

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 55 OF 2018

(Originating from Commercial Case No. 129 of 2017)

PIMAK PROFESYONEL MUTFAK LIMITED SIRKETI..... APPLICANT

Versus

**PIMAK TANZANIA LIMITED
FARHA ABDULAH NOOR**

.....
.....

**1st RESPONDENT
2nd RESPONDENT**

RULING

10/12/2018 & 18/02/2019

SEHEL, J.

This is a ruling on application for setting aside dismissal order in respect of Commercial Case No. 129 of 2018. The application is made under Order XXV Rule 2 (2) of the Civil Procedure Act Cap 33 (hereinafter referred to as "the Code") and it is supported with an



affidavit of Mohamed Telha Ismail, the principal officer of the Applicant.

The facts that led to the present application are such that the applicant who is a foreign company incorporated in Turkey filed a suit against the respondent vide Commercial Case No. 129 of 2017. The respondent after being served with the plaint, filed an application for security for costs. The application was granted by ordering the applicant to deposit in Court a Bank Guarantee of Tanzania Shillings Forty Five Million (Tshs. 45,000,000/=) as security for costs. The applicant was further ordered to make the said deposit within six weeks reckoned from 15th December, 2017 failure of which the suit stands dismissed. On 9th February, 2018 when the matter was called for necessary orders, the applicant's counsel made a prayer for extension of time within which to furnish security. The application was denied and Commercial Case No. 129 of 2017 was dismissed under Order XXV Rule 2 (1) of the Code. Hence the present application was made.

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The respondent after being served with the present application filed its counter affidavit to oppose it.

The application was heard orally on 10th day of December, 2018. Prior to the holding of the oral hearing, both parties complied with Rule 64 of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 by filing skeleton arguments which they adopted during oral submissions.

At the oral hearing, learned advocate Grace Joachim appeared to represent the applicant while learned advocate Deogratius Lyimo appeared to represent the respondent.

Counsel Joachim after fully adopting the skeleton arguments and affidavit in support of the application emphasized that there are sufficient reason for setting aside the dismissal order because Mr. Serdar Donmez who signed the pleadings in the Commercial Case No. 129 of 2017 and counter affidavit in the application for security for costs had to leave the country as he had no work permit. She further submitted that even Mr. Mohamed Telha Ismail who was appointed to be the acting general manager failed to finalize the

payment of security for costs in time because he fell sick and he had to travel to India for treatment upon his return he found out the suit was struck out. As per her skeleton arguments, she said as per Order XXV Rule 2 (2) of the Code, a party upon advancing sufficient cause, can set aside the dismissal order and be afforded time to furnish the same. By using the authorities in the **Regional Manager, TANROADS Kagera Vs Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007; **The Registered Trustees of the Archdiocese of Dar es Salaam Vs The Chairman Bunju Village Government and 11 Others**, Civil Appeal No. 147 of 2006; **Tanga Cement Company Limited Vs Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (All CAT Unreported) and **Benedict Mumello Vs Bank of Tanzania**, [2006] E.A 227 where it was generally established that sufficient cause has not be defined but it can be determined according to the circumstances of each case by looking at to whether or not the application has been brought promptly, the absence of any or valid explanation for the delay, and lack of diligence on the part of the applicant. The learned counsel



further contended that illness is sufficient cause as held in **Sadru Maganji Vs Abdul Azizi Lalani and Others**, Misc. Commercial Application No. 126 of 2016. She therefore prayed for the application to be allowed.

It was replied by first adopting the counter affidavit and skeleton arguments and it was stated that the reason of illness given was not part of the reason advanced on 9th day of February, 2018 where the Court heard and determined an application for extension of time for furnishing security for costs. The learned counsel argued that the reason given was failure to finalize the process of bank guarantee which the court considered and ruled it out. He further contended that even Mohamed Telha Ismail was not one of the principal officer at the time of the order but Serdar Donmez Ismail was the principal officer. The learned advocate acknowledged that Order XXV Rule 2 (2) of the Code allows the Court to set aside dismissal order where there is sufficient. He argued in the matter at hand there is no sufficient reason for this Court to do so because

even the illness of Mohamed Telha Ismail is not established. He prayed for the application to be dismissed with costs.

In rejoinder it was insisted that Mr. Mohamed Telha Ismail was sick and there are documents to prove the illness.

I have carefully considered the submissions and arguments advanced by the counsels. It is not disputed that the applicant's suit was dismissed by this Court on 9th day of February, 2018 upon the applicant's failure to furnish security for costs. It is further not disputed that the suit was dismissed under Order XXV Rule 2 (1) of the Code. Sub rule 2 to Rule 2 of Order XXV of the Code allows the court to set aside the dismissal order upon the applicant having advanced sufficient reason. The said sub rule reads:

"Where a suit is dismissed under this rule, the plaintiff may apply for an order to set aside and, if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the court shall set aside the dismissal upon such terms as to security, costs or

otherwise as it thinks fit and shall appoint a day for proceeding with the suit."

From the above provision of the law, it is trite law that the applicant must advanced sufficient cause for the Court to set aside the dismissal order. What amounts to sufficient cause has not been defined by the law but as correctly submitted by the learned counsel for the applicant, certain factors may be taken into account to ascertain whether a party has advanced sufficient cause. The factors are: whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; and lack of diligence on the part of the applicant.

Applying the factors to the matter at hand, the respondent has not raised any concern over the promptness of the application and in any event it was brought within time.

It is argued by the counsel for the respondent that Mr Ismail was not one of the principal officer of the applicant at the time the earlier extension was requested and even the reason advanced at that time was failure to finalize the bank process. He further

contended that there is no proof of illness of Mr. Ismail and no proof of appointment of Mr. Ismail as general manager of the applicant. I will not dwell much on the complaint that the earlier application was declined because the records of Commercial Case No. 129 of 2017 show that on 9th February, 2018 the Court after considering the request for extension of time dismissed the suit under Order XXV Rule 2 (1) of the Code. As I said, Order XXV Rule 2 (2) of the Code allows the applicant to make an application for setting it aside by advancing sufficient reason and that is why the applicant has filed the present application. Now has the applicant advanced sufficient reason?

The reason advanced in the affidavit was that Mr. Ismail fell sick hence he travelled to India for treatment. The applicant appended with the application his medical chit and his travelling documents to prove that he travelled to India and was treated in India.

I have scrutinized the medical chit and noted that it was issued on 12th January, 2018 and addressed "to whom it may concern". Generally it explains that Mr. Mohamed Telha Ismail was under

treatment and he had Laser Ear Surgery of "Cholesteatoma Removal" of right ear and that Mr. Ismail was advised to rest for further two weeks.

Sickness is a sufficient reason as explained by the Court of Appeal of Tanzania in the case of **John David Kashekya Vs The Attorney General**, Civil Application No. 1 of 2012 (Unreported-CAT) when it said:

"..sickness is a condition which is experienced by the person who is sick. It is not a shared experience. Except for children who are not yet in a position to express their feelings, it is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he is required to do. In this regard it is the applicant who says he was sick and he produced medical chits to show that he reported to a doctor for check up for one year. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to come to Court and pursue his case. Under such

circumstances, I do not see reasons for doubting his health condition. I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to file..."

The applicant herein through his affidavit has explained that he could not properly facilitate the process of the Bank guarantee due to his poor health. As sickness is a condition which is experienced by a sick person and since the applicant said due to his sickness he failed to process the security and since he has attached evidence to prove that he was sick then I see no reason to doubt his condition at that time.

In view of the aforesaid reason, I am satisfied that, the applicant has advanced sufficient cause for the delay which I consider as good cause. Accordingly, the application for setting aside the dismissal order is hereby granted by restoring Commercial Case No. 129 of 2017 to the register and it shall proceed for further proceedings from where it reached on 9th February, 2018. At the same time the applicant is ordered to deposit in Court the bank ~~bank~~

guarantee of Tshs. 45,000,000/= as security for costs. The deposit shall be made within six weeks from the date of this ruling. No order for costs is made due to the prevailing circumstances of this application. In other words each party shall bear its own costs. It is so ordered.

Dated at Dar es Salaam this 18th day of February, 2019.



A handwritten signature in black ink, appearing to read "B.M.A Sehel".

B.M.A Sehel

JUDGE

18th day of February, 2019