

**IN THE HIGH COURT OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL CASE NO. 278 OF 1997**

**CHRISTOPHER MTIKILA ..... PLAINTIFF**

**VERSUS**

**JACOBA NKOMOLA..... 1<sup>ST</sup> DEFENDANT**  
**NOOR SHIJA..... 2<sup>ND</sup> DEFENDANT**  
**THE EDITOR, UHURU NEWSPAPER..... 3<sup>RD</sup> DEFENDANT**  
**THE PUBLISHER, UHURU NEWSPAPER.... 4<sup>TH</sup> DEFENDANT**

**Date of last order: 8/3/2006**  
**Date of ruling: 10/5/2006**

**RULING**

**MANENTO, JK:**

The applicant had sued the respondents for a tort of defamation. That was on 29<sup>th</sup> day of September, 1997. Today, it is about nine (9) years old. It has passed through the hands of several judges. It has been dismissed and reinstated on several occasions. It was lastly set for hearing on 7/4/2003. The date when the hearing day was fixed, both learned counsel for both parties were present. On the hearing date, when the case was called for hearing before the trial judge, neither the plaintiff or his advocate were present. The learned counsel for defendants prayed for the dismissal of the

suit under rule 8 of Order IX of the Civil Procedure Code, 1966. The request was granted with costs. That was on 7/4/2003. On 2<sup>nd</sup> day of March, 2005, Jasson Rweikiza, learned counsel for the applicant filed a chamber summons, supported by his own affidavit and that of the applicant asking to be heard on the following orders:

1. That this Court may be pleased to enlarge the time within which to file an application for an order to set aside dismissal of the suit.
2. That this court may be pleased to make an order setting aside the dismissal of the suit made on 7/4/2003 and appoint the day for proceeding with the hearing of the suit.
3. Costs and any other orders and reliefs, as the Court may deem fit and just to grant.

In his affidavit, Mr. Rweikiza, learned counsel deponed that he had attended the court on the date set for the hearing of the case, that is to say 7/4/2003 but the case was not indicated in the cause list placed at the notice board. On inquiry, he was told by an unnamed court clerk that, the honourable judge who was on transfer would not hear his cases, instead, such cases would be placed before the honourable judge incharge for reassignment and would be served with

summons. He could not get such summonses until when he made further search and perusal of the case file to find that the case was dismissed for non appearance. On the other hand, Mr. Byarushengo, learned advocate replied in his counter affidavit that it was cause listed that the case would be heard in chamber No.30 before hon. Luanda, J. a chamber well known to any advocate based at Dar es Salaam. He further deponed that contents of paragraph No.4 of the affidavit were just concoctions in that the name of the alleged clerk who misinformed Mr. Rweikiza is not disclosed in the affidavit and secondly that one M/S Livanga, who was the court clerk for Mr. Justice Luanda was in the chambers of the trial judge when the suit was dismissed on 7<sup>th</sup> April, 2003. Lastly, the learned counsel for the respondent deponed that failure to turn up to court by Mr. Rweikiza, learned advocate and his client, the applicant was a gross negligence in prosecuting the case as evidenced by the order of this court dated 20/3/2001. On the day in issue, the suit was dismissed with costs since the plaintiff, (now applicant) was duly served and was not present in court. However, that order was vacated by this Court on 31/7/2001. Though the dismissal order was vacated after an

application, it showed how negligent the applicant and or her advocate were.

On hearing the submissions by the learned counsel, Mr. Rweikiza, learned counsel had nothing much to add over what he had deponed in his affidavit. On the other hand, Mr. Byarushengo, learned counsel submitted that it has been established by the case law that filing of an affidavit of the alleged clerk who informed the learned counsel of the reassignment was to be accompanied with that of the learned counsel for the applicants. He cited some unreported decisions of the Court of Appeal and the High Court. These were the cases of **Issack Sebegele applicant vs. Tanzania Portland Cement, Civil Application No. 25 of 2002**. In that case, the Court of Appeal had ruled that evidence in support of the applicant's claim against the court clerk registry was necessary and that the name of the said court clerk should have been indicated in one of the paragraphs of the affidavit of the learned counsel. Thirdly that the application should have been accompanied with the affidavit of the Court Registry Officer duly sworn to that effect. Thus, the bare assertions could not sufficed in showing good cause for the delay. Several other cases were cited in that case (supra) by the honourable court of appeal Judge.

The High Court decision, **Commercial Case No.86/2003, Arbogast C. Warioba vs. National Insurance Corporation (T) Ltd.** The Presidential Parastatal Sector Reform Commission added that it was negligent for both the applicant to attend to Court leading to the dismissal of the suit. It is clear as was held in the Commercial Court case that under Order VIII A rule 4 of the Civil Procedure Code, 1966 that once an event is Scheduled to proceed on certain date, it cannot be departed from, unless for exceptional reasons and that should be placed before the Scheduled event.

Mr. Rweikiza, learned counsel for the applicant by his affidavit wanted the Court to consider the issue humanitarily in that he had never missed court proceedings previously. However, he did not reply to the effect that the established practice of the court is that an assertion must be proved by an affidavit of a person alleged to have given the applicant an information about the status of the case. I cannot depart from that established practice and now binding of this Court as it was a practice established by the Court of Appeal. One wrong cannot be cleared by the previous good conduct as if it were a mitigation for sentence in criminal charges.

What has been established must be respected and adhered to. Thus failure by the learned counsel to indicate the name of the court clerk who told him that the case would be reassigned and was not before the trial judge, coupled with the fact that no such an affidavit of the alleged court clerk, makes me conclude that what the learned counsel deponed and subsequently submitted are mere allegations. I am sorry to say that the Court of Law cannot act on allegations, because to do so, the sky would be the limit. The application is therefore dismissed with costs.

  
A.R. Manento

**JAJI KIONGOZI.**

**Coram:** P.A. Lyimo – D/DSM

For the Applicant – Mr. Mosha/Rweikiza

For the 1<sup>st</sup> Respondent – Absent

For the 2<sup>nd</sup> Respondent)

For the 3<sup>rd</sup> Respondent)

For the 4<sup>th</sup> Respondent) Byarushengo

For the 5<sup>th</sup> Respondent)

Order: Ruling delivered in court this 10<sup>th</sup> day of May, 2006 in presence of Mr. Mosha for Mr. Rweikiza learned counsel for the applicant and Mr. Byarushengo for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.

**P.A. Lyimo**  
**DEPUTY REGISTRAR-HIGH COURT**  
**10/5/2006**