IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CIVIL APPLICATION NO. 582 OF 2022

ALOYCE CHACHA KENGÁNYA t/a
ALOYCE CHACHA MSABI t/a
IDARA YA MAJI NA ULINZI MAGUNGA ..... APPLICANT

VERSUS

IRASANILO GOLD MINE ..... RESPONDENT

(Application from the decision of the High Court of Tanzania at Musoma)

(Mahimbali, J.)

dated the 28th day of September, 2022

in

Civil Case No. 08 of 2021

RULING OF THE COURT

12th & 13th June, 2023

MWANDAMBO, J.A.

We have found compelled to preface our ruling with an old adage that has not been uncommon in our decisions, that is to say: speed is good but justice is better. We said so in **Independent Power Tanzania Limited & Another v. Standard Bank (Hong Kong) Ltd,** Civil Revision No. 1 of 2009 and reiterated in **Nyanza Road Works Limited v. Giovanni Guidon**, Civil Appeal No. 75 of 2020 (both

unreported) to mention just a few. There is no doubt that the adage cannot be more relevant in the impugned order as it was in the decisions we have just referred.

The applicant was a plaintiff in Civil Case No. 8 of 2021 before the High Court at Musoma. The respondent was the defendant who also filed a counter-claim against the suit. After completion of pleadings in the suit, the High Court fixed the suit for hearing upon conducting a final pre-trial conference in terms of Order VIII rule 40 of the Civil Procedure Code (the CPC) whereat issues for the its determination were framed. The record shows that, on 3/8/2022, the High Court granted the prayer to the parties to file witness statements introduced in the CPC by the Civil Procedure Code (Amendment of The First Schedule) Rules, G.N. No. 761 of 2021 which came into force on 22/10/2021. Having set the schedule for filing the witness statements, the High Court fixed the suit for hearing on 28/9/2022 during which, witnesses for the plaintiff would appear for cross-examination on their evidence in chief contained in their respective witness statements. It is not completely irrelevant to state here that, the filing of the witness statements was prompted by the plaintiff's state of his health which had a bearing on his frequent travels to Musoma for hearing of the suit had the hearing proceeded by oral evidence in chief. On 28/9/2022, the date fixed for the hearing of

the suit, the plaintiff did not enter appearance but his advocate did and informed the trial Judge of his client's inability to enter appearance for cross examination due to illness and prayed for an adjournment.

Apparently, the learned advocate for the respondent did not object to that prayer. Nevertheless, the learned trial Judge could not find purchase in the reason for non-appearance and the prayer for adjournment. Instead, he refused the said prayer and, influenced by the provisions of Order VIII rule 21 of the CPC, he took the view that the plaintiff's non-appearance constituted a default which could warrant dismissing the suit. Despite stating that non-appearance of the plaintiff could not hinder the court to proceed with other witnesses in the list, the court dismissed the suit with costs in pursuance of Order VIII rule 21 (a) read together with Order X rule 1 of the CPC. However, the court said nothing regarding the counter-claim.

The applicant was aggrieved by that order. Instead of appealing against it, he preferred an application for revision under section 4 (3) of the Appellate Jurisdiction Act (the AJA) contending as he does, that, the impugned order is tainted with illegalities constituting exceptional circumstances which warrant the Court's exercise of revisional power.

Through paragraph six of his affidavit annexed to the notice of motion, the applicant has raised four issues which he considers to be the

grounds for the Court's consideration in the exercise of its revisional power but, we think two of them are directly relevant for the determination of this application. The two issues boil into one main issue, that is to say; whether it was proper for the court to dismiss the suit under Order VIII rule 21 (a) of the CPC without addressing itself on the witness statements on record. The respondent for her part filed an affidavit in reply resisting the application.

Mr. Mwita Emmanuel, learned advocate representing the applicant appeared during the hearing of the application whilst, Mr. Edison Philipo, learned advocate appeared for the respondent. It transpired through the brief dialogue the Court had with Mr. Emmanuel and indeed, the learned advocate conceded that the applicant had a right of appeal which he could have exercised to achieve the same purpose which this application seeks to achieve. We were of the same view considering that it is trite that revision is a discretionary remedy which cannot be resorted to as an alternative to appeal. That has been the position of the Court in its various decision, amongst others, **Moses J. Mwakibete v. The Editor Uhuru, Shirika la Magazeti ya Chama and Another** [1995] T.L.R 134 and reiterated in **Hallais Pro- Chemie v. Wella A.G.** [1996] T.L.R. 269

Mr. Emmanuel was candid that under the circumstances, the application was incompetent. However, he urged the Court against striking out the application but to retain the matter with a view to correcting the glaring illegalities in the order of the High Court. Mr. Philipo was man enough to concede that, indeed, the order of the High Court was erroneous and that in the circumstances, it was appropriate for the Court to exercise its revisional power in the manner prayed by Mr. Emmanuel. Having taken due consideration of the matter, we agreed that the peculiar circumstances in the record warranted the course of action touted by Mr. Emmanuel and agreed upon by Mr. Philipo. Indeed, the approach is not novel. The Court has taken a similar approach in the past in **Chama cha Walimu Tanzania v. The Attorney General**, Civil Application No. 151 of 2008 and **Tanzania Heart Institute v. The Board of Trustees of National Social Security Fund**, Civil Application No. 109 of 2008 (both unreported) amongst others. With the foregoing in mind, we shall now turn our attention to the pertinent issue in the impugned order.

As indicated earlier on, the learned trial Judge dismissed the suit under Order VIII rule 21 (a) read together with Order X rule 1 of the CPC. Counsel are agreeable and rightly so that the High Court strayed into a grave error in dismissing the suit under the said provisions.

Undeniably, the suit had gone beyond the final pre-trial conference conducted on 22/11/2021 in pursuance of Order VIII rule 40 of the CPC following failure of mediation. Order VIII rule 21 (a) gives power to the court to dismiss the suit where the plaintiff fails to comply with any of the directions given, including non-appearance during the pre-trial conference in pursuance of Order VIII rule 20 of the CPC. The learned judge dismissed the suit on a date it was fixed for hearing rather than a pre-trial conference. On the other hand, Order X rule 1 of the CPC was utterly irrelevant in supporting the dismissal order it being dedicated to ascertainment of admissions and denials in the pleadings. Besides, the case had gone beyond that stage but above all, the court had no power to dismiss the plaintiff's suit under that order. As rightly submitted by Mr. Emmanuel, this was not a case falling under Order XVI rule 20 of the CPC warranting pronouncing judgment had the applicant been present in court but refused without lawful excuse to give evidence or produce document in his possession or power. With respect, the learned trial Judge acted with material irregularity in dismissing the plaintiff's suit as he did.

Having held that the trial court acted illegally in dismissing the suit under Order VIII rule 21 (a) and Order 10 rule 1 of the CPC, what would have been the appropriate order in the circumstances of the case?

Ordinarily, the absence of the plaintiff during the hearing of the suit would have warranted dismissing the suit under Order IX of the CPC. However, that course of action was not available in view of the provisions of Order XVIII rule 5 (5) of the CPC which stipulates:

> *"Where a witness fails to appear for production of his statement, tendering of exhibit or cross examination, if any, the court shall strike out his statement from the record unless it is satisfied that there is good cause to be recorded by the court for such failure"*

It is plain in the record that the applicant had filed two witness statements. Consequently, the course open to the court was to strike out the witness statement of the absent witness, in this case, the plaintiff. The record shows that the adjournment was sought by reason of the absent ailing plaintiff (applicant). There is no indication whatsoever regarding the other witnesses. Although the court was not addressed on the other witness, it went ahead dismissing the suit acting under inapplicable provisions. This was, yet again a serious irregularity in the trial court's order warranting the Court's intervention by way of revision as urged by both counsel. At any rate, since there was a counter-claim in the suit, it is not clear on the fate of such counter-claim which constitutes another error in the court's order.

In the event, we are constrained to exercise our revisional power vested in the Court under section 4 (3) of the AJA which we hereby do and quash the purported order dismissing the suit and direct the matter to be remitted to the High Court to proceed according to law before another judge. As both advocates are in agreement, we direct that each party bears his own costs in this application.

Order accordingly.

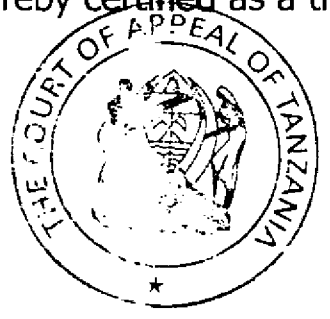
DATED at **MUSOMA** this 13th day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 13th day of June, 2023 in the presence of Mr. Edson Philipo, learned counsel for the Respondents and also holding brief for Mr. Mwita Emmanuel, leaned counsel for the Applicant, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL