

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO.332 OF 2021

(Arising from Civil Case No. 28 of 2019)

NATIONAL INVESTMENT COMPANY LIMITED.....APPLICANT

VERSUS

KATHLEEN ARMSTRONG.....RESPONDENT

RULING

Last Order: 11/5/2021

Date of Ruling: 28/5/2021

MASABO, J.:

National Investment Company Limited has moved this court to vacate its dismissal order in respect of Civil Case No. 28 of 2019. Made under Order IX r.3 of the Civil Procedure Code [Cap 33 RE 2019] the application is accompanied by an affidavit deponed by Benjamin Mwakagamba, counsel for the applicant in which he deponed that, the suit was dismissed for want of prosecution owing to his default appearance on the hearing date fixed on 11th April 2019 and adjourned to 28th May 2019. He deponed that his failure to enter appearance on these two dates was not occasioned by negligence or apathy but was for genuine reasons to wit, on 11th April 2019 he was sick and on 28th May 2019 he had travelled to Mbeya for funeral of his driver. Thus, he instructed another advocate from his chambers, one Mbarouk Mwinyi, to appear before court with no instruction to proceed as he was the

only one conversant with the matter. A medical chit, an itinerary and an affidavit deponed by the said Mbaruku Mwinyi, was appended to the application as Annexure BMA-1, BMA-2 and BMA-3 respectively.

Upon the application being filed, service to respondent ensured with no fruition as her whereabouts could not be ascertained. A substituted service was consequently issued and published in Daily News of Thursday, February 13, 2021, yet the respondent did enter appearance. Upon the court being satisfied that the respondent was duly served through substituted service on 11/3/2021 it was ordered that hearing of the application proceed *ex parte* the respondent.

Submitting in support of the application in a *viva voce* hearing, Mr. Kelvin Kidiffu, learned counsel for the applicant, submitted that paragraphs 2, 3, 4, 5, 6 and 7 of the affidavit have sufficiently demonstrated that the applicant was prevented by a good cause from entering appearance in court. He added that, the medical chit, the itinerary and the affidavit of Advocate Mbaruku Mwinyi, have sufficiently established that the application merits a positive consideration.

I have respectfully considered the application. As per Order IX rule 3 of the Civil Procedure Code, where suit dismissed for non-appearance of the parties,

“...the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply to

set aside the dismissal order, and if he satisfies the court that there was good cause for his non-appearance, the court shall set aside the dismissal order and shall appoint a day for proceeding with the suit.”

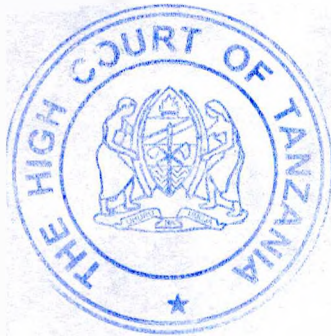
The powers vested in court by this provision are discretionary in nature and the exercise of which is predicated upon the plaintiff furnishing the court with materials demonstrating that his default appearance was due to a good cause. Accordingly, the only issue waiting determination is whether a good cause has been demonstrated. Whereas the term good cause is an open-ended term, in applications of this nature, a good cause is deemed to have been rendered if the applicant ably demonstrates that the reasons that prevented him from entering appearance in court were other than his negligence, apathy or sloppiness.

The affidavit filed by the counsel and the annexures thereto coupled with the supplementary affidavit of advocate Mbarouk Mwinyi have, in my firm view, ably demonstrated that, on the date the suit was dismissed, the plaintiff's counsel had travelled to Mbeya. Thus, there is a good cause upon which to exercise the powers vested in this court by Order IX rule 3 of the Civil Procedure Code, Cap 33 RE 2019.

In the foregoing, I allow the application. The dismissal order in respect of Civil Case No. 28 of 2019 is vacated and set asset aside and the case file is

forthwith restored. The parties are to appear for necessary orders on 22/6/2021.

DATED at DAR ES SALAAM this 28th day May 2021.



A handwritten signature in blue ink, appearing to be "J.L. MASABO", written over a circular stamp.

J.L. MASABO

JUDGE