

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 175 OF 2023

(Originating from Misc. Civil Application No. 319 of 2122 of the High Court of Tanzania
at Dar es Salaam)

JOSEPH MKUNDA.....APPLICANT

VERSUS

CHARLES ANTONY KASWIZA..... RESPONDENT

RULING

Date of Last Order: 23/08/2023.

Date of Ruling: 01/09/2023.

E.E. KAKOLAKI, J.

In this application, the Court is moved by the applicant to vacate its order handed down on 6th April, 2023 dismissing Misc. Civil Application No. 319 of 2022 for want of prosecution, as well as ordering for costs of the application to be provided for and any other relief as it deem fit to grant. The application is preferred by way of chamber summons, under section 14 (1) of the Law of Limitation Act [Cap. 89 R.E 2019] (the LLA), supported with the affidavit duly sworn by one **Samwel Shadrack Ntabaliba**, applicant's advocate, mainly stating two reasons as to why this Court should grant the prayers

sought. **One** that, on the 6th of April, 2023 when the application was dismissed for want of prosecution, applicant's advocate Mr. Malima (by then) was indisposed as he fell sick and rushed to the hospital for treatment first before coming to court and **second** that, on that day applicant was in court premises but did not hear his case being called.

When served with the application the respondent vehemently resisted its merit as he filed his counter affidavit to that effect and in furtherance filed a Notice of Preliminary Objection challenging the competence of the application itself. And countered applicant's assertion vide his counter affidavit in that, there was no proof that applicant's advocate by then (Mr. Malima) was sick and that the applicant was present within the Court premises as alleged.

Both parties were represented and heard in written form as they all complied with the filing schedule as ordered by the Court that required them to argue both preliminary objection and the application on merit. The applicant had the services of Mr. Samwel Shadrack Ntabaliba while the respondent represented by Mr. Emmanuel Hyera, both learned counsel. In disposing of this matter I am intending to address the preliminary objection first and then revert back to the merit of the case if need be.

To start with preliminary objection it was Mr. Hyera's submission that, the application is incurably defective as the Court was moved not only under wrong provision of the law but also the law referred itself is wrong. That, instead of citing the provision of Order IX Rule 9 of the Civil Procedure Code, [Cap. 22 R.E 2019] (the CPC) for setting aside dismissal order, the applicant relied on section 14(1) of the LLA. He thus invited the Court to find the application is incurably defective and struck it out. In his response Mr. Ntabaliba argued that, it is no longer position of the law that non-citation or wrong citation of the law renders the application incurably defective and incompetent before the court more particularly where the Court has jurisdiction to entertain the matter before it. He supported his argument with the case of **James Burchard Rugemalila Vs. The Republic**, Criminal Application No. 59/19 of 2017 (CAT-unreported). According to him this Court is crowned with jurisdiction to entertain this application under Order IX Rule 6(1) of the CPC and not Order IX Rule 9 of the CPC as Mr. Hyera would want this Court to believe. The learned counsel therefore invited this Court to find the preliminary objection raised devoid of merit and proceed to determine the matter on merit.

Having a glanced at the chamber summons and weighed the competing submissions from both parties, it is true and I agree with Mr. Hyera's submission on the fact which is also not disputed by applicant that, in moving this Court to vacate the dismissal order of his application dated 6th April, 2023, the applicant cited a wrong provisions of the law. That, instead of citing Order IX Rule 6(1) of the CPC as rightly submitted by Mr. Ntabaliba and not Order IX Rue 9 as Mr. Hyera would want this Court to believe, the applicant relied not only on wrong provision of the law but also wrong statute when referred to section 14(1) of LLA dealing with extension of time instead of sought order for vacating the dismissal order by this Court. Now the issue for determination before this Court is whether such wrong citation of the law by the applicant renders the application incurably defective.

It is settled law now as rightly submitted by Mr. Ntabaliba and I need not cite any law that, in the awake of the principle of overriding objectives as christened in sections 3A and 3B of the CPC calling for court's determination of parties disputes basing on substantive justice, expeditiously and at affordable cost without being tied up with procedural technicalities, and the given unescapable fact that, this Court is possessed with the necessary jurisdiction under Order IX Rule 6 of the CPC to entertain the application

under hand, I find no merit in the respondent's preliminary objection. Order IX Rule 6(1) of the CPC provides thus:

*6.-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action, but he **may apply for an order to set the dismissal aside** and, if he **satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing**, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit. (Emphasis suiipled)*

In the present matter and as per the order sought in the chamber summons no doubt the applicant in seeking to set aside the dismissal order by this Court of 6th April, 2023 dismissing his application, the application which this Court is crowned with necessary jurisdiction to entertain as alluded to above. I do not find how the decision of this Court to entertain the same on merit will prejudice the respondent, as allowing the same to be disposed of on merit will determine the matter conclusively. I therefore find the preliminary objection raised by the respondent is devoid of merit as I proceed to overrule the same and continue to determine the application on merit.

As per the cited provisions of Order IX Rule 6(1) of the CPC, it behoves the applicant to demonstrate sufficient cause for his non-appearance when the suit was called on for hearing, warranting this Court exercise its jurisdiction to grant the sought orders. As alluded to above, the applicant has advanced two reasons that prevented him from entering appearance in court on 6th April, 2023 when his application was dismissed for want of prosecution. Submitting on the first reason Mr. Ntabiliba argued that, as stated in paragraphs 4,5,6,7 and 8 of the affidavit on that date applicant's advocate by then Mr. David Malima was sick and attended treatment at Mnazi Mmoja, the Government hospital, the result of which he reached the Court premises at 9.30 am where he joined the applicant. In the second reason it was averred in the affidavit that, the applicant was at the waiting lounge since 9.00 am waiting for his case to be called until 9.30 am, when advocate Malima joined him there and both stayed in the same waiting lounge until 10.00 am without hearing their case being called, only to be informed later by the trial judge's court clerk that the matter was called on at 9.00 am and dismissed. According to him, applicant's non-appearance was not caused by negligence as he had been all of the time conducting himself diligently in

prosecuting his matter and never missed in Court before. He thus implored the Court to exercise its discretion and grant the application.

In rebuttal Mr. Hyera attacked the applicant's submission contending that, none of the raised reasons was evidentially proved by the applicant in terms of the provisions of section 110(1) and (2) of the Evidence Act as also emphatically observed in the case of **Antony M. Masanga Vs. Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT-unreported) on burden of proof. He voiced that, the assertion of sickness of advocate Mr. Malima by the applicant is not justified for want of either medical chit or prescription proving that he really attended the said Government hospital on that date. Regarding the contention that, the applicant never missed even single Court session he countered that, the contention was misleading to the Court as he lastly missed in court on the 14th December, 2022 despite of the matter being fixed for hearing on that date. As there was no evidence to back up the advanced reasons for non-appearance in Mr. Hyera's view this Court was invited to dismiss the application for want of merit. In his brief rejoinder while reiterating his submission in chief Mr. Ntabaliba was insistent that, the applicant should not be penalized because of sickness of his advocate as the Court will be

convinced that, he was at all-time attending court session without miss. Otherwise he prayed the Court to grant the orders as prayed.

I have taken time to consider the fighting submission by the parties as well as perused the affidavit and counter affidavit in search of truth as to whether the applicant has demonstrated sufficient cause warranting this Court exercise its discretion to grant him the sought orders. To start with the reason of sickness, I wish state from the outset that when proved to the Court's satisfaction the same can constitute good cause for non-appearance in Court. In this matter I note as rightly submitted by Mr. Hyera that, the contention that advocate Malima fell sick on the date when the applicant's application was dismissed and that he attended at Mnazi Mmoja hospital for medical attention, is not supported by any documentary evidence apart from mere words by Mr. Ntabaliba which I consider to be hearsay. I so view as the averred contention in paragraph 4 of the affidavit that Mr. Malima fell sick and attended the alleged hospital is premised on the information in which as per the verification clause was received by Mr. Ntabaliba from the applicant and not Mr. Malima himself. Assume for the sake of argument the information was relayed to him by Mr. Malima, still I would have hold the same was insufficient to prove the assertion that he had gone sick as it is

settled law that, averment in an affidavit mentioning another person is a hearsay unless the facts stated therein are exhibited by the person so named in the affidavit. This settled position of the law was adumbrated in the case of **NBC Ltd Vs. Superdoll Trailer Manufacturing Company Ltd**, Civil Application No. 13 of 2002 (CAT-unreported), where the Court of Appeal categorically stated that:

"...an affidavit which mentions another person is hearsay unless that other person swears as well."

See also the case of **Benedict Kimwaga Vs. Principal Secretary Ministry of Health**, Civil Application No. 31 of 2000 (CAT-unreported). In view of the above I find the reason of sickness of applicant's advocate lacking in merit, therefore crumbles.

Similarly I find the assertion that the applicant was present in the Court premises and did not hear the application called before its dismissal is not established for being a mere hearsay. I so find as the applicant ought to have sworn an affidavit proving to this Court's satisfaction not only the fact that he was in Court premises with advocate Malima until 10.00 but also that it was the clerk who informed him of the dismissal of his case. Further to that, I find another affidavit of the said court clerk was necessary to confirm

the averment by the applicant that he is the one who passed the information of dismissal of the case to both applicant and his advocate Mr. Malima. Admittedly, in absence of that evidence adduced in Court through affidavits is cannot be said that sufficient reasons that prevented the applicant from entering appearance on 6th April, 2023, have been sufficiently demonstrated by the applicant to warrant this court exercise its discretion either to grant the sought prayers or not.

Regarding to the assertion by the applicant that, he never missed appearance in court before the dismissal date, I think that should not detain this Court. I so say as it is clearly seen from the record that, the applicant did not enter appearance in Court on 14th December, 2022 when the matter was set for hearing before the same was adjourned to 6th April, 2023. With that clear evidence from the record is see no reason as to why the applicant picked the option of telling lies to the Court which I hold does not bear him out.

All said and done, I find the application is devoid of merit and proceed to dismiss it with costs.

It is so ordered.

Dated at Dar es Salaam this 01st September, 2023.



E. E. KAKOLAKI

JUDGE

01/09/2023.

The Ruling has been delivered at Dar es Salaam today 01st day of September, 2023 in the absence of both parties and in the presence of Mr. Oscar Msaki, Court clerk.



E. E. KAKOLAKI

JUDGE

01/09/2023.

