

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

Misc Civil Application No.315 OF 2023

(Arising from the decision of the High Court at Dar es salaam, Before Hon. E. Mkwizu, Judge in the Civil Appeal No. 69 of 2022, dated 28th April 2023)

ATLAS MARK GROUP(TZ).....1ST APPLICANT

ATLAS SCHOOL.....2ND APPLICANT

SILVANUS RUGAMBWA.....3RD APPLICANT

VERSUS

MWAILIMA INVESTMENT GENERAL

SUPPLY.....RESPONDENT

RULING

2nd August & 27th October 2023

MKWIZU, J:-

This is an application for restoration of Civil Appeal No. 69 of 2022 dismissed for want of prosecution by this court on 2/6/2023. It is made under Order IX Rule 3 and Section 95 of the CPC accompanied by an affidavit by Conradus Felix advocate for the applicants. The application is opposed by the respondent through the counter affidavit by Godfrey Kelvin Mwilima her principal officer.

A brief factual background giving rise to this application are simply that: the applicants were not amused by the judgment and decree of the Kinondoni District Court in Civil Case No. 22 of 2021 delivered on 28th April 2022. They thus decided to appeal to this court via Civil Appeal No

69 of 2022 which was dismissed on 2nd June 2023 after failure by the appellant's counsel to file written submissions in support of the appeal as ordered by the court on 22/3/2023 hence this application for restoration.

When the application was called on for hearing, the Applicants enjoyed the services of Mr Conradus Felix the learned advocate whereas the respondent enjoyed the service of Mr Benjamin Kalume also the learned Advocate.

Arguing in support of the Application Mr. Conradus Felix submitted that there are a good number of points of law to be determined in the dismissed appeal, including an issue of whether 1st Applicant and third Applicant were a part of the agreement if any between the Second Applicant and Agusta Vedasto Ijumba emanating from the principles of separate legal entities requiring a company to sue or be sued in its own name once incorporated as expressly provided for under Section 16 of the Companies Act No. 12 of 2002. His contention was that the trial court contravened the separate entity principle by holding accountable the 1st Applicant and the 3rd Applicant because the 1st Applicant and 3rd applicants were not privy to the agreement between Agusta Vedasto Ijumba and Atlas School. He maintained that denying the restoration application is as good as condemning the 1st Applicant and 3rd Applicant contrary to Article 107A(1) of the Constitution of the United Republic of Tanzania.

The applicant counsel went further to submit that the ruling that dismissed Civil Appeal No. 69 of 2022 contravenes the constitutional principles regarding fair hearing per Article 13(6)(a) of the Constitution of the United Republic of Tanzania for failure to explain the right of appeal to whoever aggrieved by the said Ruling as one of the requirements and contents of

the decision by this Court. He lastly urged the court to allow the application.

In opposing the application Mr Benjamini Kalume learned Counsel for the respondent submitted that the application for restoration must be based on sufficient reasons as stated in **Bahati Matimba Vs Jargo Enterprises Ltd**, Misc Application No 42 of 2022(unreported) emphasising that there is nothing like sufficient reasons advanced by the applicants to warrant the grant of the application sought. Citing to the court the case of **Godrey Kimbe Vs Peter Ngonyani**, Civil Appeal No. 21 of 2014(unreported), the respondent counsel said, Article 107(2)(e) of the Constitution of the United Republic of Tanzania, cannot be blindly applied by this court in the circumstances of this case where the applicants failed to file a written submission without reasonable cause.

He contended further that the argument that the dismissal order contravened the constitutional principles Article 13(6)(a) of the Constitution regarding fair hearing is only not a misconception because the dismissal order was caused by the applicant's own failure to file their written submission as per the court order but contrary to the applicant's own deposition in paragraph 12 of the affidavit where failure to file written submissions was described as an act of *GOD*. He lastly cited the case of **Jamal S. Mkumba & Abdallah Issa Namangu & 359 Others Vs The Attorney General**, Civil Application No.240/01 of 2019, CAT at Dar es salaam (unreported) advising the court to dismiss the application with costs stressing that the carelessness and negligence done by the applicants' counsel was intentional and they cannot shift the blames to the acts of God.

I have considered evidence in both affidavits and submissions made on behalf of the parties in this Application and find that the main issue to be determined is whether the applicants have adduced sufficient reasons for failure to file written submissions in Civil Appeal No.69 of 2022.

In his supporting affidavit, the applicant's counsel admits being aware of the written submissions schedule associating his failure to comply with the order with his journey to Bukoba to attend his relative's funeral. Paragraphs 3 to 9 of the supporting affidavits are so explicit on the point and I will reproduce them here for clarity:

- 3. That, initially the matter was presided over by Honorable Mgonya, J. Accordingly we never failed to make an appearance on the scheduled date to wit on 12th July 2022 before Luambano DR, 16TH August 2022 before Maditi DR 29th September 2022, 27th October 2022.*
- 4. That, on 1st December 2022 we accordingly appeared hence informed that the trial judge stated in the preceding paragraph has been transferred to another duty station thus Appeal No. 69 of 2022 will be adjudged by Honorable Mkwizu, J on 1st March 2023*
- 5. That, accordingly on 1st March, 2023 we appeared but a hearing of the matter could not proceed for the reason that the trial file was yet to be sent to the High Court of Tanzania. The matter was therefore adjourned until 23rd March 2023.*
- 6. That, ON 2ND March 2023 Mr. Benjamin Kalume hold a brief on my behalf thus Honorable Mkwizu, J. ordered the hearing of Civil Appeal No. 69 of 2022 be conducted by way of written submission.*

- 7. That, accordingly the appellants had to file submissions in Chief on 4th April 2023 the Respondent had to file Reply to Submission in Chief on 18th April 2023 and Rejoinder was to be filed by 25th April 2023. The matter was set for Judgment on 26th May 2023 AT 14:00 hours.*
- 8. That, we failed to file the submissions as scheduled for the advocate had traveled to Bukoba to attend the funerals of his beloved relative.*
- 9. That, on 26th May 2023 we appeared but only to be informed that we had to make an appearance at 9:00 hours and not 14:00 hours as stated in paragraph 7 herein.*

It is certain from the above paragraphs that the applicant's advocate was well informed of the dates on which written submissions were to be filed. There is nothing however, filed in this court to prove that he indeed travelled to Bukoba on those specific dates. As rightly submitted by the respondent's counsel, in this case, the dismissal order was prompted by the applicant's failure to file their written submissions in support of the appeal as ordered by the court without reason. The applicants were thus expected in this application to justify their failure by giving reasonable reasons. One would have expected the applicants to come with clear and detailed information as to who had died in Bukoba and when; the date their advocate had travelled to Bukoba and back to Dar es Salaam and the reason why the court was left unaware of that fact during that event or even immediately thereafter.

Worse, while deposing death of his beloved one as the reason for his failure to file written submissions in court in his affidavit, the applicant's submissions bear a different reason altogether. Instead of expounding

the reasons advanced in the affidavit, the applicant's written submission talks of illegality in the original trial court decision and denial of a fair hearing as the grounds in support of the application. The two reasons advanced in the written submissions do not justify the applicant's failure comply with the court's instruction. And even if they were so convincing, still the two grounds were wrongly brought in court through a back door via written submissions purely a summary of arguments that cannot be used to introduce grounds for the decisions or evidence. See the case of **Tanzania Union of Industrial & Commercial Workers (TUICO) at Mbeya Cement Company Ltd vs. Mbeya Cement Company Limited & National Insurance Corporation (T) Limited** [2005]TLR 41

There is no gainsaying here that the applicant's application is an afterthought and without good reasons.

As a result, the application is dismissed with costs.

It is so ordered



E. Y Mkwizu

Judge
27/10/2023

