

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO.108 OF 2022

(Arising from Commercial Case No.61 of 2021)

REGENT TANZANIA LTD..... APPLICANT

VERSUS

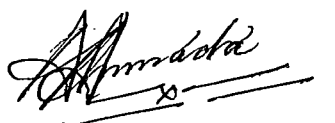
BG INTERNATIONAL LIMITED.....RESPONDENT

RULING

A.A MBAGWA J.

This is an application to set aside a dismissal order of this court (Hon. Maruma, J) made on 20th June, 2022 and restoration of Commercial Case No. 61 of 2021. The application has been made by way of chamber summons under rule 31(2) of the High Court (Commercial Division) Procedure Rules 2012 GN. No.250 of 2012 (the Rules) and section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] and any other enabling provision of the law. The applicant prays before this Honorable Court for the following orders: -

1. That this Honorable Court be pleased to set aside the dismissal order made on 20th June 2022 and restore Commercial Case No.61 of 2021 between the parties herein.



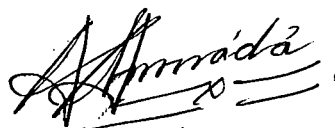
2. Any other relief that the Hon. Court may deem just and fit to grant.

The application is supported by an affidavit, reply to counter affidavit and supplementary affidavit in reply to respondent's counter affidavit all affirmed by Aziza Ally Mmbaga, the applicant's learned counsel.

In contrast, the application was hotly contested by the respondent through counter affidavits sworn by Mr. Gerald Shita Nangi and Jeremia Tarimo, learned advocates for the respondent.

What is obtaining in this application may, in a nutshell, be recounted as follows;

The applicant herein, Regent Tanzania Ltd instituted Commercial Case No. 61 of 2021 which was before Hon. Maruma J. After failure of mediation, the matter was scheduled for final pre-trial conference on 27th May, 2022. However, the final pre-trial conference could not take off on 27th May, 2022 as advocates including the applicant's advocates were attending Tanzania Law Society annual general meeting. According to the record (annexure AM-10 to the applicant's affidavit), on 27th May, 2022 Ms. Jackline Mazura appeared holding brief of Mr. Jeremia Tarimo for the defendant (respondent) whilst there was no representation on the plaintiff's side, now the applicant. As such, the matter was adjourned and fixed for final pre-trial conference on 20th June, 2022. It is the applicant's



own evidence that their legal officer one Davis Kwembe was present in court on 27th May, 2022 when the matter was adjourned and fixed for final pre-trial conference on 20th June, 2022. Nonetheless, on 20th June, 2022 when the matter came for final pre-trial conference, the applicant's counsel were absent without notice whereas Mr. Gerald Nangi, learned counsel appeared for the defendant, now the respondent.

According to the record, no reason or information whatsoever was communicated to the court on the absence of the applicant's counsel. Consequently, this court, in terms of rule 31(1) of the High Court (Commercial Division) Procedure Rules dismissed the suit namely Commercial Case No. 61 of 2021. It is against this background; the applicant has brought the instant application.

Ms. Aziza Ally Mmbaga in her affidavit contends that she had no knowledge of the fixed date to wit, 20th June, 2022. She states that a legal officer one Mr. Davis Kwembe whom they had sent to court on 27th May, 2022 erroneously recorded the date as 25th June, 2022 instead of 20th June, 2022. Ms. Mmbaga further avers that on 20th June, 2022 at around 11:30 hrs she received a call from Zaharan Sinare asking her whether she was aware of the date, and that after communication with her office mates she realized that the matter had been scheduled for final pre-trial conference on 20th June, 2022. Thus, she rushed to the court only to find

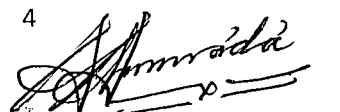


that the case i.e., Commercial Case No. 61 of 2021 was already dismissed. However, the evidence is silent on how Zaharan Sinare got the information which triggered him to inquire the date from Aziza Mmbaga. In essence, the applicant's substantial contention is that non-appearance was not intentional ratherd human error which was caused by erroneous recording of date by the legal officer one Davis Kwembe.

To the contrary, the respondent resisted the application through the affidavits of Mr. Gerald Shita Nangi and Jeremia Tarimo, learned advocates for the respondent. Mr. Nangi avers that the applicant was fully aware of the scheduled date. He adds that through phone conversation between Jeremia Tarimo and Aziza Mmbaga (BG-1), Aziza confirmed that she had knowledge of the fixed date. The audio recording of the conversation was attached to the counter affidavit and marked annexure BG-1 and it was played in court during oral hearing of the application.

Before the hearing date, parties filed their respective skeleton arguments for and against the application pursuant to rule 64 of the Rules.

In the written skeleton arguments, the applicant's counsel urged this court to consider the following issues for determination of this application; the applicant's conducts before non-appearance; the erroneous recording of the date i.e., 25th June, 2022 as a human error, the applicant's diligence in prosecuting the dismissed suit and promptness in filling this application,

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the efforts made by the applicant's counsel to communicate with the learned counsel for the respondent on 20th June 2022 prior to the dismissal order, the applicant's right to be heard on merits of the suit and the fact that the grant of the application is not prejudicial to the respondent.

The applicant's counsel cited a plethora of authorities including **Aisha Magoti (Administratrix) of the Estate of the Late Hamis Asili vs. Hassan Kapuli & Others**, Misc. Land Application No. 05 of 2021, HC Mwanza in which the court held what constitutes a reasonable cause has not been defined under the section because it is a matter for the court's discretion which cannot be laid down by any hard and fast rules but to be determined it by reference to all the circumstances of each particular case. He also cited the case of **Shehan Tanzania vs. Coletha Simon Chaganike**, Miscellaneous Labour Application No. 186 of 2020, HC Labour Division at Dar Es Salaam whereby the court referred to the case of **Shocked and Another vs Golds Schmidt and Others (1998)1 ALER 372** to support his assertion that the applicant's conducts before the acts of non-appearance should be taken into consideration in an application of this nature. He thus urged the court to find that his non-appearance was due to incorrect recording caused by a pure human error which, in his views, is excusable. In support of his position, he referred



the court to the cases of **National Bank of Commerce Limited vs Ahmed Freight Limited and 2 Others**, Misc. Commercial Case No. 230 of 2016, Commercial Division at Dar es Salaam and **Clement George Mwakibinga vs CRDB Branch Manager - Kahama & Others**, Civil Appeal No. 17 of 2019, HC at Shinyanga

Furthermore, while citing the case of **Githere vs Kimunqu [1976 – 1985] 1 EA 101 (CAK)**, the applicant's counsel told the court that where there has been a *bonafide* mistake and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard. The counsel was thus opined that non-appearance was caused by *bonafide* mistake of incorrect recording as such, he implored the court to have sympathy with the applicant and grant the application.

The applicant's counsel continued that by granting the application, this court will be discharging its fundamental role of fair administration of justice. He cited the case of **Mary Daniel vs. National Housing Corporation**, Civil Application No. 505 of 2016, CAT at Dar es Salaam where the court held thus;



"We have no hesitation to state that the order of Mziray, J that restored that suit in the register and ordered the hearing to proceed was consistent with the provision of order IX Rule 9 (1) of the Civil Procedure Cap. 33 R. E. 2019. Certainly, as indicated in the said ruling, the trial judge was satisfied that the applicant had demonstrated sufficient cause to show her non-appearance was not caused by her negligent or willful conduct. Therefore, we are compelled, with respect, to emphasize that the restoration of the case was not meant to 'create a vicious backlog' as opined by the learned judge. On the contrary, the said order aimed to facilitate fair administration of justice between the parties to the dispute by ensuring that both sides were heard before the final decision was made by the high court"

In the end, the applicant's counsel implored the court to find merits in this application and consequently grant it.

In reply, after adopting the counter affidavits, the respondent's counsel proceeded to submit that allegations of erroneously recording the date are hearsay since the said Mr. Davis Kwembe did not swear any affidavit to back up the contentions. As such, the respondent's counsel opined that the deponent could not be believed. To bolster his argument, the respondent's counsel referred this court to the cases of **Phares Wambura and 15 Others vs Tanzania Electrical Supply Company Limited**, Civil Application No. 186 of 2016, CAT at Dar es Salaam and

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Heritage Insurance Company Limited vs Sabians Mchau & 2 Others, Civil Application No. 284 /09 of 2019, CAT at Mbeya.

Further, the counsel complained that the allegations that Mr. Davis Kwembe was in court on 27th May, 2022 and requested Ms. Jackline Mazura, learned advocate to hold brief of Mr. Sinare Zaharan are not true for the court record on the proceedings dated 27/05/2022 reveals that no brief was held on behalf of the applicant's counsel, Zaharan Sinare.

Moreover, the counsel for the respondent submitted that the applicant did not dispute the contents of the counter affidavit to the effect that applicant's counsel was aware that the suit was scheduled for final pre trial conference on 20th June 2022.

The respondent's counsel further argued that the cases cited by the applicant are distinguishable to the application at hand and cannot savage the applicant at this juncture. He elaborated that the case of **Aisha Magoti (Administratrix) of the Estate of the Late Hamis Asili vs. Hassan Kapuli & Others**, Misc. Land Application No. 05 Of 2021, HC Mwanza is distinguishable because the court was considering a specific excuse of sickness which was out of control of a party to the case. He said that the situation is different from the present application where the applicant alleges inadvertent erroneous recording of case date.

Regarding the case of **Shehan Tanzania vs. Coletha Simon Chaganike**, Miscellaneous Labour Application No. 186 of 2020, HC Labour Division at Dar Es Salaam, the respondent's counsel said that the case was dismissed for want of sufficient reason.

The counsel further attacked the case of **National Bank of Commerce Limited vs Ahmed Freight Limited and 2 Others**, Misc. Commercial Case No. 230 of 2016, Commercial Division at Dar es Salaam and distinguished it on the following aspects namely, that there was substantiated evidence because of existence of sworn affidavits of the legal officer who erroneously recorded the incorrect date in an entry of a computer, the advocate who appeared in court and the court clerk, and that an advocate for the applicant had appeared in court properly and took a date but only that there was a flagrant mistake by a legal officer whose duty was to feed the date in the computer system.

He argued that in this application the alleged Davis Kwembe, Zaharan Sinare, Norah Marah and Cosmas Yaghambe did not swear affidavits. He expounded that in recording the information in a computer there was a human error but in the current application the date was known and the applicant has intentionally chosen to lie as exhibited in annexure BG-1 to the counter affidavit.

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

He concluded that the circumstances and material facts in the other cited cases were materially different from the circumstances in the instant matter as such, they are irrelevant.

In fine, the respondent's counsel wound up his submission by praying the court to find this application meritless and therefore liable to dismissal with costs.

When the matter was called on for hearing, Mr. Alex Nguluma assisted by Aziza Mmbaga appeared for the applicant whilst Mr. Gerald Nangi represented the respondent.

In his oral submissions, while expounding on the written skeleton arguments, Mr. Nguluma strongly argued that the audio recording is not of Aziza Mmbaga as contended by the respondent. He submitted that the voice is not of Aziza Mmbaga who was in court along with him. He reiterated that the reason for their absence was due to erroneous recording by their legal officer who recorded 25th June, 2022 instead of 20th June, 2022.

Mr. Nangi, on his part, challenged the applicant's counsel for attacking the audio recording from the bar. He submitted that the contention against the audio recording is not found in their depositions. Further, the respondent's counsel candidly argued that the applicant's counsel had the

right under Order XIX of the Civil Procedure Code to call and cross examine Jeremiah Tarimo who recorded the audio but did not do so. Mr. Nangi also told the court that according to annexure AM8, it appears that the applicant was aware of the date.

With respect to time chart and court records (annexure AM5) to the applicant's affidavit, Mr. Nangi assaulted it on the ground that there is no affidavit of Mr. Davis Kwembe.

I have carefully read the depositions as well as the parties' written skeleton arguments and oral submissions for and against the application. The central issue for determination is whether the applicant has demonstrated good cause that prevented him from appearing in court when Commercial Case No. 61 of 2021 was called on for final pre-trial conference on 20th June, 2022. The applicant contends that the legal officer Mr. Davis Kwembe erroneously recorded the date as 25th June, 2022 instead of 20th June, 2022. Ms. Aziza also stated that she came to know the true date after she was called by Zaharan Sinare inquiring her the case date. All the same, the applicant did not see it fit to file affidavits of the said Davis Kwembe and Zaharan Sinare despite the fact that they appear to have material facts on how the miscommunication of dates came about. In rebuttal, the respondent stated that Ms. Aziza Mmbaga

was fully aware of the scheduled date. The respondent produced audio recording of the conversation between Ms. Aziza Mmbaga and Jeremia Tarimo which, in deed, affirms that Ms. Aziza Mmbaga was aware that the case was coming for final pre-trial conference on 20th June, 2022. I have also scanned the annexures to the affidavit of Aziza Mmbaga in particular, Annexure AM-8 which is text messages between Aziza Mmbaga and her office mate Norah Marah. It tells it all that even their office docket indicated the true date i.e., 20th June, 2022 contrary to what the applicant contends. The communication goes as follows;

Please text me.

Mr. sinare amesemwa imeitwa Aziza matter ya Regent ni leo

Say something

Ni 26th please check the file Ipo kwa Davis

Ni tarehe 20 Aziza From the file? OMG

Nipe number za (sic) kaka

***Mimi niko CMA 0768286487 Jeremiah yupo nae firm moja.
Ya Gerald Nangi for some reasons siioni.***

Throughout this communication, there is nowhere indicated that the date was erroneously recorded rather it shows that even the applicant's counsel's office record indicated 20th June, 2022. This is gleaned from the



response of Norah Marah who insists that the case date was 20th June, 2022.

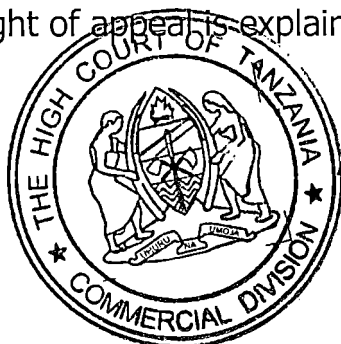
Indeed, court orders are meant to be complied and should be strictly complied unless there are good and cogent reasons for deviation. It is a trite law that every case should be decided on its own merits. In this application, after thorough consideration of the affidavit evidence and their attendant annexures, I do not see any good reason for non-appearance of the applicant's counsel in Commercial Case No. 61 of 2022 when it was called on for final pre-trial conference on 20th June, 2022 before Hon. Maruma J. Rather, what I glean from the evidence at my disposal is negligence and disrespect to the court orders, on the part of the applicant.

On all the above account, I find this application without merits.

Consequently, I dismiss it with costs.

It is so ordered

The right of appeal is explained.



A. A. MBAGWA
A. A. MBAGWA

JUDGE

12/05/2023