

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 209 OF 2023

(Originating from Civil Case No. 117 of 2020 before Hon. Kakolaki, J)

NIXON BANDAGO HAULE..... APPLICANT

VERSUS

AIRTEL (T) PLC1ST RESPONDENT

OGILVY TANZANIA LIMITED.....2ND RESPONDENT

TONGWE RECORDS.....3RD RESPONDENT

RULING:

13th Dec 2023 & 13thFeb 2024

KIREKIANO; J

Before this court, there was a civil case no 117 of 2020. On 25/04/2023, this case was scheduled for the first pretrial conference with orders directing the parties to appear. The plaintiff defaulted appearance. This court made an order dismissing the suit with costs under order VIII rule 20 (1) (a) Civil Procedure Code Cap. 33 [RE 2019] to be referred to as CPC.

The plaintiff who is the applicant in this application has thus filed this application under Order VIII Rule 20 (2) of the CPC praying this court to set aside the dismissal order and make other orders as it may deem fit.

This application is supported by the affidavit of Mr. Mikidadi the applicant's counsel.

In substance, the grounds advanced in the affidavit is that, on 24/04/2023 around 12:30 hrs., the applicant counsel received a call from clerk of this court informing him that he was assigned criminal session cases hence he was required to represent the accused on 25/04/2023 the next day for plea taking. The cases were; *Criminal Session no 14/2023 Republic Vs Anadon Nicodemus Mendes*, *Criminal Session no 105 of 2021 Republic Vs Maximillian Simon Mbagala*, and *Criminal Session no 182 of 2022 Republic Vs Emanuel Mitamo*.

According to the applicant's counsel, he did abide by court summons and that on 25/04/2023, he could not have anyone to hold his brief nor his client to appear in Civil case no 117 of 2020. He then went for the morning briefing in the criminal cases listed. When he, made a follow-up about the civil case at issue he learned that the case was dismissed for non-appearance.

The application is contested by the respondent who filed a counter affidavit sworn by Mr. Gasper Nyika learned advocate for the 1st respondent. While noting the facts stated in the applicant's affidavit, he stated that the applicant's counsel could have informed the court in writing on the predicaments he faced but also it was laxity on the part of the applicant's counsel because as he agreed with his client not to attend to court.

Submitting in support of the application. Mr. Mikiadadi's line of argument was under Order VIII Rule 20 (2) of the Civil Procedure Code Cap 33 [RE 2010] that this court has power to set aside the dismissal order upon satisfaction of good and sufficient cause.

He argued that, the act of advocate to appear in more than one court session on one day was not intentionally made hence a good cause. According to him, if the order is set aside, it will accord the applicant the right to be heard without prejudicing the respondent.

In support of this proposition, he cited decisions in **Pili Erness Vs Moshi Musani Civil appeal no 39 of 2019 CAT** but also **Rashid Othman Ramadhan Vs DPP Criminal Application no 20/2019 CAT**.

On the other hand, Mr. Mikidadi hinted that the counter affidavit sworn by Mr Gasper Nyika as a senior advocate from IMMA engaged to represent “the applicant” was untrue and ought to be expunged and this court may consider whether the remaining part of the affidavit can support the application. He cited **Panton Modern Transport [1985] Ltd to support** his argument.

On the part of the respondent, Mr. Nyika conceded the wording complained in paragraph 1 of his affidavit and submitted that the wording that Mr. Nyika was authorized by “the applicant” to swear counter affidavit was a typographical error instead he was representing the “1st respondent.”

Mr. Nyika submitted that to warrant this court granting the application this court out to look at whether the reasons furnished are sufficient to justify the applicant’s nonappearance and not whether the case is sound and maintainable. He relied on the decision in **Nasibu Sungura Vs Peter Machumu [1998] TLR 496.**

According to Mr. Nyika, the applicant's counsel gave no sufficient reasons because he had ample time to inform the Court in writing of his predicament. He cited the decision in **Evod August Mallya Vs Shedrack**

Kalinga and 22 others Misc Land Application no 232 of 2023 to the effect that the advocate should have made correspondence to court by a letter.

Responding to the question of the right to be heard, Mr. Nyika argued that the decision in **Pili Ernest Vs Moshi Musani** is distinguishable because in the former case, the parties were not given a chance to be heard while in this application the same involves the applicant's laxity.

In his rejoinder, the applicant's Counsel argued that he was caught between the two schedules in attending the case at issue Civil case no 117 of 2020 and the Criminal sessions, and thus since he did not wish to seek adjournment of the Civil case there can be no laxity for failure to write a letter. He emphasized that the reasons stated are good cause to grant the application. On the right to be heard in his rejoinder, the applicant maintained that the decision in **Rashid Othman on the right to be heard** was not distinguishable because the same involved restoration of appeal.

I have considered the parties' submission in line with the cited enabling provision. Indeed, this court has discretion under order VIII Rule 20 (2) of the Civil Procedure Code to grant the application and set aside the dismissal

order. However, this discretion may be exercised if reasons are exhibited and justice dictates that the applicant has demonstrated good cause to warrant the grant of the application. The central issue in this application therefore is whether the applicant has demonstrated good cause.

It is an undisputed fact that a day before when the case was scheduled for its first pre-trial conference, the counsel for the plaintiff (now for the applicant) was assigned other cases in the same registry. It follows that at this point he had to consider what was in his diary and if, with new criminal cases coming to his diary how would he manage to attend. If not, then communication ought to be made to the court.

Advocates appearing in court, in addition to being professional are officers of the court, who play an important role in the dispensation of justice to litigants. The requirement for advocates to communicate with the court formally as rightly submitted by Mr. Nyika cannot be over-emphasized. It is a good practice in the conduct of court business based on courtesy and now finds its expression under **Advocates (Professional Conduct and Etiquette) Regulations. GN 118 2018.**

The applicants counsel stated that he had not planned adjourn the case.

I have taken into account the circumstances surrounding applicant's counsel defaulting appearance. It is undisputed that this advocate was in court premises, in fact attending other proceedings having been summoned.

While the court in civil case ought to be informed of the predicaments, I find that having been summoned to appear in criminal session case just a day before while already have a scheduled case to attend was not exhibition of laxity on part of the applicant's counsel. This is a scenario for the interest of justice, I find it fitting for this court to rise and exercise its discretion in favor of the granting the application.

Given the foregoing, the application is granted, the order 25/04/2023 dismissing civil case no 117 of 2020 is set aside. Considering the nature of this application I shall make no order as to costs.

Dated at Dar es Salaam this 13th Feb 2024:



A handwritten signature in blue ink, consisting of a stylized, circular flourish followed by a horizontal line.

A. J. KIREKIANO

JUDGE

13/02/2024