

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 35 OF 2019

(Arising from Commercial Case No. 107 of 2018)

NATIONAL BANK OF COMMERCE LIMITED.....APPLICANT

VERSUS

IDD ABUBAKARY MZIRAY.....RESPONDENT

RULING

B.K. PHILLIP, J

This ruling is in respect of an application for setting aside a dismissal order entered on 4th April 2019 in Commercial case No.107 of 2018. The application is made under the provisions of Rule 43(2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by GN. No. 107 of 2019. It is supported by an affidavit sworn by the learned Advocate Dr Onesmo Kyauke. The respondent, Mr. Iddi Abubakari Mziray swore an affidavit in opposition of the application.

A brief background to this application is that the applicant is the plaintiff in the above mentioned commercial case No. 107/2018 (Henceforth "the Case") while the respondent is the defendant. On the 20th February 2019 the Final Pre-Trial Conference for the case was conducted in the presence

of the learned advocate Dr. Onesmo Kyauke and the respondent, thereafter the case was scheduled for hearing on 4th April 2019. On the 4th April 2019 when the case was called for hearing the respondent /defendant appeared in court. Dr. Onesmo and the applicant / plaintiff did not appear in court and there was no any notice on their absence. consequently, the court dismissed the case with costs.

In his affidavit in support of this application, the learned advocate Dr. Onesmo stated that he failed to attend in court on 4th April 2019, because he travelled to Arusha to attend the Annual General Meeting ('AGM') of the Tanganyika Law Society (TLS).

I ordered this application to be disposed of by way of written submissions upon the request made by the respondent for the same. I have perused the court's records and noted that it is the applicant's advocate only who has filed the written submission in support of this application as ordered by this court. The respondent has not filed any response to the applicant's written submission.

In his written submission the applicant's advocate reiterated the contents of the affidavit in support of this application and proceeded to submit that Dr. Onesmo did not notify the court on his none appearance in court on 4th April 2019 because he believed that the letter that was sent to the Judges by the Chief Registrar was enough notice to the court on TLS AGM that was held in Arusha on 5th and 6th April 2019. He insisted that the

applicant's advocate failure to appear in court on 4th April 2019 was not out of negligence or dilatory.

Having analyzed the submission made by the applicant's advocate which is not challenged, in my considered view, in this application my task is to decide whether or not the applicant has adduced sufficient reasons for his none appearance in Court on 4th April 2019 when the case was dismissed, to move this court to restore the same. As I have mentioned earlier herein above, the respondent has not challenged the submissions filed by the applicant's advocate. It is not in dispute that when the case was called for hearing on 4th April 2019, the applicant and his advocate were not in court. However, it is also true that on 5th and 6th April 2019 there was a TLS AGM in Arusha as evidenced by the letter from the chief Registrar which has been attached to the affidavit sworn by Dr. Onesmo. It is also true that the learned advocate Dr. Onesmo did not notify this court that he was going to attend the TLS AGM in Arusha on 4th and 5th April 2019. To my understanding the Chief Registrar's letter was not intended to adjourn all cases regardless whether or not the advocate appearing in a particular case was going to attend the TLS AGM. I think the applicant's advocate was obliged to notify the court on his intention to attend the TLS AGM. However, despite the fact that Dr. Onesmo did not notify the court that he was going to attend the TLS AGM in Arusha, since the respondent opted not to challenge this application, I am of a settled view that if this application is granted the respondent will not be prejudiced. Thus, for the interests of justice, I hereby grant the application. Therefore, Commercial

case No 107 of 2018 is hereby restored as prayed by the applicant's Advocate. I give no order as to costs.

Dated at Dar Es Salaam this 13th day of March 2020.




B.K.PHILLIP
JUDGE