

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

Misc. Commercial Application No 108 of 2020

JITESH JAYANTLAL LADWA.....APPLICANT

VERSUS

**AATISH DHIRAJLAL LADWA.....1st RESPONDENT
NILESH JAYANTILAL LADWA.....2nd RESPONDENT**

Last Order: 05/05/2021.

Ruling, 07/05/2021.

RULING

NANGELA, J.:

On 9th July 2020, the Applicant herein filed this Chamber Application under Order XXV Rule 1(1) of the Civil Procedure Code, Cap.33 R.E 2019 seeking for the following Orders:

1. That, this honourable Court be pleased to order the 2nd and 3rd Respondents (in the main application) to deposit in Court a sum of USD 100,000/= each, being security for costs incurred or likely to be incurred by the Applicant in Misc.

Commercial Application No.35 of 2020
(main case);

2. An order that No any application either done orally or formally should be entertained by this Court until security for cost is deposited in this Honourable Court by the 2nd and 3rd Respondent in the main case.
3. Costs of this application be provided for;
and
4. Any other order or relief that the Honourable Court shall deem fit and just to grant in the circumstance.

The Chamber Summons was supported by an affidavit of the Applicant. When the parties first appeared before me on the 5th August 2020, the Applicant enjoyed the services of Mr Elly Musyangi, learned advocate, while Mr Patrick Kaheshi, learned advocate represented the Respondents.

On the material day prayers to file a Counter Affidavit were made by the counsel for the Respondents and the Court granted them. The Counter Affidavit was to be filed on 12th August 2020 and a reply thereto was to be filed on 19th August 2020. The matter was fixed for a mention in Chamber on 9th September 2020.

On the material date, i.e. 9th September 2020, Mr Musyangi appeared in Court assisted by Mr Sisty Bernard, learned advocate. He informed this Court that, the learned counsel for the Respondents did not comply with the orders of this Court dated 5th August 2020. He noted that, the Respondents' counter affidavit was filed outside the time without there being the leave of the Court. In view of that, he prayed that the same should be struck out.

When I examined the counter affidavit, I found, indeed, that, the counter affidavit was filed outside the time I had scheduled that such affidavit to be filed. As per the record, the counter affidavit was filed on 24th December 2020, while it should have been filed on or before 12th December 2020.

With such findings, and, since there was no leave of the Court sought to have the counter affidavit filed outside the earlier scheduled time, this Court granted the prayer by Mr Musyangi and struck out the counter affidavit with costs. I allowed the matter to proceed to proceed *ex-parte* (undefended).

Following that order of the Court, I fixed the hearing of the matter to be on 16th November 2020. However, before the hearing of this Application took

place on the appointed date, on 13th November 2020, the Applicant lodged in this Court a request, in a form of a letter, that I recuse myself from the matter.

As I had earlier set to hear the matter on 16th November 2020, when the parties appeared before me on the material date, and there being the request for recusal, I had to hold back and hear the Applicant's request as per his letter dated 13th November 2020.

On the material date, Mr Musyangi and Mr Bernard, the learned advocates who appeared for the Applicant, informed this Court that, the Applicant, who was the author of the letter in his personal capacity, was unable to be present in Court and make own submissions, due to some medical reasons. The duo, therefore, prayed to have the matter be adjourned.

Mr Kaheshi, learned counsel for the Respondents, had appeared in Court with a view to submit on the recusal application. He did not object to the prayer for adjournment of the matter. As a result, I granted their prayer and the matter got adjourned till 27th November 2020, a date when I was to hear the Applicant's request for recusal.

However, when the parties appeared on the 27th November 2020, the Applicant did not appear in person as earlier stated. Instead, his advocate, Mr Musyangi, informed this Court that, the Applicant has prayed to withdraw from the Court, his earlier request for recusal. Mr Kaheshi did not object to that prayer. However, he prayed for costs which, through a ruling which I delivered on the same date, I declined to Mr Kaheshi's prayers for costs.

Following the ruling of this Court, Mr Musyangi prayed for a date of hearing the Application at hand. At that juncture, Mr Kaheshi seized the moments and orally applied to Court to set aside its earlier orders dated 9th of September 2020, struck out the Respondents' counter affidavit and allowed the Applicant to proceed ex-parte. In that prayer of his, Mr Kaheshi requested this Court to grant the Respondents opportunity to re-file a fresh counter Affidavit. Mr Musyangi objected to the prayer.

However, having heard both parties, I made a ruling and allowed, in the interest of justice, that a fresh counter-affidavit should be filed and the matter be heard *inter partes*. A schedule of filing was made and the matter, therefore, was fixed for mention on

14th December 2020 at 8.45 am to ascertain the status of the filing of their documents.

On the 1st of December 2020, this Court received a letter from Lawgical Attorneys requesting to be availed with the proceedings of this Court and a certified copy of the ruling of this Court dated 27th September 2020. When the matter was called on for mention on 14th December 2020, Mr Musyangi appeared before me in the absence of Mr Kaheshi. Since the pleadings were complete, he prayed for a date of hearing the matter. I fixed the matter for hearing on 15th March 2021.

On the material date, i.e., 15th March 2021, the learned counsels for the parties appeared before this Court. Mr Musyangi told the Court that, although the matter was set for its hearing, the Applicant has preferred a Revision before the Court of Appeal on 16th December 2020. He therefore asked this Court to have this Application stayed.

Mr Kaheshi objected to the prayer to stay the matter. He reasoned that, he is being taken by surprise since he was unaware of the Revision Proceedings referred to by Mr Musyangi. Mr Musyangi was adamant that, a Revision Case, No.539/16 of

2020, was pending in the Court of Appeal and, for that matter, I should stay this matter.

Having heard the parties and there being no information filed in this Court that there was such case before the Court of Appeal, I declined to grant the prayers and ordered the parties to file their written submissions. A schedule of filing was given as follows:

1. That the Applicant was to file its submission on or before 29th March 2021.
2. The Respondents to file their written submission on or before 12th April 2021;
3. Rejoinder submission by the Applicant (if any) be filed on or before 20th April 2021.

Having set out the schedule of filing, the matter was set for mention on 5th May 2021, with a view to ascertain the status of the filing and, also, see if there will be any confirmed notice of pendency of a related matter filed in the Court of Appeal, as alleged, which could have justified this Court to stay its proceedings.

In the course of giving the Orders of the Court on material date, this Court was mindful that, there has not been any notice of call of the records of this

case by the Court of Appeal, and, consequently, this Court's first and foremost priority was to call upon the parties to file their written submissions. Anything else was to follow after compliance with such orders.

On the date when this case was called for mention as earlier scheduled, i.e., 5th May 2021, Mr Sisty Bernard, learned advocate appeared for the Applicant and Mr Patrick Kaheshi, learned advocate, appeared for the Respondents. On that material date, it was made clear to the Court that, its orders issued on 15th March 2021, were not implemented. The Applicant had not filed its written submission as ordered by this Court and, for that matter; the Respondents could not file theirs as well.

It was Mr Sisty's submission that, the Applicant reason for the non-compliance with the Court orders was that, on the 19th of March 2021, through his advocates, the Applicant notified this Court, by way of a letter, that, there was a pending matter in the Court of Appeal and attached a copy of the said pending application. With that submission, he prayed that this Court should stay the matter pending hearing and determination of the said application filed in the Court of Appeal.

For his part, Mr Kaheshi could not hold his horses. He submitted that, in the first place, the Applicant has not complied with the Court orders, and, that, this Court cannot, by any means possible, be moved by a mere letter. He contended that, the legal requirement to notify the Court is via a notice of application. In Mr Kaheshi's view, even the letter referred to by the learned advocate for the Applicant was not served on the Respondents. He contended, therefore, that, the Court has not been properly informed.

On a further submission, Mr Kaheshi contended that, the last orders of this Court were for the parties to file written submissions in support of and in opposition to the application at hand. In the course of his submission, Mr Kaheshi referred to this Court its decision in the case of **Monica d/o Dickson v Hussein J.Wasuha (kny Chama cha Wafanyabiashara), PC Civil Appeal No.04 of 2019, HC Mbeya Registry (Unreported).**

On account of the above decision, it was Mr Kaheshi's submission that, orders of the Court are binding and, failure to file written submission as ordered by the Court means that the Applicant has

ignored to prosecute its case, as he failed to appear. For that matter, he prayed for an outright dismissal of this application with costs.

Mr Sisty rejoined, reiterating his earlier submission in chief. He admitted, indeed, that, the Applicant did not file its submission. He argued, however, that, since this Court was notified of the pendency of the application for revision of its earlier orders, which revision application is pending in the Court of Appeal, proceeding with this application will affect the proceedings.

As such Mr Sisty insisted that, these proceedings are to be stayed and, distinguished the case of **Monica d/o Dickson (supra)**, arguing that in the present application, there is a matter pending in the Court of Appeal, and further, that, in that cited case the Applicant did not tell the Court why they did not file their written submissions.

I have dispassionately given my attention to the learned counsels' submissions. Indeed, as correctly stated by Mr Kaheshi, Court orders are to be strictly adhered to. Failure to adhere to such orders has dire consequences and this fact has been emphasised by this and other Courts in various decisions.

In the case of **Harold Maleko v. Harry Mwasanjala, DC Civil Appeal No. 16 of 2000, (HC) Mbeya Registry**, (unreported) Makanja, J., (as he then was) dismissed an appeal with costs, following the Appellant's failure to timely file his written submission in respect of an appeal which he had filed in the Court, and, the Court held that:

"the failure to file written submission [in] the time prescribed by the court order was inexcusable and amounted to failure to prosecute the appeal.."

Likewise, in the case of **Olam Tanzania Limited v. Halawa Kwilabya, DC Civil Appeal No. 17 of 1999 (unreported)**, this Court held that:

"Now what is the effect of a court order that carrier instructions which are to be carried out within a predetermined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of the

hearing. So if a party fails to act within the prescribed time, he will be guilty of in-diligence in like measure as if he defaulted to appear...This should not be allowed to occur. Courts of law should always control proceedings. To allow such an act is to create a bad precedent and in turn invite chaos."

Besides, in the case of **P3525 LT Idahya Maganga Gregory v. The Judge Advocate General, Court Martial Criminal Appeal No. 2 of 2002** (unreported), it was held that:

"It is now settled in our jurisprudence that the practice of filing written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound...Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered...."

There are as well other cases that have taken the same route and same line of thinking. These include: **Wananchi Marine Product (T) Limited v Owners of Motor Vehicle, Civil Case No. 123 of 1996 (HC), DSM Registry** (unreported); **Leonard Nyang'ye v The Republic, Misc. Criminal Application No. 39 of 2016 (HC) Mbeya Registry**, (unreported); **Andrea Njumba v. Trezia Mwigobene, PC Civil Appeal No. 1 of 2006 (HC) Mbeya Registry**, (unreported).

Other cases include the case of **Geofrey Chawe v Nathaniel K. Chawe, Misc. Civil Application No. 22 of 1998, (HC) Mbeya Registry**, (unreported); **Famari Investment (T) Ltd v Abdallah Selemani Komba, Miscellaneous Civil Application No. 41 of 2018 (HC) Mbeya Registry**, (unreported) and **Brazafric Enterprises Limited v Kaderes Peasants Development (Plc) Misc.Commercial Appl. No.15 of 2019, (HC) CommDv. Mwanza Registry** (unreported).

The above cited decisions of this Court have together a concurrent voice that the orders of any court must be given utmost respect.

In this instant application, the Applicant did not comply with the orders of this Court. The counsel for the applicant has tried to offer unconvincing excuses that there was filed in this case a letter with an annexed record showing that there is a pending matter in the Court of Appeal and, for that matter, I should stay the proceedings.

Looking at the letter and its annexure, it is clear to me that, what was annexed is an incomplete record which does not convincingly tell me what is pending in the Court of Appeal. For instance, its annexed information is incomplete and has missing pages. I do not think a Court can act on an incomplete information.

Besides, whether there was a filing of the letter in Court or not, the primary order of this Court was that parties should have filed their written submissions in this Court and the rest were for the Court to decide and not for the parties to choose what to do and not to do. Allowing that to happen, will set a very bad precedent as it will be encouraging sloppiness in the administration of law and justice as parties will be left to do as they wish.

Considering the fact that the orders of this Court were not adhered to as strictly as they should have been, I am fully convinced that, the Applicant's failure to file his written submission is tantamount to a failure to prosecute the Application. Consequently, and, as this Court stated in the case of **Monica d/o Dickson (supra)**, (citing the case of **P3525 LT Idahya Maganga Gregory (supra)**) "*Courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions.*"

In the upshot, I will right away proceed, as I hereby do, to dismiss this application with costs for want of prosecution. The application is thus dismissed with costs.

It is so ordered.



DATED at **DAR-ES-SALAAM**, this **07th May 2021**

HON. DEO JOHN NANGELA
JUDGE

High Court of the United Republic of Tanzania
(Commercial Division)