

IN THE HIGH COURT OF TANZANIA
(MOROGORO DISTRICT REGISTRY)
AT IJC MOROGORO
MISC. CIVIL APPLICATION NO.89 OF 2023

MWANANJIA ALLY MPONZI..... APPLICANT

VERSUS

ABDALLAH LIVO CHILUMANGA RESPONDENT

RULING

18th of January 2024.

LATIFA MANSOOR, J

Through the legal service of Mr. Fredy Julius Sanga, the Applicant Mwananjia Ally Mponzi, preferred the instant application by way of chamber summons made under Order IX Rule 3 of the Civil Procedure Code (Cap 33 R.E 2019) seeking orders as hereunder:

1. That this honorable court be pleased to set aside the dismissal order dated 10th of October, 2023 in Misc. Land Application No. 48 of 2023 and appoint a day for proceeding with the application.



2. Costs of this application be provided for.
3. Any other relief that this honorable Tribunal shall deem fit and just to grant.

With the leave of the Court given on 6th day of December, 2023, the hearing of the application was canvassed by way of written submission. The applicant was represented by Fredy Julius Sanga the learned advocate, whereas on his part, the respondent was represented by Erick Felix Chale the learned advocate.

Counsel Fredy J Sanga was the first one to start to kick the ball rolling, he adopted the four (4) affidavits to form part of his submissions, he adopted his own affidavit, the affidavits of Baby Stanslaus Duwe, Salum Kondo Abdala and Sweya John Sweya. These four affidavits were filed to support the chamber summons. He started by challenging the propriety of the dismissal order by highlighting that the application was erroneously dismissed on the date it was fixed for mention, he traced the day upon which the impugned application was filed and he lamented that, the applicant's advocate was not issued with a summons when the matter was fixed for mention on the 11th of July 2023. He maintained further that it was upon such non-issuance of the summons, neither the applicants advocate nor the respondent entered appearance on 11th of July 2023,

when the application was called for mention. He also submitted that the court summons which was issued on 11th of July, 2023 indicated that the application was fixed for mention on 05th of September, 2023 before Hon. Ngwembe, J. Unfortunately, the judge was supposed to be on criminal session at Kilombero from 28th of August, 2023 to 22nd of September, 2023. He added that due to absence of judges, all advocates whose matters were before the judges who were supposed to be in criminal sessions were advised not to go to court as the date which will be fixed for next sessions in respect of their matters will be communicated to them.

Mr Fredy accentuated further that on 05th of September 2023, the application was adjourned before Hon. Lyakinana, Ag DR and that it was fixed for mention on 10th of October, 2023 and he added that on the respective date, neither the applicant's advocate nor the respondent entered appearance and the application was dismissed for non-appearance of the applicant.

The Counsel was of the view that the honorable court erroneously dismissed the application for non-appearance of the applicant and he was of the opinion that neither Order IX rule 2 nor Order DC rule 5 of the Civil Procedure Code [Cap 33 R.E 2019] gives the court power to dismiss a suit

or application when it is scheduled for mention. According to him the two provisions give the court powers to dismiss the suit or application when it is called on for hearing. To support his stance, he referred this court to the case of **Mrs. Farhia Shanji vs. The Registered Trustees of Khoja Shia Ithnasheri (MZA) Jamaat**, Civil Appeal No. 143 of 2019 (CAT) at Mwariza (Unreported), where it was observed that dismissing the suit at the date of mention is a serious omission constituting an illegality and also he found reliance on the case of **Mr. Lembrice Kivuyo vs. Ms. DHL World Wide Ejtyress**, Civil Appeal No. 83 of 2008 (CAT) (Unreported) where it was observed that dismissal can only be made on a hearing date.

Being guided by the above case laws the learned counsel concluded that the honourable court erroneously dismissed the application on the date it was fixed for mention.

He demonstrated further that the error constitute illegality. To buttress his contention, he referred this court the decision made by the court of appeal in Mrs, Farhia's case (supra) and he maintained that the court was not moved by either party for an order for dismissal and neither party was heard before such order was made.

Mr. Fredy expounded further that, the court of appeal has set a legal principle that "illegality" constitutes a good ground for setting aside dismissal orders and restoring suit which was illegally dismissed. To support his stance, he referred this court to the case of **Jamal S. Mkumba & Another vs. The Attorney General**, Civil Application No. 240/01 of 2019 (CAT) at Dar es Salaam (Unreported).

Explaining the reason for his absence on the day the case was fixed for mention, Mr. Fredy contended that his non - appearance was not occasioned by negligence rather it was due to circumstances which were beyond his control. He contended that on 08th of October, 2023, he received information that his uncle who was residing at Kibaha had passed away and thus he had to travel immediately for burial ceremonies. He added further that while at Kibaha, he tried to his level best to make sure that he notifies the court over his absence on the date so fixed for mention of the application and the reason for his absence. According to him he prepared a notice of his absence and he electronically send the same to a fellow who could pass it to a person who would have assisted him to file it before the court. He lamented that, when the notice was filed it was rejected by the court as he omitted to write the address. He maintained further that failure to indicate address of the advocate was a mere human

error considering the situation in which the advocate was and the fact that there is no a prescribed form which is being used as notice of absence. The Counsel reminded this court that, advocates are the officers of the court whose duty is to assist the court in delivery of justice and he advised the court not to doubt what he has deponed in an affidavit on simple allegations that they are afterthoughts. He contended further that it will be uncalled if the court will believe that an advocate can swear on the demise of his uncle just for the sake of rescuing the application of his client while in fact the information is not true. He added that to question attachment of a burial permit to the application will be equal to lifting the standard of proof required in civil matter from that of balance of probabilities to beyond reasonable doubt.

The Counsel was of the view that, the applicant has demonstrated good reasons for this court to grant the instant application.

Responding to the applicant's submission Counsel Erick adopted the counter affidavit affirmed by the Respondent and he submitted that the principle of our land requires the case to belong to the one who has filed it and that such person is duty bound to make follow up and attend when his or her case is scheduled in Court.

He demonstrated further that, in the instant application it is only the advocate who is advancing the reasons for absence but not the applicant herself and he contended further that the affidavit sworn by the applicant's advocate does not state in any way as to why the applicant was not entering appearance for her case. He was of the view that, when a party engages an advocate for her case is not a criterion for her to skip making follow up or attending court sessions on its entirety, according to him the applicant was still duty bound to know the progress of her case.

He concluded that once an advocate is engaged by a party to the case it is both of them, thus an advocate and his client have to attend at the Court or at least either of them whether the matter or case is scheduled for mention or hearing. To buttress his contention, he referred this court to the case of **Khalil Ibrahim vs. Unyawagala Auction Mart and Court Broker Ltd.** Misc. Land Application no. 149 of 2023 at Page 9 High Court (Unreported), and **Dira Media Group vs. Joseph Kubebeka Kulangwa & 2 Others**, Miscellaneous Application No. 504 Of 2022, HC Labour Division, Dar Es Salaam, quoted with approval the 8 case of **Lim Han Yun and Another vs. Lucy These as Kristensen**, Civil Appeal No. 219 of 2019, CAT.

Being guided by the above cited case, the learned counsel opined that, the said four affidavits had to show the reasons as to why both the Applicant and his Advocate did not enter appearance when their case was due in this honourable Court three times consecutively and the reason of advocate absence only.

The counsel argued further that entertaining mistakes to omit the address by the applicant counsel would amount to misuse of court process and it will encourage endless suits even when the applicant does not comply with court orders as the herein applicant. To support his stance, he put reliance on the case of **Emil Woiso Lesheya v. Aenea E. Makoninde**, Misc. Civil Application No. 136 of 2022 High Court (Unreported) where the court insisted the advocates to notify the court in writing on their absence not by sending a fellow advocate to hold a brief on their behalf. Furthermore, he referred this court to the cases of **Bahati Matimba v. Jagro Interprises Ltd**, Misc. Civil Application No 42 of 2022 High Court (unreported) and **Mwidini Hassani Shila and 2 Others vs. Asinawi Makutika and 4 Others**, Land Appeal No, 04 of 2019, High Court (unreported) where it was observed that sufficient reason has to be furnished for a court to set aside dismissal order.

Basing on the above explanation and the cases law cited herein, Counsel Erick was of the view that an Applicant has not advanced sufficient reasons to warrant this honourable Court to set aside the dismissal order dated on 10th day of October 2023, in Misc, Land Application no 48 of 2023.

In response to propriety of the dismissal order counsel Erick finds the point unfounded and as for him if unlimited adjournment will be allowed there would be endless mentions orders of the court even on non-appearance of the Applicant. He was of the view that the interest of justice requires litigation to come to an end. He added that absences of the Applicant and her advocate three consecutive altogether is a sufficient cause for the court to dismiss the suit and according to him the cited cases by the applicant advocate are distinguishable from the matter at hand. He concluded that instant application has no merit hence deserves to be dismissed with costs.

I have objectively considered and weighed the rival arguments from both parties' counsels along with the affidavit deposed by the applicant's advocate. The sole question for my determination is whether or not the

applicant has disclosed good cause to warrant this Court exercise its discretionary power.

The starting point will be the provisions of Order IX rule 3 of the Civil Procedure Code (Cap 33 R. E 2019). For easy reference I take the liberty to reproduce it hereunder:

3. Where a suit is dismissed under rule 2, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.

In terms of the foregoing provision, the Court will only grant an application for setting aside dismissal order of a suit dismissed under rule 2 upon an applicant showing good cause for the non-appearance. The reasons for the non-appearance have been deposed by Counsel Fredy Sanga at paragraph 10 of the affidavit. I shall let the paragraphs speak for themselves;

10. That my absence from the court on 10th October, 2023 was because I travelled to Kibaha to attend burial

ceremony of my uncle PRAYGOD PETER MSEJA and my efforts to file the notice of absence was not successful.

The applicant counsel, depended in his affidavit that his absence on the date fixed was because he attended the burial ceremony of his uncle and he has demonstrated the endeavours he took to notify this court about his absence as indicated in paragraphs 12,13 and 14 of the affidavit in support of this application.

He demonstrated further that after he received information that his uncle has expired, he prepared the notice and sent it to Baby Stanslaus Duwe through WhatsApp and he asked her to print it and to give it to Salum Kondo Abdallah so that he can take it to the court and hand over to Sweya John Sweya who would have helped him to file it, unfortunately after it was presented in court registry for filing it was rejected for not containing an address.

In determining the reason advanced the applicant I am persuaded by the position underscored in the case of **Emil Woiso Lesheya v. Aenea E. Makoninde**, Misc. Civil Application No. 136 of 2022 High Court (Unreported) where the court insisted the advocates to notify the court in

writing on their absence as rightly cited by the respondent's counsel. Being armed with the above position, I find paramount at this stage to hold that, the recommended mode for advocates to notify the court on their absence is by way of writing not by sending their clients to court as suggested by the respondent counsel.

That being said, I am therefore convinced that the applicant counsel acted within the required standard to notify this court on his absence even though his efforts ended in vain it is futile to allocate the blames to him, I am also satisfied that the reason given on the notice of absence namely; attendance to the burial ceremony is good cause under these circumstances to exercise my discretion.

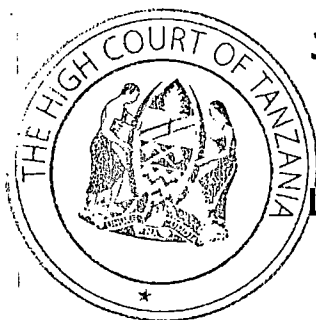
Regarding the propriety of the dismissal order, it is certainly clear that Order IX rule 2 of the Civil Procedure Code [Cap 33 R.E 2019] presupposes that the order has to be issued on non-appearance of the parties at hearing stage. The record shows that, on 05/09/2023 the case was called for mention and both parties didn't enter appearance and it was scheduled for mention on 10/10/2023, again both parties didn't enter appearance and consequently the court dismissed the application for non-appearance of the applicant.

I am aware of the decision of the Court of Appeal in **Mr. Lembrice Israel Kivuyo vs. M/S DHL World Wide Express DHL Tanzania Limited**, Civil Appeal No. 83 of 2008, (Unreported) as rightly cited by the applicant counsel that, dismissal can only be made on a hearing date and not "mention" as most parties consider a "mention" day as a day for necessary orders, including scheduling of a hearing date however as far as the instant application is concerned I don't find if this is the proper forum to determine the propriety or otherwise of the dismissal order and thus I will not be detained to discuss it.

Consequently, this application is granted and I set aside the dismissal order dated 10th of October, 2023 in Misc. Land Application No. 48 of 2023 and I hereby order the application to proceed for mention on 15th day of February, 2024.

It is so ordered.

DATED AND DELIVERED AT MOROGORO THIS 18TH DAY OF



JANUARY, 2024

LATIFA MANSOOR

JUDGE

18TH JANUARY 2024