IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 02 OF 2021

(Originating from Civil Case No. 34 of 2018)

A. M. STEEL & IRON MILL LTD.....APPLICANT

VERSUS

TANZANIA ELECTRICITY SUPPLY COMPANY LTD..... RESPONDENT

Date of Last Order: 11/08/2022
Date of Ruling: 21/10/2022

RULING

MGONYA, J.

This is an Application for enlargement of time within which to file an application for setting aside the summary Judgment entered by this court dated 5th April,2018 in **Civil Case No. 34 of 2018.** The applicant has moved the Court under **Section 14(1) of the Law of Limitation Act, Cap. 89 [R. E. 2002],** supported by affidavit duly affirmed by Sheikh Shahid Majeed, the Applicant's Managing Director.

Briefly, the Applicant was the Defendant in **Civil Case No. 34 of 2018,** filed by the Respondent on 21/02/2018 under Summary Suit before this court, for recovery of loss allegedly

suffered due to the reversal of red and blue electric phase where by the bill charged was only 1/3 of the electricity consumption. The Summary Judgment was entered in favour of the Respondent where the Applicant was ordered to pay the claimed amount to a tune of **Tshs. 2,055,423,184.44** as a loss suffered from unmetered amount. The Applicant's effort to obtain necessary leave to appear and defend the suit as well as to have the Summary Judgment set aside were unsuccessful due to the objections raised by the Respondent's counsel.

The first shot to set aside Summary Judgment was through **Misc. Civil Application No. 216 of 2018 before Ngwala, J.** where the application was struck out on 28th May, 2019 for being incompetent. Deduced from his affidavit in support of the Application, the Applicant deponed that they have recently discovered that the summary summons that was served to them was apparently made under **Order XXXV of the Code of Civil Procedure 19666 (Act No. 49) of 1961** and the summons was stamped with the stamp of Regional Manager Tanesco Temeke Region in the position of Deputy Registrar. The Applicant states that, since the Summary Summons is the control tower in the proceedings, and where the same being defective and bad in law, this led to the Summary Judgement that is **void ab initio** by means of illegality contained in the Summary Summons which was ignored by the court. The Applicant further

deponed that, there is a great need for extension of time to allow the Applicant to file the Application for setting aside the Summary Judgment and have the procedure streamlined and parties be heard inter parties in the interest of justice.

With order of this court, hearing of the application proceeded by way of written submissions whereby both the Applicant and Respondent were represented by Geodfrey Ukwonga, Advocate and Mkumbo Elias, Advocate respectively.

Submitting in support of the application, Mr. Ukongwa stated that, the Plaintiff/Respondent claim was and is marred with apparent element of illegality in terms of **Order XXXV (1) (d) of the Civil Procedure Code, Cap. 33 [R. E. 2019]**. He went on to state that not all TANESCO claims must come under the Summary Suit Procedure. Upon admission that it was their own staff who caused the mix-ups of the red and blue wires, the case ended there, otherwise the same could have been filed as ordinary suit after having made reference of the matter to EWURA for amicable settlement. To support his stance, the case of ***SALIM KABORA VS TANESCO LIMITED AND 2 OTHERS, CIVIL APPEAL NO.55 OF 2014***, where the court faced a kin situation was referred.

Mr. Ukongwa contended further that, one area of illegality is contained in the summons issued by the court (annexture "A" to

the application) and Paragraph 5 of the Applicant's affidavit in support of the Application is concerned, where the summary suit summons in this case has been issued under **Order XXXV of the Code of Civil Procedure 196666 (Act No. 49) of 1961**. It is Mr. Ukwonga assertion that with that defects even if the Applicant was to apply in time for leave to appear and defend the suit, the judgment would legally be improperly obtained in view of the nature of the summons involved.

Two areas of illegality mentioned by Mr. Ukongwa are; **One,** jurisdiction that the suit is disqualified by operation of the law to a summary suit where there are set out procedure to follow and; **Two,** that the summons issued based on a none existing law in the country. To bolster his submission the counsel cited the case of ***CHARLES ZEPHANIA MWENESANO VS DANIEL SAMWEL CHUMA, Civil Application No. 274 of 2015*** where the decision made in ***PRINCIPLE SECRETARY MINISTRY OF DEFENCE AND NATIONAL SERVICE VS DERVAN VALAMBI (1992) TLR 182*** was quoted with approval.

Mr. Ukongwa further submitted that, it is only under summary procedure that the law allows the same court to set aside its own judgment under **Order XXXV Rule 8 of the Civil Procedure Code Cap. 33 [R. E 2019]**. Further, it is a practice of this court whereby many times has granted extension of time

based on the grounds of illegalities. He said, in this Application the Applicant has delayed but he has given reasonable explanations in his affidavit in support of the application at paragraph 5, 6, 7, 8, 9 and 10. Hence he argued this court to consider the applicant's prayer of extension of time.

On the contrary, the respondent submitted that, summary procedure summons was not in any way defective as it had all requisite legal features of Summary Procedure Summons. Elaborating on this point, the Respondent invited this court to the case of ***J.K.T LIMITED AND FOUR OTHERS VERSUS NBC LTD, [proper CITATION]*** where the High Court was alive with the provisions **Order 35 Rule 2(2)(a) of the Civil Procedure Code.**

In regard to the point that the summons was signed by the Regional Manager of the Respondent, the Respondent's Counsel further submitted that the Applicant is misleading this court. As the summons issued was signed by the Deputy Registrar. The Respondent's Counsel submitted further that the Applicant admits in paragraph 2 of the affidavit that on 9th March, 2018 he was served with two documents being a Summary Suit Plaint in **Civil Case No. 34 of 2018** and **summons on Summary** Suit where the Applicant acted upon believing is from court as deponed at paragraph 4 of the affidavit that he made efforts to obtain necessary leave to appear and defend unsuccessful.

Responding on the point of illegality, the Respondent referred this court to read **BLACK'S LAW DICTIONARY**, where illegality has been defined as act forbidden by law or the state of not being legally [Bryan A. Garner 11th Edition 2019]. He said the Applicant to raise the issue of illegality means that the case was illegal filed and the procedure made by the Respondent didn't comply with the requirement of the law which is not true. The Respondent contended further that she had the right to file the Summary Procedure Suit under **Civil Procedure Code, [Cap. 33 R. E. 2002] Order XXXV Rule 1(d)** which provides that the suit against recovery of meter rent charges for the supply of electricity and other charges including tax connected with or incidental to supply electricity. In his view narration by the Applicant on reversal of the red and blue phase does not exonerate responsibility in consumed electricity discovered through audit exercise conducted by the Respondent.

It was further over red that the Respondent when instituting claim against Applicant complied with the provision of **Section 26(6) and (7)** of **Electricity Act** which provides that TANESCO is entitled to recover the amount due of electricity supplied and used by customer. Hence the respondent has the right to file the application as evidenced in ***ZALLA v RALLY BROTHERS 1969 E. A.*** The Respondent distinguished the cited case of ***SALIM O. KABORA V. TANESCO AND 2 OTHERS***

(SUPRA) that this case was about electricity bills and electricity disconnection while the one at hand is related to electricity bills and meter tempering which resulted to loss of revenue. Further to that the case of **KABORA** was decided early **2021** where the summary judgment in this case was delivered on **5th day of April, 2018.**

The Respondent went on to state that the Applicant failed to submit on the reasons for the delay, also he has not shown diligence in conducting this matter rather he shows gross negligence. It was submitted that, after the Applicant's Application for leave to defend being ruled out to be time barred, he sought to file a Notice of Appeal to challenge the said ruling in the Court of Appeal. Further, on second sought he filed present Application for extension of time to set aside the Summary Procedure Judgment. It is the Respondent's stance that, the summons issued and received by the Applicant and not acted upon according to **Order XXXV Rule 1 of the Civil Procedure Code Cap. 33 [R. E 2002],** cannot in any way be illegality which render the process to be marred with incurable mistakes as it was in the case of ***INTEGRATED PROPERTY INVESTMENT (T) LIMITED AND TWO OTHERS*** *Versus* ***THE COMPANY FOR HABITAT AND HOUSING IN AFRICA***, **Civil Appeal No.107 of 2015.** It is insisted that, the Applicant, was aware of the date for hearing of the Application to appear and

defend the suit but failed to enter appearance. Thus, they failed to obtain leave to defend the summary suit. In her view, since the case was filed as summary suit and summons was issued there is no any illegality because the Applicant was not prejudiced as they understood the nature of the suit and did not file Application for leave to appear and defend the suits.

On the strength of what she submitted, the Respondent argued this court to dismiss the Application as the Applicant totally failed to adduce any ground to obtain leave for an extension of time to file an application to set aside Summary Suit Judgement.

In his rejoinder the Applicant reiterated what he submitted in submission in chief although he added that, the summons issued on 5th March, 2018 was misleading as it is written at the top that, "this is a specific Summary Suit on Negotiable Instrument which is a different matter from this case. Also the summons which was given to the Applicant is different from summons which is in the Honourable Court's file.

I have keenly examined the parties' affidavit, counter affidavit and submissions for and against the application. The issue for determination before this court is whether there are sufficient reasons to warrant this court to grant the Application

As alluded to earlier, this application is brought under **Section 14 (1) of the Law of Limitation Act, [Cap. 89 R. E. 2019].** The same states that:

> ***"Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application".***

From the wording of the above provision, it is apparent that, this court has discretion to extend time to the Applicant, the discretion which must be exercised judiciously upon the applicant advancing reasonable or good cause. As to what amounts to good cause there is no hard and fast rule but it depends on the circumstances of each case. In the case of ***The International Airline of the United Arab Emirates Vs. Nassorror, Civil Application No 263 of 2016, CAT at Dar es Salaam (Unreported)*** it was held that:

> ***"In order for the court to establish whether there was a good cause or sufficient reason, depends***

on whether the application for extension has been brought promptly as well as whether there was diligence on the part of the Applicant."

Also in the case of ***CRDB (1996) Limited Vs. George Kilindu, Civil Appeal No 162 of 2006 CAT (Unreported)*** the Court had this to say:

"...sufficient cause may include, among others, bringing the Application promptly, valid explanation for the delay and lack of negligence on the part of the Applicant."

In Generally, the Applicant has to state reasonable cause that prevented him from taking action within the prescribed statutory time as it was stated by the Court of Appeal in the case of ***JUMANNE HUSSEIN BILINGI VS. REPUBLIC (CRIMINAL APPLICATION NO. 2014 [2015] TZCA 65 (UNREPORTED)*** further that the Applicant must account for each and every day of his delay as it was stated in the cases of ***TANGA CEMENT COMPANY LIMITED VS. JUMANNE D. MASANGWA AND AMOS A. MWALWANDA, CIVIL APPLICATION NO. 6 OF 2001; OSWARD MASATU MWIZARUBI VS. TANZANIA FISH PROCESSING LTD, CIVIL APPLICATION NO. 13 OF 2010; BUSHIRI HASSAN VS. LATINA LUKIO, MASHAYO, CIVIL APPLICATION NO.***

3 OF 2007 and ***ONDIEK NUNDU VS. WILSON KASUKU SARONGE*, *CIVIL APPLICATION NO. 539 OF 2020 (ALL UNREPORTED)*.** Just to mention the fear.

Further, in the case of Ondiek Nundu (supra) the Court quoted with approval the case of ***MOHAMED ATHUMAN VS. R, CRIMINAL APPLICATION NO. 13 OF 2015 (UNREPORTED)*** where it was stated that:

> ***"It is now trite law that the applicant has to account for each of the delayed days."***

Now the issue is whether in the present application the, Applicant has accounted for each delayed days to warrant this court to grant the Applicant her the prayer for extension of time. It is gleaned from the contents of the Applicant's affidavit as well as the court records that upon the expiration of 21 days within which to file an application to appear and defend, the Applicant made an Application to set aside the Summary Judgment. However, the application was struck out on 28/05/2018 due to defective affidavit. The Applicant opted to file an application for leave to appear and defend the suit but the same was also struck out by court on 30/3/2020 as it was time barred and overtaken by event. Therefore, for the interest of justice the time she spent in prosecuting those applications which were unsuccessful due to technical delay will be excluded in computation of time.

Therefore, the Applicant has to account from **30/3/2020 to 31st December, 2020** when this Application was filed. From 30/3/2020 to **31st December 2020,** there is a difference of **270** days delayed by the Applicant. As the requirement of the law he is supposed to account for each delayed day.

It is deponed in his affidavit that after being aware that the summons was defective they opted to file this Application. With due respect, I find this to be not a reason to warrant this court to grant the Application. At paragraph 2 of the affidavit it is shown that the summons was served to them on 09/03/2018, which means all that time they had those documents in their possession but they did not pay attention to them until after the lapse of all most **270 days.** For the court to entertain such kind of reasons the litigation won't reach to an end which is not in the interest of justice. It is quite clear that the Applicant failed to account for each delayed day.

Also there is another reason of illegality advanced by the Applicant, whereby under paragraph 8 of his affidavit the said illegality is on the defectiveness of the summons. It has been stated in the case of ***LYAMUYA CONSTRUCTION COMPANY LTD VS. BOARD OF REGISTERED TRUSTEES OF YOUNG WOMEN CHRISTIAN ASSOCIATION TANZANIA, CIVIL APPLICATION NO. 20 OF 2010 (UNREPORTED)*** that for the court to grant extension of time there must be point of law that

of sufficient importance and must be apparent of the face of record. The Applicant alleged illegality that a Chamber Summons contained a non-existed law and the same Chamber Summons was signed by the TANESCO Regional manager and sealed with his stamp instead of being signed by the Court Registrar, does not qualify to be the illegality as it is a settled legal stance now that, none or wrong citation of the law is not fatal as along as the Court has the requisite powers to entertain the matter. The Court of Appeal in the case of ***JOSEPH SHUMBUSHO VS. MARY GRACE TIGERWA AND 2 OTHERS, CIVIL APPEAL NO. 183 OF 2016 (CAT-UNREPORTED)*** held that:

> ***"...we still hold the same position of the law that the citation of superfluous provisions of the law in the chamber application does not make the application incompetent."***

From the above expositions of the law, what matters is whether the trial court is clothed with the jurisdiction to entertain such matter before it.

Having considered the reasons raised by the Applicant, I find the same to be lacking in merits as the Applicant in his submission failed to account for each delayed day for all the **270 delayed days.** It has been stated that, it is upon the discovery that the summons was improper constructed the Applicant

decided to file this Application, the version which am not ready to buy. I concur with the Respondent's counsel that no sufficient reasons have been established by the Applicant to warrant the Court to grant the application.

Hence force, **I find the Application is devoid of merits and proceed to dismiss it as I hereby do**.

Each party to bear its own costs.

It is so ordered.

L. E. MGONYA

JUDGE

21/10/2022