IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 263 "B" OF 2015

1. CONVERGENCE WIRELESS NETWORKS (MAURITIUS) LIMITED
2. CONVERGENCE PARTNERS INVESTMENTS (PTY) LIMITED
3. ANDILE NGCABA
4. BRANDON DOYLE ..... **APPLICANTS**

VERSUS

1. WIA GROUP LIMITED
2. ABDULRAHMAN OMAR KINANA
3. ERIC MWENDA ..... **RESPONDENTS**

(Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) At Dar es Salaam)

(Nyangarika, J.)

Dated the 1st day of October, 2013
In
Commercial Case No. 13 of 2012
.....

RULING

4th & 16th March, 2016

MUGASHA, J.A.:

This is an application for extension of time to file stay of execution by notice of motion brought under rule 10 of the Court of Appeal, Rules, 2009. The grounds canvassed by the applicant in the notice of motion as follows:-

1. *The applicants had not yet filed a Notice of Appeal against the decision dated 1st October, 2013 and the sane was filed on 9 October following the grant of enlargement of time to file notice of appeal to CAT by the High Court.*

2. *That in terms of rule 11(2) (b) the Court of Appeal Rules, a Notice of Appeal is a prerequisite for an application for stay of execution pending appeal.*

3. *As evidenced in the contents of the affidavit in support of the Notice of motion, there is good cause shown to grant extension of time within which to file an application for stay.*

The application has been challenged by the respondents through the affidavit in reply of **PATRICK MUTABAZI NYINDO,** the principal officer of the respondents. Parties have filed written submissions in support of their arguments for and against the grant of the application.

The applicants were represented by Gasper Mr. Nyika learned counsel and Mr. Silvanus Mayenga learned counsel represented the respondents.

The background of the application is briefly as follows: The respondents filed commercial case No. 13 of 2012 at the High Court Commercial Division. On 12/6/2012 before the same court, the respondents filed an application to restrain the applicants from continuing with the

arbitration proceedings which were to be or about to be instituted by the 1st applicant at the International Court of Arbitration of the International Chamber of Commerce (ICC). The application was dismissed. The applicants unsuccessfully filed a joint petition to stay the proceedings at the commercial court so as to allow the parties to submit their dispute to arbitration. The application was struck out following which the applicants sought extension of time to file a written statement of defence which was equally dismissed.

Thereafter, the respondents successfully applied for the default judgment which was entered in their favour as against the applicants on 1/10/2013. The application to set aside the default judgment was dismissed on 19/12/2014. However, the applicants became aware of the dismissal a month later on 19/1/2015 learning the same from witness statement filed by the respondents in arbitral proceedings in South Africa in relation to subject of the default judgment. This revelation made the applicants to look for another advocate who is the current counsel to pursue an appeal against the default judgment. As time had already expired the applicants' counsel successfully applied and was granted leave to file notice of appeal out of time. The applicants aver that, stay of execution could not be sought without initially filing the notice of appeal. Also it is the averment of applicants that,

the respondents have already lodged an application for execution which is yet to be determined.

The hearing of the application was preceded by a preliminary objection raised by the respondents on the competence of the application on the following grounds:-

1. *Judgment and Decree against which the application for extension of time is sought and which is the subject matter of the intended stay has not been annexed to the affidavit.*

2. *The affidavit supporting the Notice of Motion is bad in law for containing extraneous matters in form of arguments, conclusion and opinion.*

3. *The application has been taken by events and therefore is in total abuse of the court process.*

At the hearing of the Preliminary Objection the respondents' counsel abandoned the 1st and 3rd grounds and argued the 2nd ground only. Mr. Mayenga submitted that, the affidavit in support of motion is defective as paragraphs 19, 20, 21, 22, 23, 24, 25 and 33 contain extraneous matters in the form of arguments, conclusions, opinion and pure principles of law. As such, he argued that, the affidavit is defective because it contravenes the

principle of law which requires affidavits to be confined to facts. He cited the case of **JOHN DAVID KASHEKYA Vs CONSOLIDATED HOLDING CORPORATION HOLDING LTD, CIVIL APPLICATION NO. 2 OF 2012** (Unreported). Mr. Mayenga also attacked the verification clause of the applicants' affidavit arguing that, as the information contained in paragraphs 5, 26 and 27 was obtained from **JEFFREY KRON,** he ought to have been mentioned in the stated paragraphs failure of which renders the verification clause defective. In the light of the said defects, Mr. Mayenga urged the Court to strike out the application because it is not accompanied by a proper affidavit.

On the other hand, Mr. Nyika learned counsel for the applicants, conceded that paragraph 21 is partly an argument. However, paragraphs 20, 22, 23, 24 are the deponent's statements of fact based on his own knowledge of the law and maintained that paragraph 33 is a statement of fact. In the alternative, he asked the Court to expunge the offensive paragraphs if it so finds, because the remaining paragraphs still can sustain the main ground upon which the application is sought. He cited **STANBIC BANK TANZANIA LIMITED VS KAGERA SUGAR LIMITED, CIVIL APPLICATION NO. 57 OF 2007** (Unreported) where at page 21 cited with approval the case

of **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T.DOBIE (TANZANIA) LIMITED, CIVIL REFERENCES NOS 15 OF 2001 AND 3 OF 2002,** where the Court held to the effect that, where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact. Pertaining to the verification clause, Mr. Nyika argued that, the counsel for respondent did not cite any law requiring the person who gives information to be stated in the body of the affidavit other than in the verification clause.

In rejoinder Mr. Mayenga argued that, even if the Court follows the case of **STANBIC BANK TANZANIA LIMITED VS KAGERA SUGAR LIMITED (supra),** the affidavit cannot stand because of the defective verification clause as proof of verification must be in the specific paragraphs. However, still he did not cite any law but reiterated that the application is not competent and it should be struck out with costs.

After a careful consideration of the submission of counsel the point for determination is whether the affidavit is defective.

The law regulating what the affidavit shall be confined to is Order XIX rule 3(1) of the **CIVIL PROCEDURE CODE [CAP 33 RE.2002]** which states:

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted."

In **UGANDA v. COMMISSIONER OF PRISONS EXPARTE MATOVU (1966) EA 514.**

" As a general rule of practice and procedure an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and the circumstances to which the witness deposes either of his own knowledge... such affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion"

The rule governing the modus of verification was stated in the case of **SALIMA VUAI FOUM v. REGISTRAR OF COOPERATIVES SOCIETIES & 3 OTHERS. 1995 TLR 75** where the Court said:

"*Where an affidavit is made on information, it should not be acted upon by any court unless the sources of information are specified".*

Similarly, **C.K.TAKWANI** in his book titled **CIVIL PROCEDURE** Fifth Edition at page 21 commenting on the Indian Code which is similar to our CPC on the respective rule states that:

"Where an averment is not based on personal knowledge, the source of information should be clearly disclosed."

In the light of the above position of the law, the information obtained from **JEFFREY KRON** as contained in paragraphs 5, 26 and 27 was properly verified by the deponent according to law. This addresses Mr. Mayenga's view who misconstrued the purpose and meaning of the verification clause.

I agree with Mr. Nyika that paragraph 33 of the affidavit is a statement of fact and what is contained in paragraphs 22, 23 and 33 is based on the knowledge of the deponent in his capacity as counsel to the applicant as reflected in the verification clause which says it all regarding the contents in the said paragraphs. However, and as rightly conceded by Mr. Nyika, part of paragraph 21 contains an extraneous matter as hereunder deposed:

"That the specific damages were also not specifically proved before the court because the court assumed that the

documents attached in the plaint are deemed to be exhibits……."

The deposition shows that, the deponent sourced this information from the court record which is not based on the deponent's knowledge considering that, in the impugned proceedings the deponent was not yet engaged as counsel for the applicants. This is contrary to what the deponent has verified in the verification clause on the entire contents of paragraph 21 of the affidavit. In addition, paragraphs 24 and 25 of the affidavit are legal arguments which should not have been in the affidavit.

In this regard, the offensive areas of the affidavit are: part of paragraph 21 and paragraphs 24 and 25. As such, the issue is whether the defects adversely impact on the entire affidavit. In terms of what was said by the Court in **PHANTOM MODERN TRANSPORT (1985) LIMITED VS DT DOBIE (TANZANIA) LIMITED,** I do not think that, it is necessary to strike out the entire application because the defects in paragraphs 21, 24 and 25 are inconsequential and the offensive paragraphs can be expunged or overlooked, leaving the substantive parts of the affidavit intact. Thus, in the application at hand, the defective paragraphs 21, 24 and 25 are safely struck out without

affecting the substance of the affidavit as the remaining parts are intact vis a vis the grounds of motion sought. In this regard, the preliminary objection is partly sustained.

Reverting back to the substantive application, it is the submission of the applicant that, ever since they became aware of the refusal by the High Court to set aside the default judgement, they engaged another advocate to pursue the matter for the intended appeal. As such, the delay was not occasioned by contributory negligence.

Furthermore, it is contended that, the current counsel was engaged after the expiry of statutory period to lodge a notice of appeal. As such, after successfully lodging an application for extension of time to file a notice of appeal, the applicants managed to file the notice of appeal on 9th October, 2015. In addition in paragraphs 33 and 34 the applicants aver that, in the absence of a notice of appeal they could not seek extension of time to file stay of execution. The applicants further submitted that, the Court has discretion to grant extension where sufficient cause for delay is established as stated in the case of **MUMELLO VS BANK OF TANZANIA (2006) EA 227 and TANGA CEMENT COMPANY LIMITED v JUMANNE D. MASSANGA AND AMOS A. MWALWANDA CIVIL APPLICATION NO. 6 OF 2001.**

In paragraph 35 of the affidavit, the applicant has deposed that the intended appeal has serious issues of illegality in the default judgment such as, the award of special damages not specifically pleaded and proved; the grant of perpetual injunction against entities who were not a parties to the court proceedings which is tantamount to unheard condemnation. To support this argument cases cited were: **KITETO DISTRICT COUNCIL VS TITO SHUMA AND 49 OTHERS CIVIL APPEAL NO. 58 OF 2010(Unreported) COOPER MOTORS CORPORATION LIMITED VS MOSHI ARUSHA OCCUPATIONAL HEALTH SERVICES (1990) TLR 96 and ZUBERI AUGUSTINO VS ANICET MUGABE (1992) TLR 137.**

The applicants added that, where the point of law at issue is illegality or otherwise of the decision being challenged constitutes sufficient reason to grant extension in terms of what the Court decided in **VIP ENGINEERING & MARKETING LIMITED AND 2 OTHERS VS CITIBANK TANZANIA LIMITED, CONSOLIDATED REFERENCES no. 6, 7 and 8 of 2006** and the case of **MINISTRY OF DEFENCE, NATIONAL SERVICE VS DEVRAM VALLAMBHIA (1992) TLR 185**

On the other hand, the respondents who challenged the application, submitted to be aware that the Court may grant extension if sufficient cause

is demonstrated by the applicant. The respondents did not dispute that, the ruling in dismissal to set aside the default judgment was delivered on 19/12/2014. However, the respondents submitted that, the contention of the applicants does not augur well as to why the applicants were not aware about the dismissal while they were well represented in the requisite proceedings before the High Court. As such, failure to take action is sheer negligence which cannot be condoned by the Court. He cited the case of **DEOGRATIAS KAPELA Vs REPUBLIC CRIMINAL APPLICATION NO. 1 OF 2006.**

The respondents questioned that, if the applicants were aware of the dismissal since 19/1/2015, why did they wait up to 6th February 2015 to instruct the current counsel? As such, the period between 19/1/2015 to 6/2/2015 is not at all accounted for. Also as the applicants successfully lodged the notice of appeal on 9/10/2015, they were not diligent in filing this application on 17/12/2015 which is almost two (2) months and eight (8) days from the date of lodging the notice of appeal. The respondent was of the view that the applicants ought to have filed the application for stay immediately.

On the issue of illegality, Mr. Mayenga learned counsel for the respondents submitted that, the cases cited by the applicants support the

respondents' proposition. In addition, he asserted that it is improper for Mr. Gasper Nyika an advocate of the applicant to turn into an attorney and the witness in the same case. He relied on the case of **GANDESHA VS KILINGI COFFEE ESTATE LIMITED [1969] EA 299.**

From the respective submissions, both counsel are in agreement that the pertinent issue for determination is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion under rule 10 which states:-

> *"The court may, upon good cause shown, extend time limited by these rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time so extended."*

The Court interpreted judicial discretion in **HENRY MUYAGA Vs. TTCL** Application No. 8 of 2011 (unreported) as follows:-

> *"The discretion of the Court to extend time under rule 10 is unfettered, but it has also been held that, in considering an application under the rule, the courts may take into*

consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted."

What amounts to good cause was said by the Court in the case of **TANGA CEMENT COMPANY LIMITED v JUMANNE D. MASSANGA AND AMOS A. MWALWANDA CIVIL APPLICATION NO. 6 OF 2001 where NSEKELA JA said:**

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant"

In **VIP ENGINEERING & MARKETING LIMITED AND 2 OTHERS VS CITIBANK TANZANIA LIMITED, CONSOLIDATED REFERENCES no. 6, 7 and 8 of 2006. (Unreported)** where the Court stated:

"It is therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason *for extension of time under rule 8* ***regardless of whether or not a reasonable***

explanation has been given by the applicant under the rule to account for the delay". Emphasis supplied)

In **VERONICA FUBILE VS NATIONAL INSURANCE CORPORATION & 2 OTHERS, CIVIL APPLICATION NO 168 OF 2008**, the Court said that, the existence of special circumstances warrants grant of extension of time to lodge an appeal out of time. Among the listed special circumstances, include the claim of illegality. **(CITIBANK (TANZANIA) LTD VS TTCL & OTHERS, CIVIL APPLICATION NO 97 OF 2003, WILLIAM MALABA BUTABUTEMI VS REPUBLIC, MZA CRIMINAL APPLICATION NO. 5 OF 2005 and PROPERTY &REVISIONARY INVESTMENT CORPORATION VS TEMPER &ANOTHER [1978] All E.R. 433. MINISTRY OF DEFENCE, NATIONAL SERVICE VS DEVRAM VALLAMBHIA(1992) TLR)**

The ground upon which this application may be granted is if there is in existence a good cause in terms of rule 10 of the Court of Appeal Rules, 2009 which can also be referred to as sufficient cause. What is crucial for consideration is whether there exists an issue worth the meaning of good cause to warrant the grant of extension of time to the application for stay of execution. At the outset, this application for

extension of time to lodge an application for stay is hinged on two limbs. **One,** the complaint of illegality, **Two,** an account of delay.

The applicants argued that, there are issues in the default judgment including the award of special damages not specifically pleaded and proved; the grant of perpetual injunction against entities who were not parties to the court proceedings. The respondents contended that, on the claim of illegality cases cited by applicants support the respondents' case. Besides, while replying on the claim of illegality the respondents relied on the case of **GANDESHA VS KILINGI** as they viewed that it was improper for the advocate of the applicant to turn into an attorney and the witness in the same case.

In my considered view, the applicants' claim on illegality of the challenged decision is one of the special circumstances constituting sufficient causes for extension of time to under rule 10 regardless of whether of whether or not a reasonable has been given to account for the delay. (**VIP ENGINEERING & MARKETING LIMITED AND 2 OTHERS VS CITIBANK TANZANIA LIMITED, CONSOLIDATED REFERENCES(supra)** and the case of

MINISTRY OF DEFENCE, NATIONAL SERVICE VS DEVRAM VALLAMBHIA (supra).

The case of **GANDESHA**, relied on by the Mr. Mayenga to attack the claim on illegality is distinguishable from the case at hand. Mr. Mayenga attacked the role of Mr. Gasper Nyika who is in this application counsel for the applicants and deponent their affidavit. In **GANDESHA**, the plaintiff's counsel was summoned as a witness because he had earlier on witnessed the transactions between the litigants and which were a subject of the matter before the Court. As such, the advocate could not serve both as an advocate and a witness. The complaint by the respondents on the role of Mr. Nyika as deponent and at the same time counsel for the applicants was addressed by the Court in the case of **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LIMITED VS THE LOANS AND ADVANCES REALISATION TRUST (LART), CIVIL APPLICATION NO. 80 OF 2002. [MROSO, JA] said**:

> " *....An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during those proceedings. I know of no*

law, rule or regulation which bars advocates from doing so. I hold therefore that it was not incompetent of Mr. Chuwa to swear and file the counter affidavit which the applicant seeks to impugn…."

In this regard, Mr. Nyika is not barred from representing the applicants merely because he has sworn an affidavit in support of the application under scrutiny.

As to the second limb regarding the reasons for the delay, counsel have taken different positions as to whether the applicants have demonstrated good cause to be granted extension of time. Mr. Nyika learned counsel for the applicants is of the view that, the applicants have paraded good cause as they could not have sought stay without having filed a notice of appeal and which was filed after the applicant had obtained leave of the High Court to file it out of time. According to Mr. Mayenga learned counsel for the respondents, the applicant have not shown good cause to move the Court to invoke its judicial discretion and attributes negligence on the part of applicants. He narrowed down his argument on the period between the knowledge on refusal to set aside default judgment and notification to another advocate who is the deponent that is, nineteen (19) days; the

lodging of the notice of appeal and the lodging of this application that is, sixty eight (68) days.

In the case at hand, the applicants have shown that they were not lying idle or dormant in pursuing the intended appeal. From the day they became aware of the dismissal to set aside the default judgment, the applicants were all along vigilant in pursuit of the matter. What the respondents attribute to be a delay, in my view it is not inordinate and the applicants exercised diligence as indicated in their relentless efforts to pursue the matter including the application at hand whereby applicants are seeking enlargement of time to file stay of execution. Besides, even if there was an attributed negligence on the part of the advocate of the applicants to notify them on the dismissal of the default judgment or to wait for 68 days to file this application after the filing of the notice of appeal, the applicant deserves the grant of the application to extend time to file stay of execution on the complaint of illegality of the decision sought to be appealed against which has not been vigorously contested by the respondents.

In view of the aforesaid reasons, I am satisfied that, the applicant has shown good cause warranting the grant of the application. I hereby grant

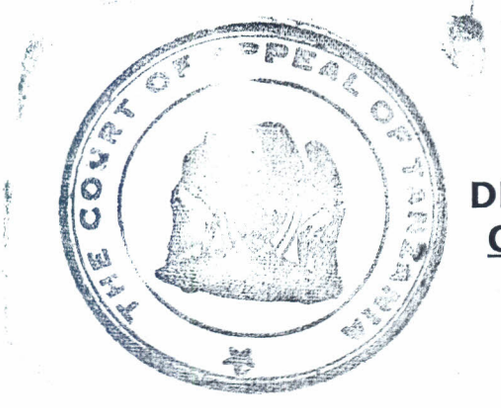
days to file this application after the filing of the notice of appeal, the applicant deserves the grant of the application to extend time to file stay of execution on the complaint of illegality of the decision sought to be appealed against which has not been vigorously contested by the respondents.

In view of the aforesaid reasons, I am satisfied that, the applicant has shown good cause warranting the grant of the application. I hereby grant the application to file stay of execution not later than 30 days from the date of this Order. I make no order as to costs.

DATED at **DAR ES SALAAM** this 11th day of March, 2016

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



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