

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS CIVIL APPLICATION NO. 1074 OF 2024

(Arising from Civil Appeal No.17 of 2023 of the HC(T)Manyara Sub-Registry and originating from Civil Application No. 3/2023 in the District Court of Hanang' at Katesh)

PATRICE GIDION BURA.....APPLICANT

VERSUS

SELINA GABRIEL GACHARESPONDENT

RULING

3RD & 15th March, 2024

Kahyoza, J.:

Patrice Didion Bura, the applicant, and **Selina Gabriel Gacha**, are married couples who for reasons not disclosed and not central to the matter before this court are not living together. **Selina Gabriel Gacha**, applied for maintenance of the issues of marriage. The district court issued the order. Aggrieved by the maintenance order, **Patrice Didion Bura** applied for variation of maintenance order before the same court.

The district court granted **Patrice Didion Bura's** prayer. It reduced the monthly maintenance costs from Tzs. 100,000.00 to Tzs. 60,000/= . It upheld the previous orders of giving 3.5 acres of the parties' land to **Selina**

Gabriel Gacha, to cultivate for her own food requirement. The court upheld its orders to the applicant to pay school fees, uniforms and stationeries for the issues of marriage.

Dissatisfied still, **Patrice Didion Bura** appealed to this Court. On 27.11.2023, on the date, when the Court fixed the appeal for hearing, **Patrice Didion Bura** did not enter appearance. The Court dismissed the appeal for want of appearance. He is before this Court seeking the Court to set aside the dismissal order and restore the appeal.

Has Patrice Didion Bura adduced sufficient reason for his non-appearance?

It is settled law that, a party seeking to set aside an order dismissing a suit or application for want of prosecution should demonstrate sufficient cause for non-appearance when the suit or application was called for hearing. The Court of Appeal in **Felix Tumbo Kisima v. TTCL Limited and Another**, Neutral media citation on www.tanzlii.org, [1997] TZCA 58, held that-

*"It should be observed that the term "**sufficient cause**" should not be interpreted narrowly but should be given a wide interpretation to encompass all reasons or causes which are outside the*

applicant's power to control or influence, resulting in the delay in taking any necessary step."

The applicant adduced two reasons for his non- appearance on 27.11.2023 when this Court dismissed his appeal. This Court's duty is to find out whether the applicant's reasons for his non-appearance are ***reasons or causes which are outside the applicant's power to control or influence, resulting*** in his non-appearance.

The applicant's first ground for his absence was that one registry officer or clerk told him that summons was not yet prepared and that he would be informed when to collect them. Unfortunately, the clerk never informed him. He deposed that he called her several times to inquire if the summons was ready but the clerk told him to wait until she or he notified him that the summons was not ready for collection.

The respondent opposed the applicant's averment. She deposed that the applicant was lying.

I was not moved by the applicant's allegations that he did not collect the summons as he was told to wait until when the registry officer informed him that the summons was ready for collection. The applicant's averment was mere words and lie as pointed out by the respondent for two reasons;

one, the applicant did not mention the name of the registry officer he was communicating with or mention his or her cell phone number in his affidavit; and **two**, the applicant did not support his averment with an affidavit of the registry officer who misled him.

It is trite law that where an affidavit in support of a certain material fact mentions another person on that point, that other person should also take an affidavit in support of that fact. I wish to refer to the decision of the Court of Appeal in **Franconia Investments Limited v. TIB Development Bank Limited**, Civil Application No. 270/01 of 2020, **Dianarose Spareparts Limited v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021 and **Phares Wambura and 15 Others v. Tanzania Electric Supply Company Limited**, Civil Application No. 186 of 2016 (all unreported). In **Phares Wambura and 15 Others** (supra), the applicants whose application had been struck out for non-appearance, sought for the restoration of the application and one of their grounds was that they were misled by a court clerk and went to the wrong chamber of Justice of the Court before whom they were supposed to appear. The Court of Appeal held that the applicants were duty bound to attach an affidavit of the court clerk to substantiate the

applicants' assertion that they came to Court and that they were so misled.

It stated that-

*"The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances, I agree with the counsel for the respondent that **there was a need for the said Court Clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits.** ...the Court Clerk could have been useful to substantiate the applicants' assertions of her or his involvement in the matter." (Emphasis added)*

The applicant deposed that on 22nd day of November, 2023 he travelled to Arusha to attend the funerals of their relative where he stayed for three days. He went to mourn the death of his younger brother. He added that on 3rd December 2023 Katesh experienced calamity as floods invaded the area causing death to several people including his relatives.

The respondent opposed the applicant's averment. She deposed that the applicant lied as there was no applicant's brother who died. She deposed that if it was true that the applicant's relative passed on she would have been informed as they are related.

Indeed, the applicant and the respondent are husband and wife, the relationship which is still subsisting despite going sour. Had it been true that

the applicant lost his younger brother who is the respondent's brother in law, the respondent would have known it. During the hearing of the application, the respondent put the applicant under pressure to mention the name of his brother who passed on. In his rejoinder, the applicant submitted without mentioning the name, that, it was not his brother who died but his brother's son.

I am perplexed as to who passed on at Arusha, it is not clear whether it was the applicant's brother as deponed in the affidavit or the applicant's brother's son as orally submitted. The only inference I can draw from the applicant's averment and submission, is that he lied. He lied both under oath in his affidavit and in oral submission before this Court during the hearing of his application. The law is settled that an affidavit containing false information cannot be relied upon by the Court to decide the matter. The Court of Appeal pronounced itself in **Damas Assey and Another vs Raymond Mgonda Paula and 8 Others**, Civil Application No. 32/17 of 2018 and **Kidodi Sugar Estate and 5 Others V Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009, (both unreported), where it cited with approval its decision in **Ignazio Messina vs Willow Investments SPRL**, Civil Application No. 21 of 2001 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 upon to resolve any issue.”

In addition, even if, I would agree that the applicant went to Arusha on 22.11.2023 to mourn the death of his brother or his brother's son and stayed there for three days, thus, he left Arusha on 25.11.2023. The question would remain that did the mourning of death on 22.11.2023 prevented him from appearing to this Court on 27.11.2023. The answer would be negative, that mourning of the death of his brother or his brother's son did not prevent him from appearing to this court on 27.11.2023 when his appeal was dismissed for want of appearance.

The applicant narrated other events which happened after 27.11.2023 when his application was dismissed, which I do not think have any relevance to his application. I will refrain from discussing them. I do not see how the events on 3.12.2023, however, serious they may be, prevented the applicant from entering appearance on 27.11.2023.

In the end, I find no merit and dismiss the application with costs. To avoid endless litigation, I tax the costs of this application under order 44 of the **Advocates Remuneration Order**, 2015 G.N. No. 263/2015 at **Tzs. 350,000/=**. I have taken into consideration the fact that the respondent

appeared twice to this Court; her first appearance being when she filed the counter affidavit and her second appearance when she appeared for hearing. I have also considered the costs of drawing the counter affidavit and filing it.


Dated at Babati this 15th day of **March**, 2024.




J. R. Kahyoza

Judge

Court: Ruling delivered in the presence of the parties. B/C Ms. Ombeni (RMA) present.



J. R. Kahyoza

Judge

15/03/2024