

**IN THE HIGH COURT OF TANZANIA
(ARUSHA SUB- REGISTRY)**

AT ARUSHA

CIVIL APPEAL NO. 52 OF 2022

(Arising from a ruling dated 16/11/2022 issued by Hon. A.R. Ndossy-SRM in Miscellaneous Civil Application No. 32 of 2022, Original Civil Case No. 8/2022 in the Resident Magistrate's Court of Arusha at Arusha)

ZILLY BADI MRUMA APPELLANT

VERSUS

KCB BANK TANZANIA LIMITED RESPONDENT

JUDGMENT

*Date of Last Order: 21/06/2024
Date of Judgement: 25/06/2024*

B. E. K. Mganga, J.

It is undisputed by the parties that, 6th July 2022, Zilly Badi Mruma, the abovementioned appellant filed Civil case No. 8 of 2022 before the Resident Magistrate Court of Arusha at Arusha against KCB Bank Tanzania Limited, the abovementioned respondent claiming to be paid TZS 28,936,470/= as special damages and TZS 100,000,000/= as general damages for malicious breach of loan facility agreement and surrender of certificate of title No. 2608 that is security for the loan appellant secured from the defendant. It is also undisputed that on 27th July 2022, the respondent filed her written statement of defence

together with a preliminary objection that the court had no jurisdiction to entertain the said case. The parties agreed the said preliminary objection to be disposed by way of written submissions. It is further undisputed by the parties that, respondent was supposed to file her written submissions on 22nd August 2022 and reply submission by the appellant was 05th September 2022 and that ruling was scheduled on 20th September 2022. It is also undisputed by the parties that no written submissions were filed by both parties and that, on 20th September 2022, the date scheduled for ruling, both parties did not enter appearance. It is further undisputed by the parties that, due to failure to file written submissions, on 20th September 2022, the trial magistrate delivered a ruling in absence of the parties and dismissed Civil case No. 8 of 2022 for want of prosecution on ground that parties failed to abide by scheduled submissions orders. It is also undisputed that, on 27th September 2022 appellant filed Miscellaneous Civil Application No. 32 of 2022 seeking to set aside the dismissal order and restore Civil case No. 8 of 2022. It is further undisputed by the parties that the said Miscellaneous Application No. 32 of 2022 was unopposed by the respondent. On 16th November 2022, the trial magistrate delivered a ruling dismissing the said Miscellaneous Application No. 32 of 2022.

Appellant was aggrieved by the ruling and order that dismissed his application to set aside the ruling that dismissed Civil case No. 8 of 2022 for want of prosecution hence this appeal. In the memorandum of appeal, appellant has raised two grounds namely:-

1. *That the trial Magistrate erred in law and fact for failure to consider reasons of non appearance advanced by Counsel for the appellant.*
2. *The trial Magistrate erred in law by dismissing the entire Civil Case No. 08 of 2022 instead of preliminary objection raised by the respondent.*

When this appeal was called on for hearing, Mr. Omary Gyunda, advocate, appeared and argued on behalf of the appellant while Mr. Godfrey Saro, advocate, appeared and argued for and on behalf of the respondent.

Mr. Gyunda, argued the abovementioned grounds jointly. Submitting in support of the appeal, learned counsel for the appellant submitted that, on 20th September 2022, the trial magistrate erred in law in dismissing the entire Civil case No. 8 of 2022 instead of dismissing only the preliminary objection that was raised by the respondent. Learned counsel for the appellant further submitted that, the trial court was supposed first to determine the preliminary objection instead and cited the case of ***Fatuma Mohamed v Chausiku Selemani***, Civil Appeal No. 225 of 2017 CAT (unreported) to support his submissions. He further argued that, a case cannot be dismissed on the mention date

and cited the case of ***Mr. Lembrice Israel Kivuyo v M/s DHL World Wide Express DHL Tanzania Limited***, Civil Appeal No. 83 of 2008 CAT (unreported) to bolster his submissions. he added that, on 20th September 2022, Civil Case No. 08 of 2022 was not been scheduled for hearing.

Learned counsel for the appellant further submitted that, in dismissing Miscellaneous Civil Application No. 32 of 2022, the trial magistrate did not consider reasons for non appearance of counsel for the appellant on 20th September 2022 namely, sickness and that, evidence to that effect was attached. He added that, Miscellaneous Civil Application No. 32 of 2022 was unopposed by the respondent. Mr. Gyunda prayed that this appeal be allowed so that Civil Case No. 08 of 2022 can be heard on merit and that upon allowing this appeal, the case should be returned to the lower court and be re-assigned to a different magistrate.

On the other hand, Mr. Saro, learned counsel for the respondent briefly supported the appeal and prayed that costs should be born by the parties.

I have considered submissions of the parties in this appeal and I am of the view that, the preliminary objection that was raised by the respondent was touching jurisdiction of the court. Therefore, it was

upon for the trial magistrate to determine the said preliminary objection by either dismissing it or sustaining it. It is unfortunate that the trial magistrate only rushed to dismiss Civil case No. 8 of 2022 on reason that the parties did not file written submissions in support or resisting the said preliminary objection. It is clear that, after respondent has defaulted to file written submissions in support of the said preliminary objection, the appellant had nothing to do because his written submissions was depending on submissions by the respondent. In dismissing Civil case No. 8 of 2022 for want of prosecution based on failure to abide to submissions orders, the trial magistrate punished the appellant for a wrong that he did not commit. In my view, the trial magistrate was supposed to dismiss the preliminary objection for want of prosecution because it is the respondent who failed to prosecute and not the appellant. At that time, Civil case No. 8 of 2022 was depending on the outcome of the preliminary objection that was filed by the respondent. In other words, it was an error on part of the trial magistrate to dismiss Civil case No. 8 of 2022 on 20th September 2022 the date it was not scheduled for hearing because dismissal orders can only be issued when the case is scheduled for hearing. See the case of *Fakhria Shamji vs The Registered Trustees of The Khoja Shia Ithnasheria (mza) Jamaat* (Civil Appeal No. 143 of 2019) [2022]

TZCA 77 (25 February 2022) and ***Lembrice Israel Kivuyo's case*** (supra).

I have also read the ruling of the trial court in Miscellaneous Civil Application No. 32 of 2022 and find that, the trial magistrate did not consider reasons advanced by counsel for the appellant relating to his non-appearance on 20th September 2022. It can be recalled that the said Miscellaneous application was not opposed by the respondent meaning that respondent was in agreement with the appellant that non-appearance was with good reasons. I should point out that acquiescence of the parties is not a ground for the court to grant what is prayed for. But, the court is required to give reasons justifying that refusal. In my view, the refusal cannot be done arbitrarily as it happened in the appeal at hand.

For the foregoing, I find that the appeal is merited because in dismissing Civil case No. 8 of 2022 for failure of the respondent to file submissions in support of the preliminary the latter raised, the trial court condemned appellant unheard. I therefore allow this appeal, quash and set aside the ruling and orders in both Miscellaneous Application No. 32 of 2022 and Civil Case No. 8 of 2022. Since there was violation of fundamental rights, I hereby return this file to the trial court so that Civil

Case No. 8 of 2022 can be re-assigned and heard by a different magistrate.

Dated at Arusha on this 25th June 2024.



B. E. K. Mganga
JUDGE

Judgment delivered on this 25th June 2024 in Chambers in the presence of Omary Gyunda, Advocate for the Appellant but in the absence of the Respondent.



B. E. K. Mganga
JUDGE