

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DARE ES SALAAM

MISC. COMMERCIAL CAUSE NO. 163 OF 2017

(ARISING FROM COMMERCIAL CASE NO. 133 OF 2016)

BETWEEN

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED..... APPLICANT

VERSUS

AFRICARRIERS LIMITED1ST RESPONDENT

BAY VIEW COMPLEX LIMITED2ND RESPONDENT

RULING

A.A. MBAGWA, J.

This is a ruling in respect of an application to set aside a dismissal order of this court in the Commercial Case No. 133 of 2016 dated 5th June, 2017. The application is by way of chamber summons made under rule 31 (2) of the High Court (Commercial Division) Procedure Rules, 2012 and, it is supported by affidavits sworn by Patrick Kissa Mtani and Sechelela Chitinka, on the one side. On the other side, the application is opposed by the respondents through an affidavit sworn by Jerome Joseph Msemwa, learned counsel for the respondents.



The factual background of the matter may briefly be narrated as follows; The applicant, Shirika la Usafiri Dar es Salaam instituted a suit to wit; Commercial Case No. 133 of 2016 against the respondents. Upon being served with the plaint, the respondents raised a notice of preliminary objection as regard to the competency of the suit. However, the said preliminary objection was overruled by the court in its ruling which was delivered on 24th May, 2017 in absence of the applicant. Thereafter the suit was scheduled for first pre-trial conference on 5th June, 2017. The applicant did not appear on the date scheduled for first pre-trial conference hence the suit was dismissed for non-appearance in terms of rule 31(1) of the High Court (Commercial Division) Procedure Rules hence forth to be referred to as the Rules.

Aggrieved with dismissal order, the applicant filed the present application namely, Misc. Commercial Cause No. 163 of 2017 seeking to set aside the dismissal order dated 5th June, 2017 in Commercial Case No. 133 of 2016. As bad luck would have it, when the matter came for hearing on 26th October, 2017, the application was dismissed for want of prosecution following the absence of the applicant's counsel one Patrick Mtani.

Consequently, the applicant filed Commercial Review No. 15 of 2017 asking the court to review its decision (dismissal order) and restore Misc. Commercial Cause No. 163 of 2017. The applicant's attempts were unsuccessful as this court dismissed the review for being baseless.

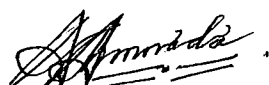
Still undaunted, the applicant sought to impugn the decision to the Court of Appeal by way of revision via Civil Application No. 448/16 of 2018. In its



ruling dated 22nd November, 2021, the Court of Appeal quashed and set aside the decision of this court in Commercial Review No. 15 of 2017. Instead, it substituted it for an order restoring Misc. Commercial Cause No. 163 of 2017.

It is against this backdrop, this application i.e., Misc. Commercial Cause No. 163 of 2017 is before this court for the second time. When the matter came up for hearing, the applicant was duly represented by Hangi Chang'a and Samweli Lukelo, learned Principal State Attorneys whilst the respondents enjoyed services of Ngassa Ganja, learned advocate.

While submitting in support of the application, Mr. Hangi Chang'a adopted the two affidavits in support of the application and went on to tell the court that the application is meritorious as the applicant was not notified of the date on which the matter i.e., Commercial Case No. 133 of 2016 was scheduled for first pre-trial conference. Mr. Chang'a expounded that from the institution of the case i.e., Commercial Case No. 133 of 2016, the applicant was appearing throughout until on 27th April, 2017 when the matter was scheduled for ruling on the preliminary objection. While referring to the affidavits, Mr. Chang'a elaborated that the applicant appeared on 27th April, 2017 but they were informed by the court clerk that the trial judge was absent and the case file was nowhere to be seen as such, the court clerk told them that the ruling would be delivered on notice. To fathom his argument, Mr. Chang'a referred this court to the proceedings of Commercial Case No. 133 of 2016 and submitted that the record is silent as regard to 27th April, 2017. The learned Principal State



Attorney continued that the applicant was not given notice of ruling as pledged by the court clerk until on 5th June, 2017 when the court clerk by the name of Mrs. Bambikya called Mr. Mtani telling him of the dismissal of the suit. Mr. Chang'a stressed that it is a court practice to issue a notice to the parties in the circumstances similar to this case but this was not done hence the applicant was not made aware of the fixed date. He thus prayed the court to allow the application and set aside the dismissal order dated 5th June, 2017 so that the parties could be heard on merits.

In contrast, the counsel for the respondents strongly opposed the application. He commenced his submission by adopting the counter affidavit sworn by Jerome Joseph Msemwa and the skeleton arguments filed in court on 19th October, 2017.

Mr. Ngassa Ganja was of the view that although the applicant was not present on 24th May, 2017 when the ruling was delivered and the date for first pre-trial conference fixed, she was duty bound to follow up her case and know the dates scheduled. The respondent's counsel lamented that there are no plausible explanations as to what prevented the applicant from entering appearance on 5th June, 2017. In the skeleton arguments, the respondent's counsel argued that the applicant's version is contradictory in the sense that on the one hand Patrick Mtani states that he did not attend the court because he had travelled to Arusha whereas Sechelela Chitinka avers that they did not attend because of lack of notice from the court.

A handwritten signature in black ink, appearing to read 'Aminda', with a horizontal line drawn underneath it.

Whereas the respondent's counsel admits that on 27th April, 2017, parties were told that they would be given notice of the ruling date, he was opined that the notice was served to both parties that is why the respondent appeared on 24th May, 2017 when the ruling was delivered. However, apart from his verbal, the respondent's counsel could not produce any evidence to prove that the applicant was duly notified of the dates fixed for ruling and first pre-trial conference. Further, Mr. Ganja submitted that the applicant ought to file a sworn affidavit of the court clerk to substantiate her claims. In fine, the respondents' counsel strongly submitted that the applicant has not demonstrated sufficient cause as such, the application is devoid of merits hence liable to be dismissed with costs.

I have carefully gone through the depositions by the parties and the record of this application in whole including the proceedings in Commercial Case No. 133 of 2016. I have also painstakingly canvassed the rival submissions made by the counsel.

At the expense of making this ruling long, I find it apposite to reproduce the relevant provision of the High Court (Commercial Division) Procedure Rules, 2012 on which this application is anchored.

31.--(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the Court may: -

(a) dismiss the suit or proceedings;

(b) strike out the defence or counterclaim;

(c) enter judgment;



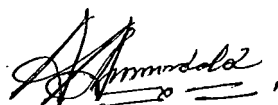
(d) make such other order as it considers fit.

(2) An Order made by the Court in the absence of a party concerned

or affected by the order may be set aside by the Court, on the application of that party within fourteen days from date of the order, on such terms as it considers just

From the above provision, it is common ground that rule 31 (2) does not provide decisive factors as to which terms would the court consider just and sufficient to set aside its orders made in the absence of the party. As such, it remains a discretion of this court to determine whether the applicant has demonstrated a sufficient cause for his non-appearance on 5th June, 2017 when the suit namely, Commercial Case No. 133 of 2017 came up for first pre-trial conference thereby leading to its dismissal.

At paragraphs 8 and 9 of the affidavit of Patrick Mtani, it is contended that the applicant had no notice that the ruling in Commercial Case No. 133 of 2017 in respect of preliminary objection was scheduled on 24th May, 2017. He further contends that following unawareness of the scheduled date for first pre-trial conference, on 3rd June, 2017 he travelled to Arusha to attend burial ceremony and returned on 5th June, 2017. Mr. Mtani attached an air ticket and boarding pass (annexure SUDL-2) to substantiate his averments. From the facts presented and the record available, it is undisputed that the ruling in Commercial Case No. 133 of 2017 was initially scheduled on 27th April, 2017 but it was not delivered as the trial judge was not present. It thus came to be delivered on 24th May, 2017 in absence of the applicant.

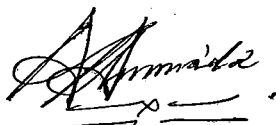


More so, there is no gainsaying that the date for first pre-trial conference was fixed on the ruling date when the applicant was not present. Moreover, the applicant's evidence is uncontroverted to the effect that she was not notified of the date for ruling and the first pre-trial conference. This is also gleaned from the holding of this court in its order dated 5th June, 2017 where it was held as follows;

'In the matter at hand today's date for pre-trial conference was fixed in absence of the plaintiff on 24th May, 2017 it was fixed after delivering a ruling were(sic) counsel for the defendants was in attendance and the plaintiff was absent it is expected by this court that the plaintiff being the one who brought the present suit to this court to make a follow up of its case. Since 24th May, 2017 up today's date of pre-trial conference almost 13 days have lapsed and the plaintiff did not bother to make follow up either to know at least the outcome of this court's finding on the preliminary objections raised by the defendants or any orders made by this court'.

From the above quote, it is common cause that no notice was served to the applicant as regard to the date of ruling and first pre-trial conference. This was contrary to what the court clerk promised the parties.

Whereas a party to the case has an obligation to follow up his case, prudence and interest of justice demands the court to inform the parties of the scheduled dates in some circumstances in order to meet the ends of justice. Since on 27th April, 2017 parties were informed by the court clerk



that the ruling would be delivered on notice, it was incumbent upon the court to ensure that parties were duly notified. In this case, Mr. Patrick Mtani states that he had no notice of the first pre-trial conference. This fact could not be sufficiently countered by the respondent. Considering that it was the first time the matter was scheduled for first pre-trial conference and taking into account that the applicant was not present on the last time i.e., 24th May, 2017 when the suit came up for ruling, I am persuaded that the applicant's non-appearance was due to sufficient cause namely, lack of notice.

I have also considered the prejudice that each party is likely to suffer and found that the applicant stands to suffer more if the application is refused than the respondents would in case the application is granted. This is because allowing this application would afford both parties the opportunity to be heard on their main dispute in Commercial Case No. 133 of 2016.

On all this account and applying the principle of overriding objective, I find merits in this application and consequently I allow it. The dismissal order dated 5th June, 2017 is hereby set aside and Commercial Case No. 133 of 2016 is restored. Costs to follow the event.

It is so ordered




A.A. Mbagwa

JUDGE

29/12/202