

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 232 OF 2014

(Arising from Commercial Case No. 134 of 2012)

MBEYA CEMENT COMPANY APPLICANT

VERSUS

KUNDAH SINGH CONSTRUCTION RESPONDENT

30th April & 20th May, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application brought by the applicant Mbeya Cement Company (henceforth "the applicant") seeking the indulgence of this court to set aside the dismissal order it made on 06.02.2014.

The background facts of this matter were sufficiently set out by this court in its ruling which was handed down on 02.04.2015 in respect of a preliminary objection raised by Mr. Mwambene, learned counsel for the respondent Kundah Singh Construction (henceforth "the respondent"). I

shall recite the said background facts as they are equally relevant in this ruling. They go thus: the applicant was the plaintiff in Commercial Case No. 134 of 2012 in which the respondent was the defendant. Therein, the applicant was seeking to move this court to compel the respondent to perform its contractual obligations by payment of some monies for the consignment delivered to it. That suit never took off as it was dismissed on 06.02.2014 for want of prosecution the plaintiff having defaulted to enter appearance. The applicant there and then filed an application vide Miscellaneous Commercial Cause No. 91 of 2014 with a view to having the dismissal order set aside. That application did not sail through as well; it faced two hurdles. The first one was a preliminary objection raised by the respondents to the effect that it was time barred. Fortunately for the applicant, the court (Nyangarika J.), found the objection to be without merit as the applicant had cited a wrong provision of the law in support of the application; he had cited section 14 of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (henceforth "the Law of Limitation"). The second hurdle was that of failure by the applicant to comply with the order of the court of payment of fees for adjournment. This led to that application being struck out on the 17.09.2014.

Undeterred, the applicant, through the services of M/S Makoa Advocates, has re-filed this application afresh under the provisions of Order IX rule 9 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC") as well as section 21 (2) of the

Law of Limitation Act seeking for the order of this court to set aside the dismissal order made by this court on 06.02.2014. The application is supported by an affidavit sworn by Emmanuel William Kessy.

This application was heard *ex parte* on 30.04.2015. When the application was called for hearing, the applicant appeared through Mr. Kessy; his advocate. For the respondent, there appeared Mr. Lukio; the learned counsel who held brief for Mr. Mwambene; learned counsel for the respondent. Mr. Lukio, learned counsel, told the court that Mr. Mwambene was attending a Special Labaour Cases Session at Moshi and that he had written the court to inform so. The learned counsel thus prayed that the hearing of the matter be adjourned to another date.

The prayer by Mr. Lukio to have the hearing of the matter adjourned to another date was strenuously objected by Mr. Kessy, learned counsel for the applicant. The objection was premised on the provisions of rule 46 (2) (c) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth “the Rules”) which provides that the fact that the advocate of a party is engaged in another court shall not be a ground for adjournment unless that advocate is appearing before a superior court. Mr. Kessy’s objection was also premised on rule 44 (1) (a) of the Rules which states that an advocate who appears in the court shall be fully acquainted with facts of the case in relation to which he appears and fully authorized to enter into agreements, both substantive

and procedural, on behalf of his client. Mr. Kessy thus prayed that the matter proceeded for hearing.

Mr. Lukio, however, was not ready to proceed with the hearing. He insisted that if the court would decide to grant Mr. Kessy's prayer to proceed with the hearing of the application, then it should do so *ex parte* as he was not prepared to proceed with the hearing. The learned counsel added that even if he would be given time within which to prepare for the hearing on that date, he would not be ready as well as he had some other matters to attend to. At the end of it all, the court granted Mr. Kessy's prayer and the application proceeded for hearing *ex parte*.

As rightly submitted by Mr. Kessy, learned counsel for the applicant, the Rules, under rule 44 (1) (a), require that an advocate appearing for a party in a matter, should be acquainted with the facts of the matter and ready to proceed for hearing if the same was fixed for hearing. The rule provides:

"(1) An advocate who appears in the Court shall be:-

(a) fully acquainted with facts of the case in relation to which he appears and fully authorized to enter into agreements, both

substantive and procedural, on behalf of his client; and

(b) prepared to discuss any applications that have been submitted and remain outstanding.”

The situations envisaged by the rule include situations when the advocate appearing holds another advocate’s brief. In the present instance, under the rule, when Mr. Lukio, learned counsel, entered appearance holding Mr. Mwambene’s brief, he ought to have been fully acquainted with the facts of the application and ready to proceed with the hearing. As bad luck would have it, the learned advocate was not acquainted with the facts of the application and hence not ready to proceed. And to exacerbate it all, the learned counsel, unsolicited, entered a caveat to the effect that it would not make any difference to grant him time to prepare for the hearing as he had some other matters to attend to on that day. The matter having stayed in this court for quite some time, and in compliance with the Rules, the court thought it appropriate to grant the applicant’s prayer to proceed with the hearing *ex parte*. The resort was made by the court on that basis despite the provisions of rule 44 (2) of the Rules which require that in situations of noncompliance with rule 44 (1), the court shall cause the advocate on record to be condemned to pay costs, unless sufficient reasons are adduced. It should be stressed here that the course opted was made under the inherent powers bestowed upon this court by the provisions of section 95 of the CPC. In the opinion of the court, the course would

promote speed and expediency; the spirit behind the Rules and without occasioning any injustice. It is my considered view that the course to hear the application *ex parte* instead of condemning the advocate on record to pay costs, did not leave justice crying.

In arguing the application, Mr. Kessy for the applicant was very brief in his submissions. He submitted that the application was seeking to have the dismissal order of this court dated 06.02.2014 set aside. He told the court that the application was supported by an affidavit which he prayed to adopt as part of the submissions. He stated that their nonappearance on 06.02.2014; the day when the suit was dismissed for want of appearance was caused by the misdirection of this court in that they were summoned to appear on 12.02.2014. He went on to elaborate that when they appeared on the said 12.02.2014, they were told that the suit had been dismissed on 06.02.2014 for want of prosecution hence the present application. He thus prayed that this application be allowed so that the suit is heard on merits.

I have scanned the court record in the light of the reasons for non-appearance as deposed to in the affidavit of Emmanuel William Kessy supporting the application and in the light of the reasons for the same nonappearance as presented to the court at the hearing. The affidavit, indeed, shows that their nonappearance on the fateful day was caused by the misdirection of this court because whereas the case was re-scheduled to 12.02.2014, the same came up for hearing on 06.02.2014.

This is proved by the Notice of Hearing which is on the court record and was appended with the accompanying affidavit as well as produced for identification during the hearing of the application. The affidavit which is appended with a photocopy of the of the Notice of Hearing issued by this court shows crystal clearly that Commercial Case No. 134 of 2012 had been slated for hearing on 12.02.2014.

I am satisfied that the applicant's counsel has shown sufficient reasons to the satisfaction of the court why they did not enter any appearance on 06.02.2014 when the suit was dismissed for want of prosecution. I would allow this application. I therefore vacate the dismissal order of this court dated 06.02.2014 and order that Commercial Case No. 134 of 2012 should be restored in the register so that it is heard on merits. In view of the fact that the applicant did not press for costs both in the chamber summons and at the hearing of the application, I make no order as to costs.

Order accordingly.



DATED at DAR ES SALAAM this 20th day of May, 2015.


J. C. M. MWAMBEGELE
JUDGE