

TANZANIA / JUDGMENT

dar es salaam maritime institute vs quality motors ltd 2010 tzhccomd 18 20 august 2010

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TZHCCOMDDECIDED
20 August 2010

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
COMMERCIAL COURT No 64 OF 2007 DAR ES SALAAM MARITIME INSTITUTE..... PLAINTIFF/
APPLICANT VERSUS QUALITY MOTORS LIMITED..... DEFENDANT/RESPONDENT

RULING.

MRUMAJ. There was a case in this court between the applicant Dar es Salaam Maritime Institute and the respondent Quality Motors Limited which was, on 30 November, 2009 dismissed for want of appearance and prosecution. About a month later that is on 22nd January, 2010 the applicant filed this application requesting the court to be pleased to set aside its dismissal order dated 30th November, 2009 and restore hearing of the case inter-parties. The applicant is also seeking for an order to set aside its order for ex-parte hearing of a counter claim and order hearing thereof to proceed inter- parties. The chamber summons was set for hearing on 20th April, 2010. On that day, Mr Kariwa counsel for the Plaintiff/Applicant and who held Mr Maige counsel for the Defendant's brief requested the court to give leave to parties to argue the application by way of written submissions. The request was dully granted and a schedule was set for the counsel to file their respective submissions. Mr Kariwa defaulted. On 17th May, 2010 he filed another i application requesting the court to extend time within which he could file his submissions. This one was not opposed and Mr Kariwa was allowed to file his submissions in support of the application for setting aside a dismissal order out of time. Two affidavits were filed in support of the application. The first affidavit is sworn by Mr Tazan Kenneth Mwiteleke, the plaintiffs counsel who had the conduct of this case. He deposed that he was prevented from appearing when the case was called for hearing because he was suffering from severe toothache and fever. He says further that his efforts to salvage the situation failed because his colleague Mr Kariwa had travelled to Arusha to attend another matter Civil Case No 8 of 2007 which was before Milla J. He discovered that the matter had been dismissed for want of prosecution when he resumed office duty on 2 December, 2010. In the supplementary affidavit sworn by Mr Kariwa Advocate, it is stated that on 30 November, 2009 when the matter was called for hearing Mr Kariwa could not attend because he was attending a sick brother at Moshi where he remained till the 2nd of

December, 2009. In his submission Mr Kariwa contends that illness of Mr Tazan Kenneth Mwaiteleke is sufficient cause for their non appearance therefore this court should exercise its discretion to allow the application on that ground only. Mr Maige, counsel for the Defendant/ Respondent contended that those reasons are not sufficient and has not been substantiated. I have carefully considered the arguments by the learned counsel for both parties and the affidavits filed in support of the arguments. There is nothing suggesting that what is averred in the affidavit in support of 2 the application is nothing but the truth. I say so because although Mr Tazan alleges that he was seriously ill there is no evidence of his illness. The learned counsel did not attempt to substantiate his illness by attaching to his affidavit a medical chit to prove that at least he was attended by any medical practitioner. I think the term illness which is a state of being physically or mentally with health problems is a technical term which need to be substantiated by a technically qualified person in that area. While I agree that illness may be a sufficient ground for non appearance, but there must be evidence that the deponent was actually ill. It is not enough in my view to merely allege that you were sick. You must go further and adduce evidence that actually you were sick. Secondly, as rightly submitted by Mr Maige, on 30th November, 2009 this matter was set for hearing and the plaintiff was supposed to bring his witnesses on that day. Neither the counsel for the plaintiff nor an officer from the plaintiffs company was in court on that day which demonstrates the plaintiffs laissez faire towards prosecuting its case. Rule 9(1) of the Civil Procedure Code Cap 33, provides that:- " Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing afresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal, and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit..... " 3 In the present application although illness which may constitute sufficient cause is pleaded, it is not proved therefore no sufficient cause had been shown. The application is dismissed with costs. A. R. MRUMA JUDGE « 4

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