

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 143 OF 2015

(Arising from Commercial Case No. 149 of 2014)

HASHI ENERGY (T) LTD APPLICANT

VERSUS

RICHOL CO. LTD

SINEIDA COPEL PETROL STATION

KCB BANK (T) LTD

KHAMIS MAGANGA

..... RESPONDENT

24th November & 1st December, 2015

RULING

WAMBEGELE, J.:

Mr. Matunda, learned counsel, has filed this application on behalf of the applicant HASHI Energy (T) Ltd who is the plaintiff in Commercial Case No. 149 of 2014. The applicant seeks the indulgence of this court to extend time within which to file a Reply to the Written Statement of Defence and a Written Statement of Defence to the counter-claim raised by the 4th defendant; the 4th respondent herein. The application has been taken under rule 23 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 and sections 93 and 95 of the Civil Procedure Code, Cap.

33 of the Revised Edition, 2007. It is supported by an affidavit sworn in by Mr. Martin Matunda; learned counsel.

The application was argued before me on 24.11.2015 during which Mr. Matunda, learned counsel, appeared for the applicant while Mr. Msuya and Capt. Bendera, learned advocates appeared for the 3rd and 4th respondents respectively. There had previously been made an order in the main suit to proceed *ex parte* against the 1st and 2nd respondents. The oral hearing was preceded by the parties filing skeleton written arguments as dictated by the provisions of rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

The main reason for delay as can be gleaned from the affidavit in support of the application and the skeleton arguments earlier filed as well as the oral submissions at the hearing is that Mr. Matunda's Law Firm was served with the 4th respondent's Written Statement of Defence which contained a counter-claim on 21.05.2015. However they could not reply in time because of lack of special instructions from Dr. Asmanan Adan, the Director of the applicant. The said Dr. Asmanan Adan was, allegedly, on safari in Nairobi. That Mr. Matunda talked to Dr Asmanan Adan on 06.06.2015 only to realize she was in Nairobi and that she would be back on 16.06.2015 while the expiry of the 21 days within which they could file a Written Statement of Defence to the 4th defendant's counter-claim was on 11.06.2015.

While Mr. Msuya, learned counsel for the 3rd respondent had nothing to say in respect of the application, the averments by the learned counsel for the applicant have been strenuously countered by Capt. Bendera, learned counsel

for the 4th respondent. Capt. Bendera, learned counsel, states in the counter-affidavit and skeleton arguments as well as during the oral hearing of the application that the applicant has not shown good cause for the delay to file the documents for which extension of time to file them is sought. The learned counsel states that the learned counsel for the applicant had talked to the Director of the plaintiff company on 06.06.2015 and the applicant's counsel does not state what matters were not briefed to him, he argues. The learned counsel also counters that the fact that the Director of the plaintiff was in Nairobi does not have any iota of truth as it is not substantiated by documentary evidence, say passport extract or other like documents. He also states that the applicant being a legal person, there are other directors of the plaintiff who could do the briefing and instruction and the applicant's counsel has not stated anything about their whereabouts.

In a short rejoinder, Mr. Matunda, learned counsel, states that the briefings and instructions could not be completed by phone. As for the lack of extracts from Dr. Asmahan Adan's passport, the learned counsel rejoins that the application was filed before her return on 18.06.2015. That Dr. Adan is the one who signed the pleadings in the suit and that all the relevant documents were in her possession.

Having listened well to the submissions of the learned counsel for the applicant and 4th respondent and having gone through the affidavit, the counter-affidavit and the skeleton arguments, I am satisfied that the applicant has not shown sufficient reasons for the delay and thus it is not entitled to the orders sought. I say so because the applicant was served with the 4th defendant's WSD on 20.05.2015 (according to the 4th defendant) and

therefore had seven days within which to file a reply thereto. These are the dictates of a proviso to Order VIII rule 13 of the CPC which provides that a reply to the written statement of defence shall be presented within seven days of service.

Thus when Mr. Matunda, learned counsel, called his client on 06.06.2015 he was already out of time because he was supposed to file the reply to the WSD within seven days after service. This delay has not been explained away by the learned counsel neither in his affidavit supporting the application nor his skeleton arguments. Neither was this delay accounted for at the oral hearing of the application.

As for the WSD to the counter-claim, in terms of Order VIII rule 11 (1) of the CPC, the same was supposed to be presented within 21 days of service. The reason why the WSD to the counter-claim was not filed in time, as already alluded to above, has been explained to be the absence of the Dr. Asmahan Adan; the Director of the applicant company. Her absence, as rightly stated by Mr. Bendera, learned counsel for the 4th respondent has not been substantiated. I am not ready to accept Mr. Matunda's contention to the effect that the application lacks such substantiation because the application was filed before Dr. Asmahan Adan returned on 18.06.2015. Such explanation cannot be acceptable in this global village where courier services are readily available let alone the fact that the said Dr. Adan was in Nairobi; the Capital City of the neighbouring country where, in addition to courier services, buses ply on daily basis to and fro and no explanation has been made why such services were not resorted to, to reinforce the reasons for delay.

And as if to clinch the matter, the learned counsel learnt that his client was outside the country on 06.06.2015 but the present application was filed on 17.06.2015 before her return. The delay for 11 days from the moment the learned counsel learnt of his client's absence to the time of filing this application has not been accounted for. This is exacerbated by the fact that the learned counsel was made aware that his client would not be back until 18.06.2015. It is obvious that the learned counsel did not wait for Dr. Adan to file the application. I really find no plausible explanation why Mr. Matunda, learned counsel acted the way he did. If anything, the applicant's counsel has exhibited inaction and negligence for his failure to act promptly. In *William Malaba Bulambwa Vs R* Criminal Application No. 5 of 2005 (Mwanza - unreported), following *Shanti Vs Hindocha and Others* [1973] 1 EA 207, a principle was laid that in applications of this nature, a party applying for extension of time should not be negligent in the delay.

It is trite law that an application of this nature will only succeed upon the applicant advancing sufficient reasons to the satisfaction of the court why the step for which extension of time is sought; in this case filing the reply to the 4th defendant's WSD and the WSD to the its counter-claim, was not taken in time. If a document is not filed in time, special circumstances have to be shown by the applicant for extension of time to file the same to issue. In the case at hand, the applicant has not explained to the satisfaction of the court why it did not file the reply to the WSD of the 4th defendant within seven days as required by the law. Neither has it explained to the satisfaction of the court why the present application was filed on 17.06.2015 while the

applicant's counsel learnt of Dr. Adan's absence on 20.05.2015 and that she would be back on 18.05.2015.

There was a contention by Mr. Matunda, learned counsel for the applicant, in the last para of his affidavit to the effect that "it is desirable to grant the enlargement of time being sought in order to accord the Applicant a fair opportunity to be heard in this case". I agree. However, I wish to remind the learned counsel that this being a court of law (not a court of sympathy) will only grant such application upon being shown sufficient reasons for delay. Inaction and negligence on the part of the applicant or his advocate will not be condoned by the court - see: *Mumelle Vs Bank of Tanzania* [2006] 1 EA 227 (CAT) and *Kalunga and Company Advocates Vs National Bank of Commerce* [2006] TLR 235

In the *Kalunga* case (supra), the Court of appeal, grappling with a somewhat similar situation as is in the instant case, had this to say

"The learned Advocate concentrated on explaining the reasons as to why leave to appeal should be granted. Where there is inaction or delay on the part of the applicant, there ought to be some kind of explanation or material to enable the court to exercise the discretion ..."

The Court of Appeal went on:

"This court has discretion to extend time but such extension ... can only be done if 'sufficient reason' has been given".

I also wish to remind the learned counsel for the applicant that rules of procedure must be obeyed. Rules are made to be followed. As already shown above, the reply to the 4th defendant's WSD ought to have been filed within seven days of service and the WSD to the 4th defendant's counter-claim ought to have been filed within 21 days of service. The applicant has presented no sufficient material upon which this court can exercise its discretion to extend time within which to file the documents. I wish to associate myself with what was stated by Lord Guest in an English decision of ***Ratnam Vs Kumarasamy and Another*** [1964] 3 All ER 933, at 935 at which His Lordship stated:

"The rules of court must *prima facie* be obeyed and, **in order to justify a court in extending time during which some step in procedure requires to be taken there must be some material on which the Court can exercise its discretion.** If the law were otherwise any party in breach would have an unqualified right to extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation."

[Emphasis supplied].

The foregoing quote was followed with approval by the Court of Appeal in **Godwin Ndewesi and Karoli Ishengoma Vs Tanzania Audit Corporation** [1995] TLR 200 in which an applicant had a one day delay in filing a notice of appeal. The Court of Appeal (Mnzavas, J.A) held - I quote from the headnote - that:

"The rules of court must *prima facie* be obeyed and in order to justify extending time during which some step in the procedure requires to be taken there must be some material on which the court can exercise its discretion".

in the case at hand, apart from the absence of Dr. Adan, which I have found and held to be frivolous and therefore unacceptable, there is no other material accounting for the delay in filing the reply to the 4th defendant's WSD and the WSD to the 4th defendant's counter-claim, upon which this court can exercise discretion to extend time within which the applicant can file his documents. In the same line of argument, the Court of Appeal had another opportunity to restate the law through Kileo, J.A in **Bushiri Hassan Vs Latifa Lukio Mashayo** Civil Application No. 3 of 2007 (unreported) in the following terms:

"Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken".

And, to reinforce this point a little bit further, I wish to quote the words of Rustomji in his book titled **Law of Limitation**, 5th Edition as quoted in ***Daphne Parry Vs Murray Alexander Carson*** [1963] 1 EA 546. The learned author stated at p. 88 thus:

"Though the court should no doubt give a liberal interpretation to the words 'sufficient cause', its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

I really, am very sympathetic with the applicant, for the outcome of this ruling may be catastrophic to it. However, as said above, this being a court of law will not be moved by sympathy. Sympathy has never been a ground for exercising discretion of this court - see: ***Amos Shavu Vs T.A Msonge & 2 others***, Civil Case No. 128 of 1993, an unreported decision of this court (Bahati, J.) and ***Mwangi Vs Mwangi*** [1999] 2 EA 234; a persuasive decision of the Court of Appeal of Kenya.

For the avoidance of doubt, I must state at this juncture that, I am aware that some of the authorities cited above were dealing with applications for

extension of time to file appeals out of time. However, I have no scintilla of doubt that the principle can be applicable to situations like the present one.

All said and guided by the authorities discussed above, the applicant having failed to show sufficient reasons to my satisfaction why it did not file the reply to the 4th defendant's WSD and the WSD to the 4th defendant's counter-claim within the prescribed time, I find no merit in this application and proceed to dismiss it with costs to the 4th respondent.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of December, 2015.

J. C. M. MWAMBEGELE
JUDGE