

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISCELLANEOUS COMMERCIAL APPLICATION NO. 102 OF 2015

[Original Commercial Case No. 293 of 2002]

NATIONAL BANK OF COMMERCE LIMITED APPLICANT
VERSUS
MILLO CONSTRUCTION COMPANY LIMITED
STEPHEN W. MTETEMELA
DANIEL J. MTETEMELA } **RESPONDENTS**

16th November & 16th December, 2016

RULING

MWAMBEGELE, J.:

The applicant; National Bank of Commerce Limited, filed this amended application seeking for, *inter alia*, extension of time within which to file a notice of appeal. The application has been taken under the provisions of section 11 (1) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002. It is supported by an affidavit of Gaspar Nyika, an advocate of this court and courts subordinate hereto, save for the Primary Court.

Against the application, Mr. Herbert Nyange, the learned counsel for the first and second respondents has filed a preliminary objection to the effect that the Amended Chamber Application is defective beyond cure.

The application was argued before me on 16.11.2016. All the parties to the application were represented. While Mr. Gaspar Nyika, learned counsel, represented the applicant, Mr. Herbert Nyange, learned counsel represented the first and second respondents and Mr. Msafiri, learned counsel, represented the third respondent. This is a ruling thereof.

Arguing for the application, Mr. Nyange, learned counsel, was very brief. He submitted that the preliminary objection is based on the fact that the Chamber Summons that was filed on 17.08.2015 says that the applicant's application is supported by an affidavit that was sworn on 27.04.2015. However, the affidavit in support of the application shows that it was sworn on 17.08.2015. There can be no application properly filed if the Chamber Summons is supported by an affidavit that is not properly before the court, he contended. He argued that in order for the chamber application to be legally compliant, the affidavit has to be sworn on the date that is indicated in the chamber summons. He submitted that there indeed is a chamber summons in place, however, it is not supported by the affidavit whose date appear in the said Chamber Summons.

The learned counsel submitted that the error cannot be categorized as an accidental slip because the date that appears on the chamber summons of 27.04.2015 is not anywhere near the date on which the affidavit was sworn, namely 27.08.2015. This is a computer generated document; the date which appears on the chamber summons is printed. Likewise the date that appears in the affidavit is printed by the computer, except that of the jurat of attestation which is written by the attesting Commissioner for Oaths. He added that the months of April and August are quite far apart and it is not possible to write the month of April instead of August; it does not stand to reason, he argued.

He added that if one compares the previous application filed on 21.04.2015 and the Amended Chamber Summons that was filed 17.08.2015, the format is substantially the same. The only difference is the addition of the administrators of the estates of the second and third respondents. Thus, he stressed, this is a copy and paste job; it was not a freshly made application. And the error occurred as result of the copying and pasting business. It was a result of forgetfulness. They forgot to change the date. For this, he submitted, Mr. Nyika, learned counsel needs to file a proper document. He thus prayed that the application be struck out with costs.

Mr. Msafiri for the third respondent had nothing useful to add, save for the rectification that that the initial Chamber summons was filed on 29.04.2015; not 21.04.2015 as put by the learned counsel for the first and second respondents.

Arguing against the application, Mr. Nyika, learned counsel for the applicant, having adopted the skeleton written arguments earlier filed pursuant to rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012, conceded that the date indicated in the chamber summons and the date on the affidavit supporting the application are different. However, it was his submission that that does not mean that there is no affidavit supporting of the application. He thus prayed that the error be rectified and that will cause no injustice to the respondents as there was no indication from Mr. Nyange, learned counsel that such error renders the Chamber Summons incurably defective. To him, the error was but an accidental slip because the previous Chamber Application had an affidavit bearing that date. The learned counsel cited ***Stanbic Bank Tanzania Limited Vs Kagera Sugar Limited***, Civil application No. 57 of 2007, an unreported decision of the Court of Appeal, in which it was held that in eventualities of this nature, an application

has to be amended provided that the defect did not go to the root of the matter.

He conceded that he forgot to change the date and that, as stated by Mr. Nyange, that was a pure accidental slip. He thus prayed that the court be pleased to accept the defect pointed out be amended and undertook to bear costs. He, however, insisted that the defect has not rendered the application incurably defective. He thus sought the indulgence of the court to allow the applicant to rectify the date in the Chamber summons and proceed to hear the application on merit.

Rejoining, Mr. Nyange, learned counsel, had a problem with the prayer. He was not sure which date is to be amended; the one on the affidavit or the other one in the chamber summons. He was thus of the view that the remedy would seem to be to file a fresh application.

I have considered the rival arguments by the learned counsel for the parties appearing. The learned counsel for the applicant has conceded that the dates on the Chamber Summons and the affidavit supporting it are at variance. That, he conceded, is a result of a mere slip. Indeed, the Chamber Summons indicates that it is supported by an affidavit of Mr. Nyika sworn on 27.04.2015. The affidavit referred to was, however, sworn on 17.08.2015. The question I pose to myself is: does this impairment make the Chamber Summons incurably defective? I have serious doubts. The learned counsel for the first and second respondents has cited no authority for his stance. In my considered view, a Chamber Summons which is at variance with the date of the affidavit purporting to support it, cannot be rendered incurably defective to deserve it being struck out for that defect. The defect is, in my considered view, curable by an amendment. As both parties are at one that it

was a slip, bearing in mind the date of the previous Chamber Summons which was amended, no injustice will be occasioned if an amendment of the date is allowed. This is but a trivial ailment to which the provisions of article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 must apply.

I find solace on the foregoing observation in an unreported decision of the Court of Appeal of ***Mr. Manson Shaba & 6 others Vs the Minister of Works & another*** Civil Application No. 244 of 2015 in which it was held that a Notice of Motion may be amended. It is important to note that "Notice of Motion" and "Chamber Summons" is a mere matter of nomenclature; while "Notice of Motion" is used in the Court of Appeal by virtue of the Court of Appeal Rules, 2009, "Chamber Summons" is its kith used in the High Court by virtue of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002.

On the basis of the above arguments, I allow Mr. Nyika's prayer to amend the Chamber Summons by substituting the erroneous date appearing in it with one he thinks appropriate. That may be done by hand and initialing the amendment with the applicant's signature and date, if he so wishes. Should the learned counsel wish to do so, I order the same to be done in a fortnight from the date hereof.

No order is made as to costs. Order accordingly.

DATED at DAR ES SALAAM this 16th day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE