

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 244 OF 2017**

**(Arising from Miscellaneous Commercial Application No. 255 of 2016)**

<b>LTA CONSTRUCTION (TANZANIA) LIMITED</b>	<b>.....</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>PETER SCHUMAN</b>	<b>.....</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>STUART WHITE</b>	<b>.....</b>	<b>3<sup>RD</sup> APPLICANT</b>
<b>AVENG LIMITED</b>	<b>.....</b>	<b>4<sup>TH</sup> APPLICANT</b>

**Versus**

<b>RESOLUTE (TANZANIA) LIMITED</b>	<b>.....</b>	<b>RESPONDENT</b>
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**RULING**

*Date of the Last Order: 09/07/2018*

*Date of the Ruling 20/07/2018*

**SEHEL, J.**

This is a ruling on application for leave to appeal to the Court of Appeal against the decision of this court in Misc. Commercial Application No. 255 of 2016.

The facts as enumerated in the affidavit in support of the application are such that on 10<sup>th</sup> May, 2010 the respondent instituted a suit against the applicants claiming among others, for the recovery

and payment of USD 1,606,311.06 being sum of Value Added Tax (VAT) paid the respondent to Tanzania Revenue Authority (TRA). The applicants were duly served with the suit and they filed their joint written statement of defence on 14<sup>th</sup> July, 2010. The suit passed through first pre-trial conference, mediation and on 18<sup>th</sup> June, 2014 when it was called for final pre-trial conference, parties were ordered to file their witness statement within three weeks from the date the order was made. The applicants failed to comply with the order of the court thus filed an application for extension of time within which to file their witness statements (i.e Misc. Commercial Application No. 177 of 2014). The application was declined. In July, 2015 the respondent applied for default judgment by filling Form No. 1 as per Rule 22 of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"). Default judgment was entered in favour of the respondent.

In January, 2016 the applicants became aware of the existence of the default judgment thus applied for an extension of time to lodge an application for setting aside default judgment. The

said extension of time was granted. Therefore, the applicants on 20<sup>th</sup> October, 2016 filed their application for setting aside default judgment. The application was heard and it was declined with the following reasons:-

*"Finally, the Court has considered other applicant's arguments including that, they were not informed on the existence of respondent's application for default judgment, they came to know about default judgment very late, and default judgement was not proper, and find there is no plausible reasons to proceed with determination of other remaining legal issues raised by both sides because court discretionary powers of the court on application to set aside default judgement set by Rule 23(8)(a) of the High Court Commercial Division Procedure Rules, GN 250 of 2012 may be applied when an application for default*

*the*

is made within 21 days from the date of judgment.

The applicant application fall outside the scope of 21

days ..... so after considering all facts and issued (sic)

raised by applicant and respondent, plus a fact, that, this

application was not filed within 21 days from a date of

default judgment, I find and decide that, this application has

no merit. Consequently, I hereby dismiss the application

for setting aside a default judgment with costs in favour of

the respondent for reasons explained above".

Dissatisfied with such a decision the applicants lodged their notice of appeal, applied for copies of proceedings and judgment and has filed the present application for leave to appeal to the Court of Appeal of Tanzania.

The legal issues to which the applicants want the Court of Appeal to consider have been enumerated under paragraph 9 of ~~the~~



the affidavit of Gracious Ishengoma, advocate of the applicants.

These issues are:-

- (a) Whether or not the discretion of the High Court to determine an application to set aside a default judgment is not exercisable to applications instituted outside 21 days as provided for under Rule 23(1) and (3) of the High Court (Commercial Division) procedure Rules, 2012 even if the extension of time has been sought and granted;
- (b) Whether or not it is proper for the High Court to grant a default judgment as per Rule 22(1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012 given the fact that the applicants had filed the defence or/and participate in the proceedings save for erroneous decision of the Court (Nchimbi, J) of 20<sup>th</sup> January, 2015.
- (c) Whether or not procedurally part of the proceedings of the High court resulting in the default judgment of 28<sup>th</sup> September, 2015 were proper.

(d) On the assumption that the decision of the court of 20<sup>th</sup> January, 2015 was proper, whether or not it was proper for the Court to pass a default judgment under Rule 22(1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012.

The application was heard orally on 9<sup>th</sup> July, 2018 whereby learned advocate Ishengoma appeared to represent the applicants and learned advocate Sinare appeared to represent the respondent.

Counsel Ishengoma begin his submissions by adopting his affidavit and counter affidavit of Sinare Zahran. He said application for leave is granted on the discretion of the court which has to be exercised judiciously according to the circumstances of particular case. He pointed out that the practise of courts is that leave is granted where there are legal issues of public importance for consideration by the Court of Appeal. He cited the Case of **Paul Juma Vs Diesel and Auto Electric Services Limited and 2 others**, Civil Application No. 183 of 2007 (unreported-CAT) where the case of

***Harban Haji Mosi and Shauri Haji Mosi Vs Omar Hilal Seif and Seif***

***Omar***, Civil Reference No. 19 of 1997 (unreported) was cited in approval as it was held:-

*"Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing feature as to require the guidance of the Court of Appeal. The purpose of provision is therefore to spare the Court the specter of unmeriting matters and to enable it to give adequate attention to cases of true public importance".*

Counsel Ishengoma then detailed the issues as outlined in the affidavit in support of the application. He argued the counter affidavit did not materially oppose the application rather averred factual issues. He thus prayed for the application to be granted.

~~WAT~~

Counsel Sinare objected to the application and adopted his counter affidavit to form part of his oral submissions. He argued the relevant paragraphs to the application are Paragraphs 6,7,8 and 9 of the affidavit and a ground stated under Paragraph 9(a) of the affidavit of which he argued Hon. Songoro, J was clear in his ruling that he considered other matters in reaching to his decision as it can be gleaned from page 9 of his ruling where he said "so after considering all facts and issues raised by the applicant and respondent.....". To the counsel's view, the trial Judge look into account other matters including the issue of time limit in reaching to his decision. He, thus, argued issue number 9(a) of the affidavit is of no merit considering the decision of the court. For issues no. 9(b) to 9(d) stated in the affidavit, he said are not relevant cause they are matters decided in Misc. Commercial Application No. 177 of 2014 and not in Misc. Commercial Application No. 255 of 2016. He distinguished the facts in the case of **Paul Juma** cited by the counsel for applicants. He thus prayed for the application to be dismissed with costs.

~~AA~~



It was rejoined that the entire ruling discussed the issue of time limitation and not other matters, Paragraph 9(b)-(d) were raised and submitted is Misc. Commercial Case No.255 of 2016; the **ratio decidendi** in **Paul Juma** is relevant and not facts thus it was insisted there are sufficient reasons for consideration by the Court of Appeal.

As instigated earlier the court is invited to grant leave to appeal to the Court of Appeal of Tanzania against the decision of this court made in Misc. Commercial Application No. 255 of 2016.

As correctly submitted by counsel Ishengoma the power to grant leave is discretionary on part of the court. It is the Court that sees to it as to whether to grant it or not. In doing so, the court has to act judiciously in accordance with the circumstances of each particular case. The purpose of leave as stated in **Haji Mosi (Supra)** and **Paul Juma (Supra)** is to spare the precious time of the court from dealing with frivolous, vexatious, useless or hypothetical appeals. The ensuing question is whether the present application is meritorious for consideration by the Court of Appeal of Tanzania. For the case to be meritorious, it must have a reasonable chances of success, or but

not necessarily, the proceedings as a whole must reveal such disturbing feature.

In the matter at hand we are told and it is gathered from the records that applicants were granted extension of time within which to present their application for setting aside default judgment. The applicants did make their application after obtaining extension of time, but it was dismissed with reason that the application was not filed within 21 days from a date of default judgment. On the face of it, this decision calls for the consideration by the Court of Appeal of Tanzania. On the affidavit evidence and on the facts before me, the applicants have established arguable case worth to be considered by the Court of Appeal. Their application is not frivolous, vexatious or useless. I therefore grant leave to the applicants to appeal to the Court of Appeal of Tanzania against the decision of this court in Misc. Commercial Application No. 255 of 2016. Applicants to have their costs. It is so ordered.

Dated at Dar es Salaam this 20<sup>th</sup> day of July, 2018.



A handwritten signature in blue ink, appearing to read "B.M.A. Sehel".

B.M.A Sehel

JUDGE

20<sup>th</sup> day of July, 2018