

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 189 OF 2022

(Originating from Misc. Commercial Reference No. 11 of 2022)

CAR AND GENERAL TRADING LIMITED..... APPLICANT

VERSUS

KENYA KAZIO SECURITY (T) LTD. RESPONDENT

RULING

Date of last order: 24/10/2022

Date of Ruling: 24/11/2022

A. A. MBAGWA, J

This is an application to set aside a dismissal order made by the court in Misc. Commercial Reference No. 11 of 2022 on 20th September, 2022. The application has been brought under Order IX rule 6(1) of the CPC and it is supported by an affidavit of Emmanuel William Kessy, the applicant's counsel. In contrast, the application was opposed by the respondent via a counter affidavit sworn by Shepo Magirari.



When the application was set for hearing, the applicant was represented by Emmanuel Kessy, learned advocate whereas the respondent had the services of Imelda Makaroni, learned counsel.

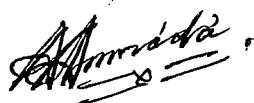
Submitting in support of the application, Mr. Kessy prayed to adopt the contents of his affidavit in order to form part of his submission. The applicant's counsel submitted that Misc. Commercial Reference No. 11 of 2022 was dismissed following his absence in court on 20th September, 2022. He clarified that his absence was neither intentional nor negligent rather it was caused by his sickness. Mr. Kessy referred the court to the medical report attached to his affidavit and expounded that on 19th September, 2022 he was admitted at Muhimbili Orthopaedic Institute (MOI) for three days from 19th to 21st September, 2022. He concluded by beseeching the court, based on the affidavit and submissions made, to find that the applicant has demonstrated sufficient grounds. He thus urged the court, for the interest of justice, to allow the application. In a bid to impress the court, Mr. Kessy committed himself that he was ready to pay the respondent costs for appearance on 20th September, 2022 when Misc. Commercial Reference No. 11 of 2022 as well as costs for prosecution of this application.

In rebuttal, the application was contested by Ms. Imelda Makaroni, learned counsel for the respondent. The counsel dismissed the applicant's grounds



stating that he would have at least sent someone to inform the court. Imelda was thus opined that the applicant did not have sufficient grounds for this court to set aside the dismissal order. On being probed by the Court, Imelda replied that the respondent incurred Tanzanian shillings one hundred thousand (100,000/=) for appearance in Misc. Commercial Reference No. 11 of 2022 on 20th September, 2022. Further, the respondent's counsel said that her client has incurred Tanzanian shillings five hundred thousand (500,000/=) in prosecuting this application. After the respondent's reply submission, there was no any rejoinder submission from the applicant.

I have carefully read the depositions by parties and the rival submissions. The pertinent issue for determination is whether the applicant has demonstrated sufficient cause for this court to set aside the dismissal order. From the pleadings and submissions, it is undisputed that Mr. Emmanuel Kessy was indisposed on the day when the matter i.e., Misc. Commercial Reference No. 11 of 2022 came for hearing. This is clearly exhibited through the medical report (annexure GTL I attached) to the affidavit. This fact was not disputed by the respondent. The only complaint by the respondent is that Emmanuel Kessy should have given notice or rather sent another attorney to appear on his behalf.



In my considered view, sickness is a good ground for allowing the application to set aside the dismissal order as it was out of the applicant's own control to enter appearance on the material date. However, I concur with the respondent's counsel that he ought to have informed the court or sent another advocate from his firm to appear on his behalf, something which the applicant's counsel did not do.

On all the above account, I find this application meritorious. Consequently, I hereby set aside the dismissal order of this court (Hon. Maruma, J) dated 20th September, 2022 in Misc. Commercial Reference No. 11 of 2022. In addition, the applicant's counsel Mr. Emmanuel Kessy is hereby ordered to pay the respondent a total sum of Tanzanian shillings six hundred thousand (600,000/=) being costs for appearance in Misc. Commercial Reference No. 11 of 2022 on 20th September, 2022 and prosecution of this application. The said costs to be paid within fourteen (14) days from the day of delivery of this ruling.

It is so ordered.




A.A. Mbagwa

JUDGE

24/11/2022

This ruling has been delivered in the presence of Emmanuel Kessy, advocate for the applicant and Imelda Makaroni, advocate for the respondent this 24th day of November, 2022.


A.A. Mbagwa

JUDGE

24/11/2022

