

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 247 OF 2023

(Arising from Civil Reference NO. 12 OF 2023)

BETWEEN

ASIRUNA KARIM MSHAHARA APPLICANT

VERSUS

OJUNG LONGDARE 1ST RESPONDENT

JOSEPHINE KIMARO..... 2ND RESPONDENT

RULING

Date of last Order: 22/05/2024

Date of Ruling: 07/06/2024

NGUNYALE, J.

This is an application for setting aside the dismissal order and restoration of Civil Reference no. 12 of 2022 which was dismissed for want of prosecution. The application was preferred under Order IX Rule 6(1) of the **Civil Procedure Code Act**, Cap. 33 R.E. 2019. The application is made by way of chamber summons supported by an affidavit of the applicant ASIRUNA KARIM MSHAHARA. The applicant is praying for the following orders:




1. This court be pleased to vacate its order of dismissing Civil Reference No. 12 of 2022 for want of prosecution and restore it and reschedule it for hearing.

2. Costs of the application be in the cause.

Upon being served with the application, the respondents jointly filed their counter affidavit opposing the application.

The applicant was represented by Mr. Barnaba Luguwa, advocate, whereas Mr. Adnan Abdalah Chitale, advocate, represented the respondents. By consent the application was heard by way of written submissions.

Submitting in support of the application, Mr. Luguwa started by craving leave of the court to adopt the contents of the affidavit affirmed by the applicant to form part of his submissions. He added that the applicant filed a civil reference to challenge the execution of the Registrar. The reference was before Hon. Kakolaki J and it was scheduled for hearing on on the 27th day of April, 2023 unfortunately as he was the applicant's advocate he was summoned to appear before a panel of the Judges of the Court of Appeal in Morogoro on the 28th day of April, 2023 hence he used the 27th day of April, 2023 to travel to Morogoro and prepare himself for the said appearance. He annexed the summons of the case he was

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attending at Morogoro as annex A to the application. He added that he informed his client on his absence and directed her to appear before the court on the fixed date and inform the trial judge on his absence. Unfortunately, on the fixed date the applicant arrived in court at around 08:30 in the morning and sat at the waiting bench but could not hear the case being called until the end of the daily court business when she was informed by the court Clerk named Asha that the case was called and dismissed for want of prosecution. He added that on the day when the matter was dismissed none of the parties entered appearance and the reasons for non-attendance of the respondent is unexplained. He prayed the court to grant the application of restoration of the reference so that the parties may be heard on merit.

Rebutting the submission of the applicant, Mr. Chitale adopted the contents of the counter affidavit sworn by both respondents to form part of his submission and added that the application is devoid of merit because the summons which the applicant relied on was not filed in court before, but also the applicant in person did not enter appearance. He added that it is not true that the applicant came before this honorable court on the date in which the case was set for hearing. And again, the affidavit of the said ASHA who informed the applicant that the case has been dismissed is not annexed to the application.

3. 

The applicant did not file rejoinder. This enables the court to determine the matter basing on the submissions in chief and the reply thereto.


Appreciating the rival submissions of the parties, the issue which is to be answered is whether sufficient reasons have been adduced by the applicant to warrant this court to set aside its dismissal order and restore the dismissed civil reference. In the case of **Sadru Mangalji vs. Abdul Aziz Lalani and 2 Others**, Misc. Commercial Application No. 126 of 2016 this court held that:

*"It is settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, **he has to furnish the court with sufficient reasons** for non-appearance when the suit was called on hearing."*

The same position was held in the case of **Mwidini Hassani Shila and 2 Others vs. Asinawi Makutika and 4 Others** Land Appeal No. 04 of 2019, this held that:

*"It is trite law that powers to set aside dismissal order are in the discretion of the court, however, the applicant **should furnish sufficient reasons to enable the court exercise its discretionary power.**"*

I have gone through the applicant's submission together with the affidavit in support of the application, the reason stated for non-appearance is that the applicant's advocate was summoned to appear before the Court of

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appeal sitting in Morogoro for the matter which was scheduled on 28th April, 2023 so on 27th April, 2023 he travelled to Morogoro and that the applicant in person came to the court but did not hear the case being called but later she was told by a court clerk that the case has been dismissed for want of prosecution.

I managed to hold a 2nd eye to the applicant affidavit and noted that the contents of paragraphs 5 and 6 are nothing but hearsay because what is stated there is the information from Mr. Luguwa and since he is not the one who swear the affidavit then the paragraphs can not be acted upon. Also, the contents of paragraph 7 are hearsay as rightly submitted by respondent's advocate that there is no affidavit of the court clerk who informed the applicant on the dismissal of the case. This position was well propounded in the case of **Benedict Kimwaga vs. Principal Secretary, Ministry of Health, Civil Application no. 31/2000** where the court of appeal held that:

"If an affidavit mentions another person, that other person has to swear an affidavit. However, information of that other person is material evidence because without the other affidavit it would be hearsay."

The consequences of affidavits which contains hearsay have been discussed by the Court of Appeal in the case of **Jamal S. Mkumba &**

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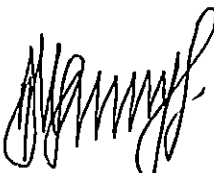
another versus Attorney General, Civil Application no. 240/01 where it was held that:

*"It is now settled that an **offensive paragraph can be expunged** or disregarded and the Court can continue to determine the application based on the remaining paragraphs if the expunged paragraph is **inconsequential.**"* (emphasis added)

See also the case of **Chadha & Company Advocates v. Arunaben Chaggan Chhita Mistry & 2 Others**, Civil Application No. 25 of 2013 at page 12.

Basing on the reasons above paragraph 5, 6 and 7 of the applicant's affidavit can not be acted upon as they are offensive for being hearsay and are hereby expunged.

Again, even if the court had to act on paragraph 6 of the affidavit of the applicant, the same contains false account because the paragraph states that the advocate wrote a letter to the court informing it on his absence, the letter was attached as annex B. It is surprisingly that the letter is dated 28/03/2023 where Mr. Luguwa prayed to adjourn the matter to 12/04/2023, again the case mentioned in the letter is different from the case indicated in annex A which is the summons to attend a case in Morogoro. In short, the attached letter (annex B) has nothing to do with

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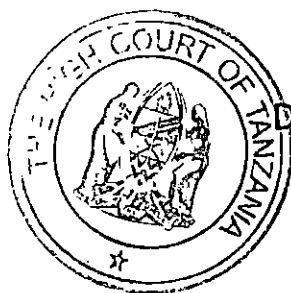
the date the case was dismissed other than misleading the court. In the case of **Ignazio Messina vs. Willow Investments SPRL & Another**, Civil Application No. 21 of 2001 the court of appeal held that:

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

Basing on the fore reasons, taking into consideration that the expunged paragraphs are consequential to the application as the all carry the weight of the application at hand together with the false statement contained in the affidavit, I am in a settled mind that the remaining paragraphs in the affidavit can not support the application; thus, the application automatically fail.

Having said and done, I find that the applicant has failed to give sufficient reasons for non-appearance in court to enable the court to grant the prayers in the application. Consequently, the application is hereby dismissed with costs. Order accordingly.

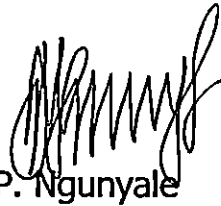
Dated at Dar es Salaam this **07th** day of **June, 2024**.




D. P. Ugunyale

JUDGE

Judgement delivered this **07th** day of **June, 2024** in presence of the applicant in person.



P. Ngunyale

JUDGE