

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

**MISC. CIVIL APPLICATION NO. 520 OF 2023
(Arising from Civil Case No. 106 of 2022)**

MARCO TUARIRA MJEMA.....APPLICANT

VERSUS

MIC TANZANIA LIMITEDRESPONDENT

RULING

Date of last order: 7th May 2024

Date of Ruling: 14th May 2024

MTEMBWA, J.:

This Application stems from a dismissal order of this Court dated 18th August 2023 in **Civil Case No. 106 of 2022**. According to the facts, on 16th August 2023, the parties appeared before the presiding Honourable Judge for purposes of scheduling a day for hearing continuously in a special session with the view to clear the backlogs. By consent, the matter was scheduled to proceed for hearing on 18th August 2023 at 08:00 am.

When the matter was called for hearing on 18th August 2023, the Applicant herein (the Plaintiff by then) was represented by **Mr.**

Rashidi Kiliza, the learned counsel while the Respondent (the Defendant by then) was represented by **Mr. Gigi Maajar**, the learned counsel. At the commencement of hearing, Mr. Kiliza expresses his inability to proceed with the hearing as his client (the Applicant) was nowhere to be found as he lost his SIM Card. He expounded further that, he had lost communication with the Applicant who by then was leaving upcountry. He therefore prayed for an adjournment, a prayer that was vigorously resisted by the Respondent's counsel.

Having considered the rival arguments by the parties, the learned presiding Honourable Judge dismissed the suit for want of prosecution under ***Order 9 rule 5 of the Civil Procedure Code, Cap 33, RE 2019*** (hereinafter the "CPC"). Still undaunted, the Applicant has brought this Application under Order 9 Rule 6(1) of the CPC seeking for an order to set aside the dismissal order dated 18th August 2023. The Application was supported by an affidavit of the Applicant.

This matter was initially presided over by Hon. S.M. Maghimbi, J and for purposes of clearing the backlog and backstopping cases it was re-assigned to me for final determination. According to the records, on 28th November 2023, the Court ordered the arguing of this Application by way of written submissions. It could appear as per the

records, only the Applicant complied to the order. When prompted on 7th May 2024, the counsel for the Respondent conceded to have failed to file the Court Affidavit and the written submissions to resist the Application. He implored this Court to consider that the Respondent has no intention to resist the Application.

In the conduct of this Application, **Mr. Ibrahimu Juma Kimwaga**, the learned counsel argued gratis for and on behalf of the Applicant. As said before, the Respondent opted not to resist the Application.

In his written submissions, Mr. Kimwaga implored this Court to adopt the Affidavit in support of the Application. He added further that, there has been no clear definition on what amounts to good or sufficient reason. However, that, each case must be considered in its own circumstances. He cited the case of ***Bahati Matimba Vs. Jagro Enterprises LTD, Misc. Civil Application No. 42 of 2023, High Court of Tanzania at Iringa.***

He added that, case laws have developed factors to be considered before the application of this nature can be granted. He mentioned the factors to be; reason for the absence; whether or not the absence was deliberate; the conduct of the Applicant in taking the required step; whether there is diligence on the part of the applicant;

and whether the grant will prejudice the other party. He cited the case of ***National Bank of Commerce LTD Vs. Ahmed Freight LTD, Misc. Commercial Case No. 230 of 2016 High Court of Tanzania at (Commercial Division) at Dar es Salaam.***

Mr. Kimwanga continued to note that, Civil Case No. 106 of 2022 was initially scheduled to proceed on 25th July 2023 but for reasons unknown to the Applicant was scheduled to proceed before Hon. Kisanga, J, Hon. Pomo, J, Hon. Phillip, J and lastly Hon. Mallata, J. Mr. Kimwanga added further that, the Applicant is not the resident of Dar es Salaam City but Pichane, Pande, Kiomoni in Tanga. That, when the matter was adjourned on 25th July 2023, it was set to proceed on 6th September 2023. He then had to go home waiting to appear before this Court on the scheduled date.

Mr. Kimwanga continued to note that, the Applicant's place of residence is notably remote such that it is not wholly accessible by mobile phone. He added that, the Applicant was inaccessible from 26th July 2023 until 18th August 2023 when he went to Pande Centre to purchase some households. While there, that, he tried to communicate with his lawyer only to be surprised by unfortunate dismissal order.

It was submitted further that, he never received information or summons to reverse the hearing date apart from 6th September 2023.

Mr. Kimwanga faulted the learned Judge for dismissing the suit while his advocate was present on the material day. To him, that caused injustice contrary to **article 107A (2) of the constitution of the United Republic of Tanzania of 1977** as amended.

Mr. Kimwanga also submitted that, the dismissal order might bring a danger to consumers by losing confidence to the Court if strict compliance with procedural rules are followed than the merits of the dispute. He cited the case of **VIP Engineering and marketing LTD Vs. Said Salim Bakhresa LTD, Civil Application No. 47 of 1996**. He added further that, justice must be better done than speed and a party should not be punished for error committed by the Court. To fortify, he cited the case of **Mount Meru Flowers Tanzania Limited Vs. Box Board Tanzania Limited, Civil Appeal No. 260 of 2018, Count of Appeal at Arusha**.

Lastly, on the principle of natural justice specifically on the right to be heard, Mr. Kimwanga implored this Court to grant the Application so that Civil Case No. 106 of 2022 can be heard interparties.

Indeed, this Application has been brought under the provisions of **Order 9 rule (6) (1) of the Civil Procedure Code (supra)**. For clarity, the cited law provides as follow, thus;

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.

Explaining more on the above rule, **Mulla** in his celebrated Book titled "**the Code of Civil Procedure**" 17th Edition has this to say at page 537;

.... It is necessary to find out as to whether the part had been able to show that there were sufficient reasons preventing them from appearing on the day fixed. The finding of sufficient reason is not confined to the reason that prevented the party from appearing. The Court has also to look at the totality of the situation, including the defect of its own procedure. A bonafide mistake which is not unreasonable is a sufficient excuse within the meaning of this rule.

As to the powers of this Court to restore the matter which has been dismissed, **Mulla** continues to note at page 571, thus;

.....this rule does not take away the inherent powers of the Court to restore a suit dismissed for default, if there be a just and reasonable cause of restoring it, even if no sufficient cause is shown in the meaning of this rule for the plaintiff's non-appearance.

From the above, a court has mandate to dismiss a matter for want of prosecution where a party who initiated it does not take active steps to pursue it. Such inactiveness may also include non-appearance

when the matter is set for hearing. In some cases, the suit may be dismissed for want of prosecution if the plaintiff seems to have been no longer interested to pursue his or her case. In such circumstances, where good cause is shown for inactiveness or non-appearance, the Court ceased with the jurisdiction may restore it. The reasons to be considered as sufficient reason are never established but the Court is obliged to consider the whole situation surrounding the matter.

In the present case, the Applicant insisted that, he was not informed of the date of hearing by his advocate or Court as he lives in the interior of Tanga Region where the mobile network is not wholly available and or accessible. It was narrated further that, he was not reachable until sometime on 18th August 2023 when he went to Pande Centre to purchase some households. While there, that he tried to communicate with his lawyer only to be surprised by unfortunate dismissal order.

The Applicant further explained that, he never received information or summons to reverse the hearing date apart from 6th September 2023. From what I gathered is that, the matter was initially scheduled to proceed on 6th September 2023 before Hon. Phillip, J. Following commencement of session with the view to clear backlog cases, it was then reversed to 18th August 2023 before Hon. Malata,

J. As per the records, this date was so arrived on 16th August 2023, two days before the dismissal order was issued by this Court.

On the day scheduled for the hearing, the Applicant's counsel was present. He informed the Court of his inability to get hold of his client for hearing. He submitted further before the presiding Honourable Judge that, his client was totally inaccessible as he lost his SIM card. The Court was not amused at all by such reasons advanced for purposes of a prayer for an adjournment. Consequently, the matter was dismissed for want of prosecution.

I have reconsidered the reason advanced by the Application for his non -appearance on the day of hearing. I should first state here that, the Applicant was present on the day scheduled through his counsel only that, there was no witness to testify. It could appear, the one expected to give evidence on the material day was the Applicant himself (the Plaintiff). However, failure to bring a witness to testify is equal to failure to prosecute the case. As such a distinction must be made between non-appearance of the party and appearance while no witness is prepared to testify on the day schedule for hearing. However, both scenarios have the same effect of dismissing the matter for want of prosecution.

In the circumstance of this case, the question would be whether the Applicant as both, plaintiff and witness, was dully notified of the day of hearing. According to the Applicant, the matter was initially scheduled to proceed for hearing on 6th September 2023 before Hon. Phillip, J. He was not informed of the new date, that is, 18th August 2023 before Hon. Malata, J. Considering his place of residence, he was not in contact with his lawyer at the time.

Considering the submissions by the Applicant, I consider the reason advanced for his non appearance to testify on the day scheduled for hearing sufficient cause warranting a grant of this Application. The Respondent has not opposed the Application that alone is an indication that she will not be prejudiced by the restoration. The promptness in filing this Application is also an indication that the Applicant is desirous and ready to prosecute his case.

To that end, the dismissal order dated 18th August 2023 in **Civil Case No. 106 of 2022** is here set aside. Hearing of the matter shall proceed interpaties. There will be no order as to costs.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 14th May 2024.



A handwritten signature in blue ink, consisting of stylized initials and a surname.

**H.S. MTEMBWA
JUDGE**