

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC.COMMERCIAL CAUSE NO. 54 OF 2018  
(Arising from Misc. Commercial Cause No. 289 of 2017)**

**IN THE MATTER OF ARBITRATION**

**AND**

**IN THE MATTER OF ARBITRATION ACT CAP 15 R.E 2002**

**AND**

**IN THE MATTER OF A PETITION TO SET ASIDE AN ARBITRAL  
AWARD**

**D.B. SHAPRIYA AND COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**STEFANUTTI STOCKS TANZANIA LIMITED ..... RESPONDENT**

**RULING**

*Date of the Last Order: 03/04/2018*

*Date of the Ruling 06/04/2018*

**SEHEL, J.**

This is a ruling on an application for setting aside a dismissal order in Misc. Commercial Cause no. 289 of 2017. The application is made under Order IX Rule 9(1) and Section 95 of the Civil Procedure Act. Cap. 33 (hereinafter referred to as "CPC") and Rule 43(2) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"). It is supported by an affidavit of Dilip Kesaria, Advocate for the Applicant.

The facts that so far relate to this matter are such that the applicant petitioned to this court through Misc. Commercial Cause no 174 of 2017 trying to set aside an Arbitral Award dated 4<sup>th</sup> April, 2017 of the sole arbitrator Mr. Chikwendu Madumere. The petition was duly served upon the respondent who filed a reply to the petition to oppose it.

On 18<sup>th</sup> day of December, 2017 when the petition was called for orders counsel Dilip Kesaria entered appearance representing the petitioner and the respondent was absent. Counsel Kesaria prayed for time to file a reply to the answer to the petition. He prayed to file it after court vacation and thereafter a date for hearing. The court granted the applicant his

prayer and ordered for the reply to be filed on 15<sup>th</sup> February, 2018. The hearing was then fixed to be held on 27<sup>th</sup> February, 2018 at 14:00Hrs.

On 27<sup>th</sup> February, 2018 at the time scheduled only counsel for respondent, Ms. Frola Obete, appeared and notified the court that she is also holding brief for counsel Kesaria who has travelled outside the country thus she prayed for another date of hearing preferably 1<sup>st</sup> week of April or any other date.

Having received such information the court was surprised to be told that counsel Kesaria has travelled outside the country, it stated:-

*"The hearing of the petition was fixed by consensus*

*with the counsel for petitioner and I am surprised*

*to be told that he is out of the country while he knows*

*that the matter is supposed to proceed with the hearing.*

*In that respect, I do not see any justifiable reason for the*

*adjournment of the hearing of the petition"*



The court then proceed to dismiss the petition for want of prosecution.

Hence the present application was filed.

The main reasons advanced in the affidavit in support of the application are such that counsel Frola Obeta made an incorrect representation since counsel Kesaria was very much within the country as he attended various cases at Commercial Court during the week of 26<sup>th</sup> February, 2018 to 2<sup>nd</sup> March, 2018. The counsel gave examples in his affidavit on the cases he attended. He said he attended Misc. Commercial Application No. 104 of 2017 before Hon. Songoro, J on 26<sup>th</sup> February, 2018 and in Commercial Case No. 6 of 2017 before Hon. Mruma, J on 1<sup>st</sup> March, 2018.

As to how counsel Flora Obeta confused the facts, the counsel, under paragraphs 7,8,9 and 10 of his affidavit, said:-

*"7. On 27<sup>th</sup> and 28<sup>th</sup> February, 2018 I was required to appear in the High Court of Tanzania, at Tanga in two separate objection applications made by Stanbic Bank Tanzania Limited and the Eastern and Southern Africa Trade and Development*



*Bank in Misc. Civil Applications No. 71 of 2017 and Misc.*

*Application No. 79 of 2017. These were high value objection*

*Proceedings (exceeding US \$ 30 Million in Value) filed under*

*Certificates of urgency by the bank as secured lenders against*

*the attachment and sale of properties of a cement factory*

*in Tanga which were charged to both bank as securities.*

*8. I therefore spoke to the respondent's counsel*

*Mr. Gasper Nyika on Monday 26<sup>th</sup> February, 2016*

*to enquire whether he could consent to a short*

*adjournment (for a week or so) of the hearing of the*

*applicant's petition in Misc. Commercial cause*

*no. 289 of 2017 which was fixed for hearing the next*

*day 27<sup>th</sup> February, 2018 before Hon. Ms. Justice Sâhel.*

*Mr. Gasper Nyika informed me that he too was engaged*

*in a case in Mwanza for the whole of that week. He*

*therefore agreed to speak to Ms. Madina Chenge in his office to hold our respective briefs and to appear before Hon. Justice Sehel, the following day, namely 27<sup>th</sup> February, 2018, to seek a short adjournment of the hearing of the applicants petition. He subsequently confirmed to me by text message that he had already spoken to Ms. Madina Chenge and had briefed her about our telephone conversation.*

*9. Out of abundance of caution, I also telephoned Ms. Madina Chenge on 26<sup>th</sup> February, 2018, when she confirmed to me her telephone conversation with Mr. Gasper Nyika and confirmed she would appear the following day of 27<sup>th</sup> February, 2018 before Hon. Ms. Justice Sehel and by consent pray for a short adjournment of the hearing of the applicant's petition.*

10. Regrettably, the next day on 27<sup>th</sup> February, 2018

*Ms. Madina Chenge did not appear and delegated to Ms. Flora Obeta to appear instead. Neither I nor Mr. Gasper Nyika had spoken to Ms. Flora Obeta and she therefore confused the facts and made an incorrect representation to the Hon. Judge and I was seeking an adjournment because I was out of the country for an unknown reason".*

With those facts, the counsel in his affidavit intimidated as follows:

*" I have since spoken to Mr. Gasper Nyika and Ms. Madina Chenge who have both informed me that they are willing to appear during the hearing of this application to confirm to the Hon. Judge that the reason for the adjournment given by Ms. Flora Obeta to the Hon. Judge on 27<sup>th</sup> February, 2018 was factually incorrect".*

*HLL*

With this affidavit, on 22<sup>nd</sup> day of March, 2018 counsels for applicant and respondent, Dilip Kesaria and Gasper Nyika/Madina Chenge respectively filed a memorandum of consent stating that parties by consent wish to record the following orders:-

1. The application for setting aside this Honourable Court order dated 27<sup>th</sup> February, 2018 be granted with no order as to costs; and
2. Consequently the order of this Honourable Court dated 27<sup>th</sup> February, 2018 for dismissal of Misc. Commercial Cause No. 289 of 2017 between the same parties be set aside and a date be fixed for inter-parties hearing of the said suit".

Armed with the memorandum of consent, on 28<sup>th</sup> March, 2018 when the application was called for orders, counsel Zakaria Daudi who appeared to represent the applicant prayed for restoration of dismissed Misc. Commercial Cause No. 289 of 2017 by reason given in the affidavit and on the strength of consent given by respondent.

Counsel Nyika who appeared to represent the respondent supported the prayer and stated further that on the reasons given in the affidavit,



they see no need to oppose it. Thus, he prayed for the matter to be restored at no costs.

From the above facts, it is for this court to determine as to whether there is a sufficient reason for non appearance of the counsel for applicant that will warrant this court to set aside the dismissal order despite there being a consent agreement. As I have shown herein, the applicant is saying he could not appear for hearing on 27<sup>th</sup> day of February, 2018 because he had to attend an emergency cases at High Court, Tanga. It is thus incumbent for this court to ascertain as to whether such circumstance was beyond the control of the counsel.

Unfortunately, we have not been supplied with any copy of summons nor were they attached to the affidavit in support of the application to show that in deed the counsel was required to enter appearance on the alleged date. Worst still, we have not been told as to when did the counsel received the information that he is required to appear at the High court, Tanga such that he could not detailed any other advocate in his chambers in time to enter appearance before this court.

All these information could have assisted the court to ascertain the impediment (if any) that prevented the counsel for applicant on 27<sup>th</sup> day of February, 2018 to enter appearance. With these lacuna, I find myself constrained to hold otherwise than there are no sufficient reasons and or facts advanced by the counsel for applicant are not enough for this court to set aside a dismissal order. Through it might be true that the counsel was well within the country and that he communicated with counsels Nyika and Chenge but I am not persuaded that his non appearance was due to good purpose. In the circumstances of this case, I find no good cause had been shown by the counsel for the applicant let alone sufficient cause. I thus proceed to dismiss the application at no costs because the respondent did not object to the application. It is so ordered

DATED at Dar es Salaam this 6<sup>th</sup> day of April, 2018.



B.M.A Sehel

JUDGE

6<sup>th</sup> day of April, 2018