IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 166 OF 2023

(Arising from Civil Case No. 63 of 2022)

TANZANIA RED CROSS SOCIETY ..... APPLICANT

VERSUS

JOHN MATHIAS BUSUNGU..... RESPONDENT

RULING

21/08/2023 & 22/01/2024

NKWABI, J.:

The respondent instituted Civil Case No. 63 of 2022 aiming for a relief among other reliefs:

> *"A declaratory order that the decision made on 30th March 2022 was arrived at without affording the plaintiff a right to be heard."*

The case was assigned to Hon. Mango, Judge who attended it up to the stage where she ordered the suit to come for 1st Pre-trial conference. On her being transferred to another duty station, the civil suit was re-assigned to me by His Lordship, Mruma, Judge in-charge on 1st October, 2022. After the case was re-assigned to me, it was called up for 1st pre-trial conference on 24th October, 2022. Unfortunately, the presiding Judge, that is myself, was not in the Court room, be it for official duties (criminal sessions) or

otherwise. It was adjourned by an Acting Deputy Registrar who inadvertently fixed the matter to come up for further orders commonly known as "Mention" on 13/12/2022, the counsel of the applicant in this application was in appearance. On that date, that is 13/12/2023 neither party appeared. Further, neither party had notified the Court of the reasons for their non-appearance. In their absence, I pronounced the following orders:

(1) "1st Pretrial Conference on 03/04/2023 at 09:00 am.

(2) Defendant be notified.

(3) Last adjournment."

On 03/04/2023, the counsel for the respondent, who had not appeared on the prior fixed dates (24/10/2022 and 13/12/2022), had his brief in Court held by Mr. Douglas Mmary, learned counsel, while, the counsel for the applicant, who had appeared on the prior fixed date (24/10/2022) did not appear as said earlier on, without any notification, either by a letter or by an advocate to hold his brief, to notify the Court about his indisposition.

When the suit was called on for 1st Pre-trial Conference on 03/04/2023, the counsel for the respondent prayed, alternatively, for the Written Statement of Defence be struck out under Order VII Rule 20 (1) (c) of the

Civil Procedure Code. I granted the prayer and ordered ex-parte hearing for ex-parte proof.

On 6th April 2023, the counsel for the applicant filed a letter addressing the Deputy Registrar requesting for perusal of the civil case file. It is unclear whether that letter was acted upon by the Deputy Registrar or not, whether the applicant paid for the requisite perusal fees and whether truly, the counsel for the applicant perused the case file. After everything, this application was filed by the applicant on 14/04/2023 in expedition for the orders about to be specified:

i. This Court sets aside an order striking out the written statement of defence in Civil Case No. 63 of 2022.
ii. Any other order/order that the Honourable Court may deem fit to grant.

The chamber summons is supported by the affidavit of Richard Magaigwa, learned counsel for the applicant. In the affidavit, the grounds for this Court to set aside the striking of the Written Statement of Defence order were that, **one,** he was unaware that the suit had been re-assigned to me by 1st October, 2022. **Two,** that he was misled by Registry Assistant Manager (RMA) that re-assignment will be communicated to all parties. Thus, his non-appearance before me was not intentional. **Three,** he was

unaware that the suit was re-assigned to me, thus he appeared before the Deputy Registrar in Execution No. 4 of 2021 which was/is before Maghimbi, Judge, but attended before the Deputy Registrar because he was not aware that the suit had been re-assigned to me.

In the counter-affidavit, the counsel for the respondent disputed the allegations expressed by the counsel for the applicant in his affidavit. He avowed that the counsel for the applicant and his client were negligent and intentional in failure to appear on the 1st pre-trial conference. Complained the lack of attachment to the affidavit an affidavit of the informant at the court house, attachment of the exchequer receipt for the perusal. The lack of averment about the follow-up after the adjournment dated 13th December 2022 for a duration of about four months, and it is negligent based on previous conducts. It was added that the applicant counsel's affidavit does not show sufficient cause for non-appearance on the scheduled dates. He also averred that re-assignment records are available at the registry.

The counsel for the applicant would not back down. He lodged a reply to the counter-affidavit in which he avowed his lack of negligence, lack of intentional non-attendance on the scheduled dates. He blamed the Court on the situation, in his own words, "*... until the re assignment process*

where had lost the track and trail of the suit ..." He too under oath, blamed the counsel for the respondent for failure to notify him of the re-assignment. He also blamed the Court and the counsel for the respondent for failure to notify him about the date where the case would have 1st pre-trial conference conducted (13th April 2023). In paragraph 7 the counsel for the applicant posed that when he appeared in Court on 24/10/2022, the re-assignment process was incomplete, in his own words *"... and even was the last person to attend the matter in absence of the respondent before the re assiment process, the reason for non appearance was due to contemplation on the re assignment process ..."*

He finally warrants that it is in interest of justice that the written statement of defence of the applicant be restored so that the applicant is not condemned unheard.

Meanwhile, the application is preferred under Order VIII B rule 19, 20 (1) (b) and (2) and section 95 of the Civil Procedure Code, [Cap 33 RE 2022]. It is disposed of by written submissions. The applicant is represented by Mr. Richard Magaigwa, learned advocate while the respondent is represented by Mr. Alex Mashamba Balomi, also learned advocate.

Mr. Magaigwa adopted the contents of the affidavit and the affidavit in reply to the counter-affidavit. He pressed he should have been notified as per the requirement of Order VII Rule 19 (1) and (2) of the CPC. Likewise, Mr. Alex M. Balomi adopted the contents of the counter-affidavit as part of his submissions. I will refer to their submissions as I canvass this application.

I start my determination of the application with the clear-cut anomaly in the application. That is no other than the falsehood in the affidavit. It is glaring clear that falsehood in an affidavit leads an application to crumble to the ground. The position was adequately stated in **Damas Assey & Another v. Raymond Mgonda Paula & 8 others,** Civil Application No. 32/17 of 2018, (CAT) (unreported) in which it is underscored that:

> *"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted to resolve any issue"*

As far as I am concerned, the above authority just adopts the position in oral or documentary evidence as stated in **Bahati Makeja v. R.** Criminal Appeal No. 118 of 2006 (unreported) where it was stressed that:

"It is settled law that a witness who tells a lie on the material point should hardly be believed in respect of other points."

The counsel for the applicant avers falsehood that he was informed by a registry official (RMA) that he would be informed about the re-assignment. It seems to me that is why he failed to mention that registry official. He was clearly aware that that registry official would be required to swear an affidavit to that effect and that affidavit of the registry official would be required to be attached to this application. Like failure to call a material witness, adverse inference is accorded to the effect that a litigant who failed to bring that material witness knows if that witness would come to testify would give evidence contrary to his interests.

There is also falsehood in respect of what the applicant's counsel caused him to fail to appear before me. He falsely claims that he had another case before Maghimbi, Judge on 3rd day of April, 2023. But execution applications are ordinarily entertained and determined by Deputy Registrars. That is proved by the attachment of the order issued by the Deputy Registrar. The execution was marked withdrawn on the prayer of Mr. Magaigwa. It is a practice that suits or applications which are assigned to Judges cannot be dismissed or be withdrawn by Deputy Registrars.

Even a case which is assigned to particular Judge cannot be dismissed or withdrawn by another Judge unless that case or application is re-assigned to that other Judge and reasons should be assigned for transparency. It is thus unmistakable that the false claim was brought up by the counsel for the applicant to salvage his ever-sinking defence and this application. It appears to me that failure by Mr. Magaigwa to attach the proceedings in Execution No. 4 of 2021 was a calculated attempt to conceal that indeed the execution application was not before Maghimbi, Judge, but was assigned before the Deputy Registrar who withdrew it. Too, had the counsel for the applicant attached the proceedings of the execution application, one would have seen the reason for re-assignment, if any, of the execution application from Maghimbi, Judge to Sundi, B. Fimbo, Deputy Registrar to enable her to make the order withdrawing the execution application.

Connected to the above falsehood though I really do not know under which provision of law a Deputy Registrar may change the stage of the case that is fixed by a judge. Unless there is a direction by the presiding judge, the Deputy Registrar cannot change the stage (status) of the case that has been fixed by the presiding judge. Just think, could I have set back the stage of the case? Why do we set speed tracks? Why the judiciary

is fighting backlog cases so that they are disposed of? Had the counsel of the applicant taken into consideration all the above posed questions, he would have done the needful rather than coming to shoulder the blame to the Court. With respect, that is unacceptable. I am aware that the counsel of the respondent did not call out his learned brother for averring falsehoods. But what he stated clearly indicates so. For instance, while the counsel for the applicant avows that he made follow-up and was told that he will be informed about the re-assignment, the counsel for the respondent in the written submission said that the applicant did not make any follow-up. That is tantamount to saying the counsel for the applicant averred falsehood that he made follow-up of the suit. One may ask, if he made follow-up about re-assignment, what would have prevented him to inquire about the next date on which 1st pre-trial conference was scheduled?

Another falsehood is in his claim that he was making follow-up to know that the case file was re-assigned. Let me put it this way, the re-assignment was done on 1st October, 2022. The written statement of defence was struck out on 3rd April 2023. So, the written Statement of Defence was struck out after the lapse of six months since re-assignment. Can anyone with sane mind accept that the learned counsel for the

applicant was making follow-up to know the case was re-assigned to which Judge? That question should be coupled with the vision of the Court of "Timely and accessible justice to all." To me, with profound respect to the counsel for the applicant, all what he claims, is nothing but audacious simulation. The above falsehoods as discussed disposes this application in favour of the respondent.

Natheless the above, unfortunately, the counsel for the applicant did not pay attention to various directives that are already in place in our jurisdiction. One of them is advocates have to be open to the court rather than conceal things. That was articulated in **Mohamed Ikbal v. Esrom M. Maryogo,** Civil Application No. 141/01 of 2017, CAT (unreported) where it was stated that:

> *"An Advocate is an officer of the Court, he is therefore expected to assist the Court in an appropriate manner in the administration of justice. One of the important characteristics is an openness."*

This moment in time, let me assume that the counsel of the applicant was in fact required to appear before Madam Justice Maghimbi. Was he not supposed to tell the Bench clerk who would come to inform me so that, I give space for that and allow him to attend at a later hour? If that were

too hard for the counsel for the applicant, what caused him fail to send another advocate to hold his brief as accentuated in **LT. Ahmed Chipanji v. Republic,** Criminal Appeal No. 89 of 1989, CAT (Unreported) where it was underscored that.

> *"We are not aware that an advocate, who is indisposed, cannot request a colleague to inform the court of his indisposition or to write to the court to that effect."*

For an authority that directs advocates of parties to be diligent and make follow up, one may wish to have a look at **Mohamed Salimini v. Jumanne Omary Mapesa,** Civil Appeal No. 345 of 2019 CAT (unreported) at page where it was underscored that:

> *"Suffice to state, having in mind the duty to ensure there is a decree and judgment attached to the record of appeal as stated in section 19(2) of the LLA falls on the appellant, there is also a duty to apply for a decree within the time prescribed for appeal. In the present case, after the trial court decree was struck out by the Court, the duty to procure a correct and proper decree was upon the appellant, and this duty was expected to be exercised within reasonable time while mindful of the time*

prescribed for lodging and appeal before the High Court ... is ninety (90) days.

Section 19(2) of the Law of Limitation Act, Cap. 89 R.E. 2019 does not remove the duty of the aggrieved party wishing to appeal within 90 days as specified under paragraph 1 part 11 of the schedule to the Law of Limitation Act ... under the circumstances, section 19(2) of the Law of Limitation Act would not any way have protected the applicant to the appeal.

... the 90 days prescribed by the law were still undisturbed when in pursuance of a proper decree, as alluded to earlier in this judgment, the duty to seek for a decree on time was on the appellant who was to benefit from this, and this duty was not absolved by reason that the decree which he was provided with was later found to be defective."

The applicant and her counsel were aware that the suit was already at the stage of 1st pre-trial conference as already scheduled by Justice Mago on 21st July, 2022 in the presence of counsel for both parties whereby the

case was to come for 1st pretrial conference on 8th August 2022. All parties did not attend on 8th August 2022. Can this non-attendance be attributed to the Court? The answer is fragrant, *"no".* Fixing the case to come for mention was inadvertently done by the acting deputy registrar regard being had to the spirit of the Judiciary of Tanzania of timely justice for all.

The counsel for the respondent is touting I dismiss this application because the counsel for the applicant did not attach necessary documents to prove his averments. One of them is the exchequer receipt to prove that truly, the counsel for the applicant did peruse the Court file and the second one is an affidavit of the Registry Management Assistant (RMA) to prove that he was told he would be informed when re-assignment is done. I am inclined to agree with the craving of the counsel for the respondent because, such, is supported by case laws of our Courts. See for instance the case of **Kighoma Alli Malima v. Abbas Yusuf Mwingamno,** Civil Application No. 5 of 1987 (unreported) where it was highlighted that:

> *"Sufficient reason has been considered in a number of cases. Sometimes a slight lapse by an advocate might be overlooked, but not a lapse of a fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time."*

See also **Ramadhani J. Kihwani v. TAZARA,** Civil Application No. 401/18 of 2018, CAT (unreported) where it was featured that:

> *"In application for enlargement of time, like the present, all material persons must swear affidavits to trigger the Court exercise its discretion under rule 10 of the Rules – see: **Mary Rugomora v. Rene Polete**, Civil Application No. 2 of 1992 (unreported)."*

This application too stumbled across a criticism from the counsel for the respondent who maintained that the date when the written statement of defence was struck out was not the first day when the counsel for the applicant had failed to appear. He pointed out to the trend of non-appearance of the counsel for the applicant. I agree with the criticism raised by the counsel for the respondent. The counsel for the applicant did not appear in Court on 08/09/2022, he also failed to appear in Court on 13/12/2022 and then failed to appear in Court on 03/04/2023. That trend is not health to timely dispensation of justice. It is thus, I decided to strike out the written statement of defence. This approach is backed by **Bernard Beatus Pamela v. Tanzania Breweries Ltd,** Civil case No. 305 of 1990 HC (Unreported) where it was stated that.

"Court may consider trend of a party to reach at a certain decision against a party at faulty. Whether to believe the claim or denial or not."

In the premises, the application by the applicant is bound to fail. My view, is also cemented by what was said by the Court of Appeal of Tanzania though in a different situation but yet relevant in this situation. That is the case of **Night Support (T) Ltd v. Benedict Komba,** Civil Revision No. 254 of 2008 CAT (unreported) where it was stated that:

"That limitation is material point in the speedy administration of justice. Limitation is there to ensure that ***a party does not come to court as when he chooses****." [Emphasis mine]*

If non-communication of re-assignment caused the counsel for the applicant to fail to appear before me, how then did the counsel for the respondent appear? In the circumstances of this application, I am of the firm view that I would have been perfectly entitled to order "Parties to appear" instead of ordering for notice to the respondent. Ordering notice to the respondent was inadvertently done by me.

The counsel of the applicant needed to be mindful of the decision of this Court in **Olam Tanzania Limited v. Hawala Kwilabya,** Civil Appeal No. 17 of 1999 HC (unreported) where it was stated that:

> *"Now what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Courts orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them. In addition, an order for filling submission is part of the hearing. So, if a party fails to act within the prescribed time, he will be guilty of indiligence in like measures as if he defaulted to appear."*

Had the counsel of the applicant paid attention to the above position of the law as stated in **Olam's** case supra, the applicant would have not found herself with her written statement of defence struck out.

The counsel for applicant does not say that the status of the case had changed from that being of 1st pre-trial conference to that of being

mention due to the inadvertent order of the acting Deputy Registrar. There is nothing to warrant that backward motion of the stage of the case. The powers of the acting Deputy Registrar was to adjourn the case and not to reverse the stage of the case. That ought to have been heeded by the counsel for the applicant.

In rejoinder submission, the counsel of the applicant laments that he was not informed about the re-assignment and the date fixed for 1st Pretrial conference. All these claims are feigned. In the first place, it is the practice that re-assignment of a case to another judge or magistrate is normally communicated to the parties by the subsequent judge or magistrate who is legally required to notify the parties. So, there is no any provision of law that requires an advocate or a litigant should have prior information about re-assignment. That can be done upon a party making an inquiry. As to his not being notified on the date of the 1st pretrial conference, I accept the view of the counsel for the applicant that there is no any justification for the counsel of the applicant's failure to make follow-up, given the fact that the case was already at 1st pre-trial conference ever since 8th September 2022 which date was fixed in the presence of the counsel for the applicant. Further, there was no change on the dates that were fixed, thus the need for the notice is a fussy. More so, there is no justification

for him or his client to fail to appear on even the "mention" date. On mention dates, parties and their counsel are not exempted to appear, the counsel for the applicant knows that position of the law, that is why he tries to hide behind the fictitious "follow-up for re-assignment".

I accede to the argument of the counsel for the respondent that to order restoration of the struck out written statement of defence will prejudice the right of the respondent who earned the striking out of the written statement of defence after the applicant and her counsel had neglected to make follow-up of the case for more than four months.

It is also, submitted in rejoinder at page 2 and I quote:

> *"My Lord furthermore we beg to submit that it has been difficult to get a cooperation and an Oath from your respective office as to te commitment on notification on re assignment on te last date of my appearance."*

I had to scan the affidavit in support of the application and the affidavit in reply to the counter-affidavit, I have not seen such averment about the difficult to get cooperation from my office. What befalls a submission which is not contained in an affidavit or evidence was elaborated in **Republic v. Donatus Dominic @ Ishengoma & 6 Others,** Criminal

Appeal no. 262 of 2018, CAT, (unreported) which quoted with approval the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2 EA where it was stated:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

See also **Registered Trustees of the Archdiocese of Dar-es-Salaam vs. The Chairman Bunju Village Government,** Civil Appeal No. 147 of 2006:

> *"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

In that regard, all submissions that are not found on the affidavit in support of the application and the affidavit in reply to the counter-affidavit are ignored by this Court.

Inevitably, I dismiss the application with costs.

It is so ordered.

DATED at **KIGOMA** this 22nd day of January 2024.

J. F. NKWABI

JUDGE