

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**ARUSHA SUB REGISTRY**  
**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 136 OF 2022**

(Originating from Civil Appeal No. 44 of 2022)

**EMIL WOISO LESHEYA..... APPLICANT**

**VERSUS**

**AENEA E. MAKONINDE.....RESPONDENT**

**RULING**

12<sup>th</sup> September & 21<sup>st</sup> December, 2023

**KAMUZORA, J.**

The applicant herein beseechs this Honourable Court to be pleased to set aside the dismissal order made on 13<sup>th</sup> September, 2022 in Civil Appeal No. 44 of 2021. Briefly, the applicant was an appellant in Civil Appeal No. 44 of 2021 before this court. The matter was scheduled for hearing by way of written submissions but the applicant did neither comply to the submission schedule nor enter appearance on the date fixed by court hence, the appeal was dismissed for want of prosecution. The applicant has brought this application seeking for the court to vacate from its order dated 13/9/2022.

When the application was called for hearing, Mr. Melkizedeck Paul Hekima, learned counsel appeared for the applicant and Ms. Lilian Joel, learned counsel represented respondent. Hearing proceeded by way of written submissions and counsel for the parties complied to the submission schedule.

Submitting in support of the application, Mr. Hekima argued that on 19/7/2022 when the matter was called for Mention before acting deputy Registrar, Hon. Msofe RM, he tried to explain why he was late to file his submission in chief within the time but, he asked to wait for the trial judge and the matter was schedule for mention on 13/9/2022. That, unfortunately on 13/9/2022 he was attending another hearing at Moshi High Court and his effort to find another counsel to hold his brief was no avail. That, the counsel for the respondent prayed for the court to dismiss the Appeal.

The applicant's counsel added that he was late to file his submission due to late supply of proceedings from the lower court which was issued to him on 15/09/2022. That, his failure to file submission in chief within the time was not due to negligence or laxity as it was prompted by reasons beyond his control. Referring the case of **Dar Express Co. Ltd Vs. Mathew Paulo Mbaruku**, Civil Appeal No. 132 of 2021 (CAT at Tanga,

Unreported) the applicant's counsel insisted that this court wrongly dismissed the appeal on the day schedule for mention.

In reply, the counsel for the respondent Ms. Lilian adopted the counter affidavit and submitted that failure to be supplied with proceedings of the lower court does not remedy the absence of the applicant's counsel when the matter was called for necessary order to ascertain if submissions were in place. That, the applicant's counsel never address the court that he was waiting for the proceedings of the lower court in order to file his submission in chief. She was of the view that, the counsel for the applicant could have sent another advocate to hold his brief since he was aware that he will be attending another matter before the High Court at Moshi.

The respondent's counsel argued further that as per Annexure EWL6 which Mr. Hekima alleged he was texting another counsel to hold his brief, no proof of affidavit from the said counsel that he was really texted by him on the material date. Further that, no summons or cause list was attached from Moshi High Court to prove he was really there. For her, non-appearance on 1/9/2022 was due to negligence and lack of seriousness on the part of the applicant's counsel.

On the argument that the matter was dismissed when it was called for mention, Ms. Lilian submitted that the matter was called for necessary

orders as the appeal was scheduled to be heard by way of written submissions. That, failure to file written submission within the time amount to non-appearance. She urged this court to distinguish all the cases cited by the counsel for the respondent as they do not fit the circumstances in this matter. She added that **Order XX Rule 1** of the CPC is not applicable to this case as it deals with notifying the party when an ex-party judgment will be delivered. She was of the view that the order was accordingly entered since failure to file submission within the prescribed time amount to non-appearance.

She maintained that no good reason was advanced by the counsel for the applicant for failure to file his submission within the time and for failure to appear on 13/9/2022. She therefore prayed for this application to be dismissed with costs for want of merit.

Having considered the arguments advanced by the learned counsels for both parties, I find the central issue for consideration and determination is whether this application is meritorious. It is trite law that in order for this kind of application to be granted, the applicant must adduce sufficient reasons to move the court to set aside the dismissal order. See, the case of **Shamsudin Jiwan Mitha v. Abdulaziz Ali Ladak** (1960)1 E.A. 1054 where it was held inter alia that; -

*"In order to succeed in an application for reinstatement of a suit or appeal, the applicant has to show that he did not appear and that he was prevented from appearing by sufficient cause."*

In the matter at hand, Mr. Hekima alleged that when the matter was dismissed on 13/9/2022 he was attending another case before the High Court at Moshi and he was unable to secure another advocate to hold his brief. He complained further that the matter was dismissed on the date scheduled for mention.

Reading through the affidavit in support of application, the applicant contended that after the judgment of the lower court in Civil Case No. 22 of 2020 was delivered on 13<sup>th</sup> August, 2021, he applied for copies of proceedings, judgment and order. That, on 23<sup>rd</sup> September 2021, he was supplied with copy of judgment and order only without proceedings. That on 27<sup>th</sup> October, 2021, he successful lodged an appeal to this court before being availed with lower court proceedings. That, on different date the applicant's counsel addressed this court on the need to be supplied with lower court proceedings. That, this court among other things called for lower court records but before the records could be forwarded to it, the matter was scheduled to hearing by way of written submissions. He thus

alleged that he delayed in filing written submissions as he was not availed with copy of proceedings on time.

It is true that this court ordered issued submission ordered before the lower court records was forwarded from the lower court. It is also true that the applicant's counsel informed this court that he was ready for the matter to be fixed for hearing upon lower court records being forwarded to this court. I would agree that they intended to use the said record in arguing the appeal and delay in being supplied with the same, affected their move in preparing the submission on time. It was however, expected for the counsel to appear and address the court on that issue because in the eyes of law, it was good reason for their not filing the submission in time.

The counsel for the applicant alleged that he failed to appear because he was attending another case before High Court at Moshi. He attached to his affidavit the proceedings of the High court at Moshi showing that on 13<sup>th</sup> September, 2022 when Civil Appeal No 44 of 2021 was dismissed by this court he entered appearance before Hon. Simfukwe J at Moshi registry.

I understand that an advocate appearing before one court registry and can pray for his case before another registry to be adjourned to another convenient date. However, the advocate is bound to control his

personal diary and ensure that his cases do not overlap in one day and affect court's duties. Where two cases litigated by the same advocate are scheduled on the same date, the advocate has to show that non-appearance was out of his personal control.

In the matter at hand, it is indeed true that the counsel to the applicant was appearing before High Court at Moshi as per the proceedings annexed to the affidavit. He however, did not demonstrate if he informed the court that he will be having another case before another registry. The procedures are very clear that an advocate who think that he will not be in attendance has to notify the court in writing of his absence and reason for his absence. However, it has become a routine for advocates to ask fellow advocate to hold their brief even without clear instructions. The claim by the applicant's counsel that he asked his fellow advocate to hold his brief is unjustified. The WhatsApp text messages attached to the affidavit could not be regarded as formal way to move the court to consider that the advocate acted diligently in prosecuting the case. The counsel for the applicant knew that he had another case and was supposed to appear at Moshi. His offices are based herein Arusha as per the address in the pleadings but, he did not consider submitting a letter of absence before he travelled to Moshi for another case and instead, he thought that he could adjourned court case by a mere

WhatsApp message. In my view, the counsel was not diligent in prosecuting the case and the same was dismissed out of his negligence. It is my settled view that negligence of an advocate cannot stand as good reason for restoration of the dismissed suit for non-appearance.

On the argument that the appeal was dismissed on the date scheduled for mention, I agree with reasoning by Ms. Lilian that the circumstance of this case does not fall within the interpretation given in **Dar Express Co. Ltd Vs. Mathew Paulo Mbaruku**, (supra). This appeal subject to this application was dismissed after the applicant failed to file submission in lieu of hearing. The mention order in the circumstance of this case was a necessary order with view of ascertain if the submissions schedule was complied with so. This is different from when the normal suit is schedule for mention for any reason before being scheduled for hearing.

In the matter at hand mention order was made after an order for hearing by way of written submission was made and the applicant was aware of the order. It is settled that failure to file written submission is tantamount to non- appearance and the remedy is to dismiss the matter for want of prosecution. I therefore find the argument that the appeal was dismissed on the date of mention baseless.



In concluding, I wish to state that I am not convinced by the applicant's reasons for non-appearance. However, I am convinced with the reason for failure to file written submission on time and for that reason, I allow the application. I therefore vacate the submission and dismissal order and restore Civil Appeal No. 44 of 2021. No order for costs is made.

**DATED** at **ARUSHA** this 21<sup>st</sup> day of December 2023.



A handwritten signature in blue ink, appearing to read "D.C. Kamuzora".

**D.C. KAMUZORA**

**JUDGE**

