

TANZANIA / JUDGMENT

diamond motors ltd vs t railways ltd

2011 tzhccomd 2081 14 april 2011

COURT
TZHCCOMDDECIDED
14 April 2011

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM
COMMERCIAL CASE No 37 OF 2010 DIAMOND MOTORS LIMITED..... PLAINTIFF/APPLICANT
VERSUS TANZANIA RAILWAYS LIMITED..... DEFENDANT/RESPONDENT

RULING

Mruma, J. This is an application for setting aside a dismissal order. The applicants Diamond Motors Limited were plaintiffs in Commercial Case No 37 of 2010 in which the respondent Tanzania Railways Limited were the defendant. In that suit the defendant defaulted in filing written statement of defence and the plaintiffs obtained leave to proceed ex-parte in terms of Rule 14 of Order VIII of the Civil Procedure Code. A date for ex-parte hearing was fixed in presence of the plaintiff's advocate. However, when the matter was called on for hearing on 21st of September, 2010 neither the plaintiffs advocate nor its principal officer was in court. The suit was dismissed pursuant to the provisions of Rules 3, 8 and 12 of Order IX of the Civil Procedure Code and hence this application. This application is brought under the provisions of Rule 4 of Order IX of the Civil Procedure Code and is supported by affidavit of Mr. Odhiambo Kobas, learned counsel for the applicant. Rule 4 of Order IX of the Civil Procedure Code provides:- "Where a suit is dismissed under rule 2 or 3, the plaintiff may (subject to the law of Limitation) bring a fresh suit or 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" In his supporting affidavit Mr. Kobas has deposed that on 16th September, 2010 he called his client with the view of preparing the witness for hearing on 21st September, 2010. The client through its Human Resources Manager Ms Betty Ntukula informed him that the only witness Mr. Abraham Siyovelwa the Company Secretary was on leave effectively from 15th September, 2010 to end on 12th October, 2010. The learned counsel stated further that on 20th September, 2010 he felt sickish whereupon he decided to take some pain killers and antibiotics. The pain became severe as a result of which he was rushed to a nearby hospital for medical check up. He was diagnosed to have severe malaria and diarrhoea and was given three days bed rest. The counsel stated on oath that due to his illness he could not

be able to immediately call his fellow advocates in their firm Messrs Matunda and Kamala. He resumed duties after a week, which is on 27th September, and that when he discovered that the suit had been dismissed. He said that his client's failure to appear in court was not deliberate but due to assurance he had given them that he would attend. Mr. Kobas obtained an affidavit of Betty Ntukula, Human Resources Manager of the Applicants. She confirmed the veracity of the report that the only witness was not available as he was on leave. I will start with the provision of the law under which this application is pegged. As stated earlier this application is brought under the provisions of rule 4 of Order IX of the Civil Procedure Code. This provision allows the court to restore a suit dismissed under rule 2 or 3 of Order IX of the Civil Procedure Code. A suit can be dismissed under the provision of rule 2 of Order IX if summons is not served in consequence of plaintiff's failure to pay costs. Rule 3 of Order IX comes into play where neither party appears when the suit is called for hearing. 2 The suit in present application was dismissed pursuant to the provisions of Rules 3, 8 and 12 of Order IX of the Civil Procedure Code, therefore it was proper for application for restoration to be brought under the provisions of rule 4. Next is whether the learned counsel has demonstrated sufficient cause for his and/or his client's non appearance on the hearing date. The counsel's main reason as he has puts it for not coming to court is that he fell sick on 20th September, 2010 and was rushed to Tabata General Hospital and Cancer Clinic where he was diagnosed to have severe malaria. I have carefully scrutinized the Clinical Notes form and the Hospital prescription chit attached to the affidavit of Mr. Kobas and I am satisfied that on the evidence available Mr. Kobas was sick and he could possibly not be able to appear for hearing on 21st September, 2010. Though there is no hard and fast rule as to what constitutes sufficient cause under the provision of rule 4, but it is my considered opinion that sudden illness of a party or his advocate may constitute sufficient cause within the law. In the present application it has been demonstrated that Mr. Kobas fell sick hours before the hearing time. The gravity and extent of his illness was such that he could not immediately communicate with either his fellow partners in their firm and/ or his client whom he had assured that he would attend. The fact that he resumed duties on 29th September, 2010 and lodged this application on 30th September, 2010 have to be taken into account when deciding the issue of what amounts to sufficient cause in the circumstances of this case. In the circumstances, I allow the application. I set aside the dismissal order dated 21st September, 2010 and permit the applicants/plaintiffs to proceed with the hearing of the case ex-parte as ordered earlier. Order accordingly' A.R. Mruma, Judge. 14/4/2011 3 14/4/2011 Coram: Hon. A.R.Mruma, Judge. For the Plaintiff/Applicant - Marwa for Plaintiff. For the Defendant/Respondent - Absent. CC: J. Grison. COURT: Ruling delivered this 14th day of April 2011 in presence of Mr. Marwa for Plaintiff. A.R. Mruma, Judge. 14/4/2011 Words 1,200. « ^ e X aa S S7 r'!:' Wdc'r- ' F j sme' Kui,i“ Commercial Court. DSM. 4

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/308948/source_file/diamond-motors-ltd-vs-t-railways-ltd-2011-tzhccomd-2081-14-april-2011.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/settingasidedismissal-tzhccomd-2011--6a3ea5273b1caa912981ef01

Prepared on 13 October 2026 · Esheria