

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 111 OF 2018**

**(Original from Commercial Case No. 136 of 2017)**

**RENI INTERNATIONAL COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**ADVENT CONSTRUCTION LIMITED .....RESPONDENT**

**RULING**

**B.K. PHILLIP, J**

The applicant herein has lodged this application under the provisions of rule 31(1) of the High court (Commercial Division) Procedure Rules, 2012 sections 68(2) and 95 and order IX rule 4 of the Civil Procedure, Cap 33, R. E 2002 praying for the following orders.

- i. That the honorable court be pleased to allow the application to set aside dismissal order in Commercial Case No.136 of 2017 to be filed out of time.
- ii. Costs to abide the event.
- iii. Any other relief(s) as the court may deem fit and just to grant.

This application is supported by an affidavit sworn by Musa Maghimbi. The respondent did not enter appearance despite being notified on the existence of this application, thus there is no counter affidavit to oppose

the application. The hearing of the application was ex-parte. The learned advocate Derrick Jacob Mwajombe appeared for the applicant and I ordered the application to be disposed of by way of written submission.

In his submission the learned advocate Mwajombe submitted that, Commercial Case No. 136 of 2017 was dismissed on 18/4/2018 for none appearance of the applicant/ plaintiff at the 1<sup>st</sup> pre trial conference under the provisions of rule 31(2) of the High Court (Commercial Division) Procedure rules, 2012 (henceforth "the Rules").

Mr. Mwajombe, proceeded to submit that, as per rule 31(2) of the Rules, the applicant was supposed to file the application to set aside the dismissal order on 2/5/2018. He contended that the delay in filing the application was due to the delay in obtaining the copy of the ruling which was made available to the applicant on 7/5/2018. That this application was filed on 11/5/2018 after obtaining the copy of the dismissal order. Mr. Mwajombe submitted further that, the delay in filing this application was not intentional or out of negligence.

In addition to the above, Mr. Mwajombe submitted further that, he failed to appear in court on 18/4/2018, that is a date on which Commercial case No. 136/2017 was dismissed, because he was under police custody as he was arrested by immigration officers for offences related to immigration issues.

Mr. Mwajombe, contended that, prior to the dismissal of the case he used to attend in court timely. Mr. Mwakajombe contended that, setting aside the dismissal order and restoration of the case is of paramount importance, since the case has overwhelming chances of success and that granting the prayer will not harm the applicant in any way.

I have dispassionately analyzed the submission made by the learned advocate Mwajombe as well as read the chamber summons filed herein, what I have noted is that, the prayer / major order sought in the chamber summons is only one that is;

*"That this honourable court be pleased to allow the application to set aside dismissal order in commercial case no. 136 of 2017 to be filed out of time"*

The provisions of law under which this application is made are; rule 31(2) of the High Court (Commercial Division) procedure Rules 2012, which provides as follows:-

*" an order made by the Court in the absence of a party concerned or affected by the order may be set aside by the court, on the application of that party within fourteen days from date of the order, on such terms as it considers just".*

Section 68(e) of the CPC which provides as follows;

*"In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf*



*(e) make such other interlocutory orders as may appear to the court to be just and convenient”.*

Section 95 of the CPC which provides as follows

*“Nothing in this code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.*

And order IX rule 4 of the Civil Procedure Code, Cap 33, R.E. 2002 which provides as follows;

*“4. Where a suit is dismissed under rule 2 or rule3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his not paying the court fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit”.*

It is my settled view that none of the laws cited herein above are applicable in moving this court to grant an order for extension of time to set aside the dismissal order of this court under the provisions of Rule 31(1) of the High Court (Commercial Division) Procedure Rules, 2012. The position of the law is that, citing wrong provision in an application renders the application incompetent.

I have also noted that in his submission the Mr. Mwajombe divided his submission into two major parts, the first one is on extension of time to file application for setting aside the dismissal order and the second part is on setting aside the dismissal order. My concern here is the second part of the submission which was not reflected in the orders sought in the chamber summons. It has to be noted that, the court is moved by way of chamber summons not by the submissions made by the parties at the hearing. The submissions are supposed to be in line with what is pleaded in the chamber summons and affidavit(s) in support of the application.

In the upshot, the application is dismissed.

Dated at Dar es Salaam on 11<sup>th</sup> day of April, 2019.



A handwritten signature in black ink, appearing to read "B.K. PHILLIP".

**B.K. PHILLIP**

**JUDGE**