

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

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 175 OF 2023

BETWEEN

ECOBANK TANZANIA LIMITED.....APPLICANT

VERSUS

EAST AFRICAN FOSSILS CO. LTD1ST RESPONDENT

VEDASTUS MATHAYO MANYINYI.....2ND RESPONDENT

STEPHEN MARWA MATHAYO.....3RD RESPONDENT

MATHAYO SONS ENTERPRISES LIMITED4TH RESPONDENT

RULING

Date of last order: 20/02/2024

Date of ruling: 15/03/2024

AGATHO, J.:

The applicant irked by the dismissal of her suit, in Commercial Case No. 38 of 2022 for want of prosecution moved the court by chamber summons supported with an affidavit of her advocate, Doreen Chiwanga seeks an order to set aside the said dismissal order. Briefly, the application is for following orders:

- i. That the court be pleased to set aside the dismissal order issued in Commercial Case No. 38 of 2022 on 30th October 2023.

The reasons in support of the above application are:

- (a) That the decision to adjourn the matter to allow consideration of consolidation status of the newly instituted suit, Commercial Case No. 108 of 2023 between East African Fossils Company v Ecobank Tanzania Limited, and Commercial Case No. 38 of 2022 between Ecobank Tanzania Limited v East African Fossils Company Limited, Vedastus Mathayo Manyinyi, Stephen Marwa Mathayo and Mathayo Sons Enterprises Limited to be determined was already allowed by the court prior to the date of dismissal for the reason that the two matters were similar.
 - (b) That the court erroneously declared with adverse effects on the Plaintiff (applicant) without going through the court proceedings to satisfy itself as to the correctness of affairs addressed by both counsels relating to the two cases (Commercial Case No. 108 of 2023 and Commercial Case No. 38 of 2022).
 - (c) The court erroneously struck out the Plaintiff's witnesses' statements given the circumstances of the case and the options available per the law.
 - (d) The order of the court was tainted with illegality for wrong construction of what amounts to collusion and want of prosecution.
- ii. Any other orders that the court may deem fit and just to grant.

Despite being served upon with the copy of the application, the respondents did not file any counter affidavit. And on 20/02/2024 when the matter came for necessary orders, the counsel for the respondents informed the court that they support the application and hence they have not filed any counter affidavit. The applicant prayed for hearing to be conducted by way of written submission. That prayer was granted and the same was filed timely.

The parties were thus legally represented. Whereas Mr. Zuriel Kazungu appeared for the applicant, Mr Seni Malimi represented the respondents.

This application has one main issue that indulged the court. That is whether there is sufficient cause to persuade the court to set aside the dismissal order and restore Commercial Case No. 38 of 2022.

Looking at the affidavit of the Doreen Chiwanga on paragraphs 6 and 7 she avers that Hon. Mbagwa J on 19th July 2023 ordered adjournment of the hearing that was set to start to another date to allow the respondents to file a new case which is Commercial Case No. 108 of 2023. On paragraph 8 of the same affidavit the deponent states that the Commercial Case No. 108 of 2023 was assigned to a different judge (Nangela, J). At that time Mbagwa, J who was presiding over Commercial Case No. 38 of 2022 had been transferred to another duty station.

Moreover, paragraph 9 of the affidavit avers that on 6th September 2023 and 2nd October 2023 the cases were set for hearing, the parties appeared but there was no trial judge following the transfer of Mbagwa J. the matter was thus adjourned before Minde DR. The respondents' counsel addressed the court on the presence of Commercial Case No. 108 of 2023. He thereafter prayed that the two cases be fixed on the same date so that the similarity of these cases can be brought to the attention of the court and the prayer be made for their consolidation.

The averments in the affidavit went on paragraph 10 that the court granted the prayer for adjournment and scheduled the next hearing date for Commercial Case No. 38 to be on 24th October 2023 at 09:00 A.M. But as indicated on paragraph 11 a few days later the parties were notified via phone call by the court process server that the Commercial Case No. 38 was set for hearing in a session on 30th October 2023. What I recollect from this averment is that the Commercial Case No. 38 of 2023 was fixed for hearing. Minder DR did neither say the two cases are fixed for hearing or necessary orders on the same date nor directed that the prayer for consolidation be entertained by the court. That certainly would have been impossible because by then she was unaware of who will preside over Commercial Case No. 108.

In the hearing session set on 30th October 2023 Commercial Case No. 38 was assigned to Matuma J and counsel for the parties appeared. They prayed for a short adjournment of the matter so the two cases could be considered for consolidation. As per paragraph 12 of the affidavit, the counsel were banking on the prayer they made to Mbagwa J on 19th July 2023 about consolidation of the two cases.

According to paragraph 13 of the affidavit as per court ruling dated 30th October 2023 the court, Matuma J refused the prayer for adjournment citing the collusion of the parties' advocates to delay the matter and the fact that the case was long due in court. It is on record the plaintiff did not bring her witnesses for cross examination on the date fixed for hearing. The court therefore proceeded to strike out the plaintiff's witness statements and dismissed the case for want of prosecution.

The plaintiff had attended court sessions without fail. Since the dismissal for want of prosecution normally occurs when the plaintiff fails to attend the court hearing without justifiable cause. Moreover, the Commercial Case No. 38 of 2023 was dismissed while the advocates representing the parties were in court as the court record show.

I have noted that affidavit of Doreen Chiwanga contains arguments, opinions, conclusions, and prayers. For instance, paragraphs 16 (argument and opinion), 17 (opinion), 18 (opinion and conclusion), 19

(prayer) and 20 (argument). These offend the law on affidavits as prescribed in Order XIX Rule 3 of the Civil Procedure Code [Cap 33 R.E. 2019]. I thus expunge these offensive paragraphs of the affidavit in accordance with the cases of **Msasani Peninsula Hotels Limited & Six Others v. Barclays Bank Tanzania Limited and Others**, Civil Application No. 192 of 2006, CAT; **Modern Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited**, Civil Reference No. 15 of 2001 CAT.

Parties are reminded that being an uncontested application does not mean that the prescribed rules of procedure should be ignored. However, despite expunging the above stated paragraphs of the affidavit, its substance remains intact. I will thus proceed to act on the remaining paragraphs.

The question that has not been answered is whether there is sufficient cause to warrant the court setting aside the dismissal order. I have perused the affidavit, read the submission by Mr Kazungu for the applicant, I am satisfied that there is a good cause. The requirement of sufficient cause to set aside a dismissal order of the suit for want of prosecution was emphasized in the case of **National Bank of Commerce Limited v Ahmed Freight Limited and Two Others**, Misc. Commercial Case No. 230 of 2016 HCCD at DSM at page 5.

"In determining whether there is sufficient cause certain factors has (sic) to be taken into account, including why the applicant absented himself; whether the application has been brought promptly; whether the conduct of the applicant i.e., lack of diligence on the part of the applicant; whether the successful party would be prejudiced by the judgment being set aside."

From the above extract it is clear that what sufficient cause depends on the circumstances of a particular case. However, the applicant has to show diligence as opposed to sloppiness. There ought to be no prejudice on the side of the respondent.

In the case at hand, the record shows that Mbagwa J on 19th July 2023 adjourned the hearing of Commercial Case No. 38 of 2022 to enable the parties to seek its consolidation with Commercial Case No. 108 of 2023. That was also brought to the attention of Hon. Minde, Deputy Registrar. What is more is that the parties never missed court attendance. They diligently appeared in court whenever summoned to do so. In my view therefore they ought to have been heard on the issue of consolidation of the cases. But whether consolidation should be allowed or not that is beyond the scope of the present application.

For these reasons, I proceed to set aside the dismissal order entered by this court on 30th October 2023, and I order restoration of the Case No. 38 of 2023. Since this was uncontested application no order as to costs is given.

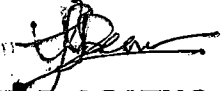
In the end the court order as follows:

1. The ruling of the court dated 30th October 2023 dismissing the Commercial Case No. 38 of 2023 is set aside.
2. The said case is restored.
3. No order as to costs.

Order accordingly.

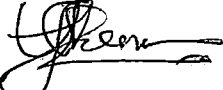
DATED at DAR ES SALAAM this 15th Day of March 2024.




U. J. AGATHO
JUDGE
15/03/2024

Court: Ruling delivered today, this 15th March 2024 in the presence of Zuriel Kazungu, advocate for the applicants, and Ibrahim Kibanda, Advocate, for the respondent.




U. J. AGATHO
JUDGE
15/03/2024