

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM**

**MISC. COMMERCIAL APPL. NO. 159 OF 2021**

(Arising from commercial Case No 67 of 2021)

JMD TRAVEL SERVICES .....APPLICANT

VERSUS

TSN OIL (T) LIMITED .....RESPONDENT

Last order: 17<sup>th</sup> December 2021

Ruling: 28<sup>th</sup> February 2022

**RULING**

**NANGELA, J:.,**

This ruling arises from an application which was preferred by the Applicant, JMD TRAVEL SERVICES on 27<sup>th</sup> October 2021. The application was by way of a chamber summons filed under Rule 31(2) of the High Court (Commercial Division) Procedure Rules, GN No.250 of 2012 (as amended by GN.No.107 of 2019). The application is supported by Affidavits of Bakari Juma as well as Hakme Abdulrahiman Pemba, advocates for the Applicant. The Applicant is seeking for the following orders of this Court:

1. That, this honourable Court be pleased to set aside its dismissal order in respect of Commercial

case No. 67 of 2021 between  
**JMD Travel Services vs TSN  
Oil (T) Limited**, which was  
made by His Lordship. Dr. D.J.  
Nangela on 22<sup>nd</sup> October 2021.

2. After setting aside the said orders, this Court be pleased to make an Order that, Commercial Case No.67 of 2021 between the afore said parties be restored and proceed with the First-Pre-trial Conference.
3. Any other order this Honourable Court may deem just, fit and equitable to grant.

Upon service of the application, the Respondent herein filed a counter affidavit to contest the granting of the prayers sought by the Applicant. When the parties appeared before me on the 23<sup>rd</sup> November 2021, Mr Bakari Juma, learned advocate represented the Applicant while Mr Raphael Rwezahura, learned advocate, represented the Respondent.

On the material date, since all pleadings were complete, it was agreed that the matter shall proceed by way of written submissions. A schedule of filing was issued and the parties have duly complied with it.

In his submissions in support of the application, Mr Bakari submitted that, this instant application emanates from

Commercial Case No.67 of 2021, which was scheduled for its first pre-trial conference (FPTC) on the 22<sup>nd</sup> day of October 2021, but got dismissed by this Court for want of prosecution. Mr Bakari submitted that, after the dismissal of the case, the Applicant has promptly filed this application seeking to restore the dismissed suit to its hearing track.

Relying on the affidavits in support of the application, Mr Bakari submitted that, when **Commercial Case No.67 of 2021**, was called on for its FPTC, he failed to enter appearance in Court because on that material day, he had mistakenly indicated in his Diary that, the suit was scheduled for FPTC at 2.00pm of the same date while in fact it was 9.am.

He submitted that, on the material date, he was away to Arusha to attend another matter and, his colleague, Ms Pemba was the one who appeared in Court on the 22<sup>nd</sup> October 2021 at 2.00 pm only to learn that the case was dismissed at 9.00 am for want of prosecution.

He urged this Court, to grant the application and restore the suit since the incident of mistaken recording of the time was a human error. He sought support from the case of **Zuberi Mussa vs. Shinyanga Town Council**, Civil Appl. No.3 of 2007, CAT (Tabora) (Unreported). He also relied on the case of **Ghania J. Kimambi vs. Shedrack Reuben N'gambi**, Misc. Appl. No.692 of 2018, HC (unreported), where this Court (Muruke, J) was of the view

that mistakes of an advocate should not be imputed on the clients. He also sought refuge on section 3A of the Civil Procedure Code, Cap.33 R.E 2021.

In opposing the application, Mr Rwezahura submitted that, Rule 31 (2) of the High Court (Commercial Division) Procedure Rules, GN No.250 of 2012 (as amended by GN.No.107 of 2019) gives this Court a discretion to set aside its orders on such terms as it thinks fit. He submitted, however, that, before the Court does so, there must be sufficient reasons.

Mr Rwezahura relied on the case of **Yusufu Same and Hawa Dada vs. Hadija Yusuf**, [1996] TLR 347 and that of **Frank Kibanga vs. ACU Limited**, Civil Appeal No.24 of 2003 (Unreported). In **Kibanga's case** (supra), the Court was of the view that, carelessness or inadvertence on the part of the litigant or their counsel cannot be accepted as constituting sufficient cause. He urged me to dismiss the application with costs.

I have carefully considered the rival submissions and taken into account the affidavits in support and in opposition to the granting of the prayers sought by the Applicant. The issue I am about to resolve here is whether the applicant has disclosed sufficient reasons to convince this Court to grant this application.

In his submissions Mr Bakari has demonstrated the reasons why he failed to appear in Court at the appointed

time. He has relied on the cases of **Zuberi Mussa vs. Shinyanga Town Council**, Civil Appl. No.3 of 2007, CAT (Tabora) (Unreported) and **Ghania J. Kimambi vs. Shedrack Reuben N'gambi**, Misc. Appl. No.692 of 2018, HC (unreported).

In the **Zuberi's case** (supra) the Court of Appeal was of the view that:

"Advocates are human and they are bound to make mistakes sometime in the course of their duties. Whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case...."

Indeed, as I look at his affidavit, its attachments, and the affidavit filed by Ms Pemba, there is no doubt that, the absence of the advocate in Court was caused by his own error in recording the time when the suit was to be called on for its FPTC. I have also noted that, the Advocate's absence was only on that material date and not repetitive.

In the circumstance, I think that his erroneous recording of the time when the case was to be called on for the FPTC and his subsequent absence at the material time, cannot be equated to an act of being negligent. I rather consider it to be an oversight which can be condoned since it was a human error.

In view of the above, I find that, this is a fit case where this Court should exercise its discretion. In the circumstance, therefore, I find that there is a need, in the interest of justice that this Court should grant the application. In view of that, this Court settles for the following orders:

1. That, the Applicant's prayer to have **Commercial Case No.67 of 2021**, restored to its hearing track is hereby granted.
2. The **Dismissal** Order of this Court date 22<sup>nd</sup> October 2021 is hereby set aside.
3. In the circumstance of this matter, each party shall bear its own costs.
4. FPTC in respect of Commercial Case No.67 of 2021 shall proceed on 3<sup>rd</sup> March 2022 at 8:30 am.

**It is so ordered**

**DATED AT DAR-ES-SALAAM ON THIS 28<sup>th</sup> DAY OF  
FEBRUARY 2022**



  
.....  
**DEO JOHN NANGELA**  
**JUDGE**