

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL APPLICATION NO 87 OF 2020

(Arising from Commercial Case No. 2 of 2019)

BETWEEN

GODLUCK ROBERT MICHAEL.....APPLICANT

Versus

JACQUELINE CHRISANT MZINDAKAYA.....1st RESPONDENT

MATILIDA JOHN MZINDAKAYA.....2nd RESPONDENT

MSANDA HIGH PARK LIMITED.....3rd RESPONDENT

THE REGISTRAR BUSINESS REGISTRATION AND

LICENCING AUTHORITY

(BRELA).....4th RESPONDENT

Last Order: 24th Mar, 2021

Date of Ruling: 6th May, 2021

RULING

FIKIRINI, J.

In this application the applicant requested this Court to set aside the dismissal order in the Commercial Case No. 2 of 2019 which was issued on 26th May, 2020, for not considering the reason which failed the applicant not to enter appearance three times in a row, when the case was called for hearing.

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Mr. Beatus Kiwale appeared on behalf of the applicant while Mr. Paschal Kihamba appeared for the 1st, 2nd and 3rd respondents. Addressing the Court, Mr. Kiwale reported failure of the applicant (then plaintiff) to enter appearance and prosecute his case. The reason given was that the witness was suffering from diabetes and high blood pressure and was attending treatment at Kilimanjaro Christian Medical Centre (KCMC). This was a third time in a row for the applicant's failure to enter appearance. The Court dismissed the suit for want of prosecution. Dissatisfied with the order the applicant thus brought this application by way of a chamber summons under Rule 43 (2) of the High Court (Commercial Division) Procedure Rules, GN. No. 250 of 2012 (the Rules) and any other enabling provisions of the Law seeking for setting aside a dismissal order issued on 26th May 2020, costs and any other relief deemed fit to be granted.

The application, apart from the affidavit and counter-affidavit filed was orally heard. The 4th respondent did not enter appearance and therefore not heard. Expanding his submission, Mr. Kiwale submitted that, on 26th May 2020 the plaintiff sole witness Mr. Peniel Mteta could not appear before the presiding Judge due to his ill health as diagnosed by KCMC hospital which included sight and diabetes problems. The Counsel also

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argued that under the circumstance it cannot be said the applicant failed to prosecute the suit, and that since the suit has been dismissed under such circumstance, this court, under Rule 43 (2) of the Rules, still has a power to set aside and restore the matter, and the same be prosecuted by the applicant.

He also argued that, the counsel for the plaintiff was present in Court and sought for an adjournment the prayer which was declined and the suit dismissed under Order 9 Rule 8 of the Civil Procedure Code, Cap 33, R. E. 2019 (the CPC).

Basing on the wording of the provision, he submitted that, the suit shall be dismissed when the plaintiff fails to enter appearance. On the date of hearing the plaintiff had entered appearance by the presence of his advocate but without the witness for the reason explained above. On that regard, it was his submission that, the suit was dismissed based on the provision which covers a different scenario.

On the strength of his submission, he submitted that, the plaintiff has the utmost desire to prosecute Commercial Case No. 2 of 2019 as stated in paragraphs 9 & 11 of the affidavit. He further submitted that dismissing the suit while the applicant's counsel was present without looking at the alternative caused injustice and was contrary to Article

107 A (2) (e) of the Constitution of United Republic of Tanzania, which encourage Court to dispense justice without being hindered by technicalities. To buttress his position, he cited the case of **Judith Mbonile & Another v FBME Bank Ltd, Miscellaneous Commercial Application No. 142 of 2016.**

Mr. Kihamba, counsel for the 1st 2nd & 3rd respondents strongly opposed the application and accordingly prayed the application to be dismissed for applicant's failure to procure his witness for cross examination.

He went on submitting that, looking at the Court records the counsel had for three (3) consecutive times unsuccessfully prayed to secure his witness. On 11th December 2019, the matter was adjourned with costs. On 26th March, 2020, he again failed to procure his witness and furnished medical report which was not sufficient to convince the Court, but still an adjournment was granted.

Again the applicant failed to do so on 26th May, 2020 relying on the medical report filed on the 26th March 2020. On those circumstances the Court rightly dismissed the suit after the witness failed to appear for cross examination.

Submitting on Rule 56 (2) of the Rules as amended by GN No. 107 of 2019, after striking out the statement of the sole witness the Court was

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left with no any other witness and hence dismissal order followed as there was no any other witness. This was done after three (3) consecutive adjournments, argued by the respondents' counsel.

Testing the applicant's counsel's submission, Mr. Kihamba submitted that, nowhere Mr. Kiwale has stated the reason as to why the applicant's witness failed to appear three times in a row. Explaining further he submitted that the counsel's appearance on 26th May, 2020 was not sufficient for this Court to waive its order for dismissal because the order was solely based on non- appearance of the witness and not otherwise.

Disputing the case relied by Mr. Kiwale, it was Mr. Kihamba's submission that, the case was distinguishable as in that case the counsel was praying to file witness statement out of time, while in the case at hand the applicant failed to observe the Court diary for failure to procure his witness for cross examination. Concluding that the counsel has failed to advance viable reason warranting this Court to grant the prayer sought, and for that reason he prayed for the application to be dismissed with costs.

In rebuttal, Mr. Kiwale rejoined that, the assertion that no reasons were advanced for failure to appear of the sole witness was misleading because the applicant counsel has already provided reasons in his earlier

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submission that the witness was ill as diagnosed by KCMC hospital. Reiterating his submission, it was Mr. Kiwale that, dismissal of the suit was based on non- appearance of the plaintiff and not the witness himself. He further submitted that the case which he relied upon was not distinguishable. Both cases touched on the procedural aspects rather than substantive and the main case was mainly used on the principle of Article 107 A (2) (e) of the Constitution.

I have carefully examined the rivalry submissions. There is essentially one issue for consideration which is **whether the plaintiff's counsel appearance on 26th May, 2020 was sufficient enough for this Court to resist issuing a dismissal of the suit order.**

Before deeply engaging in determination of this application, I noted the following facts are not in dispute: **one**, the applicant's counsel failed to procure a witness for cross examination for three consecutive times. **Two**, on the day the suit was dismissed, there was not current medical report availed to the Court aside from the one filed in March 2020.

Turning back to the application at hand, it is common knowledge that, courts cannot conduct its business without code of procedure otherwise the whole rationale of having those legal procedures in place would be meaningless. In addition, even the justice pursued will hardly be

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achieved and the court at most might find itself operating with chaos. Furthermore, it is also a settled legal position that, a party who knows of existence of an order of the Court is obliged to obey it. In the case of **John Mwansasu v Republic, Criminal Review Case No. 8 of 2000** it was held that:

*"A court order is lawful unless it is invalidated by another superior order, and therefore **it must be obeyed.** Contrary view will have the undesired effect of creating an impasse in conduct of the trials."*
[Emphasis mine]

It is thus uncontroverted fact that, an advocate being an officer of the Court is deemed to act diligently and there is actually no excuse for an officer of the Court who decides not to comply with the Court order without any sufficient reasons. In the **Calico Textile Industries Ltd v Pyraliesmail Premji [1983] T.L.R 2**, echoed this when it was held that:

"Once the advocates are instructed to take the conduct of the case, they are use all diligence and industry."

If parties or their counsels are to act in total disregard to the Court orders, the chances are the Court business will be rendered uncertain

and hindrance to the efficient administration of justice. And that is why disobedience of the Court order naturally draws sanctions. In the case of **Idahya Maganga v The Judge Advocate General Court Martial, Criminal Appeal No. 4 of 2002 (unreported)** it was held that:

“The duty to obey court orders is essentially not only because it vindicates the rule of law and the legal rights of the parties but also because it fortifies and protect the dignity of the court. It is a vital asset which the court has a lot to do to protect it, including ensuring that its orders or directives are strictly complied with.”

In this instant application, the Court issued order three times that is on 17th October 2019, 11th December 2019 and 26th May 2020, for the applicant to procure his witness before the Court for cross examination. And not only for the applicant’s counsel appearance. Therefore, the applicant’s counsel appearance without the witness while the suit was scheduled for hearing amounted to non appearance and compliance of the Court order.

The assertion that, the appearance of the counsel was enough and that the suit was dismissed based on the provision which covers a different scenario despite being baseless is equally misconceived. The real

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meaning of the Court order was not only the appearance of the counsel but also bringing along the witness for cross examination since the matter was fixed for hearing which is akin to prosecute the case.

And if the Court assumes the applicant's counsel's assertion is valid, which I do not agree to, then the pertinent question to be asked will be whether counsel's appearance on the date fixed for hearing and fails to procure witness was sufficient appearance? If the answer is yes, then the three (3) consecutive adjournments granted by this Court were uncalled for and at best can be termed useless. As pointed out earlier, that is not how appearance on the date set for hearing whereby attendance of a witness was pertinent, should be interpreted. And as a matter of fact and sound reason, logic and common sense appearance of a witness is of utmost importance on the date set for hearing, followed by that of his counsel. Non-appearance should only be with sufficient reason and not otherwise.

In the case **Olam Tanzania Limited v Halawa Kwilabya, DC Civil Appeal No. 17 of 1999**, it was held that:

"Now what is the effect of the court order that carrier instructions which are to be carried out within a predetermined period? Obviously, such an order is binding.

Court order is made in order to be implemented; they must be obeyed. If the order made by the courts are disregarded, the system of justice will grind to a halt or if will be so chaotic that everyone will decide to do only that which is conversant to them."

I have closely examined the medical report relied on by the applicant's counsel and find that: **One**, the report was issued on 25th March 2020 while the hearing date in question was 26th May 2020 which was almost two months prior to date the Court dismissed the suit. **Two**, perusing through the medical report critically, the report just explains the condition of the witness which for clear appreciation of my stance is reproduced below:

"The patient is known diabetic and hypertensive on regular medication complaining of reduced vision both eyes."

The report further advised the patient the following:

"The patient was required to attend in October and eye clinic for regular treatment."

Whilst it is not in my place to answer this medically but by the looks of the document, the witness was not admitted nor was he in a serious

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condition perhaps to interfere with his routine or assignment. Based on the medical report I failed to find a justifiable cause for his non appearance before the Court. **Three**, on 26th May, 2020, which was exactly two months later, the counsel had no current status or medical report to prove the stated witness illness. Therefore, counting from the 17th October 2019 up to 26th May 2020, it is almost seven (7) months the applicant has failed to prosecute his case and without any reasonable ground. **See: CRDB Bank Holding Corporation [2000] T.L.R 422.**

I fully subscribe to the principle that the Court in dispensing justice should not be hindered by technicalities, however, that does not mean or allow disregard of the rules of the procedures or disobedience of the Court orders. The applicant's counsel's submission cannot in my considered opinion cure the situation.

All these considered together leads to the conclusion that the application is devoid of merits and thus dismissed with costs. It is so ordered.



P. S. FIKIRINI

JUDGE

6th MAY, 2021