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

MISC. COMMERCIAL APPLICATION NO. 353 OF 2017

LESLIE DOUGLAS OMARI.....APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED.....1ST RESPONDENT
AFRICAN CONLUTING GROUP LIMITED.....2ND RESPONDENT
FRANK MUGEJA MUTANI.....3RD RESPONDENT
AKIDA MWINCHUMU.....4TH RESPONDENT
EDWARD MASANJA.....5TH RESPONDENT
CYPRIAN MALEKELA.....7TH RESPONDENT

Date of Last Order: 11.03.2019
Date of Ruling: 12.04.2019

RULING

V.L. MAKANI, J

This is an application by the applicant, LESLIE DOUGLAS OMARI for orders that:

(a) That this honourable court be pleased to extend time within which to set aside the execution of the decree, set aside decree and grant leave to appear and defend in Commercial Case No. 62 of 2015 out of time.

(b) That this honourable court be pleased to set aside the execution of the decree, set aside decree and defend in and grant leave to appear and defend in Commercial Case No. 62 of 2015

(c) That cost follow the event

(d) Any other relief(s) this honourable court may deem fit and just to grant

The application is made under Order XXXV Rule 8 of the Civil Procedure Code CAP 33 RE 2002 (the **CPC**) and section 14(1) of the Law of Limitation Act CAP 89 RE 2002 (the **Limitation Act**) and it is supported by two affidavits of the applicant.

In the course of hearing of the application the learned Counsel for the applicant Mr. Jonathan Mbuga prayed for and was granted leave to withdraw the 2nd to 7th respondents as parties to the application.

According to the records, there was a summary judgment against the applicant vide Commercial Case No. 62 of 2015. It was the applicant's argument and emphasized in the affidavits by the applicant, the skeleton written submissions duly adopted by the court and the oral submissions by Mr. Mbuga that the applicant was not aware of Commercial Case No. 62 of 2015 because he was not properly served. He came to know about it when he was arrested by the police at his home in Kigamboni and brought to court to show cause as to why execution should not proceed against him for failure to honour payment of the decretal sum of more than TZS 3,800,000,000/= (Tanzania Shillings 3.8 Billion).

Mr. Mbuga submitted that Item 21 Part III of the Limitation Act provides for application to be filed within 60 days. He said the summary decision was on 04/09/2015 and the application was filed on 08/11/2017 more than 2 years. He said that was the reason the

applicant was seeking for extension of time. He said the summary decision was in the absence of the applicant so he was not knowledgeable of the said decision until when he was arrested in 27/05/2017. He said time could not start to run without the respective party being knowledgeable of the decision. He said it was the duty of the decree holder to notify the applicant of the decision. Mr. Mbuga cited the cases of **Rapando vs. Vuma & Others, Odunga Volume IV Case No. 7738 at page 3623** and **Cosmas Construction Co. Limited vs. Arrow Garments Limited [1992] 127**. He said though the cases relate to ex-parte judgment but they give the jurisprudence as to when time starts to run against applicant/judgment debtor from a decision issued against an applicant in his absence. He went on to say that the counter-affidavit of the respondent did not show when the applicant became knowledgeable of the summary judgment, which according to Mr. Mbuga is a very vital element.

Mr. Mbuga said it is a matter of law that where an illegality is pointed out in the applicant and the court is able to see it on the face the court is thus duty bound to extend time so that it can deal with the illegality. To support the argument he cited the case of **Tanzania National Parks (TANAPA) vs. Joseph K. Magombi, Civil Application No. 471/18 f 2016 (CAT-Dar es Salaam)** (unreported). It was Mr. Mbuga's argument that the illegality in this case is that the applicant was not given the opportunity to be heard as per Article 13(6)(a) of the Constitution of the United Republic of Tanzania; and this is because Order V Rule 12 of the CPC requires

that a party has to be served individually. He said Annex B to the counter affidavit is an affidavit of the process server and it does not show if there was an attempt to serve the applicant but it was a massive service. He said the deponent of the Counter affidavit admitted this fact during cross-examination. He said the applicant was imprisoned for four years from March 2013 in Economic Criminal Case No. 14 of 2010 and therefore the prison term is supposed to end on March 2017. He however, pointed out that the plaint subject of the summary judgment was filed in 2015 and thus the applicant was still in jail. He said the procedure for service to a party in custody is by virtue of Order V Rule 24 of the CPC that service should be o Prisons Incharge Officer. This was not done therefore the applicant was not propyl served and so the right to be heard was violated.

Mr. Mbuga raised an issue of "technical delay". He said the fact that there was Misc. Commercial Application No. 167 of 2017, which was withdrawn means that the applicant should not be punished for time spent in court. Mr. Mbuga in his skeleton submissions said time spent in court should be exempted in gauging the extent of the delay and he cited the case of **Zahari Kitindi & Another vs. Juma Swalehe & 9 Others civil application No. 4/05/2017 (CAT-Dar es Salaam)**(unreported). For these reasons Mr. Mbuga prayed for the court to grant extension of time to set aside the summary judgment and decree in Commercial Case No. 62 of 2015.

As for the order for setting aside the summary judgment, Mr. Mbuga said the law requires special reasons as to why such an order should

be granted. He said the court acted under presumption of facts that the applicant could not be traced according to the affidavit of the process server and subsequently ordered for publication. He said it was the duty for the applicant to rebut the presumption and he did so because service to the applicant was not proper as the applicant was in prison; proof of service by the process server did not indicate the name of the applicant that he was duly served and the affidavit was irregular as it did not comply with Order V Rule 18 of the CPC and the case of **Ramadhani Haji Adulkarim vs. Harbart Mwara and Family Investment & 3 Others, Civil Appeal No. 88 of 2015 (CAT-DSM)**(unreported); it was not certain if service by publication by the respondent reached the applicant as the respondent was aware that the applicant was imprisoned for four years and a summons for a prisoner is supposed to be delivered to the Officer Incharge of the Prisons. So there was no proof that the applicant who was in prison was aware of the publication or newspaper as the law required (**Gatete & Another vs. Kyobe 2 EA 135)**; and the applicant was not a director or shareholder in African Consultling Group Limited as there was no proof to that effect though the respondent so alleged in the counter-affidavit.

In summary Mr. Mbuga said they have shown sufficient cause for extension of time because the applicant was not aware of the Summary Judgment and was not accorded a right to be heard considering that there was a large amount of money that is involved. He said special circumstances were also shown that he was not served. He prayed for the court to grant the application.

In response, Ms. Raya Nasir said in the outset that though Counsel for the applicant was arguing about extension of time but it was not clear whether he was praying for extension of time to set aside execution of the decree or summary judgment or leave to appear and defend the suit. She went on to adopt the counter-affidavits by Edmund Mwasaga and the skeleton submissions.

Ms. Raya said the applicant was fully aware of the case and the court did not act under any presumption. She said the address for service was given to the process server and when he went to the office the applicant was not in the office. She said the publication was in two separate newspapers, namely Mwananchi and Daily News. She said it was unjustifiable for the applicant to say he was in prison because he did not show when he was released. She went on further to say that Counsel did not show if the applicant served the four years imprisonment or he was out on bail. She denied that there was any presumption and that the applicant was aware of the court's decision as he failed to prove that he was in custody when the matter was in court. Ms. Raya said that the decision of the Resident Magistrate Court Moshi and the High Court Moshi zone showed that the applicant was shareholder and director of the African Consulting Group Limited. She said the Notice of Appeal to the Court of Appeal does not nullify the High Court decision. Ms. Raya pointed out that for leave to be granted there has to be a ground and the applicant has failed to show that ground. She found support in the cases of **Oasis Energy Co. LLC vs. Amram Mohamed Twalib & MPS Oil**

(T) Limited, Commercial Case No. 114 of 2009 (High Court Commercial Division – DSM)(unreported) and **Sebastian Ndaula vs. Grace Rwamafa (Legal Personal Representative of Joshwa Rwamafa), Civil Application No. 4 of 2014 (CAT-Bukoba)**(unreported). Ms. Raya prayed for dismissal of the application with costs.

In rejoinder Mr. Mbuga stated that the prayers in the Chambers Summons are omnibus and he understood that such prayers are allowed. He said if Counsel were serious he would have filed a notice of preliminary objection and not raise the issue at the bar. As for the release order Mr. Mbuga emphasized that the applicant was in prison for four years he said the term ended in 2017. He said since the respondent had rebutted this argument they were to provide the Release Order in terms of section 111 to 113 of the Evidence Act. He said this court has the mandate to set aside a judgment, which has been procured procedurally not on merit or consent. As for the case of **Oasis Energy Co. LLC** (supra) Mr. Mbuga stated that it was inapplicable because it dealt with leave while the present case is dealing with extension of time. As for the case of **Sebastian Ndaula** (supra) he said the applicant herein has accounted his day to day whereabouts and the issue of illegality waives the issue of delay. He prayed for the prayers in the Chamber Summons to be granted.

In considering this application I will start with the complaint by the learned Counsel for the respondent Ms. Raya that the prayers in the Chamber Summons were lumped up. I have gone through the

Chamber Summons and as correctly argued by Mr. Mbuga the application has omnibus prayers. Such prayers can be properly combined in one Chamber Summons if they are not diametrically opposed to each other. In other words, one prayer easily follows the other (see **MIC Tanzania Limited vs. Minister for Labour & Development and Attorney General, Civil Application No. 103 of 2004 (CAT-Dar es Salaam)**(unreported). The rationale of combining prayers that are not opposed to each other was stated in the case of **Tanzania Knitwear Limited vs Shamshu Esmail [1989] TLR 48** where the court held:

> *In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite.*

In the present case, once the prayer for extension of time to set aside the execution order and to set aside the summary judgment and decree in Commercial Case No. 62 of 2015 is granted, then the prayer for leave to set aside the execution order and to set aside the summary judgment and appear and defend the said suit follows. I must admit that the drafting of the prayers in the Chamber Summons is confusing but it is clear that the prayers are for extension of time to set aside execution, judgment and decree of Commercial Case No. 62 of 2015 and the following prayer is for leave to set aside execution, judgment and decree of Commercial Case No. 62 of 2015 and further defend the said suit. The application is therefore competently before the court. In any case, if Ms. Raya was of the view that this point was worth challenging then

she would have filed a notice of objection rather than arguing this point from the bar.

As for the main application, the applicant is praying for extension of time to set aside execution, set aside judgment and decree of Commercial Case No. 62 of 2015. It is a settled principle of the law that an application for extension of time is entirely the discretion of the court. Extension of time may only be granted where it has been sufficiently established that there is a sufficient cause that warranted the delay. (See **Kalunga & Company Advocates vs. NBC Civil Application No. 124 of 2005 (CAT-DSM)**(unreported). In the case of **Yusufu Same & Hawa Dada vs. Hadija Yusufu, Civil Appeal No. 1 of 2002 (CAT-DSM)** (unreported), the Court stated:

> *"An application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion, however, has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing".*

The main reason for the delay given by the applicant according to the affidavits, written and oral submissions is that he was not aware that there was a summary judgment and decree in Commercial Case No. 62 of 2015 as he was not properly served. He therefore could not attend and be heard on the matter. The applicant claimed that he was in prison and no summons was served on him and further that he became aware of the summary judgment when he was arrested on 24/05/2017 and this was after perusal of the file at the court. The applicant relied on the judgment in Economic Criminal Case No. 14 of 2010 dated 22/03/2013 to justify that he was imprisoned to serve

four years in prison and that the sentence was confirmed by the High Court in (DC) Economic Appeal No. 1 of 2013. According to the submissions by Mr. Mbuga, after the applicant became aware of the summary judgment he took steps by filing Misc. Commercial Application No. 167 of 2017 to set aside the summary judgment but it was withdrawn because it had defects and hence he termed this as a "technical delay".

Indeed, the applicant, in Economic Criminal Case No. 14 of 2010 was imprisoned for four years from 22/03/2013 and the appeal by the applicant to the High Court in (DC) Economic Appeal No. 1 of 2013 did not succeed hence the sentence of four years was confirmed by the High Court. By reflection these judgments show that the applicant was in prison at the time when Commercial Case No. 62 of 2015 was filed and the order for summons to issue and subsequent service of summons by publication were granted by the court. This is so because, if the applicant's sentence was for four years commencing on 22/03/2013, he ought to have completed his sentence, on March, 2017. Unfortunately, in his affidavits and also the written and oral submissions, the applicant has not shown when he completed his sentence and was released. The skeleton submissions merely state that the sentence was terminated "early 2017". However, it is the procedure that when a prisoner is discharged after serving his term in prison he is given a Release Order. The applicant has not endeavored to produce the Release Order so as to specifically show when he was released in terms of the date in "early 2017". Further, even if by any reason the Release

Order was lost or could not be found, the act of release from prison is a noteworthy event and one cannot forget easily the date or even the month he was released and simply state that it was "early 2017". The applicant has also failed to consider that it was important for the date of release to be known as the applicant may have been released earlier under the remission by the prisons authority according to section 49(1) of the Prisons Act and also presidential pardon. The fact that the applicant did not present the Release Order to show when he was released, and he did not state the specific date and month of his release and his Counsel did not even attempt to lead him to do so, gives an adverse inference that this was a deliberate move intended to conceal the real date of his release from prison. In the circumstances, it is difficult for the court to rely on the general assertion that the applicant was released "early 2017" and agree to the applicant's argument that he was not around when the summons, specifically the substituted service by way of publication, was served. It is the applicant who alleged that he was released "early 2017", so he had the burden to prove, according to section 110 of the Evidence Act, to state the exact date and month he was released. Regrettably, the applicant failed to do so and thus the balance therefore tilts in favour of the respondent that the applicant was actually out of prison and was aware of the substituted service by way of publication hence had knowledge of the subsequent summary judgment. The applicant therefore has not given sufficient reason to warrant this court to grant extension of time to set aside execution, set aside the summary judgment and the decree in Commercial Case No. 62 of 2015.

Mr. Mbuga also argued that the court may extend time on account of illegality. The illegality raised was that the applicant was not given the opportunity to be heard as per Article 13(6)(a) of the Constitution of the United Republic of Tanzania because Order V Rule 12 of the CPC requires a party has to be served individually. As stated hereinabove, the applicant could not have been served individually because no one was found at the address provided by the plaintiff as the building was demolished (see affidavit of process server Annex B to the counter affidavit). The court found it prudent, by virtue of Order V Rule 20 of the CPC, to order substituted service by way of publication and that was done vide the Daily News and Mwananchi Newspapers of 28/07/2015 and 31/07/2015 respectively. Indeed, this was to make the applicant aware of the claim wherever he was. Since the applicant has failed to state with certainty where he was at the time of the publication, then it is, as stated above, clear that he saw the publication and or was made aware of the said suit. Failure by him to appear as per the substituted service could not be referred to mean that he was not given the opportunity to be heard rather the applicant waived this right by failing and or ignoring to enter appearance himself or by a representative. The respondent with the aid of the court did what it could to locate the applicant; first by the physical summons through the process server and secondly by substituted service by way of publication. In this regard, the issue that the applicant was not given an opportunity to be heard has no merit and it is disregarded.

Mr. Mbuga also addressed the court on "technical delays". He said the applicant should not be punished twice as he was already punished when he withdrew Misc. Commercial Application No. 167 of 2017. "Technical delays" were discussed in the case of **Fortunatus Masha vs. William Shija and Another [1997] TLR 154** where the Court of Appeal stated:

> *"A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but has been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

According to the above-cited case, the term "technical delays" would stand where after an order of striking out or dismissal is given, a party immediately files an application but unfortunately the said application is met with technicalities and is struck out. In the circumstances of the present case the principle of "technical delay" cannot stand because, having established that the applicant was aware of the substituted service by way of publication and thus knowledgeable of the summary judgment issued on 04/09/2015 he ought to have taken action immediately. But regrettably there is no proof on record that the applicant took any action until he was arrested two years later on 24/05/2017 which fact invalidates the principle of extreme promptness described in the case of **Zahara Kitindi** (supra).

For the reasons above, I am of a considered view that no sufficient reason has been advanced by the applicant to warrant extension of time to set aside the execution, set aside the summary judgment and decree of Commercial Case No. 62 of 2015.

Having established that there are no sufficient reasons advanced by the applicant for extension of time to set aside the execution, the summary judgment and decree of Commercial Case No. 62 of 2015, then the prayers for orders to set aside the said execution and the summary judgment and decree in Commercial Case No. 62 of 2015 have no legs to stand on and they are accordingly dismissed.

In the result the application is hereby dismissed with costs for want of merit.

It is so ordered.

V.L. MAKANI
JUDGE
12/04/2019

Date: 12/4/2019

Coram: Hon. N.R. Mwaseba – DR

For the Applicant: Present in person

For the 1st Respondent: Absent

For the 2nd Respondent - 7th Respondent: Withdrawn.

CC: Bampikya Mrs.

Applicant:

The case is coming for ruling.

Court:

Ruling delivered on 12/4/2019 in the presence of the Applicant in person and in the absence of the Respondent.

Sgd: N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019

Rights of Appeal is open.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019