medical certificate LLK.2 to his affidavit and the affidavit is not opposed by way counter affidavit by the Respondent. The entire application is actually not opposed at all as the Respondent excluded himself from taking part in the

hearing despite substituted service to him. Therefore, I am of the view that the applicant in the case at hand has shown a good cause for non-attendance in court on 30th March 2023 when the Civil Case No.157/2022 was dismissed by this Court for his non-appearance. He was sick.

As to the second cause for absence, the Applicant has alleged that the advocate Mr. Andrew Chima who was sent by the Applicant's undisclosed former advocate to hold his brief, was late to arrive in Court. In my considered view, this is not a good cause for non-appearance in Court or for setting aside dismissal order under Order IX Rule 3 of the Civil Procedure Code Cap 33 (RE 20219). It would encourage laxity and negligence on the part of the counsel. In addition, I have taken note of the fact that the allegations of Mr. Andrew Chima Advocate being sent to hold brief by the Applicant's Counsel; and of his coming late to Court, are purely hearsay and un-substantiated. There is no any supporting affidavit filed by the alleged Applicant's advocate nor by Advocate Andrew Chima to support the factual allegations made by the Applicant in his affidavit. It is trite that where an affidavit mentions another person, that other person should also swear an affidavit to confirm the allegations put forward by the deponent. In the case of **Charles Haule versus R** Criminal Appeal No.27/10 of 2022 decided by

the Court of Appeal of Tanzania sitting at Songea, this rule was reiterated that:

"the law is clear that, if an affidavit mentions another person, then the other person should also take an affidavit to prove existence of the respective fact".

There is no supporting affidavit by the un-named former advocate of the applicant nor by Advocate Andrew Chima to substantiate the factual allegations raised by the Applicant in his affidavit in respect of Advocate Andrew Chima coming late to Court. As such, I find that the allegations are unfounded. It should be remembered that an affidavit for use in court is a substitute for oral evidence. It is oral evidence in a written form. As such, it should conform to the rules regarding reception of oral evidence including the rule of exclusion of hearsay evidence. I therefore, do not accept the unsubstantiated allegations put forward by the Applicant that Advocate Andrew Chima attended in Court on 30th March 2023 for his matter but that he arrived late at 8:30 am only to find that the Civil Case No.157/2022 had already been dismissed.

Lastly, I have noted that in his affidavit the Applicant has attempted to attack the validity of the Order of Hon. Nkwabi, J., in dismissing the suit for non-appearance of the parties while it was scheduled for mention and not for hearing. I will not determine this point for I am functus officio. The Counsel for the Applicant ought to have advised his client that a successor Judge of the High Court steps in the same shoes earlier worn by the predecessor judge. At any rate, the present matter is not an appeal, review or revision. I decline to entertain that allegation of illegality.

In the upshot, I find that the Applicant has advanced a good cause for non-appearance in court on 30th March 2023 due to sickness which in my view is a good cause in terms of Order IX Rule 3 of the Civil Procedure Code Cap 33 (RE 2019). I allow the application. I hereby set aside the dismissal order of Civil Case No.157/2022 and restore the suit. The Civil Case No.157/2022 shall proceed with hearing on a date to be fixed by the court after consultation with the parties. This application is allowed with costs.

It is so ordered.

Right of appeal explained.



A.H.Gonzi
Judge

27th October 2023

This Ruling is delivered in Court today the 27th day of October 2023 in the presence of Mr. Hezron Mwankenja Advocate for the Applicant and in the absence of the Respondent who was duly notified by Publication via the Guardian Newspaper dated 24th October 2023.



A. H. Gonzi

Judge

27th October 2023