

IN THE HIGH COURT OF TANZANIA

TANGA SUB REGISTRY

AT TANGA

DC CIVIL APPEAL NO. 19 OF 2023

(Arising from Misc. Civil Application No. 03 of 2023 and Originating from Misc. Civil Application No. 19 of 2022 and Civil Case No. 11 of 2019 of the District Court of Tanga at Tanga.)

OMARI MOHAMED MWASINGO APPELLANT

VERSUS

MASHAKA YUSUPH MAUMBA 1ST RESPONDENT

NEEMA YUSUPH MAUMBA 2ND RESPONDENT

IWARD ABIAS MWANZA 3RD RESPONDENT

JUDGMENT

18/03/2024 & 16/05/2024

NDESAMBURO, J.:

On the 8th of November 2021, the District Court dismissed Civil Case No. 11 of 2019 due to lack of prosecution. In an attempt to revive the case, the appellant filed Misc. Application No. 19 of 2022, requesting an extension of time to file an application for the restoration of the dismissed civil case. However, the application was

dismissed because the appellant failed to appear. Undeterred and resolved to pursue judicial resolution, the appellant filed Misc. Civil Application No. 3 of 2023 at the same court, seeking an order to set aside the dismissal. The appellant's efforts were fruitless, leading to the current appeal.

The appellant has raised three grounds of appeal as listed below:

- i. That the trial had made the finding that "it is true that for the geographic location and the distance between Songwe and Tanga, the advocate couldn't appear before the two courts on the same day and same time" erred in law and fact by dismissing the application without regards to the other facts on records.*
- ii. That, the trial court erred in law by making the finding that the appellant had no interest to proceed prosecuting the case by relying on the applicant's absence on the days not scheduled for hearing.*
- iii. That, the trial court erred in law by finding that the appellant had no interest to proceed to prosecute the case without taking into account the technicality raised by the respondent through raising the overruled preliminary objection.*

At the hearing, parties were being represented, the appellant had the service of Mr. Atranus Method, learned counsel whereas the respondents had the service of Mr. Manzi, also a learned counsel. The hearing proceeded by way of written submission. The set scheduling order was adhered to by the parties.

In support of the appeal's first ground, the appellant's learned counsel argues that the learned trial magistrate erred both in law and in fact by dismissing the application without due consideration of all relevant circumstances. It is contended that the trial magistrate acknowledged the geographical distance between Songwe and Tanga, recognizing the impracticality of the advocate's presence in both courts simultaneously. However, it is asserted that the learned magistrate failed to give weight to the reasons provided for the advocate's absence, as outlined in paragraphs 7 and 8 of the accompanying affidavit. Mr. Method emphasizes that these reasons were presented to the court but were unfortunately not considered by the District Court in its decision.

In regards to the second and third grounds, Mr. Method contended that Misc. Application No. 19 of 2022 the subject of his

appeal, was dismissed on a day not scheduled for hearing and in contravention of legal provisions. He argued that on the 6th of March 2023, the matter was scheduled for the hearing of the respondent's preliminary objection. He argued that the court ought to have disposed of the preliminary objection before the main application. Mr. Method asserted, that the procedure adopted by the learned trial magistrate resulted in a miscarriage of justice on the appellant's side. Thus, he prayed for this court to set aside and vacate the dismissal order made in the Misc. Application No. 19 of 2022.

In the alternative, he prayed for the court to invoke its revisional powers and vary and set aside the dismissal order as the Resident Magistrate court did not have jurisdiction over the matter lodged at the District Court.

In responding to the grounds of appeal, advocate Manzi strongly argued that the geographical distance between Tanga and Songwe did not serve as a hindrance for the counsel to attend the case. He emphasized that the advocate had more than enough time to notify the court of his attendance at another matter in Songwe, yet failed to do so.

He also strongly supported the District Court's findings that the appellant had no interest in pursuing his case. This was underscored by the fact that the contested matter was dismissed for want of prosecution, and the appellant took no steps towards its restoration for about seven months. The learned counsel then beseeched this court to dismiss the appeal.

After reviewing the submissions from both counsels and examining the records of appeal, the key issue for consideration is whether this appeal holds merit.

In addressing the first ground of appeal, the appellant's counsel argued that the District Court's decision to dismiss the application was flawed as it overlooked other factors on record. Conversely, the respondents' counsel countered by asserting that the trial court was justified in dismissing the matter, the advocate had more than enough time to notify the court of his attendance at another matter in Songwe, yet failed to do so.

In its decision, the District Court firmly held that the appellant's counsel, despite knowing that he had another case in Songwe on the

same date and being served with a summons on the 15th of February 2023, had sufficient time to notify the court of his absence but chose not to do so. Moreover, the appellant's counsel had a history of non-attendance at court sessions.

It is without doubt that an advocate cannot effectively serve two courts in different locations simultaneously, as asserted by the appellant's counsel. However, advocates are expected to accurately not to do so. If a history of non-organize their schedules to ensure compliance with professional standards and ethics. In instances of conflicting schedules, advocates are expected to inform the court of their absence in advance, arrange for alternative representation, or even have the client inform the court. Since the appellant's counsel did not take proactive steps to notify the court of his absence, given the prior notice of his duty at Songwe, this cannot serve as an excuse.

Moreover, when the matter was dismissed, the appellant was not present in court. It has consistently been emphasized that parties to a case bear the responsibility to follow up on their case. This obligation has been underscored multiple times by the Court of Appeal in various decisions. For instance, in the case of **Lim Han Yung & Another v**

Lucy Treseas Kristensen, Civil Appeal No. 219 of 2019 the court stated:

"We think that a party to a case who engages the services of an advocate has a duty to closely follow up the progress and status of his case."

Consequently, this ground of appeal lacks merit and is hereby dismissed.

Regarding the second and third grounds, which contest the District Court's decision to dismiss the application during the preliminary objection hearing, the records unequivocally confirm the dismissal at that juncture. Misc. Application No. 19 of 2022's record reveals that the respondent lodged a notice of preliminary objection. The District Court scheduled the preliminary objection hearing for the 6th of March 2022. However, on the scheduled date, instead of addressing the preliminary objection, the respondent's counsel informed the court of the appellant's counsel's absence, describing it as habitual, and requested dismissal of the application for want of prosecution. Subsequently, the District Court dismissed the application due to non-appearance. The appellant's counsel asserts that this

premature dismissal during the preliminary objection stage constitutes an irregularity, leading to a miscarriage of justice.

This court is well-versed in established legal principles dictating that whenever a preliminary objection is raised, it should be heard and resolved before addressing the substantive merits of a case. This principle among other authorities, was stated in the case of **Shadida Abdul Hassanal Kassam v Mahamed Mohamed Gulamal Kanji**, Civil Appeal No. 42 of 1999 CAT (unreported). In this authority, the Justices of Appeal underscored the importance of addressing preliminary objections as a procedural prerequisite before proceeding to the substantive merits of a case.

Furthermore, the case of **Khaji Abubakar Athumani v Daud Lyakugile Ta D.C. Aluminium and Mwanza City Council**, Civil Appeal No. 86 of 2018, provides pertinent insight. In this case, the second defendant raised a preliminary objection in written submissions, prompting the trial court to schedule a hearing for it. However, on the scheduled date, the trial court proceeded with the hearing of the main suit instead of addressing the preliminary objection. On appeal, the Court of Appeal held:

"That was definitely a fatal procedural irregularity. The trial court ought to have heard the preliminary objection first before going into merits or substance of the suit".

Applying the aforementioned legal precedents to the present appeal, it becomes evident that the District Court dismissed the application on a date scheduled for the hearing of the preliminary objection. On this date, the court was obligated to address and resolve the preliminary objection raised. However, contrary to this procedural requirement, the court prematurely dismissed the application. Although the court did not proceed to consider the merits of the application, its failure to address the preliminary objection constitutes a procedural irregularity. This irregularity resulted in a miscarriage of justice for the appellant, depriving him of the opportunity to pursue his application in the event that the preliminary objection was overruled.

Hence, I determine that the procedure adopted by the learned trial magistrate did result in a miscarriage of justice on the appellant's side, consequently, the appeal is allowed. The order dismissing the application is set aside, and it is directed that the preliminary objection

be expeditiously heard by another magistrate. No order as to costs is granted.

It is so ordered.

DATED at **TANGA** this 16th day of May 2024.



A handwritten signature in blue ink, appearing to be "H. P. Ndesamburo".

H. P. NDESAMBURO

JUDGE