

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

MISC LAND APPLICATION 12 OF 2022

(Originating from PC Matrimonial Appeal No. 13 of 2021 of the High Court of Mtwara).

STEVEN M. PUNDILE

..... APPLICANT

VERSUS

Evodia Kalibwani

.....RESPONDENT

RULING

Date of last order: 19.09.2023

Date of Ruling: 15.12.2023

Ebrahim, J.

The applicant herein has lodged the instant application praying for this court to set aside its order of 06.10.2022 which dismissed PC Civil Appeal No. 13 for want of prosecution with costs. The application has been preferred under **section 95 and Order IX Rule 3 and Order XXXIVX Rule 19 of the Civil Procedure Code Cap 33 RE 2019** and it is supported by the affidavits of Steven M. Pundile, the applicant.

Going by the averments of the applicants in his affidavit, the Applicant filed the above named appeal in this court on 11th March 2021 which was initially assigned to hon. Ndyansobera, J and later re-assigned to Judge Dr. Laltaika.

On 24th February, 2022, the appeal was scheduled to be disposed of by way of written submission and the Respondent raised a preliminary objection that the notice of appeal and appeal are time barred. The scheduling order made by the court was that submission in chief be filed on 10th March, 2022, reply on 24th March, 2022 and rejoinder on 31st March, 2022; and both parties complied with the scheduling order and addressed both the appeal and the preliminary objection.

The Applicant averred further that he filed his submission in chief on 10th March 2022 and rejoinder on 30th March, 2022. To his surprise, his appeal was dismissed for want of prosecution on 6th October 2022 on the reason that he did not comply with the scheduling order of the court. He stated that he entered appearance on all occasions when the matter was called for either mention or hearing and that

the court dismissed his appeal without according him right to be heard. He thus prays for the application to be granted.

As for the Respondent save for para 8 of her affidavit that she admitted to have been served by the Applicant his submission in chief on 10.03.2022 and some paragraphs which she noted; she denied each and every fact stated in the affidavit of the Applicant.

The application was argued by way of written submission. The Applicant was represented by the learned advocate Songea whilst the Respondent appeared in person.

Submitting in support of the application, Mr. Songea stated that the confusion began on the hearing date when the Respondent orally raised a point of preliminary objection. At that moment parties conceived that both preliminary objection and appeal be argued together which is a normal practise as illustrated by this court in the case of **Kibo Match Group Limited Vs Mohamed Enterprises (T) Limited**, Civil Case No. 6 of 1999, HCT – Commercial Division at Dar Es Salaam.

Mr. Songea, submitted further that both parties proceeded to submit on both substantive points of appeal and preliminary objection. However, to their dismay on 6th October, 2022 the court delivered a ruling dismissing the matter for want of prosecution indicating that both parties did not comply with the court order. Mr. Songea was therefore of the firm opinion that if the court order was not adhered to then the appeal should not have been dismissed because it was the Respondent who was supposed to begin her submission on the raised point of objection. Else, parties adhered to the order and if there was any other issue court should have called the parties to address on the same and that the provisions of **Order IX Rule 2** of the CPC were improperly applied, insisted Mr. Songea.

Insisting on the requirement to furnish good reason on an application for restoration, Mr. Songea cited a number of case including the case **Sadru Mangaiji Vs Abdul Aziz Lalani and 2 Others**, Commercial Application No. 126 of 2016, High Court of Tanzania, Mwanza Registry (Unreported); and the case of **Mwidini Hassani Shila and 2 Others Vs Asinawi Makutika and 4 Others**, Land Appeal No. of 2019, High Court (unreported) which held that:

"It is trite law that powers to set aside dismissal order are in the discretion of the court, however, the applicant should furnish sufficient reasons to enable the court exercise its discretion."

Emphasising on the right to be heard, among others he cited the Court of Appeal case of **Mrs. Fakhriav vs Shamji Vs The Registered Trustees of the Khoja Shia Ithnasheri (MZA) Jamaat**, Civil Appeal No. 143 of 2019, Court of Appeal of Tanzania at Mwanza, where the Court held as follows:

"As rightly conceded by Mr. Mayenga and Mr. Gilla that the right to be heard, which is fundamental, has been violated. We agree that not hearing the parties on the merits of the PO raised and dismissing the same on the "mention" date without being moved by a party present was a serious omission constituting illegality that violated the rule of natural justice. In the famous case of Abbas Sherally & Another Vs Abdul S.H.M Fazalboy, Civil Application No. 33 of 2002 (unreported).....Given the settled position of the law, we are satisfied that none of the parties was availed an opportunity to be heard on the preliminary objection raised. This vitiated the proceeding from the High Court from 27th March, 2018 onwards, and those proceedings are thus nullified see page 11 and 12 of the said ruling"

Given the above, he prayed for the application to be allowed.

Responding to the submission by the counsel for the Applicant, the Respondent began by raising another preliminary objection that the application is bad in law for want of proper citation of the law since

the Applicant cited the provisions of **Order XXXIVX Rule 19** which is none existent and **Order IX Rule 19** which is for restoration of the fresh suit. She cited a number of cases in showing that wrong citation renders the application incompetent.

Submitting on the issue of dismissal for want of prosecution, the Respondent said that both parties agreed that the points of objection be argued by way of written submission and the scheduling order was set by the court.

The Respondent explained on length on how she was taken advantage for being unrepresented party and that she did not know the language of the court hence sought a lawyer one Fred Mmasi. She further cited the persuasive case of **Johnson Nyakisomwa Vs Ipsos Tanzania Ltd**, Miscellaneous Application No. 444 of 2022 (HC Labour Division); and the case of **Eiasi Mashija Nyangoro & Others Vs Mwananchi Insurance Company Ltd**, Civil Appeal No. 278 of 2019[2022] TZCA 648 at page 7 on the requirement to assign good cause that prevented the Applicant from appearing when the matter was fixed for hearing.

She concluded that the Applicant had no good cause because he did not comply with the scheduling order of the court.

In rejoinder, counsel for the Applicant responded on the issue of none citation that firstly the citing of the none existent law was a minor typing error which can be ignored by the court in view of the Oxygen principle and that at no time did the Appellant took advantage of the Respondent.

I out-rightly agree with such a contention. Verily one can see that the citing of **Order XXXIVX Rule 19 of the CPC** was an *lapsus calami* and it is clear that the intended provision was **Order XXXIX Rule 19 OF CPC, CAP 33 RE 2019**.

As for the citing of **Order XXXIX Rule 3**, I associate myself with the cited case of the Court of Appeal of **Joseph Shumbusho Vs Mary Grace Tigerwa & 2 Others**, Civil Appeal No. 183 of 2016, TZCA at Dar Es Salaam (unreported) which held that:

"To date we still hold the same position of the law that the citation of the superfluous provisions of the law in the chamber application does not make the application incompetent".

In considering that in this application there is a correct provision of the law to move the court to perform its judicial function, I dismiss the point of objection for being unmeritorious.

As to the reason that the Respondent was taken advantage of, again, it is an afterthought seeking to gain undeservingly sympathy of the court. I also find it to be baseless and I dismiss it.

I visited the record, nowhere did the court records specifically stated that the preliminary objection shall be argued first by way of written submission but rather hearing shall be by way of written submission. What transpired on 24.02.2022 as per the court records is as follows;

"Ms. Kalibweni

Also have three prayers to make

- 1. Proceed by way of written submissions*
- 2. The Appeal is time barred*
- 3. I was not served with the notice of appeal*

That's all.

Court:

As for the written submissions the prayer is granted.

Mr. Msalenge:

Order:

Written submission to proceed as per the following jointly agreed schedule

- (i) Written submission 10/03/2022*
- (ii) Reply 24/03/2022*
- (iii) Rejoinder if any 31/03/2022*
- (iv) Mention for necessary order 5/4/2022"*

Conspicuously, there was nothing to suggest that the court intended or it was agreed that the preliminary objection is to be argued first. If that was the case, then the Respondent would have been the one to submit on the preliminary objection.

More- so, I repeat what I had stated in the cited case of **Alphonse Mwita (Honole Alphonse Mwita) – Administrator) V Papayai Kaloya** (Supra) that;

"However, each case is decided on its own facts and circumstances.

I have in mind that courts as fountain of justice are always keen in ensuring that all parties are given right to be heard unless otherwise. It is on those circumstances that court would at times depending on the circumstance of each case give a chance to a party who has failed to enter appearance."

Under the circumstances and in considering the fact that the Applicant was not negligent and he attended the court when called, it is clear that the court order was general as to what should the parties do since practice allows arguing the appeal or main application together with the preliminary objection.

I would that not assume on the right of a person but allow parties rights to be adjudicated on merits.

Having said that, I allow the application and accordingly vacate the order of this court of 06.10.2022 which dismissed the matter and restore PC Matrimonial Appeal No. 13 of 2021 from 24th February 2022 when the Judgement date was scheduled.

Being a matter emanating from a matrimonial cause, I give no order as to costs.

Accordingly ordered.



R.A. Ebrahim

Judge



Mtwara

15.12.2023