

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 264 OF 2016

(Arising from Miscellaneous Commercial Review No. 1 of 2016)

MWANANCHI INSURANCE COMPANY LIMITED APPLICANT

Versus

THE COMMISSIONER OF INSURANCE RESPONDENT

RULING

Date of the Last Order: 16/07/2018

Date of the Ruling 20/07/2018

SEHEL, J.

This is a ruling on application for setting aside the dismissal order by Hon. Msumi, DRCC in taxation of bill of costs arising from Miscellaneous Commercial Review No. 1 of 2016. The application is made under Order IX Rule 9(1) of the Civil Procedure Act, Cap. 33 and it is supported by an affidavit of Hussein Kitta Mlinga. The main reason advanced in the affidavit for non-appearance was that the

advocate suddenly fell sick thus could not attend and could not timely find another advocate to hold his brief.

The respondent after being served with the application filed their counter affidavit to oppose it stating that the applicant was not serious in handling its matter as he could have instructed his legal officer or his client to attend the court.

Prior to the oral hearing, both parties complied with Rule 64 of the High Court (Commercial Division) procedure Rules GN 250 of 2012 ("the Rules") by filing their skeleton arguments of which they adopt them in their oral submissions to form part of their submissions.

At the hearing of the application, learned advocate Agness Dominic appeared to represent the applicant while learned Senior State Attorney Sylvester Mwakitalu appeared to represent the respondent.

Counsel Dominic in her submission maintained that the reason for failure to attend was that the counsel fell sick hence he could not timely get another advocate from the firm to appear or hold his brief.

and it was for the first time, the applicant failed to appear. She said the respondent did not object the reason of sickness rather said the counsel ought to find another advocate. In that regard, she prayed for the court to grant their prayers as this court has discretionary power to set aside the dismissal upon advancement of sufficient reasons.

It was replied by the Senior State Attorney Mwakitalu that the reason of sickness advanced was not sufficient enough since there is no proof of medical sheet and there are other advocate at Elite Attorneys who could have appeared on that day as they did today. In support of his submission, he cited the case of **Timothy Daniel Kilumile Company Ltd Vs. Hilary Patrice Otaigo t/a Nyankanga Filling Station**, Commercial Case No. 22 of 2004 (unreported) where this court through Mwambegele, Judge (as he then was) said:-

"..... secondly, the said Rweikiza could not be able to disclose what kind of ailment had befallen the defendant.

Neither was he able to tell the court the name of the hospital



into which the defendant is purported to have been admitted..... if courts of law were to entertain such a practice, then, in my considered view, justice would be put at stake".

With the above understanding, Senior State Attorney Mwakitalu said the supporting affidavit does not disclose the type of sickness nor name of hospital attended. He thus prayed for the application to be dismissed for lack of merit with costs.

Counsel Dominic rejoined by acknowledging that Elite Attorneys has more than one advocates but on that particular day it was impossible to detail another advocate to hold counsel Mlinga's brief. On medical sheet, she said the counsel did not go to hospital and the issue of sickness was stated in the affidavit under oath thus the advocate could not be lying.

I have considered carefully arguments advanced by the advocates and I concur with the learned Senior State Attorney that for the court to set aside dismissal order, the applicant must

advance sufficient reason. The main reason stated in the affidavit and during oral submissions is that on the date fixed for taxation, the counsel for the applicant fell sick thus could not detail another advocate in time to hold his brief. It has been held by the Court of Appeal of Tanzania in its numerous decisions that sickness is sufficient reason to allow an applicant for extension of time or for adjournment of hearing of the suit (see the cases of **John David Kashekya Vs. The Attorney General**, Civil Application No. 1 of 2012; **Director Ruhonge Enterprise Vs. January Lichinga**, Civil Application No. 1 of 2006; **Kapapa Kumpindi Vs The Plant Manager, Tanzania Breweries Limited**, Civil Application No. 6 of 2010 (All unreported)).

In the matter at hand we are told by way of affidavit and submissions that on 28th September, 2016 the counsel of the applicant fell sick at his residential home at Changanyikeni therefore he could not attend the taxation. It is true that the respondent did not say a thing in their counter affidavit about sickness of the counsel but applicant still has to bring proof to court to establish the same. It is unfortunate that the court is not availed with further and better

[Signature]

particulars of the sickness of the counsel of the applicant for the court to entertain the plea of sickness. We are not told the kind of ailment had befallen to him for the advocate not to be able to attend the court and not to see the need of attending hospital of which would have assisted him to produce a medical sheet to prove his sickness and the Court to be satisfied indeed the counsel was sick. As stated by my brother mwambegele, J in **Timonthy's Case** (Supra) *"if Courts of law were to entertain such a practice, then justice would be put at stake"*.

I am therefore not persuaded that the counsel of the applicant was sick on that fateful day. I see no merit in the application. I proceed to dismiss it with costs.

It is so ordered.

Dated at Dar es Salaam this 20th day of July, 2018.



B.M.A Sehel

JUDGE

20th day of July, 2018