

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM SUB-REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 202 OF 2023

(Arising from Civil Appeal No. 110 of 2022)

L. N. FUTURE BUILDING MATERIALS COMPANY LTD APPLICANT

VERSUS

JASS SECURITY COMPANY LTD..... RESPONDENT

RULING

07/09/2023 & 11/03/2024

NKWABI, J.:

The applicant had her Civil Appeal No. 110 of 2022 dismissed for failure to serve the summons to the respondent for over a period of seven months since lodging the appeal and also for failure to appear in person which means by an officer of the applicant/or her counsel.

She is currently, in this Court in pursuit to be availed with an order setting aside the dismissal order and having her appeal restored. For easy of reference, I emulate the orders that are sought by the applicant:

1. An order setting aside an order dismissing Civil Appeal No. 110 of 2022 (the suit) dated 4th April 2023.
2. An order for restoration of the said suit to proceed from the stage reached on the said date that is 4th April 2023.
3. An order that the costs of this application be provided; and

4. Any other relief(s) that the honourable Court may deem just, fit and proper to grant the applicant in the circumstances.

Meanwhile, the application is preferred under Order XXXIX Rule 9 of the Civil Procedure Code, [Cap 33 R.E. 2022]. The chamber summons has been taken at the instance of AYMK Attorneys and is supported by Mr. Athanas Wigan, learned counsel for the applicant. The application is disposed of by written submissions. Mr. Athanas Wigan, learned counsel filed the written submission in chief. The respondent had her written submissions drawn and filed by Mr. Mohamed Manyanga, also learned counsel.

In an attempt to move this Court to grant the prayers that are enumerated in the chamber summons, Mr. Wigan asserts that by the affidavit of the Court process server one Athuman Hassan Chama, he has proved that the office of the respondent was closed and could not get any person to receive the appeal documents. He stated that the counsel for the applicant fell suddenly sick on 4th April 2023 thus failed to come to ask the Court for substituted service by way of publication.

The counsel for the respondent submitted that closure of the respondent's office should not lead the applicant to assume that the respondent had shifted to another place. He demanded the neighbour who told the court broker about the whereabouts of the respondent ought to have sworn an affidavit.

In rejoinder submission, the counsel for the applicant reiterated that the process server did not find any person to receive the appeal documents.

I have painstakingly considered the submissions of both parties. I think that the attempt to bring the affidavit of a court broker is an afterthought. This is because, on 14/02/2023, the advocate who held the brief for the counsel for the applicant, one Godlisten Lyimo did not tell the Court about the difficult in locating the respondent, instead pressed the case be fixed for hearing. Too, the advocate who held brief for Mr. Wigan on 25/10/2022 did not report any difficult in serving the respondent with appeal documents. The Court was not informed that there was any difficult in locating the respondent. Surprisingly enough, the applicant does not say she attempted to serve the counsel of the respondent but refused to receive service of the appeal documents. What is even worse striking, the counsel for the respondent appeared and said, they were not served with

the appeal. This is what Mr. Mohamed Manyanga told the Court on 04/04/2023 prior to the appeal being dismissed:

Mr. Mohamed: "We have not been served with any petition of appeal."

If the office of the respondent was closed, why did the applicant fail to serve the appeal documents through the counsel of the respondent? I find that the above claim was not only just an afterthought but also falsehood. I outrightly reject it. The falsehood goes to taint the affidavit and make the application collapses to the ground. The above discussion disposes of the appeal in favour of the respondent.

Despite the above findings and conclusion, I feel compelled to consider and determine the other thrust held by the counsel for the applicant. Mr. Wigan too stated that he has demonstrated sufficient cause for sickness as ground of restoration of the appeal. That is in the 5th paragraph of the affidavit in support of the application. He stresses that there was no negligence. He tried to get an advocate in vain but came to the Court whereas he found the matter had been dismissed. He backed up his argument by the case of **Jumane Chakupewa Mchondo v. Bahebe Rutubisha & 4 Others**, Misc. Land Application No. 41 of 2021, HC (unreported).

The counsel for the respondent did not buy the failure of the applicant (client) to appear when the counsel was sick. It is added that the counsel for the applicant is contradictory in his claim that he tried to look for an advocate to hold his brief but failed and came to Court late. He stressed that the submission is baseless. He also insisted that the process server ought to have used the street leaders to get the truth. He prayed the application be dismissed with costs.

In rejoinder submission, the counsel for the applicant maintained that he had given sufficient cause of sickness so, the appeal be restored.

I am sure, as eggs is eggs, that the counsel for the applicant is well informed about **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."

He is too acquainted with the decision 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."

Unfortunately, the counsel for the applicant, who avowed the affidavit in support of the application has never appeared in Court himself, but was sending some other advocates to hold his brief. In the circumstances it is very unlikely that his failure to appear was caused by sickness. It is very unfortunate that even medical chits like in the circumstances of this application, are not reliable (have not to be taken as gospel truth). One may have reference on what has been reported on CNN on 10th March, 2024 about a scientist who manipulated data in hundreds of cases over decades. No doubt, that Courts of law may reject opinion by medical experts. My decision on that point has been reached basing on the trend of Mr. Wigan's none-appearance since the appeal was filed to the date it was dismissed. 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, finds soothed in **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]


The counsel of the applicant appears to be mindful of, but did not heed to, the decision of this Court in **Olam Tanzania Limited v. Hawala Kwilabya**, Civil Appeal No. 17 of 1999 HC (unreported) where it was underscored 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."

Ultimately, I dismiss the application with costs. It is so ordered.

DATED at **KIGOMA** this 11th day of March 2024.




J. F. NKWABI
JUDGE