

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 270 OF 2022**

**SOPHIA NYAKUNGA MLOTE.....PLAINTIFF**

**VERSUS**

**EMMANUEL TARIMO.....1<sup>st</sup> DEFENDANT**

**MARTHA MPAZE.....2<sup>nd</sup> DEFENDANT**

**RULING**

*02/05/2023 & 03/05/2023*

**Masoud, J.**

When the matter came before me for the first pre-trial conference following the failure of the mediation, Mr. Kennedy Sangawe, learned counsel for the plaintiff, moved the court under Order VIII, rule 29 of the Civil Procedure Code, cap. 33 R.E 2019 for the striking out of the second defendant's written statement of defence on the ground that the second defendant did not enter appearance for the mediation session and there were no good reasons adduced for her non-appearance.

In reply, Mr. Humphrey Malenga, learned counsel for the second defendant, who also represented the first defendant, did not dispute that the second defendant did not attend the mediation session on the scheduled dates. However, the learned counsel told the court that the said defendant did not attend the mediation because she was attending a seminar outside Dar es Salaam, which seminar was assigned to her to attend by her employer, and the said reason is a good cause for her non-appearance. In his rejoinder, Mr Sangawe reiterated his submission in chief, insisting on the prayer being granted with costs and the matter being ordered to proceed ex-parte against the second defendant.

I looked at the relevant provision which was invoked by the counsel for the plaintiff. It reads thus and I hereby quote

*"Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-*

*(a) dismiss the suit, if the non-complying party is a plaintiff, or strike out the defence, if the non-complying party is a defendant.*

*(b) order a party to pay costs or*

*(c) make any other order he deems just."*

Clearly, the provision vests discretionary power to this court to, among other things, consider striking out a written statement of defence of a defendant where the defendant failed to appear during mediation session and as a result of the failure the mediation session could not be conducted. Of significance, the provision requires the mediator to remit the relevant file to the trial court to make such consideration. In so far as I am concerned, the record of the appearance of the parties during the mediation sessions is critical for the trial court to consider whether or not to strike out the defence.

The record relating to the mediation session only showed that the mediation was conducted but failed. It was not shown that the outcome was a result of the alleged failure of the second defendant to attend the

sessions as alleged by the counsel for the plaintiff, and that the failure was without good cause.

In addition, the record only showed that there was in attendance in the mediation session the counsel for the plaintiff, one, Mr Kennedy Sangawe, and the counsel for the defendants, one, Ms Matinde Waisaka. There was clearly no mention on the record that the parties were or were not in person in attendance with their learned counsel.

The relevant record of proceeding of mediation session reads thus:

*DATE: 05/04/2023*

*For the Plaintiff: Kennedy adv*

*For the 1<sup>st</sup> and*

*2<sup>nd</sup> Defendant: Matinde Waisaka, adv*

***Order***

*Mediation conducted but failed. For that reason, case file is hereby returned to Hon. Trial judge for adjudication.*

It therefore meant that whatever was said by the counsel for the plaintiff was mere statement from the bar and could not be established on the record. While the plaintiff's counsel said that the second defendant did

not attend the mediation session which as a result led to the failure of the mediation, the record in relation to the mediation and in relation to which the mediation was marked as failed shows that there was the learned counsel for the defendant in attendance as was the learned counsel for the plaintiff. There was no mention on the record that the parties were also, or were not, in attendance as already pointed out above.

If the court were to go by the prayer and the supporting argument by the counsel for the plaintiff, and the record as afore shown were to be construed as suggesting that the parties were not in attendance, the plaint would not survive either as it would be not clear as to whether or not the plaintiff in person was in attendance. However, I cannot pursue that line of thinking and so hold since the record is clear that "*mediation was conducted but failed*", and for that reason, the case file was remitted for adjudication of the case. This, to me, shows that the mediation was conducted, only that it was not successful, but not for reasons of failure

of any of the parties and for this matter the second defendant, to attend the mediation sessions without good cause.

When all is said and done, I am of a firm finding that the record in the file and in particular the order in respect of which the case file was remitted to the trial court does not support the prayer. I am for such reason inclined not to exercise my discretion in granting the prayer inviting the court to strike out the second defendant's defence, to order the second defendant to pay costs to the plaintiff, and to order the matter to proceed ex-parte against the second defendant pursuant to Order VIII, rule 29 of the Civil Procedure Code.

In the upshot, the prayer is hereby refused and accordingly dismissed with costs. It is so ordered.

Delivered at Dar es Salaam this 3<sup>rd</sup> day of May, 2023.



*B. S. Masoud*  
**B. S. Masoud**  
**Judge**