

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 209 OF 2021

(Original Civil Case No. 20 of 2020)

VIGU TRADING COMPANY LIMITED.....APPELLANT

VERSUS

SINOTRANS TANZANIA CO. LTD.....RESPONDENT

RULING

06th Oct, 2021 & 05th Nov, 2021.

E. E. KAKOLAKI J

Whether the applicant has demonstrated sufficient cause to warrant this court exercise its discretion to set aside the dismissal order as per the dictates of Order XI Rule 14(1) of the Civil Procedure Code, (termed CPC), is the central issue for determination by this court. By way of chamber application supported by the affidavits of one James Andrew Bwana, applicant's advocate, Mahesh Sankaran, applicant's Chief Operation Officer and Jesca Crisant Milambo, the court is moved by the applicant for an order to set aside the dismissal order entered by this court on 12/04/2021 in respect of Civil Case No. 20 of 2020 between the parties herein and

restore back the proceedings to its earlier status. The application which has been preferred under Order IX Rule 6(1) and Sections 68,(e) 95 of the Civil Procedure Code, [Cap. 33 R.E of 2019] is strenuously resisted by the respondent who through its advocate one Benard Stephen filed three Counter Affidavits in opposition of the three affidavits filed by the applicant in support of her application. As both parties appeared represented during hearing of the matter, leave was granted by the court for them to argue the application by way of written submissions and the filing schedule orders issued to that effect, which was followed religiously. The applicant hired the services of Mr. James Andrew Bwana learned advocate while the respondent enjoyed the services of Mr. Benard Stephen, learned counsel.

As the above stated issue would demand the applicant in this matter is called to demonstrate to the court sufficient cause warranting exercise of its discretion to set aside its dismissal order. As to what amount to sufficient cause for failure to prosecute the case or non-appearance in court it is not specifically defined by the law as the same can only be defined according to the peculiar circumstances of each case. See the cases of **Mwanza Director M/S New Refrigeration Co. Ltd Vs.**

Mwanza Regional Manager of TANESCO and Another (2006) TLR 329.

Briefly the applicant in this case had instituted the suit against the respondent in this court via Civil Case No. 20 of 2020, claiming for USD 266,677.77 or its equivalent in Tanzanian Shillings being payment for logistics and transportation services rendered to the respondent, interest thereof at the rate of 9% per annum, general damages and costs of the suit. The suit was scheduled to commence for hearing on 07/12/2020 before it was adjourned to another date for the last time on 08/04/2020. On that date when it was called for hearing counsel for the applicant informed the court that, the plaintiff (applicant) was unable to proceed with hearing following demise of the main and single witness in the case, one *Viran Josephi Mkomba* who had personal knowledge and custody of all documents to be relied on in the said case. He thus prayed for adjournment of hearing to allow the plaintiff with time to collect the said documents and reposition herself so as to be able to proceed with hearing. The trial judge was unsatisfied with the advanced reason for adjournment of the case, the result of which was to dismiss the case for want of prosecution. It is from that dismissal order this application has been

preferred by the applicant seeking to set aside the said order. It is worth noting that the trial Judge my sister Ebrahim J, was transferred from this registry to another duty station thus, could not entertain this application as the same was reassigned to me to proceed with.

I have carefully perused and understood both applicant's affidavits, reply to counter affidavits and respondent's counter affidavits in support and against the application as well as the conflicting submissions from both parties. It is the law, the powers conferred to this court by the provisions of Order IX Rule 14(1) of CPC to exercise its discretion to set aside dismissal order is so invoked and exercised upon the applicant advancing sufficient cause to the court as it was rightly stated by this court in the case of **Mwidini Hassani Shela and 2 Others Vs. Asinawi Makutika and 4 Others**, Land Appeal No. 04 of 2019 (HC-unreported), wherein the court said:

*"It is trite law that powers to set aside dismissal order are in the discretion of the court, **however the applicant should furnish sufficient reasons to enable the court exercise its discretionary power.**" (Emphasis added)*

In discharging such noble duty and accounting for sufficient cause Mr. Bwana for applicant in his submission in chief advanced two reasons for failure to prosecute the case. **One**, he said was due to death of the key witness on 07/02/2021, one Mr. Virani, chief executive officer of the applicant company, with full knowledge and details of the facts supporting the case for being a person who negotiated for the contract and custodian of various original documents in support of the case. As the said documents were in his custody and kept at his home private office he argued, they could not be obtained in time as proved by his wife one Jesca Crisant Milambo in her affidavit, who deposed was unable to open the said office for fear of losing some documents concerning deceased's estate due to ill relationship that was prevailing between her and her late husband's relatives. **Second**, he contended, the trial judge over stepped on the procedure prior to dismissing the main suit as upon rejection of the prayer for adjournment, the applicant ought to have been ordered to proceed with the case. He therefore contended, the applicant's case was dismissed without according her with an opportunity to choose whether to proceed with hearing or not. With those reasons Mr. Bwana insisted the applicant

demonstrated sufficient cause, thus implored the court to set aside the dismissal order and restore the suit to its full determination.

Retorting Mr. Bwana's submission, Mr. Stephen for the respondent from the outset contended, the applicant failed to the advance sufficient cause to warrant this court exercise its discretion to set aside the dismissal order complained of. He stated, the applicant failed to demonstrate the degree of diligence in prosecuting the case as on the 08/04/2021 advocate Bwana appeared in court with Mr. Mahesh Sankaran the principal officer who verified and signed the plaint hence capable of testifying in court, but instead of parading him before the court for testimony, applicant's advocate asked for adjournment on the reason of death of the only intended witness one Mr. Viran who never signed or verified the pleadings. He further stated, at first the case was scheduled for hearing on 07/12/2020 before it was adjourned to 08/04/2021, so to him the advocate for the applicant had ample time to prepare the documents by then but failed to do so. More so, the death occurred on 07/02/2021 so the applicant had enough time to collect the said documents instead of seeking for adjournment, Mr. Stephen stressed. According to him it was unsound and insufficient reason for the applicant's advocate to allege was not in

possession of documents on the hearing date as he could have prepared the documents long ago even at the stage of filing the suit. Mr. Stephen added, there was no justification that Mr. Virani was the only person with personal knowledge of the case and that it was resolved by the Company resolution the said documents be under his custody as Director and Chief Executive Officer of the applicant. Lastly he commented on the cases relied on by the applicant distinguishing them to the circumstances of this case and urged this court to find the applicant has failed to demonstrate sufficient cause, thus proceed to dismiss the application with costs.

In his rejoinder submission Mr. Bwana apart from reiterating the contents of his earlier submission in chief responded on some part of the respondent's submission. On the need of justification of the Company's resolution for the said late Virani to keep some of the documents at home he countered, that was not the requirement of the law as the deceased could keep his important documents at his home private office bearing in mind the company was/is a family owned one. As to why the documents could not be obtained timely he intimated, the affidavit of deceased's wife one *Jesca Milambo* expressly stated, she was still mourning her husband while at the same time faced with risk of losing vital documents that could

have affected deceased estate due to ill relationship with her in-laws, thus unable to search and locate them timely in the deceased home private office. On why not presenting the witness who signed or verified the pleadings, he stated the right to choose witness to the case lies with the plaintiff, thus it was not mandatory for the plaintiff to call the person who signed the pleadings. As such he argued, the case was not dismissed on the ground that a signatory of pleadings was still alive but rather failure to prosecute it. On the cases relied on he insisted the same were relevant to this case and prayed the court to consider them. On the basis of that submission the court was invited to grant the applicant's prayers by setting aside the dismissal order and restore the proceedings to its full determination.

Having summarised the submission by the parties, the crux of the matter before me for determination is whether the advanced reasons have demonstrated sufficient cause warranting this court exercise its discretion to set aside the dismissal order. To start with the first reason of failure to prosecute due to death of Mr. Virani and absence of original documents which were in possession of the said Virani, I find the same to be lacking in justification as rightly submitted by Mr. Stephen as the applicant seem not

to have had been willing and prepared to prosecute the case apart from employing delaying tactics for three reasons. **One**, as per paragraphs 5 and 6 of the affidavit of one James Andrew Bwana, the deceased was the only main and single witness in that case with personal knowledge of all facts about the case and in possession of the original documents necessary for production in court. The said paragraphs 5 and 6 read:

5. That, on 7th February 2021, Mr. Virani Joseph Mkomba, who was the main and single witness for this case who had personal knowledge of all the facts about the case, passed away.

6. That, in addition to being the main witness, Mr. Viran Joseph Mkomba also had custody of most of the original documents that are necessary for production in court.

Now if the court is to believe the above averred facts where the court is told the deceased was the main and single witness, then there is no way the applicant could have proceeded with the case under such circumstances as there was no any other witness apart from the deceased to testify in court. Thus the sought adjournment by the applicant was without justification at all apart from being a delaying tactic. **Second**, assuming there was another witness apart from the deceased, in my opinion this would be to none other than Mr. Mahesh who signed or

verified the plaint to the effect that he had personal knowledge of all the facts stated therein save for paragraph 18 of the plaint (annexure 1 to the affidavit of James A. Bwana) containing facts on the information of jurisdiction of the court which was based on the advice received from the advocate. As submitted by Mr. Stephen for the respondent which submission I embrace the court was not told as to why this witness could not have testified in place of the deceased for being in full knowledge of all facts of the case. **Thirdly**, is on the unavailability of the original documents during the hearing date. While Mr. Mahesh in paragraphs 7 and 8 and Ms. Jesca Milambo (deceased wife) in paragraphs 10,11,12,13 and 14 of their affidavits respectively are claiming in mid-March, 2021, the deceased wife was not in a position to search for the required original documents which were locked in the deceased home private office for being emotionally challenged one month after demise of her husband and for fear of risking them falling into in-laws hands, despite of full knowledge that were such necessary documents to prove the case in court, it is noted the same wife managed to produce them on 15/04/2021, three (3) days after receipt of the information of dismissal of the case. It is beyond comprehension of any reasonable person to hear and believe that, the alleged emotional

challenges and fear of risking documents falling into hands of in-laws ceased to exist after dismissal of the suit as it is stated nowhere whether the alleged in-laws were threatening to dispossess her of the said document and when did the said threat cease. In my considered opinion these assertions by the applicant are nothing but an afterthought and cannot in any way constitute sufficient cause to warrant this court exercise its discretion to set aside the dismissal order.

Next for consideration is the second reason where Mr. Bwana complained the applicant's case was dismissed without according her with an opportunity to choose either to proceed with hearing or not. With due respect to the learned counsel I don't find any justification in this complaint too. The reason as to why I am so holding is not far-fetched. The applicant while seeking adjournment submitted before the court that, was unable to proceed with hearing following demise of the main and single witness in the case, one *Viran Joseph Mkomba* who had personal knowledge of all facts about the case and custody of original documents intended to be tendered in court. With that applicant's proposition one would wonder as to how it could possible for the court to put her to choice whether to proceed with hearing or not in a situation of demise of the main and only witness

with personal knowledge of all facts of the case and in absence of the original documents intended to be produced in court on that day as stated in paragraph 5 of James A. Bwana's affidavit. With that clear explanation of the circumstances that preceded the decision of the court, I find this reason advanced by the applicant is wanting too to warrant this court exercise its discretion of setting aside the dismissal order as prayed by the applicant, contrary to requirement as lucidly articulated in the case **Mwidini Hassani Shela** (supra).

That said and done, and for the reasons stated this application is without merit and the same is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 05th day of November, 2021.




E.E. KAKOLAKI

JUDGE

05/11/2021

Delivered at Dar es Salaam in chambers this 05th day of November, 2021 in the presence of Mr. James Bwana Advocate for the appellant, Mr.

Rangeni R. Rangeni advocate for the respondent and Ms. Asha Livanga,
court clerk.

Right of appeal explained.




E. E. KAKOLAKI

JUDGE

05/11/2021