IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 95 OF 2015

(Arising from Commercial Case No. 68 of 2014)

FUTURE TRADING COMPANY LIMITED ..... APPLICANT

VERSUS

ECOBANK TANZANIA LIMITED ..... RESPONDENT

13th August & 1st September, 2015

RULING

MWAMBEGELE, J.:

This Ruling seeks to answer the following question: what happens when a party fails to comply with an order for payment of adjournment fees made under the provisions of rule 46 (2) (a) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

Before answering the question, let me, firstly, narrate the background facts leading to this Ruling. The applicant Future Trading Company Limited is a plaintiff in Commercial Case No. 68 of 2014 in which the Respondent bank is a defendant. The case having passed through initial stages and the parties having filed the witnesses' statement to pave way for hearing, the applicant company realized that it needed to file additional witness statement. As time

to file the witness statements had expired, the applicant company filed this application; application No. 95 of 2015 seeking the indulgence of this court to file an additional witness statement out of time. The application has been taken under the provisions of section 93 of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC").

When this application was called on for hearing on 08.05.2015, the respondent's counsel prayed for adjournment on the ground that Mr. Matunda, the learned counsel who was in conduct of the case was indisposed. That prayer was made by Mr. Majura, the learned counsel who held Mr. Matunda's brief. The prayer was strenuously objected by Mr. Rwegasira, learned counsel for the applicant. The anchor of Mr. Rwegasira's objection was the provisions of rule 44 (1) (a) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules") which requires an advocate holding brief for another advocate to be acquainted with the facts of the case and ready to proceed for hearing. The court granted Mr. Majura's prayer but ordered the respondent to pay fees for the adjournment as provided for by rule 46 (2) (a) of the Rules.

When the matter came up for necessary orders on 21.05.2015, out of inadvertence, it was not realized that the respondent had not complied with the court order. The matter was fixed for hearing of the preliminary objection (which had earlier been filed) on 15.06.2015. On the said 15.06.2015, the court realized that the order it made on 08.05.2015 had not been complied with. The court thus ordered the parties to address it on 23.06.2015 on the way forward in the advent of such noncompliance.

Come 23.06.2015, both learned counsel appeared and addressed the court accordingly. It was Mr. Matunda, learned counsel who kicked the ball rolling. The learned counsel, indeed, as a true officer of the court, admitted that the order of this court had not been complied with. He ascribed to the noncompliance as an act of inadvertence because their Mr. Majura, the learned counsel who held his brief on the date the order was given, did not communicate the order to their Firm. He stated that when he appeared in person on 21.05.2015, he was not reminded of the noncompliance. However, he stated, though belatedly, he had complied with the order by paying Tshs. 150,000/= as adjournment fees as prescribed by item 9 of the High Court of Tanzania (Commercial Division Fees) Rules, 2012 – GN No. 249 of 2012. He conceded that the order was made under rule 46 (2) (a) of the Rules which requires that the fees should be paid before the next hearing. In view of the fact that the rule does not provide for any sanction for failure to abide with the order and in further view of the fact that the order has now been complied with, though belatedly, the learned counsel sought the indulgence of the court to exercise its discretion under section 95 of the CPC by extending the time for an act ordered by the court under section 93 of the CPC. He concluded that in the interest of justice the payment should be taken retrospectively.

Mr. Rwegasira, learned counsel for the applicant submitted that the noncompliance with the order was out of sheer negligence on the part of the learned counsel for the respondent. He stated that the act amounts to contempt. To buttress this point, the learned counsel cited ***Silent Inn Hotels Ltd Vs Interstate Services Ltd***, Civil Case No. 464 of 1999 (unreported).

On the order being complied with, the learned counsel stated that the same has been paid without leave of the court which is unprocedural as they have paid after they were asked by the court why they did not pay the same.

The learned counsel stated further that the court cannot exercise discretion under section 95 of the CPC while there is a specific provision to cater for the problem. Mr. Rwegasira was of the view that the learned counsel for the respondent cannot rely on the provisions of section 95 of the CPC and section 93 of the same Act at the same time.

In rejoinder, Mr. Matunda conceded that the provisions of section 95 of the CPC cannot be invoked where there is a specific provision of the law to cater for a problem. However, he called upon the application of section 95 because section 93 is silent on whether the act done (of payment of fees) can be taken retrospectively. Thus he called upon the court to grace an act which has been done before an extension has been granted in order to expedite the disposition of the case instead of waiting the extension being granted first.

He submitted that the respondent was not in contempt of any court order as failure to comply with the court order did not amount to contempt of court; it was a mere default that can be dealt with under the Rules, he submitted.

The act of complying with the court order after being required to explain why they did not comply, Mr. Matunda rejoined, was a gesture of good faith and a mitigating factor for lenience. That is to say, the mitigation has been purged before coming to ask for the indulgence of the court. On the ***Silent Inn***

case, Mr. Matunda stated that it was distinguishable from the present matter in that it dealt with contempt of court which was not the case in the case at hand. As rule 46 does not provide for any sanction for noncompliance, the court cannot deny the respondent the right to be heard, he argued.

The order for payment of adjournment of fees made by this court on 08.05.2015, as alluded to above, was made under the provisions of rule 46 (2) (a) of the Rules. For ease of reference, I reproduce the relevant part hereunder:

> "(2) Notwithstanding the provisions of sub rule (I), at any stage of the [proceedings] provided that:-
> (a) **the party orally or in writing applying for adjournment pays to the Court the fees for adjournment sought as provided by the Court Fee Rules** whether or not condemned to pay costs for adjournment and unless under this rule, **the same shall be paid before the next hearing**;
> (b..."
> [emphasis supplied].

It is obvious therefore that the adjournment fees must be paid "before the next hearing". In the case at hand, the fees were not paid before the next hearing; the same were paid after the parties were ordered by the court to address the court as to the way forward after the noncompliance with the

court order. The same was paid after default and it did not, in my view, erase the noncompliance.

The provisions of rule 46 (2) (a) of the Rules are couched in mandatory terms. The same is evidenced by the use of the word "shall". By the use of the word "shall" in the provisions, it means such an act must be performed. This is as per section 53 (2) of the Interpretation of Laws Act, Cap. 1 of the Revised Edition, 2002. The said subsection 2 of section 53 of the Interpretation of Laws Act provides:

> "Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

As per section 53 of the Interpretation of Laws Act, "may" imports discretion and "shall" is imperative. In the present case, Mr. Matunda, learned counsel concedes that he did not comply with the court order or, rather, he complied with the court order belatedly. The learned counsel also concedes that he ought to have paid the same before the next hearing which was not done. He seems to urge the court to exercise lenience as the order has been complied with, though belatedly. The course Mr. Matunda urges the court to take cannot be acceptable for two main reasons. First, the provision, as already alluded to, is mandatory and secondly, the period for which the court could apply the Rules with lenience has long expired. As per rule 2 (1) of the Rules, the Rules were to be applied with lenience in the first year of application; that is to say, the period between 10.07.2012 when they came

into force and 10.07.2013 on their first anniversary. The practice of this court has, after expiry of the one year grace period, been taking noncompliance with orders of payment of adjournment fees seriously. The noncompliance with the court order in the instant case is fatal and inexcusable. This is a court of law; not a court of sympathy.

Having found that the act is inexcusable, what then should be the way forward? This question has greatly exercised my mind. It has greatly exercised my mind because, firstly, as intimated earlier on, the Rules are silent on the sanction for failure to comply with an order for payment of adjournment fees. Secondly, the respondent is not the beneficiary of the application hearing which has been kept at abeyance by reason of such noncompliance. That notwithstanding, the noncompliance with the rules of this court in itself is, as intimated above, inexcusable. Gracing the same by condoning retrospective compliance will be nothing but perpetuation of ridicule and disrepute of the very same rules, which in my considered opinion will not be healthy for both justice and its consumers. It will undoubtedly be a dangerous precedent, detrimental to the smooth operations of the Rules due to the possibility of setting a loop-hole for noncompliance. Therefore, the *lacuna* in the Rules notwithstanding, and bearing in mind the peculiar circumstances of the matter at hand, I find it to be in the interest of justice to invoke the inherent powers of this court under section 95 of the CPC to penalize the action of noncompliance and/or complying with the court orders out of time. Accordingly, the respondent is ordered to pay to court Tshs. 150,000/= for failure to comply with the court order within time. The respondent is also to pay the applicants costs to be taxed for the whole

period the case the main application has been kept at abeyance. That is to say, from 15.06.2015 to the date of this ruling.

Order accordingly.

DATED at DAR ES SALAAM this 1st day of September, 2015.

J. C. M. MWAMBEGELE
JUDGE