

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

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 100 OF 2023**

**(Arising from Commercial Case No. 16 of 2015)**

**BETWEEN**

**BANK OF AFRICA TANZANIA LTD.....APPLICANT**

**VERSUS**

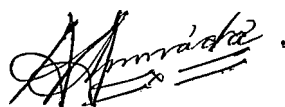
**ISSA KITIVO MDOLA.....RESPONDENT**

**RULING**

**A.A. MBAGWA J.**

This is an application to set aside a dismissal order of this Court in Commercial Case No. 16 of 2015 dated 23<sup>rd</sup> June, 2023. The application has been brought by way of chamber summons made under Order IX Rule 9 of the Civil Procedure Code and it is supported by an affidavit sworn by Godwin Muganyizi, the applicant's counsel. In addition, the application is supplemented by an affidavit of Eustachus Sarapion.

Mr. Godwin Muganyizi contends that on 23<sup>rd</sup> June, 2023 he was involved in a car accident on his way to Court to attend Commercial Case No. 16 of 2015 which had been scheduled for hearing on that date. Mr. Muganyizi also annexed the affidavit of Eustachus Sarapion to substantiate his averment on the occurrence of the alleged accident at 08:30hrs. Mr. Muganyizi states further, that following the accident, he arrived in court



around at 09:15hrs only to find that the case had already been dismissed for want of prosecution. On the strength of the two affidavits, the applicant prays for the following orders;

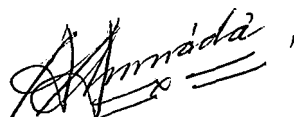
1. That, this Honourable Court be pleased to set aside the dismissal order that was made by his Lordship Judge A.A. Mbagwa dated 23<sup>rd</sup> June, 2023.
2. Costs of this suit be provided for
3. Any other order which this Honourable may deem fit to grant.

Upon service, the respondent strongly resisted the application through a counter affidavit affirmed by Kamal Abdul Kihwile, the respondent's learned counsel. The respondent stated that the applicant failed to adduce sufficient grounds for his absence on the hearing date i.e., 23<sup>rd</sup> June, 2023. The respondent lamented that the applicant did not bring an official accident report from the competent authority namely, Tanzania Police Force as such, there was no sufficient proof as to the occurrence of the alleged accident. Further, the respondent averred that the applicant had no intention to prosecute her case in that even her intended witnesses were not in court on the material date to demonstrate that she was prepared to proceed with hearing of the case, had it not been the alleged accident. The respondent thus, urged the court to dismiss the application with costs.



When the matter was scheduled for hearing, Mr. Godwin Muganyizi, learned advocate appeared for the applicant whereas the respondent was represented by Mr. Kamal Abdul, learned advocate as well.

Arguing in support of the application, Mr. Muganyizi adopted the contents of his affidavit and that of Eustachus Sarapion. He then told the Court that the reasons for his absence on 23<sup>rd</sup> June, 2023 when Commercial Case No. 16 of 2015 was scheduled for hearing are contained in paragraph 4 of his affidavit. The learned counsel expounded that he was involved in the car accident and the same was communicated to the respondent's counsel. The applicant's counsel further submitted that there were also ongoing efforts to settle the matter amicably but after the matter was dismissed, the respondent lost interest to settle the matter. He contended that he appeared in Court at 09:16 hrs after the matter was dismissed. As such, the applicant's counsel strongly submitted that his nonappearance at 09:00hrs on the hearing date was not intentional nor was there negligence on his part. The counsel proceeded that the applicant has never been absent since the start of the matter i.e., Commercial Case No. 16 of 2015 except on 23<sup>rd</sup> June, 2023. He added that, it would be in the interest of justice that this matter be finalized on merits. In the event, the applicant's counsel prayed the Court to set aside the dismissal order dated 23<sup>rd</sup> June, 2023.

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In rebuttal, Mr. Kamal Abdul, the respondent's counsel contested the application. He argued that, the applicant in his affidavit, has not even suggested that he had a witness on the material date. According to the respondent's counsel, absence of witnesses on the hearing date proves that the applicant was negligent or he had no interest to prosecute the matter. It was the counsel's submission that Commercial Case No. 16 of 2015 has been dismissed twice for the same reasons namely, want of prosecution and it has been dragging in court for seven years now. He was thus opined that considering the above facts and in light of the principle that litigation must come to an end, the application should not be granted. To support his argument, learned counsel cited the case of **Anyambilile Mwakisale vs Abdallah Katoto**, Civil Application No. 553/01 of 2017, CAT at Dar es Salaam. He elaborated that the denial of this application would remind the parties to follow up their cases and not to leave everything to their advocates. On this note, he referred to the case of **Lim Han Yung and Another vs Lucy Yreseas Kristensen**, Civil Appeal No. 219 of 2019, CAT at Dar es Salaam at page 22. The respondent's counsel concluded that the applicant has failed to provide sufficient causes to warrant the orders sought in this application. He thus prayed for dismissal of this application with costs.

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In rejoinder, Mr. Muganyizi submitted that much as the respondent's counsel conceded that he was asked to hold his brief, he was supposed to move the Court to wait for some minutes. With regard to the absence of witness, the applicant's counsel replied that it was not mandatory to bring the witnesses because the witness statements had already been filed in court.

Having canvassed the parties' depositions and the rival submissions, the germane question for determination of this application is whether the applicant has demonstrated sufficient reasons to warrant grant of the application. However, before further ado, it is worthwhile to note that the applicant brought this application under Order IX Rule 9 of the Civil Procedure Code but the proper enabling provision for applications of this nature is Order IX Rule 6 of the Civil Procedure Code. Nonetheless, I find the ailment inconsequential bearing in mind the overriding objective principle. Consequently, I proceeded to determine the application on merits.

Upon perusal of the record in this application and in Commercial Case No. 16 of 2015, it is common cause that Commercial Case No. 16 of 2015 has been pending in court for almost seven years due to the applicant's lack of diligence. The applicant is seeking to set aside the dismissal order and

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consequently restore Commercial Case No. 16 of 2015. As rightly submitted by the respondent's counsel, this is one of the oldest cases which has been dragging in court at the instance of the plaintiff including the plaintiff's failure to file witness statements within time, an error which triggered the case to go to the Court of Appeal.

Cognisant of the old age of the case, this Court fixed the matter for hearing on 19<sup>th</sup> June, 2023 but the plaintiff's counsel was not able to proceed on the ground that there were ongoing negotiations to settle the matter amicably. Consequently, the Court adjourned the case and fixed it on 23<sup>rd</sup> June, 2023 for hearing, in case the settlement failed. Sadly, on 23<sup>rd</sup> June, 2023 neither deed of settlement had been filed in court nor was the plaintiff's counsel present to proceed with hearing. To crown it all, there was no plaintiff's witnesses at least to convince the court that the plaintiff was determined to proceed with the hearing. The plaintiff's counsel, Mr. Godwin Muganyizi appeared in court (before me) around at 11:00hrs after I had even finished hearing of another case namely, Commercial Case No. 82 of 2022 between **Rehema Hamza Chegeka t/a Ibonike Enterprises vs Gross Investments Limited**. Mr. Muganyizi orally told me that he was at Muhimbili National Hospital in a bid to sign the deed of settlement. He said that one of persons who were

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supposed to sign deed of settlement on the plaintiff's part was admitted at Muhimbili National Hospital. It is very surprising that Mr. Muganyizi has come up with new version in this application that he was involved in an accident.

I have considered the applicant's contention that Mr. Muganyizi was involved in the car accident but I decline to accept this averment. This is because there is no official accident report from the police as rightly submitted by the respondent's counsel. Further, the photos of the car purportedly involved in the accident are not intelligible nor do they show the said Godwin Muganyizi at the scene. Moreso, it is undisputed that the applicant had not brought the witnesses on the hearing date i.e., 23/06/2023 at least to show that she was prepared to proceed with the hearing. The applicant's argument that there was no need of witness on the ground that she had filed witness statements is, with due respect to the applicant's learned counsel, unfounded because filing of witness statements does not dispense with the requirement for calling witnesses. Moreso, the purported request letter for court order allegedly filed on 23<sup>rd</sup> June, 2023 is highly questionable. This is because even the court receipt stamp is too faint to show the date. In addition, the said letter could not be traced in the court case file.

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Having considered all the above, I am of the unfeigned view that the applicant has not demonstrated sufficient cause which prevented her from appearing in court on 23<sup>rd</sup> June, 2023.

In the event, this application is without merits and for this reason I dismiss it with costs.

It is so ordered.

The right to appeal is explained.



  
**A.A. Mbagwa**

**JUDGE**

**22/09/2023**