

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR-ES-SALAAM DISTRICT REGISTRY)**

**AT DAR-ES-SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 43 OF 2023**

(Originating from Civil Case No. 51 of 2021)

**LUKOLO COMPANY LIMITED ..... APPLICANT**

**VERSUS**

**THE MUNICIPAL DIRECTOR,**

**SONGEA MUNICIPAL COUNCIL ..... 1<sup>st</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>nd</sup> RESPONDENT**

**UAP INSURANCE TANZANIA LIMITED ..... 3<sup>rd</sup> RESPONDENT**

**RULING**

Date: 18 & 31/07/2023

**NKWABI, J.:**

In a summary suit which is pending in this Court, filed on 30<sup>th</sup> March 2021, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are entreating the Court to grant them the following reliefs:

1. An order that the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally pay the plaintiffs funds amounting to T.shs 1,432,058,646.43 being the sum guaranteed by 1<sup>st</sup> defendant as surety in the performance bond in regard to the contract between the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant.

2. Payment of interest at a commercial rate of 25% per year from the date of termination of contract between the plaintiff and the 1<sup>st</sup> defendant to the date of final payment of the funds.
3. Payment of interest at the court rate of 12% per annum from the date of judgment to full payment.
4. Costs of this suit be provided for, and
5. Any other relief(s) this honourable Court may deem just and equitable to grant.

To have an avenue to defend, the applicant is required to have the leave of this Court to appear and defend the suit. The applicant had earlier on filed Misc. Civil Application No. 297 of 2022 which was withdrawn with leave to refile on 01/11/2022. Rooted on Order XXXV rule 3 of the Civil Procedure Code Cap. 33 RE 2019 and any other enabling provisions of the law, this application is brought. The application was lodged in this Court on 8<sup>th</sup> February 2023. The gist of the application is as follows:

1. That this honourable Court be pleased to grant leave to the applicant to appear and defend the suit,
2. Costs be in course.
3. Any other relief this honourable Court may deem fit and just to grant.

All the same, the application has confronted a preliminary objection which has one ground of legal objection which is that:

1. The applicant's application is time barred contrary to item 21 Part III of the Schedule to the Law of Limitation Act, Cap. 89, Act No. 10 of 1971.

The preliminary objection was disposed of by way of written submissions. Ms. Frida Mollel, learned State Attorney, submitted for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The applicant had her submissions drawn and filed by Mr. Godfrey Mapunda, learned advocate.

It was the contention of Ms. Mollel that an application for leave to defend in a summary suit is 21 days under Order XXXV of the Civil Procedure Code. The applicant was granted leave to refile the application on 1<sup>st</sup> November 2022. The applicant ought to file the same within sixty days in accordance with Item 21 Part I of the Schedule to the Law of Limitation Act. The 60 days lapsed on 31<sup>st</sup> December, 2022.

It was maintained that by filing this application on 8<sup>th</sup> February, 2023 the application was out of time for 40 days without extension of time being

granted. It is prayed that the application be dismissed with costs for being time barred.

The counsel for the applicant retorted that the order of this Court which contained a leave for refiling the application had no specific time for refiling the application. It is added that the applicant would not be able to file this application without a copy of the order of this Court annexed to the application. The applicant delayed to file this application because they managed to get a copy on 19<sup>th</sup> December, 2022 whereas the proof for obtaining is in the High Court register. He pressed the time spent to obtain the copy of the order should be excluded in computation of the 60 days per the Item 21 of Part III of the Law of Limitation Act.

The counsel for the applicant, too refuted the application is bound to be dismissed under section 19 of the Law of Limitation Act. He added that, it will be a punishment to the applicant because delay was caused by delay in obtaining the drawn order. The applicant invited me to uphold the overriding objective principle while citing **Elias Tibendelana v. The Inspector General of Police & Another** [2013] which cited with approval **Microsoft**

**Corporation v, Mitsumi Computer Garage Ltd**, [2001] 2 EAR 467 where it was stated that:

*"Rules of procedure are the handmaidens and not the mistresses of justice. They should not be elevated to a fetish . theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it ..."*

The counsel for the applicant prayed the preliminary objection be dismissed.

Going by the submissions of both counsel, it is common ground that the applicant delayed to file this application for 40 days. The applicant's counsel is justifying the delay by delay in being supplied with the copy of the order of the withdrawn application and the overriding objective principle.

However, the applicant ought to have applied for extension of time in which she would attach a copy of an affidavit of the Deputy Registrar of the High Court to prove that the delay was caused by the Court and not the negligence of the applicant. For that position of the law, I can exemplify **Jacqueline Ntuyabaliwe Mengi & 2 Others v. Abdiel Reginald Mengi & 5 Others**, Civil Application No. 332/01 of 2021, (unreported) where the Court stated that:

*"We note that paragraphs 8 and 14 of the 1<sup>st</sup> applicant's affidavit and paragraph 10 and 11 of Kahendaguza's affidavit contain hearsay not supported by evidence. For instance, in paragraphs 14 and 11 of the respective deponents affidavits they have averred an information obtained from the DR Fovo regarding how best they could deal with the so-called defective decree while the said DR has not sworn any affidavit to that effect."* [Emphasis mine].

The counsel for the applicant brought to his assistance the overriding objective principle as narrated above. However, that principle does not apply in every situation just like in this application. See **Mondorosi Village & 2 Others v Tanzania Breweries Ltd & 4 Others**, Civil Appeal No. 66 of 2017 CAT (unreported) where it was stated that:

*"Regarding the overriding objective principle, we are of the considered view that, the same cannot be applied blindly against the mandatory provision of the procedural law which go to the very foundation of the case."*



In the final analysis, the preliminary objection is sustained. Consequently, Miscellaneous Civil Application No. 43 of 2023 is ruled to be incompetent for being time barred and is dismissed with costs.

It is so ordered.

**DATED** at **DAR-ES-SALAAM** this 31<sup>st</sup> day of July, 2023.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi", is written over the seal.

J. F. NKWABI

**JUDGE**