

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 126 OF 2016
(Arising from Miscellaneous Commercial Cause No. 3 of 2015)

SADRU MANGALJI APPLICANTS

VERSUS

ABDUL AZIZ LALANI	}	RESPONDENT
AMIN RAMJI			
MEHBOOB RAMJI			

11th October & 16th November, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for, *inter alia*, setting aside the dismissal order made by this court on 20.06.2016 in Miscellaneous Commercial Cause No. 3 of 2015. That was a petition for orders in respect of Nyakato Steel Mills Ltd and was dismissed for want of prosecution. The present application has been taken under the provisions of rule 43 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth “the Rules”). It is supported by an affidavit of Dr. Onesmo Kyauke and contested by a counter-affidavit of Thomas Eustace Rwebangira, both advocates of this court and courts subordinate hereto, save for the Primary Court.

The application was argued before me on 11.10.2016 during which both parties were represented. While Mr. Makarios Tairo and Emmanuel Nasson, learned counsel, joined forces to advocate for the applicant, Mr. Thomas Eustace Rwebangira, learned counsel, advocated for the respondents. The learned counsel for the parties had earlier filed their respective skeleton written arguments in line with the dictates of the provisions of rule 64 of the Rules.

It was Mr. Tairo, learned counsel who started the ball rolling. Having adopted the affidavit supporting the application and the skeleton written arguments earlier filed, the learned counsel submitted that on the date when the case was dismissed for want of prosecution, Dr. Kyauke, the learned counsel who was to appear, was within the court precincts but was rather sick. The learned counsel referred to the medical excuse slip attached to the affidavit to verify this point. He submitted that sickness of the applicant's advocate is sufficient reason to grant application for setting aside the dismissal order. To buttress this proposition, he cited ***B. H. Ladwa Limited Vs Salem Construction Company Limited***, Miscellaneous Commercial Cause No. 12 of 2010 and ***Sultan Bin Hilal El Esri Vs Mohamed Hilal and Others***, Miscellaneous Commercial Cause No. 196 of 2014; both unreported decisions of this court.

The learned counsel also submitted that on that date, the matter was set down for hearing of the Preliminary Objection; not the main petition. In the circumstance, the learned counsel argued, it was not appropriate to dismiss the entire petition.

Arguing against the application Mr. Rwebangira, learned counsel, also having adopted the counter affidavit and skeleton arguments earlier filed, disputed

Dr. Kyauke's presence in court on the material at 1030 hours stating that he, Mr. Rwebangira was present and when the court called the case at 1149 hours, Dr. Kyauke was not here. The learned counsel stated that he would have conceded if the only reason advanced for non- appearance would have been sickness. He argued that the whole scenario contains some lies; and affidavit which contains some lies cannot be relied upon.

On the second point that the matter was set for hearing of the preliminary objection, he submitted that on 01.06.2016 Mr. Emmanuel Nasson, learned counsel appeared for the applicant and that it was agreed to move the court for further steps. The matter was adjourned for that purpose. Thus it was appropriate to dismiss the petition, he argued. If Dr. Kyauke, learned counsel, was sick and was excused from duty, why did he come to court late as alleged rather than sending another advocate to hold his brief as he did in some previous times, he asked. He thus prayed for dismissal of the application with costs.

In a short rejoinder, Mr. Tairo, learned counsel, submitted that the major reason non-appearance was Dr. Kyauke's sickness. There are neither contradictions nor lies in the affidavit, he stated and that Mr. Rwabangira had ample time to verify the veracity of the medical chit.

I have considered the learned arguments for and against the application. It settled law that an applicant seeking to set aside a dismissal order of the court dismissing any suit for want of prosecution, he has to furnish the court with sufficient reasons for nonappearance when the suit was called on for hearing. It is evident from the affidavit supporting this application that counsel for the applicant's failure to appear when the matter was called on for hearing was a result of his being sick; that he had a running stomach so

when the case was called he was in the toilet. He has appended with the application a medical chit dated 20.06.2016 showing that he was suffering from "Acute Gastro enteritis" and was excused from duty for three days; 20 – 22.06.2016. As seen above and in the counter affidavit of Mr. Rwebangira, Dr. Kyauke's presence in court precincts on the material date is highly disputed arguing that if Dr. Kyauke was excused from duty did he come to court why in the first place.

I have weighed the arguments for and against the application as presented to me by both learned counsel. I think the applicant's counsel has sufficiently explained away why he did not appear in court when his case was dismissed for want of prosecution. I have reached that conclusion having considered among other things, the conduct before the dismissal order. The applicant's counsel has all along appearing to prosecute his case and on few occasions that he did not, he sent another advocate to hold his brief. In ***Shocked and another Vs Goldschmidt and others*** [1998] 1 All ER 372 it was stated that the applicant's conduct before the alleged non-appearance should be taken into consideration in application of this nature. I have also considered the fact that it is in the interest of justice and the practice of this court that, unless there are special reasons to the contrary, suits are determined on merits – see: ***Fredrick Selenga & another Vs Agnes Masele*** [1983] TLR 99 and ***Mwanza Director M/S New Refrigeration Co. Ltd Vs Mwanza Regional Manager of TANESCO Ltd & another*** [2006] TLR 335.

I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this application – see: ***Jesse Kimani Vs McCornel and another*** [1966] EA 547.

In view of the above, on a balance of probabilities, I think the applicant has provided sufficient cause why counsel did not enter appearance when the suit was called on for hearing. I have taken the trouble to find out in the **Concise Oxford Dictionary** (10th Edition) what was scribbled on the medical chit means, it being written in a technical language. I have found the term "acute" to mean, *inter alia*, "critical; serious – (of an illness) coming sharply to a crisis; severe. Often contrasted with chronic", "gastro" to mean "stomach" and "enteritis" to mean "inflammation of the intestine, especially the small intestine, usually accompanied by diarrhoea". The definition of the terms appear to me to tally with what the deponent deposed in the affidavit in support of the affidavit; that he had a running stomach. That is to say, the technical terms in the medical chit relate to a running stomach; a disease Dr. Kyauke alleges to have been suffering on the material date and at the material time.

As to the discrepancy in time complained by Mr. Rwebangira, learned counsel, I have taken the view that it is not always humanly practicable to look at the watch to observe time whenever one does any act like his case being called for hearing. In the instant case, the situation is exacerbated by the fact that the deponent had a diarrhoea. It is not humanly expected a person attacked by a running stomach or diarrhoea to look at his watch the moment he is called by nature to attend the call.

I think justice will smile if the applicant is availed an opportunity to prosecute his case.

In the upshot, the present application is allowed. Miscellaneous Commercial Cause No. 3 of 2015 shall be restored to the register for continuation from where it stopped on 20.06.2016 when it was dismissed for want of

prosecution. For the avoidance of doubt, the circumstances of this application are such that there should be no order as to costs. I make no order as to costs.

Order accordingly.

DATED at DAR ES SALAAM this 16th day of November, 2016.



J. C. M. MWAMBEGELE
JUDGE

