

**IN THE HIGH COURT OF THE UNITED REPUBLIC  
OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR-ES-SALAAM**

**MISC. COMMERCIAL APPL. NO.104 OF 2020**  
**(Arising from Comm. Case No.22 of 2020)**

**BRITAM INSURANCE (T) LTD .....APPLICANT**

**Vs.**

**OCTAVIAN WILLIAM TEMU t/a OCTAVIAN AND  
COMPANY ADVOCATES.....RESPONDENT**

*Last Order: 6<sup>th</sup> April 2021*  
*Ruling: 21<sup>st</sup> May 2021*

**RULING**

**NANGELA, J.:**

On 16<sup>th</sup> June 2020, this Court, acting under Order IX rule 8 of the Civil Procedure Act, Cap.33 R.E 2019, dismissed, with cost, Commercial Case No. 22 of 2020 for want of prosecution.

Following that dismissal, the Applicant herein filed this application by way of a Chamber Summons, under Rule 31 of the High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019), section 3A

and 3B (1)(a),(b),(c) of the Civil Procedure Act, Cap.33 R.E 2019, (as amended 2019).

In the Chamber summons, the Applicant seeks for the following Orders of this Court:

1. That, this Court be pleased to set aside a dismissal Order of this Court dated 16<sup>th</sup> June 2020 by Hon. Nangela, J., in **Commercial case No.22 of 2020** and restore the same.
2. Costs for this application be in the cause.
3. Any other reliefs which this Court may deem fit and just to grant in favour of the Applicant.

The application is supported by affidavits of Mr Jonathan Wangubo and a supplementary affidavit of Ms Fortunata Barnabas. The Respondent filed a counter affidavit deponed by Mr Julius Lazaro Manjeka to challenge this application.

When the matters came up for its hearing, the parties requested that it be disposed of by way of written submissions. I granted their prayer and set

forth a schedule of filing. The parties have duly complied with it, hence this ruling.

In his submission in support of the Chamber summons, and, relying further on the affidavits filed in support of the application, the learned counsel for the Applicant prayed to do away with his earlier reliance on Rule 31(2) of the Commercial Court Rules 2021 (as amended), which was cited as a basis of supporting the application as he found it to be mistakenly cited. He went on submitting on why the previous orders of this Court should be set aside.

Submitting on the reasons for non-appearance when the matter was scheduled for orders on the 16<sup>th</sup> March 2020, Mr Nyika relied on the facts disclosed in the affidavits of Mr Wangubo and Ms Barnabas. In so doing, Mr Nyika referred this Court to the decisions of the Court of Appeal in **Tanga Cement Company Ltd v Jumanne Massanga and Another, Civil Appl.No.6 of 2001 (CAT) (unreported)** and

**Mumello v Bank of Tanzania, Civil Appeal No.12 of 2002, CAT (unreported).** In these cases the Court of Appeal addressed the issue of what amounts to sufficient cause.

Looking at both the affidavits and the written submission by Mr Nyika, it is clear to me that the reasons made out to justify the Applicant's non-appearance in Court on the 16<sup>th</sup> June 2020 are that, on the appointed date, and, due to the outbreak of Covid-19 pandemic, the Court Clerk communicated to the parties the Court's appearance dates by way of telephone and, the Applicant overheard the date for which the Court had fixed the case for Orders, as being 19<sup>th</sup> June 2020 instead of 16<sup>th</sup> June 2020, the actual date.

Mr Nyika contended that, on the 5<sup>th</sup> of May 2020, when the matter was fixed for Orders on 16<sup>th</sup> June 2020, Mr Wangubo is on record, that, the learned

counsel for the Applicant was not present in Court, a fact supported by the Court Clerk.

In his Counter Affidavit, Mr Lazaro Manjeka has lashed out that, the Applicant's counsel was negligent, an allegation which Mr Nyika has been strongly refuted in his rejoinder submission. The Applicant's counsel contends that, the background and circumstances leading to the non-attendance in court on the appointed date cannot amount to a lack of diligence on the part of the learned counsel for the Applicant.

Mr Nyika made efforts to shield the Applicant's position and maintained that, there was no any act of negligence on the part of the Applicant's counsel. He referred to this Court several decisions of the Court of Appeal and of this Court, which, except for one decision, I do not see the need to cite them here.

In the Case of **Nasibu Sungura v Peter Machumu, [1998] TLR 496**, the Court stated that:

"in an application to set aside the order dismissing the suit for non-appearance, the important question is not whether the case for the applicant is soundly maintainable and meritorious, but whether the reasons furnished are sufficient to justify the applicant's non-appearance on the day the suit was dismissed."

Mr Nyika has submitted that, the affidavit of Mr Wangubo and that of Ms Barnabas have disclosed sufficient reasons warranting that this application be granted and, the orders dated 16<sup>th</sup> June 2020 be set aside, with costs. As I stated earlier, the Respondent has filed a counter affidavit and, did also file written submission, contending among other grounds, that, the application is devoid of a proper enabling legal provision.

I have carefully gone through the rival submissions. First, as regards Mr Manjeka's submission that the application has not been supported by proper legal provisions, I think I need not be detained by that

submission because; the inability to cite a relevant provision cannot be fatal. That is, but a curable defect.

However, what I have gathered from the Respondent's affidavit and from Mr Manjeka's written submission is that, the Applicant was negligent and lacked diligence. In my view, however, having gone through the pleadings and the rival submissions, the crux of the matter not whether the Applicant was negligent or lacked diligence but whether the Applicant's learned counsel has managed to disclose sufficient reasons regarding why his client, the Applicant, failed to appear in court on the appointed date, i.e., 16<sup>th</sup> June 2020 as ordered by this Court.

Having gone through the affidavits of Mr Wangubo and Ms Barnabas, I am in agreement with the submissions of Mr Nyika that there were reasons regarding why the Applicant's counsel could not make it for the Court on the appointed date. The confusion which persisted, much as it could be attributed to the

circumstances under which most of the court hearings were subjected to owing to the outbreak of the Covid-19 pandemic which, at that time was somehow at its peak, was also attributable to the human error as a possible culprit.

Given the circumstances that surrounds this application and the reasons disclosed in the Applicant's supporting affidavits, I find, in my view, that, no court would be adamant if asked to set aside its orders given under such circumstances. However, while the Applicant has prayed for costs of this application, I am not convinced that any of the parties should be condemned to costs. For that reason I will not grant that prayer.

In the upshot, I am convinced that the Applicant is entitled to the prayers sought and I hereby make the following orders, that:

1. the orders made by this Court on the 16<sup>th</sup> June 2020 are hereby set aside;



2. the Commercial Case No.22 of 2020 is hereby restored to its hearing track;  
and;
3. in the circumstances of this matter, this Court makes no orders as to costs.

**It is so Ordered**

DATED at DAR-ES-SALAAM, this 21<sup>st</sup> MAY 2021



A handwritten signature in blue ink, appearing to read "Nangela", written over a horizontal dotted line.

**HON. DEO JOHN NANGELA  
JUDGE,**