IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CIVIL APPLICATION NO.538 OF 2023

(Arising from Civil Case No. 138 of 2021, Hon. Mkwizu, J.)

MBUYULA COAL MINING LIMITED.....1ST APPLICANT

RAJESH H. WILLIAM.....2ND APPLICANT

IDD KAJUNA.....3RD APPLICANT

VERSUS

ASIAFRICA INTERNATIONAL LOGISTICS

AND TRADING COMPANY LIMITED.....RESPONDENT

RULING

21st May & 13th June, 2024

DYANSOBERA, J.:

The applicants herein have, through Evodius Mtawala of Arcis Law Attorneys, filed this application under Section 14 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019] seeking extension of time for them to file an application to set aside ex parte judgment in Civil Case No. 138 of 2021 between the respondents and the applicants dated 17th March, 2023. The applicants have supported their application with the joint affidavit affirmed by the 2nd and 3rd applicants who are the shareholders of the 1st applicant and who are duly authorised to affirm the affidavit on her behalf.

The respondent has, through a counter affidavit, opposed the application.

Briefly, the facts leading to this application is as follows. On 8th June, 2019 the respondent and the applicants entered into a contractual agreement whereby the latter hired from the former three dump trucks and three excavators for purposes of excavating, mining and transporting coal at the applicant's coal mines located at Mbuyula Village in Mbinga District within Ruvuma Region. It was agreed that each dump truck would fetch USD 300 per day and each excavator would fetch USD 150 per day. The money was payable after a month period of use and the contractual term was set to come to an end on 10th July, 2019. The respondent successfully discharged her contractual obligation by handing over the said working tools to the applicants on 10th June, 2019.

It was claimed by the respondent that the applicants defaulted to make payments as had been agreed and she decided to terminate the contract. She, in consequence, instituted Civil Case No. 138 of 2021 before this court against the applicants claiming the following reliefs, namely: -

a) Payment of Tshs. 170, 573, 493/= being costs for the hired dump trucks and excavators,
b) Interest on the principal sum at bank's rate of 25% per annum from 10th July to the judgment date,

c) Compensation and general damages to the tune of Tshs. 100, 000, 000/= resulting from the breach of business contract,
d) Interest on the decretal sum at the court's rate of 12% per annum from the date of judgment till full and final payment,
e) Costs

The suit against the applicants proceeded ex parte after they failed to enter appearance at the mediation under O. VIII rule 29 of the Civil Procedure Code [Cap. 33 R.E.2019]. This court (Hon. Mkwizu, J.), on 17th March, 2023 entered judgment in favour of the respondent as indicated in the judgment.

The applicants, it would appear, failed to apply for setting aside the exparte judgment in time hence this application.

During the hearing of this application, Mr. Evodius Mtawala, learned Counsel, stood for the applicants while the respondent enjoyed the legal services of Mr. Erick Derick Kahigi, learned Advocate.

Supporting the application, learned counsel for the applicants adopted the affirmed joint affidavit to form part of his submission. Admitting that court's power to extend time is vested int the discretion of the court but which discretion must be exercised judicially upon good cause being shown, he pointed out that through several decisions of the

Court of Appeal, the phrase sufficient cause has not been defined but from several cases a number of factors have to be taken into account including whether or not the application was brought promptly, absence of any valid explanation for the delay and lack of diligence on part of the application. Making reference to paragraph 4 of the applicants' affidavit, counsel for the applicants submitted that the 2nd applicant came to know the existence of the summons that was incorrectly served through being informed by Advocate one Mary Edwin Kapori whose sworn affidavit has been attached. He contended that the person who received the summons one Julieth Kagaruki has, by her affidavit, shown that she mistakenly received the same and had been looking for the applicants to tell them about its existence. It is also his argument that the applicants immediately took necessary steps to institute the current application. Counsel is of the firm view that the applicants are entitled to constitutional right of being heard and there is no way the respondent is going to be prejudiced if the prayers are granted.

In response to the submission of counsel for the applicant, Mr. Erick Derick Kahigi, adopting the counter affidavit lodged on 8th November, 2023, strongly contested the application. Joining hands with counsel for the applicant that granting an application for extension of time is an

exercise of judicial discretion according to the rules of reason and justice, counsel for the respondent, after reiterating the criteria set out in the famous case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, posed a question whether the applicants have met the set-out criteria. He answered the question in the negative. He argued that the joint affidavit affirmed by the 2nd and 3rd applicants does not show that the threshold was met. He explained that there has been no accounting for all of the period of delay. According to him, the judgment sought to be challenged was pronounced on 17th March, 2023 and the application on hand was filed on 22nd September, 2023 which means that in between there are about one eighty days of which the applicants have not accounted for.

On the applicants' argument that the notice was mistakenly served to Julieth Kagaruki suggesting that the applicants were not aware, counsel sees that argument as a hoax. Referring to paragraphs 3 and 4 of the counter affidavit, learned counsel insisted that the applicants were duly served through Advocate Nestory Peter Wandiba who was representing the applicants throughout in Civil Case No. 138 of 2021 and that it is on record that he was served with a notice of summons by the respondent's

officer one Faraji Yahaya Ramadhan to the Advocate's office-Eminent Attorneys as per proof of service (Ann. ASF. 1). Besides, counsel for the respondent went on submitting, the applicants have attached the notice of judgment duly stamped and signed by Julieth Kagaruki which indicates the date of its receipt to be 30th March, 2023 at 13:20 p.m. Counsel for the respondent was emphatic that the unaccounted-for delay of 180 days was also inordinate. Insisting on the contents of paragraph 7 of the counter affidavit, counsel for the respondent urged the court to find that the applicants were dilatory, sloppy and negligent in challenging the impugned judgment despite their having notice of its existence through Nestory Peter Wandiba of Eminent Attorneys.

Counsel for the respondent also challenged the application on account that there was no suggestion on part of the applicants that there was any illegality in the impugned judgment. Believing that the applicants have failed to meet the criteria set by the Court of Appeal, the court should dismiss this application with costs.

Mr. Evodius Mtawala, in rebuttal, admitted that Julieth Kagaruki received the summons but that the same person stated that she received it mistakenly. Counsel reiterated the contents of paragraph 4 of the joint

affidavit on the time the notice of ex parte judgment came to her knowledge.

With regard to the proof of service, counsel for the applicants argued that Faraji Yahaya Ramadhan is an officer of the applicant and not a court officer empowered to do service. He said that there is no any supplementary affidavit of Wandiba giving that statement.

I have carefully considered the competing arguments by both parties in support and in opposition of the application. The governing law for extension of time in this application is Section 14 (1) of the Law of Limitation Act (supra) which provides that: -

> '14.-
>
> (1) 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'.

What amounts to reasonable or sufficient cause has not been defined but the courts have set some guidelines on some factors which constitute sufficient cause which, in most cases, depend on the

circumstances of a particular case. For instance, the Court of Appeal in the case of **Lyamuya Construction Company Ltd versus Board of Registered Trustee of Young Women's Christian Association of Tanzania** Civil Application No. 2 of 2010, cited by both learned counsel for the parties in their submissions, at page 6 to 7 of the typed judgment observed: -

> 'As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated (a) the applicant must account for all period of delay (b) the delay should not be inordinate(c) the applicant should show diligence, and not apathy, negligence, sloppiness in the prosecution of the action that he intends to take (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged'.

The issue calling for determination in the present application is whether the reasons advanced by the applicants both in the joint affidavit and the submission of their learned Counsel constitute sufficient cause to warrant this court exercise its discretionary powers in their favour.

While counsel for the applicants wants the court to answer the issue in the positive, the respondent's advocate urges the court to hold a different view.

In his submission, counsel for the applicants, making reliance on paragraph 4 of the applicants' joint affidavit, argued that the 2nd applicant came to know the existence of the summons that was incorrectly served through being informed by Advocate one Mary Edwin Kapori. Counsel for the applicants expressed that the person who received the summons one Julieth Kagaruki has, by her affidavit, shown that she mistakenly received the same and had been looking for the applicants to tell them about its existence and the applicants immediately took necessary steps to institute the current application.

Paragraphs 4 and 5 of the applicants' joint affidavit affirmed by the 2nd and 3rd respondents aver as follows: -

> '4. However, we have come to know the existence of the said ex parte judgment on 11/9/2023 when the 2nd applicant was informed nby Advocate Mary Edwin Kapori on the existence of the summons that was incorrectly served to Eminent Attorneys, the firm that do not and has never represented us.'
>
> '5. That Advocate Mary Edwin Kapori, who is a former colleague of Eminent Attorneys informed the 2nd respondent when he met her in one of the dealings, where she told the 2nd applicant that

she was told by Ms Julieth Kagaruki sometimes back on the presence of the said summons that was incorrectly served to Emminent Attorneys and the firm were trying to get hold of us for a while now without any success.'

It is on record and evidenced by MBY-2 that this court, on 10th March, 2023 issued a summons to Mbuyula Coal Mine Ltd and 2 others requiring them to make appearance in court on 17th March, 2023 at 09:00 a.m. before Hon. Mkwizu, J. so as to receive judgment. The summons was duly served on and received by Julieth Kagaruki of Eminent Attorneys on 13th March, 2023 at 13:20 p.m. The said Julieth Kagaruki who is an advocate duly signed and stamped it on that very day and at the mentioned time.

There is MBY-4 which is a sworn affidavit of Julieth Kagaruki. In her sworn affidavit, Julieth Kagaruki, admitted to have received the said summons on 13th March, 2023 requiring the applicants to attend court for judgment that had been set for delivery on 17th March, 2023. According to her, she tried to contact them using a word of mouth through mutual people as she had no phone number of theirs. The same deponent admitted to have attended the 1st applicant as a 'walk-out client.'

The affidavit of Julieth Kagaruki was, however, silent on important facts. In the first place, she did not mention Mary Edwin Kapori anyhow. In the absence of her being referred to by Julieth Kagaruki who received the summons, all the contents/averments of Mary Edwin Kapori in her affidavit was inconsequential and unreliable, if not hearsay. Second, the same Julieth Kagaruki did not state how the applicants for whose summons she had received were served with it. By receiving the summons and endorsing on it with both her signature and office stamp, she meant what she had intended to do and what was required of her, she being not only a lawyer and an advocate but also having attended the 1st applicant, albeit as a walk-in client. She did not deny to have served it to the applicants.

As to how the service of summons is affected, rule 16 of O.V of the Civil Procedure Code [Cap.33 R.E.2019] comes into play and provides thus: -

> '16. Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or to other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.'

According to the proof of service of notice of judgment by the serving officer one Faraji Yahaya Ramadhan, he was, on 13th March, 2023, informed by their advocate Derick Paschal Kahigi that there was a notice of judgment to be served on the applicants' advocate one Nestory Peter Wandiba. The said Wandiba informed the serving officer that at that time he was not in office and was no longer working with the applicants. He directed him to go to Eminent Attorneys office where Julieth Kagaruki duly received the summons, endorsed on it her signature and the office stamp promising him that she would attend during the delivery of the judgment as indicated on the received summons. This proof of service was verified by the serving officer and attested before Lilian Pendo Rutaiganna, Advocate on 3rd November, 2023.

Mr. Evodius Mtawala argued that Faraji Yahaya Ramadhan is an officer of the respondent and not a court officer empowered to do service. I think the argument of the learned counsel is misplaced. A process server is defined under rule 2 of the Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017 GN No. 363 published on 22/09/2017 as a person appointed under rule 5 (2) or engaged in terms of rule 30 of these Rules to effect service of court

process. The duties and functions of the process server are detailed under rule 8 of the Rules as follows: -

> '8. The main function of a process server shall be to serve judicial and extra-judicial documents and shall include serving: - (a) summonses, notices, copies of judgments, rulings, decree or orders; (b) notices of engagement to court brokers; and (c) any other documents issued by the court'.

It should be recalled that advocates being officers of court must not only be sincere and honest but also transact their businesses with diligence and skills. Her argument that she mistakenly received the summons demonstrates a manifest desire not to be sincere and is a clear exhibition of partiality in order to achieve certain goals. Besides, the applicants were silent both in the joint affidavit and submission by their learned counsel on the fate of the summons received by Julieth Kagaruki. Did they receive the said summons? When was it served on them by Julieth Kagaruki? Her affidavit was silent if the said summons was not served on the applicants before the date of judgment. Of course, Julieth Kagaruki, a lawyer and an advocate, could not have, in her calibre, thrown a court process in a dust bin! It is my finding that the alleged mistake was imaginary if not self-imposed.

In view of the above finding of fact, the applicants, upon being required to appear in court to receive the judgment, were duty bound to comply. Here I wish to borrow the wisdom of the Supreme Court of India whereby Carr J. in **Su-Ling Vs. Goldman Sachs International,** [2025] EWHC 759 (Comm.), observed:

> 'Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the ligation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so'.

It should also be emphasized that the reason for failure by the applicants to comply with the court's process had to be in good faith and with due diligence so as to avert increased legal costs and any inconvenience.

As learned counsel for the parties have submitted before me, it is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. I must add that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. The Court of Appeal in the case of

Regional Manager, TANROADS v. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007 observed:

> "What constitutes "sufficient reason cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules"

As far as application in question is concerned, I am not satisfied that the applicants have placed before me material sufficient to exercise my judicial discretion in their favour. The applicants are reminded to heed to the calling by the Court of Appeal in the case of **Magnet Construction Limited v Bruce Wallace Jones** Civil Appeal No. 459 of 2020 that:

> '....to be entitled to extension of time, the applicant must put before the court sufficient material to show not only that he took actions before and after expiry of time to lodge the application but also that he acted promptly and diligently to take the action in order to convince the court to exercise its discretion grant extension of time'.

Furthermore, the Court of Appeal in the case of **Dr. Ally Shabhay v. Tanga Bohora Jamaat** [1997] TLR 305 remarked: -

> 'Those who come to courts of law must not show unnecessary delay in doing so; they must show great diligence'

In the matter under consideration the applicants, it seems, have not heeded to this calling. Suffice it to say I align myself to the position held by the respondent and her learned counsel that the applicants have not advanced sufficient reasons for the extension of time for them to apply to set aside the exparte judgment in Civil Case No. 138 of 2023.

In that regard, the application is hereby dismissed with costs.

Order accordingly.

W.P. Dyansobera

JUDGE

13.6.2024

Dated and delivered at Dar es Salaam this 13th day of June, 2024 in the presence of Mr. Leobinus Mwebesa assisted by Ms. Lilian Rutaiganwa, both learned counsel for the respondent but in the absence of the applicants who had, through their learned advocate, knowledge of this date and time for delivery of the ruling.

W.P. Dyansobera

JUDGE

13.6.2024