

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPL. NO. 127 OF 2021

(Arising from the Order of this Court dated 6th July 2021 in Misc. Comm.
Appl.No.83 of 2021 9 Rectified on 9th July 2021)

BETWEEN

TOTAL TANZANIA LIMITED.....APPLICANT

VERSUS

GEOFREY DANIEL MCHANGILA1ST RESPONDENT

CITI BANK TANZANIA LTD.....2ND RESPONDENT

ALCHEMIST ENERGY TRADING DMCC.....3RD REPENDENT

Last order: 13th December, 2021
Judgment: 21st February, 2022

RULING

NANGELA, J.

This ruling arises from an application filed in this Court on the 13th September 2021 by way of a chamber summons supported by an affidavit of Marsha Msuya Kilewo dated 8th September 2021. The chamber summons was made under sections 31, 42 (c) and 95 as well as Order XXXVII Rule 2 (2) of the Civil Procedure Code, Cap.33 R.E 2019, read together with Section 2(3) of the Judicature and Application of Laws Act, Cap.358 R.E 2019.

In this application the Applicant is seeking for the following orders:

1. That, this honourable Court be pleased to detain and imprison the 1st Respondent as a civil prisoner for disobedience of the order of this Court (Hon. Nangela, J.,) dated 06th July 2021 as rectified by the Order of the same Court dated 9th July 2021 in Misc. Commercial Application No.83 of 2021.
2. Costs of this Application be provided for in favour of the Applicant.
3. Any other Order(s) as the Hon. Court shall deem fit and just to grant.

Briefly, on the 6th July 2021, (and on 9th July 2021) this Court issued a restraint order to the Respondents following a successful application by the Applicant. Unfortunately the said Order of this Court was not adhered to by the 1st and 2nd Respondents and, hence, this application.

On the 22nd November 2021, the parties made representation before the Court. Mr Audax Vedasto and Ramadhani Karume, learned advocates, appeared for the

Applicant while Mr Gasper Nyika appeared for the 1st and 2nd Respondents. The 3rd Respondent was absent.

On the material date, it was agreed that the matter shall be disposed of by way of written submissions. As such, this Court issued a schedule of filing whereby the Applicant was to file her skeleton argument on or before 29th November 2021 and the Respondents were to file their written submission on or before 6th of December 2021. Rejoinder submissions were to be filed on the 13th day of December 2021.

On the 13th December 2021, the parties appeared before this Court. Mr Vedasto had not filed the written submission for the Applicant. However, Mr Nyika had filed one. Mr Vadasto told this Court that, out of confusion he filed a submission not in respect of this Misc. Commercial Appl. No. 127 of 2021, but that, the submission was filed in respect of a sister application (Misc. Commercial Application No. 126 of 2021), which was as well been pending in this Court and which was disposed of orally.

Because of that confusion, he asked for this Court's indulgence that, the Applicant be granted an extension of time and file her written submission out of time. He contended that, the confusion was but an accidental and excusable human error.

For his part, however, Mr Nyika submitted that, it is not in dispute that no submission was filed in support of Misc. Commercial Application No.126 of 2021. He submitted that, the effect of not filing any submission in this current application means that, the Applicant has failed to prosecute the application. He referred this Court to the case of **Godfrey Kimbe vs Peter Ngonyani**, Civil App, No.4 of 2014 (CAT) (unreported). He insisted that, failure to file submissions as ordered by the Court is inexcusable. He asked this Court to dismiss the application.

Mr Vedasto rejoined that, the Respondent's counsel's assertions that the Applicant did not file any written submission is an oversimplification of the state of things since the fact remains that, the Applicant filed one but out of confusion it was filed as Misc. Commercial Appl.No.126 of 2021. He contended that, the Applicant is fully interested to prosecute the application. Relying on the overriding objective principle, he reiterated his submission and urged this Court to allow the applicant to file the written submission out of time.

Having heard the parties' submissions, the only question that I need to address is whether I should grant the prayer made by the learned advocate for the Applicant

or move on to dismiss the application for want of prosecution.

I have looked at the records and I notice, indeed, that, while the Misc. Commercial Application No.126 of 2021, which is essentially between the same parties, was heard orally, still the Applicant filed a written submission and filed it as a written submission in respect of that application while instead ought to have been filed in respect of this application.

I think I should be inspired by the wisdom of the Court of Appeal in the case of **Zuberi Mussa vs. Shinyanga Town Council**, Civil Appl. No.3 of 2007, CAT (Tabora) (Unreported) and also the wisdom of this Court in the case of **Ghania J. Kimambi vs. Shedrack Reuben N'gambi**, Misc. Appl. No.692 of 2018, HC (unreported).

In the **Zuberi's case** (supra) the Court of Appeal was of the view that:

"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case...."

In this case, I do not think that there has been negligence. The fact is that, there has been two similar and equally pressing applications by the same parties, and the possibility to error and or confuse one application for the other is palpable, especially where the same advocate handles them. That indeed, is an excusable matter.

But I am also inspired by the wisdom of this Court expressed in the case of **Ghania J. Kimambi vs. Shedrack Reuben N'gambi**, Misc. Appl. No.692 of 2018, HC (unreported), whereby, this Court, (Muruke, J) was of the view that, mistakes of an advocate should not be imputed on the clients.

In view of the above, I am inclined, under Rule 4 of the High Court (Commercial Division) Procedure Rule, GN.250 of 2012 (as amended) as well as under section 3A of the Civil Procedure Code, Cap.33 R.E 2021, to grant the applicant an extended time within which to file her written submissions.

In the upshot, this Court settles for the following orders:

1. That, the prayers by the learned advocate for the Applicant to file written submissions which ought to have been filed earlier, save for the confusion, which the

Applicant's advocate encountered, is here by granted.

2. That, the Applicant is to file the submissions not later than the 28th February 2022.
3. The Application is set for a mention on the 3rd of March 2022 at 8.30 am.

It is so ordered

**DATED AT DAR-ES-SALAAM ON THIS 21st DAY OF
FEBRUARY 2022**



A handwritten signature in blue ink, appearing to read "Deo John Nangela", is written over a horizontal dotted line.

**DEO JOHN NANGELA
JUDGE,**