

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

**AT DAR ES SALAAM.**

**MISCELLANEOUS CIVIL APPLICATION NO. 229 OF 2023**

*(Originated from Misc. Civil Application No. 547/2022)*

**GODFREY KIMPOKILE MWAKYOMA.....APPLICANT**

**VERSUS**

**ADMINISTRATOR GENERAL.....RESPONDENT**

**RULING**

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

*Date of Ruling: 29/11/2023*

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

This is an application to set aside a dismissal order made by this Court (Hon. Pomo J) dated 20<sup>th</sup> April 2023. The applicant, Godfrey Kimpokile Mwakyoma, by way of chamber summons made under the provisions of Order IX Rule (6) (1) (2), Order XLIII Rule 2 and Section 95 of the Civil Procedure Code, 1966 ( CPC) is applying before this Honorable Court for the following orders;

- (a) That the Honourable Court may be pleased to make an order setting aside the dismissal order dated 20<sup>th</sup> day of April 2023 and restore Misc. Civil Application No. 597 of 2022.
- (b) That, the costs of the application be provided for



(c) That the Honourable Court be pleased to grant any other order it deems fit.

The application is supported by the affidavit deposed by the applicant, Godfrey Kimpokile Mwakyoma on 19<sup>th</sup> May 2023. On the other hand, the application was seriously resisted through a counter affidavit sworn by Clementina Rishela, learned State Attorney.

Before venturing to the merits or the otherwise of the application, it is prudent to give a brief background of the facts of the matter at hand. It goes as follows; Jestina Tamali Mwakyoma ("the deceased"), died testate on the 17<sup>th</sup> day of October 2015 at Health Care Global Enterprises Hospital, India. In her WILL dated 22<sup>nd</sup> February, 2010, the applicant appointed the respondent as the Executor of her WILL. Furthermore, in the WILL, the deceased mentioned several beneficiaries including the applicant.

The respondent petitioned for letters of probate of the deceased's estate *vide* Probate and Administration Cause No. 76 of 2017, and the same were granted by this Court on 30<sup>th</sup> April, 2019.

The applicant was not amused by the appointment of the respondent, thus he first filed, before this Court, Misc. Civil Application no. 455 of 2022 seeking for revocation of the respondent's letters of probate. However, the said Misc. Civil Application no. 455 of 2022 was not fruitful

as it was struck out by the Court for the non-registration of the power of attorney given by the applicant to one Tenzi Anthony Nyundulwa ("the attorney").

Still determined to challenge the grant of letters of probate to the respondent, the applicant filed again, before this Court, Misc. Civil Application No. 547 of 2023 seeking the same orders, i.e., revocation of the respondent's letters of probate.

The respondent filed a counter affidavit together with a notice of preliminary objection. On the other hand, the applicant entered an appearance through his attorney one, Tenzi Anthony Nyundulwa. Again, the Court noted some discrepancies in the power of attorney thus it refused to recognize him as a duly authorised attorney of the applicant. Consequently, the Court ordered the applicant to appear in person or through his recognized agent. It then scheduled the matter for hearing on 20/04/2023. Unfortunately, when the matter came for hearing, neither the applicant nor his recognized agent entered an appearance. Subsequently, upon prayer by the respondent, this Court dismissed the application with costs for want of prosecution. It is against this background the applicant has brought this application.

When this application was called on for hearing on 05/09/2023, Mr. Tenzi Anthony Nyundulwa, learned advocate appeared for and on behalf of the



applicant whilst Ms. Clementina Rishela, learned State Attorney appeared for and on behalf of the respondent. This Court ordered the application be disposed of by way of written submissions and both sides have complied with the scheduled orders. I am grateful to the learned minds for their submissions for and against the application.

Submitting in support of the application, Mr. Tenzi argued that this application is for restoration of the applicant's application namely, Misc. Civil Application No. 547 of 2022 before this Court which was dismissed for want of prosecution on 20<sup>th</sup> April, 2023 Hon. Pomo, J. He then adopted the applicant's affidavit supporting the application to form part of this submission.

The learned counsel argued that, it was illegal and procedural irregularity for the Court to dismiss the application which was scheduled for the hearing of preliminary objection rather the Court was to proceed with the determination of the preliminary objection *ex parte* in the absence of the applicant. To buttress his submission, he cited the case of **The DPP vs Farid Hadi Ahmed and 36 Others**, Criminal Appeal No. 205 of 2021, Court of Appeal at Dar es Salaam (Unreported). He insisted that, the ground of illegality is also sufficient in the application for restoration of a dismissed suit and cited the case of **Jamal S. Mkumba and Another vs**

**A.G, Civil Application No. 240/01/2019,** Court of Appeal at Dar es Salaam (Unreported).

The counsel argued that, after disqualifying the attorney and in the absence of the applicant in court on 20/04/2023, the Court was supposed to find other independent means to notify the applicant rather than dismissing the application. He added that, the Court was not proper in expecting a disqualified attorney to be an agent of the court in service of the hearing date. He went further that, after disqualifying the attorney, the court was supposed to act more judiciously by issuing a summons to the applicant in person.

The counsel added that, the applicant pursued his rights in court through legal representation because of his permanent body incapacity and sickness and never missed the event on deliberate non-appearance. It was his submission that, the applicant's legal representative, one Tenzi Anthony has been refused several times by pure human error which is curable under the law including the attorney mistakenly recording the hearing date. He stressed that the circumstances in which the application was dismissed justify an order for restoration.

Furthermore, the learned counsel had it that, the grant of this application would not prejudice the respondent in terms of costs and time as the latter is the agency of the government. The counsel cemented his stance



by citing the case of **National Bank of Commerce Ltd vs Ahmed Freight Ltd**, Misc. Commercial Case No. 230 of 2016 HC (Commercial Division) Dar es Salaam.

Counsel submitted further that the applicant made this application promptly after the dismissal of the one in dispute. In support of his point, he cited the case of **George Badaga vs Pili Yusu Kawiza**, Misc. Land Application No. 246 of 2019, HC, Land Division (Unreported). He finally beseeched the Court to grant the application in the interest of justice on the ground that the dismissal order is tainted with illegalities and irregularities. In that regard, he cited provisions of Article 107A (2) (e) and 107 B of the Constitution of the United Republic of Tanzania.

In reply, Mr. Samwel C. Mutabazi, learned Senior State Attorney adopted the counter affidavit to form part of this submission.

Mr. Samwel Mutabazi argued that, the grounds for setting aside a dismissal order are settled in law. He added that, the applicant must prove before this Court that he was prevented from prosecuting his suit on 20/04/2023 by sufficient causes as provided for under Order IX Rule 1 of the CPC.

It was Mr. Mutabazi's further argument that looking into the applicant's affidavit, the ground for non-appearance was because his representative incorrectly recorded the hearing date as 21/04/2023 instead of

20/04/2023. In his view, this is not a sufficient reason for the Court to set aside the dismissal order rather it proves negligence and lack of seriousness on the part of the representative.

The learned Senior State Attorney argued further that, there is neither illegality nor irregularity as the Judge acted correctly by dismissing the applicant's application for non-appearance in terms of Order IX Rule 5 of the CPC. He stressed that the applicant was required to appear in court to prosecute his case regardless of whether the matter was scheduled for the hearing of preliminary objection or main application. He concluded that the applicant has failed to adduce sufficient reason to warrant the restoration sought.

Mr. Samwel Mutabazi continued that, since the applicant's representative was present in court on 21<sup>st</sup> March 2023 when the matter was scheduled for hearing on the 20<sup>th</sup> of April, 2023, then the Court was not bound to issue a summons to the applicant. He added that, it was incumbent upon the applicant to pursue his case.

Mr. Samwel Mutabazi further opined that the applicant misdirected himself by submitting on grounds for extension of time rather than establishing sufficient causes which prevented him from appearing in court and prosecuting his case when the suit was scheduled for hearing on 20/04/2023.



The respondent's counsel submitted further that, the applicant is not trustworthy and contradicted himself because he submitted that he did not appear before this Court on the hearing date due to his body incapacity and sickness and that his attorney (representative) was disqualified on 20/04/2023 whereas, on the other hand, he deposed in his affidavit that the reason for his non-appearance was due to incorrect recording of dates by his representative. Mr. Mutabazi argued that, if at all the applicant was sick and his representative was disqualified then the applicant ought to inform the court accordingly, in the absence of that information then the Court was correct in dismissing the applicant's application for want of prosecution.

Mr. Samwel Mutabazi lamented that the contention that the representative incorrectly recorded the hearing date is hearsay because there is no proof to show that the applicant was misled by his representative. He insisted that, it is a trite law that the Court cannot rely on the hearsay evidence and that the said representative was supposed to swear an affidavit to prove the allegations. To back up his submission, he cited the case of **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020, CAT at Dar es Salaam (unreported) in which the decision of the Court of Appeal in **NBC Ltd. v**



**Superdoll Trailer Manufacturing Company Ltd**, Civil Application No.

13 of 2002, CAT (unreported) was cited with approval.

The learned Senior State Attorney concluded that the applicant had failed to establish sufficient reasons. Consequently, he prayed for the application to be dismissed with costs.

I have given due consideration to the parties' depositions and their rival submissions. However, before I delve into the merits of the application, it is noteworthy to address the discrepancy in the case number of the application which was dismissed by my brother, Pomo, J. While the affidavit, counter affidavit, and the attached dismissal order refer to Misc. Civil Application No. 597 of 2022, As per the court record which I had the opportunity to revisit, the correct application number which was dismissed for the applicant's non-appearance on 20<sup>th</sup> April 2023 is Misc. Civil Application No. 547 of 2022. Nonetheless, I find the discrepancy inconsequential as the adage goes, *"To err is human"*.

Now back to the merits of the application. The applicant's main ground is found under paragraph 14 of the affidavit in support of the chamber summons, to which the applicant has deposed as follows;-

***"14. That my attorney incorrectly recorded the hearing date 21/04/2023 instead of 20/04/2023". (Emphasis is mine)***

As can be gleaned from the records, on 21<sup>st</sup> March 2023 this Court (Hon. Pomo, J) adjourned the hearing in Misc. Civil Application No. 547 of 2023 to 20<sup>th</sup> April, 2023. In addition, it ordered the applicant to appear before the court on the scheduled date either in person or through the recognised agent, however, the applicant defaulted to adhere to the said court order. In applications of this nature, the only determining factor is whether, the applicant has satisfied the court that, there was sufficient cause for his non-appearance when the suit (in this case the application) was called on for hearing. The provision of Order IX Rule 6(1) of the C.P.C provides;-

*6.-(1) Where a suit is wholly or partly dismissed under rule 8, 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 upon such terms as to costs or otherwise as it thinks fit** and shall appoint a day for proceeding with the suit.*

It is common cause that there is no hard and fast rule as to what constitutes a sufficient cause. Sufficient cause may depend on several factors depending on the circumstances of each case.

The scheduled hearing date was pronounced by the court, in the presence of Mr. Tenzi Anthony Nyundulwa whom the applicant laments that, he incorrectly recorded the hearing date as 21<sup>st</sup> April, 2023 instead

of 20<sup>th</sup> April 2023. Unfortunately, the applicant has not filed the affidavit of the said Mr. Nyundulwa to substantiate his allegations in the affidavit. Thus, as rightly submitted by the learned Senior State Attorney for the respondent, there was a need for the applicant to file the affidavit of Mr. Nyundulwa to substantiate his contentions. Failure to do that makes his averment hearsay which is not acceptable in law. In the case of **Charles Haule v. The Republic, Criminal Application No. 27/10 of 2022**, CAT at Songea (unreported), Rumanyika, J. at page 8 of the typed Ruling had this to say, and I quote;

*"I agree with the learned State Attorney's contention that, the applicant's assertions that he got assistance of the prison officers to transmit the documents late to be unfounded thus, not a good cause. **The reason I am saying so is that, the applicant's assertions on the delay were not supported by an affidavit of the alleged prison authorities. On that aspect, the law is clear that, if an affidavit mentions another person, then that other person should also take an affidavit to prove existence of the respective fact. See the case of Sabena Technics Dar.***

***Limited v. Michael Luwunzu, Civil Application No. 451/18 of 2020 (unreported) citing Benedict Kiwanga v. Principal Secretary Ministry of Health, Civil Application No. 31 of 2000 and NBC Ltd. v. Superdoll Trailer Manufacturing Company Ltd, Civil Application No. 13 of 2002 (both unreported). Short of that, that remains to be hearsay evidence which is not accepted."***

For the fore reasons, I agree with the learned Senior State Attorney that, the applicant has miserably failed to demonstrate sufficient cause for the court to set aside its orders dated 20<sup>th</sup> April, 2023 in Misc. Civil Application No. 547 of 2022.

As I wind up this ruling, I find it prudent to address the allegations of irregularity and illegality raised by the applicant under paragraph 18 of his affidavit. The applicant has deposed that, the dismissal order in Misc. Civil Application No. 547 of 2022 is coupled with illegalities and irregularities. However, he has not specifically mentioned or identified those illegalities and irregularities, thus making the allegations to be vague. To crown it all, illegalities and or irregularities are not

considerations for setting aside a dismissal order in terms of Order IX Rule 6 of the Civil Procedure Code.

In the upshot and for the reasons stated hereinabove, I hereby dismiss this application for want of merits. Since it is a probate matter, I make no orders as to costs.

It is so ordered.

The right of appeal is explained.

Dated at Dar es Salaam this 29<sup>th</sup> day of November, 2023



  
**A. A. Mbagwa**

**JUDGE**

**29/11/2023**