IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 34 OF 2020

BETWEEN

BEVCO LIMITED.....1st APPLICANT

MARK TECHNO LIMITED.....2nd APPLICANT

Versus

ANNA INVESTIMENT COMPANY LIMITED.....RESPONDENT

Last Order: 10th May, 2020

Date of Ruling: 17th June, 2020

RULING

FIKIRINI, J.

The applicants brought this application by way of chamber summons under Rule 31(2) of the High Court (Commercial Division) Procedure Rules of 2012 (the Rules) requesting to set aside the dismissal order dated 18th March 2020, in Commercial Case No. 74 of 2019.

The application was orally heard. The applicants enjoyed the legal services of Mr. Dennis Mwesigwa learned counsel while the respondent was represented by Mr. Mudhihir Maghee learned counsel.

It was Mr. Mwesiga learned counsel's submission that the applicants filed this application seeking to set aside the dismissal order dated 18th March, 2020. Assigning reason for his none appearance, when the matter was called for the first Pre-Trial Conference (1st PTC), that in the morning of the case as reflected in annexture 3 he had to go for further medical checkup including screening for Covid-19 at Mwananyamala Hospital because of the continued having headache besides having undergone the same at Lancet Laboratory commonly known as Doctors' Plaza (as exhibited in annexture-2). That since it was still morning, after the checkup, he came straight to Court, only to be notified by the Court clerk that the matter has been dismissed with costs for non -appearance of the counsel and the parties. The suit was dismissed under Rule 31 (1) of the Rules.

Mr. Mwesiga further submitted that since filing of the Commercial Case No. 74 of 2019, he has never failed to enter appearance nor ignored to attend one. On this occasion his non-appearance was due to his attendance to screen for COVID-19. As an officer of the Court he has a duty to protect the safety of the Court staff as well as himself, underscored Mr. Mwesiga. To that effect he prayed for the Court to set aside the dismissal order and order Commercial Case No. 74 of 2019, be heard on merits for the benefit of both parties and justice.

Opposing the application, it was Mr. Maghee's submission that the applicant submission was devoid of merits as the counsel has failed to give sufficient reasons as to why he failed to appear leading to the dismissal of the suit.

Mr. Maghee, disputing the account of illness gave the following reasons; *One,* that the applicant presented the laboratory results while his affidavit was silent as to why he had to present those results which were annexed to the affidavit. *Two,* that the annexed document (annexture-2) was silent as to whether the applicants' counsel was required to present the investigation result to any other hospital, as he did. *Three,* that there was no any medical chit from Mwananyamala hospital indicating the counsel for the applicants was attended before, at Mwananyamala hospital. *Fourth,* that the applicants' counsel has attached a letter instead of attaching a medical chit, as they all aware that, when patient is attended by a doctor a medical chit is generated from that visit. The question to be asked was why the applicant submitted a letter instead of medical chit? it was a wonder to Mr. Maghee.

He further submitted that the letter did not state at what time he was attended too at the hospital. He went on submitting that the matter before the Court was scheduled during the morning there was a possibility that the applicant went to Mwananyamala hospital that evening to procure the letter since he had knowledge that the matter has been dismissed. In addition, there was no affidavit procured

from the doctor who attended the counsel at Mwanyamala hospital. Doctor's affidavit would have stated the time the counsel was attended too at the hospital, as the counsel's affidavit was silent on that. Also the investigation at Dr's Plaza was conducted on 6th March 2020, but the counsel kept results until 18th March 2020 when the matter was coming for the orders, which was almost twelve (12) days later. In the absence of a medical chit that the counsel was attended at Mwananyamala hospital, it will be unsafe to conclude that the counsel went to Mwanyamala hospital for medical attention and that on the same morning he appeared before the Court only to find the matter has been dismissed. This is more so, as there was neither proof to that effect provided nor an affidavit of the court clerk who informed him that his case has already been dismissed.

Finalizing his submission, he submitted that the applicants' counsel law firm has more than one advocate and any one could have appeared on particular date on behalf of Mr. Mwesiga or he could even ask the applicants themselves to appear before the Court on the particular date. Examining all these together, Mr. Maghee prayed for the dismissal of the suit with costs.

In rejoining it was the applicants' counsel submission that a letter from Mwananyamala hospital was written by the practitioner from the Mwananyamala hospital. The letter has the emblem and signature of the medical in charge and it has been stamped, dated and therefore no doubt of its authenticity.

Responding to concern's raised in respect of annexure 2, the counsel admitted that he was never requested by doctor at Dr's Plaza to take his result to Mwananyamala hospital, but since the country was under threat due to Covid-19, he therefore did not need to get a leave from anyone as he was concerned for his own safety and that of the public as well.

Concluding his submission, it was his submission that, he was aware that the matter was coming on 18th March, 2020, and that was why he did not seek any adjournment.

I have carefully examined the rivalry submissions. From the outset I would wish to restate that, granting or not granting of this application is at Court discretion. The discretion which ought to be exercised judiciously, by taking into account, all the circumstances of each particular case.

Although there is no exact definition of what amounts to sufficient cause or reason but that is one of the pre-condition in order for the application to be granted. However, with time the Court of Appeal has come up with decisions giving guideline on what should be considered as sufficient cause or reason. **See Tanga Cement Company Limited v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001 and Gideon Mosa Onchwart v Kenya Oil Co Ltd & Another [2017]**

Now turning to the application itself which has been predicated under the provision of Rule 31 (2) the Rules, which provides as follows:

> *"An order made by the court in the absence of the party concerned or affected by the order may be set aside by the court, on the application of that party within fourteen days from the date of the order, on such terms as it considers just."*

The applicants through Mr. Mwesiga assigned one reason in persuading this Court that on 18th March 2020, when the matter was scheduled for the 1st PTC, he went for medical checkup as he was not feeling well. Basing on court records the following facts stands undisputed: Whilst Covid-19 pandemic can be sufficient cause warranting grant of the application, but that can happen upon proof, that Mr. Mwesiga, failed to appear before the Court on time as he was at Mwanyamala hospital for medical attention. Section 110 (2) of the Evidence Act, Cap 6, and R.E 2002 (the Evidence Act), is clear when it comes to burden of proof. The provision states that:

> *"When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

I have closely examined all the reasons advanced by the applicants' counsel, they were nonetheless not persuasive. **First,** the applicant did not provide a medical chit

to prove that on that particular date and time he was being attended at Mwananyamala hospital. A letter from medical officer in charge is not conclusive evidence to prove that the counsel was at Mwanyamala hospital for the stated reason. An affidavit from the doctor who attended the counsel in the absence of ordinary medical chits, raises concern. On this I am more persuaded by Mr. Maghee's submission in opposition to the grant of the application.

It is more likely than not that the visit to Mwanyamala hospital twelve (12) days after his visit at Dr's Plaza and a letter which was not a medical chit procured was an afterthought and specifically to back up his story trying to draw Court's sympathy on Covid-19 pandemic threat.

Second, hospital attendance is usually unplanned and the time to be spent unknown in most cases. For an advocate who is also an officer of the Court, not to be cautious that his time at the hospital might interfere with his Court attendance, did not exhibit diligence. This is more so considering that there were other lawyers at the Law Firm he is working. Had the counsel been serious and applied a bit of care he would not have leave things as he did. He could as well inform his clients so that they can be there and seek for an adjournment assigning reasons for their counsel's absence. Despite the fact that the country was under Covid-19 pandemic threat and any one of us was vulnerable and could catch the disease, yet that did

not mean people should act wildly knowing that the disease can be posed as a defence. In this I do not find the counsel to have acted properly. In **Calico Textile Industries Ltd v Pyaraliesmail Premji [1983] TLR 28,** the Court in dismissing the excuse given, held that:

> *"Once the advocate are instructed to take the conduct of the case, they are expected to use all diligence and industry"*

Even though the Court of Appeal decision was based on the advocate acting diligently and industrious, nonetheless, the situation in this application is not really different from the one experienced in the cited case above. Like in the cited case, the counsel in this case did not act as expected of an advocate and officer of the Court.

Protecting oneself and others as the counsel argued, is noble duty to be taken up by everyone, especially during this trying times when the world is facing Covid-19 pandemic. Nevertheless, I, find the counsel's narrative conflicting. At one point he wanted to protect himself and the public including Court staff, yet from the Mwananyamala hospital he came to Court so as to enter appearance. His action, presumably what he is saying is what took place, then, he was not exhibiting what he portrayed, that of protecting himself and others, for the Court to be believe. The proper reaction if any would have been for him to ask another well intended

advocate from the Law Firm he was working with to appear on his behalf. That way he would have protected himself and the rest of us and not him physically coming to Court. So it is likely the counsel had no good excuse, and just picked Covid-19 knowing the Court will be persuaded. Unfortunately, was not.

Third, the account that the applicant approached the Court on the same day and was notified by the court clerk that matter has been dismissed with costs, has no any legal basis. *One*, it is not certain that the counsel indeed came to Court with the intention of entering appearance in the matter he was involved in. *Two*, the proof of that is, the counsel did not mention the name of the purported Court clerk as well no affidavit from the court clerk who dealt with the matter to support the application was procured. Mr. Mwesiga's statement is therefore simply unsupported assertion and hearsay which ordinarily is not admissible before the Court of law.

Fourth, while I agree that once parties have engaged an advocate to represent them, they turn to relax, which is of course expected, but this has to be carefully navigated, since that does not fully absolve parties from following up on their cases and if necessary enter Court appearance. In this instance failure to make follow up on their case has amounted to an in attention and it is without doubt that is never a sufficient ground.

Having stated so, it however does not mean that the Court should completely abdicate from its noble duty of dispensing justice for all. Whereas on one hand, the Court is obligated to dismiss the suit or application if sufficient reasons are not established, but on the other hand the Court cannot deviate from its obligation of seeing justice dispensed justly and fairly. Therefore, for this Court to take a strict or technical view of the procedures prescribed, while it knows can cause prejudice to the innocent party who has faith not only on the advocate they have engaged but the ultimate faith in the Court, will be acting irresponsibly. Between chastising the advocate for his inattention the Court should equally consider the parties and the effect it will cause to their rights. In this regard the Court should always make it paramount that no innocent party suffers due to the default or negligence of an advocate, instead the Court should observe or strive to promote for substantive justice. Of course this approach should not be taken as a leeway for sloppy advocates or inactive parties as a shrub from which they can hide. The Court will therefore assess circumstance of each individual case before it opts to intervene.

In the view of the above, I find this application for setting aside devoid of merits however for the interest of justice, I do allow it and accordingly set aside the dismissal order dated 18th March 2020, with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

17rd JUNE, 2020