IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

MISCELLANEOUS CIVIL APPLICATION No. 189 OF 2019

(Originating from the Judgment and Decree of the Court of Resident Magistrate Mwanza in RM. Commercial Case No. 63 of 2017)

INDUSTRIAL GASES AND CHEMICALS LIMITED ..... APPLICANT

VERSUS

SASA KAZI FUEL LIMITED .....RESPONDENT

RULING

& 27th July, 2020

TIGANGA, J:

In this ruling, the applicant, a limited liability company registered under the laws of Tanzania, and carrying its business in Tanzania, applies for an order for extension of time within which to file an appeal against the Judgment and Decree of the Resident Magistrate's Court of Mwanza, at Mwanza, (Hon. Y. Ruboroga, SRM) dated 28th March 2019, in Commercial Case No. 63 of 2017.

The application is against the respondent, also a limited liability company registered and carrying its activities in Tanzania.

The same has been preferred by the chamber summons filed under Section 14(1) of the Law of Limitation Act [Cap 89 R.E. 2019] and any other enabling provision of the law, and it is supported by an affidavit of

one Rajesh Kapoor who introduced himself as a principal officer of the applicant, dully authorised by the applicant.

The reasons given in the affidavit in support of the application are that, in the above RM's Commercial Court, the applicant though dully served, but could not file the Written Statement of Defence in time because the principal officer of the applicant who could have collected evidence and handed it over to the lawyer for the lawyer to proceed preparing the defence fell sick and travelled outside the country to Kenya for treatment.

On his return, they were already late to file the defence, they therefore filed an application for extension of time to file defence but the same was dismissed, and the case was heard and determined *ex parte*.

On what made them delay to file an appeal or take any other appropriate action after the judgment was delivered, he deposed that the copy of the said judgment was supplied to them late, to be particular, on 13/12/2019, while the said judgment was delivered on 28/03/2019.

The deponent went further and said that no notice of the date of judgment was given to the defendant before the judgment was delivered. It is also deposed that, upon being supplied with the copy of judgment, the applicant noted a number of illegalities worth for this court to grant for extension of time so that those illegalities can be rectified on appeal.

The application was countered by a counter affidavit sworn and filed by Charles Philipo Mzatula who introduced himself as a principal officer of the respondent, dully authorised to depose the facts in this case.

In that counter affidavit, save for the date of delivery of the judgment, the rest of the facts in the affidavit were disputed. The deponent deposed that, failure of the applicant to file the Written Statement of Defence was due to negligence and laxity.

He also deposed that even the delay to take necessary steps to challenge the decision in RM Commercial Case No. 63/2017 was due to negligence and laxity on the part of the applicant and there is no reason to justify the delay. He deposed further that, the applicant is instead trying to hide under the umbrella of illegalities to seek any sympathy of the court while the issue of illegalities are not seen in the judgment.

Last, the deponent in the counter affidavit deposed that, the application at hand was brought pre-maturely and with intention to delay and prejudice the entitlement of the respondent.

By the leave of the court, the application was argued by way of written submissions, which were filed according to the schedule.

Save for the authorities cited and relied upon in support of the arguments, the applicant reiterated the contents of the affidavit filed in support of the application which facts and arguments, for the purpose of brevity, I will not repeat in this ruling but I will sufficiently consider them.

In support of the application, he cited the case of **Musa and Another vs. Wanjilu and Another** (1970) EA 481 in which it was held that, for a person to be entitled for extension of time, he must show sufficient reasons which must relate to inability or failure to take particular steps.

It was submitted that, the applicant has demonstrated on how he was restrained by the sickness and been not informed of the date of delivery of judgment or to be supplied with the copy of the said judgment in time.

The counsel also submitted that, the applicant was diligent as immediately after he was supplied with the copy of judgment on 13th December 2019, within three days that is on 16/02/2019, he filed this application.

He also submitted that it has now been a good practice that for the matter which has been heard *ex parte*, it is necessary that the defendant be notified a date of judgment, the rationale being to let him/ her know the verdict and prepare to take action against it.

On the issue of illegality, the counsel submitted that it is now the principle of law that illegality in the decision sought to be challenged is the ground for extension of time. On that, he cited the authority in the case of **Principal Secretary Ministry of Defence and National Service vs. Devram Valambia,** [1992] TLR 85, **VIP Engineering Limited and 2 Others vs. Citibank Tanzania Limited,** Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) and two other foreign decision with similar principle.

He cited a number of illegalities which are that, the judgment has no issues, and falls short of the requirement of Order XX Rules 4 and 5 of the CPC [Cap 33 R.E. 2019], the same has no analysis of the evidence and verdict.

The other one was the facts that, the applicant was supposed to be served with the notice of judgment by the court as a legal requirement but that was not done. That being his submission, he asked the application to be granted.

Just like the applicant, the respondent submission has its content reiterated the content of the counter affidavit, save on the issue of immaturity of this application which, has been put in front.

The counsel, submitted by reminding the court that the proceedings in RM's Commercial Case No. 63 of 2017 went and the case was determined *ex parte*. According to him, the first re-course to be taken by the applicant was to apply to set aside the said ex parte judgment even if they were out of time. They were supposed to file an application for extension of time to file the application to set aside an *ex parte* judgment before commencing the appeal process.

He submitted that, failure to do so contravene Order IX Rule 13 (1) and (2) of the CPC (Supra) which direct that if the defendant is aggrieved by an *ex parte* judgment, the avenue available is to apply to set aside such *ex parte* judgment and not to rush to appeal. According to the counsel, as the applicant failed to exhaust the remedy of setting aside *ex parte* judgment then this application has been preferred prematurely.

In the second premises he submitted that, the reason of sickness of one principal officer of the company cannot be taken to be the reason for delay to fail Written Statement of Defence. He gave two reasons for his that argument;

(i) That the applicant is a corporate entity not an individual, it has legal department which deals with legal issue, it cannot be understood that the absence of one individual collapses the whole entities.

(ii) That in the affidavit it has not been shown that it was only the said officer (deponent) who deals with legal issues, in exclusion of all other staffs.

Further to that, he acknowledges that the order sought is grantable on discretion of the court. However, there are factors to consider, he mentioned those factors to be, the length of delay, reason for delay and the degree of prejudice that the respondent may suffer if the application is granted, he cited and relied on the case of **Moto Matiko Mabanga vs. Ophir Energy PLC and two others,** Civil Application No. 463/01 of 2017 CAT at Dar es Salaam.

He submitted that the judgment was delivered on 28/03/2019, but this application was filed on 16/12/2019, this delay is inordinate.

To buttress his position, he also cited the case of **Wambere Mtumwa Shahame vs. Mohamed Hamis** (the Administrator of Estate of the late Asha Juma) Civil Application No. 197 of 2014 CAT – Dar es Salaam.

He submitted that the applicant has failed to account more than six months delay.

On the issue of illegality, he submitted that there is no any illegality, but the same was raised for the applicant to run away from his responsibilities. He submitted further and relied on the decision of **Moto Matiko Mabanga Vs. Ophir Energy PLC** (supra) page 13, 14 and 15 in which it was held inter alia that;

"The illegality in the impugned decision should be of sufficient importance and must clearly be visible on the face of the record; as such it should not take long process to decipher from the impugned decision to find out the alleged illegalities".

He submitted that from the face of the record especially the judgment illegality is not noticeable. He in the end asked for the application to be dismissed on the reasons given.

At this juncture, it is important to note that, in the last paragraph of the counter affidavit, the respondent deposed of the immaturity of this application, that was a new issue of which it was expected for the applicant to file a reply to the counter affidavit to address it, but the applicant did not file one.

He did not even address the said issue in the submission in chief, when the applicant filed one.

However, in the reply to the submission in chief the respondent made that as the first ground and sufficiently argued it, that the law and practice requires the defendant who is aggrieved by the decision of the court passed *ex parte* against him, to first apply to set aside the said *ex parte* judgment before appealing against it. It was also expected that the applicant would address it in the rejoinder to be field by him but, the applicant did not file rejoinder.

It is a principle of law that this issue in a way, touches the jurisdiction of this court; and therefore this court, after having satisfied itself that the applicant had two opportunity to address it, in the reply to the counter affidavit and rejoinder to the reply submission but did not do

so, it cannot be said that the applicant was not afforded an opportunity to be heard on that issue, he was so given but did not utilise it.

Now, having so satisfied myself, I will start with this issue, before addressing other grounds of application. There is no dispute that, the judgment sought to be appealed against was passed *ex parte* by the trial court, following the failure of the applicant (then the defendant) to file the Written Statement of Defence. It was also on record that after the order allowing an *ex parte* proof, the applicant filed an application asking for extension time which was dismissed for want of merits, following the dismissal of the application it was when the case was heard and determined *ex parte*.

There is no dispute that after the delivery of an *ex parte* judgment, the applicant, (then the defendant) did not apply to set it aside.

Order IX Rule 13(1) of the Civil Procedure Code (Cap 33 R.E. 2019) it provides that;

> *"In any case in which a decree is passed ex parte against the defendant, he may apply to the court by which the decree was passed for an order to set it aside, and if he satisfies the court that the summons was not dully served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court, or otherwise as it thinks fit, and shall appoint a day for proceeding with a suit".*

This provision has been interpreted in a number of authorities by the Court of Appeal of Tanzania one of them being **MIC Tanzania Limited vs. Kijitonyama Lutheran Church Choir,** Civil Appeal No. 109 of 2015 in which it was held *inter alia* that;

> *"Last, in ground (c) of complaint, the applicant blames the High Court Judge to have failed to appreciate the established principle of law that illegalities and irregularities is sufficient reason for extension of time. In the circumstances of this mater, we think the argument cannot apply. We think we have amply demonstrated above that the first option which was available to the applicant was to apply to set aside the ex parte judgment under Order IX Rule 13(1) within 21 days, since the trial court proceeded under Order IX Rule 6(1) of the Civil Procedure Code Act Cap 33 R.E. 2002.....The Applicant was thus supposed to have utilized that option to convince the trial court that there were reason for non-appearance .....If the trial court could have declined to set aside the ex parte judgment she could have appealed to the High Court."*

The Court of Appeal went a heard and explained that;

> *"We are however aware of the arguments of the applicant's advocate that the applicant had the option of either appealing or applying to set aside ex-parte judgment, on that both remedies can be exercised concurrently. Nevertheless in the circumstances of this case the applicant should have applied to*

set aside the ex parte judgment .....Besides, the District Court would have been better placed to hear the arguments on non appearance than the High Court".

In this application, the applicant asks for extension of time to file an appeal against the judgment passed *ex parte* against it. The applicant did so without first applying to set aside an *ex parte* judgment.

This means, the applicant is seeking leave to appeal, without first exhausting the remedy of applying to set aside the *ex parte* judgment he is seeking to appeal against as required by Order IX Rule 13(1) and the decision of **MIC Tanzania Limited vs. Kijitonyama Lutheran Church Choir** (supra). Granting this application will be wastage of time, because the applicant will definitely be ordered by the appellate judge before which the intended appeal will be assigned to first set aside the *ex parte* judgment.

That said, I find this application, under this ground to be devoid of merits, for being pre-mature. I am aware that there are other grounds of sufficient cause and illegality. However, I find it pre mature to deal with these two grounds. The Application therefore fails for being pre-maturely filed; it is struck out with costs to be paid by the applicant to the respondent.

It is so ordered.

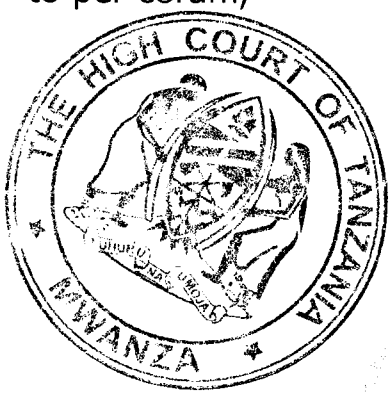
DATED at **MWANZA,** this 27th day of July, 2020.

J. C. Tiganga

Judge

27/07/2020

Ruling delivered in open chambers in the presence of the parties as to per coram,



J. C. Tiganga

Judge

27/07/2020