IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 257 OF 2018

BHESANIA GARAGE LTD.....1st APPLICANT

TIMBER TONE (T) LIMITED.....2nd APPLICANT

RAMESH RAMJI BHESANIA.....3rd APPLICANT

BHARAT RAMJI BHESANIA.....4th APPLICANT

KISHORE RAMJI BHESANIA.....5th APPLICANT

Versus

EXIM BANK (T) LIMITED.....RESPONDENT

Last Order: 29th July, 2019

Date of Ruling: 17th Sept, 2019

RULING

FIKIRINI, J.

The applicants by way of chamber summons and pursuant to section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 (the Law of Limitation Act) moved this Court seeking for an extension of time within which they can make an application to set aside the *ex parte* judgment and decree dated 28th August, 2018 in Commercial Case No. 18 of 2015. The

application is supported by an affidavit of Bharat Ramji Bhesania, giving out reasons for the delay; that they were not aware of the judgment date and could not get the copies of the necessary documents until the 19th November, 2018

Opposing the application two counter affidavits were filed, one, by Mr. Aaron Mwasaga a Principal Officer of the respondent and the second filed by Ms. Levina Kiiza Phillemon Kagashe counsel for respondent who appeared in Commercial Case No. 18 of 2015. With the two counter affidavits a notice of preliminary objection was as well raised that:

1. The affidavit of Bharat Ramji Bhesania in support of the application is incurably defective for contravening section 8 of the Notaries Public and Commissioner for Oaths Act, Cap. 12 R. E. 2002 as amended.

The notice of preliminary point of objection was later withdrawn by Mr. Gabriel Mnyele counsel for the respondent.

At the hearing of the application which took place on 29th July, 2019, Mr. Omar Idd Omar the counsel who appeared for the applicants prayed their affidavit and their skeleton arguments which was filed under Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 (The Rules) be

adopted and made part of the submission in support of the application, which the Court did. Supplementing the two, it was Mr. Omar's submission that after the *ex parte* was delivered, the applicants requested to be supplied with the necessary documents, to enable them to process their application to set aside the *ex parte* judgment. The documents were supplied on 19th November, 2018. This was followed by the applicants filing this application on 21st November, 2018, thus, if there was any delay, it was of 2 (two) days only upon which the applicants were required to furnish the Court with the reasons. According to Mr. Omar the delayed 2 (two) days were reasonable under the circumstances of the case, otherwise the application was filed promptly without any delay.

Furthering his submission it was Mr. Omar's contention granting of the application would not prejudice the respondent whatsoever, and in case it will the same could be compensated by way of costs. Supporting his position he referred this Court to number of cited cases in the skeleton arguments namely: **Benedict Mumello v BOT, CAT, Civil Appeal No. 12 of 2002, (unreported)** p. 5 -6, where the CAT concluded that an

application for extension of time was entirely at Court's discretion, but only upon furnishing sufficient cause for the delay.

Another CAT case cited was that of **Tanga Cement Company Ltd v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001 (unreported)**, where the Court while admitting that there was no definition of the term "sufficient cause" but from decisions several factors can be considered in granting or not grating the application, such as whether or not the application has been filed promptly; absence of any valid explanation for the delay or lack of diligence on the applicants' part. Other cases were **Haidar Thabit Kombo & 10 Others v Abbas Khatib Haji & Another, Civil Application No. 2 of 2006 (unreported)**, the evidence in support of the application for extension of time have to appear in the supporting affidavit, which what the applicant's affidavit did, argued Mr. Omar.

Mr. Omar also made reference to the case of **Costellow v Somerset County Council (1993) 1 WLR 256** quoted in **Gibb Eastern Africa Ltd v Syscon Builders Ltd & Two Others, Civil Application No. 5 of 2005 (unreported),** where the Court propounded two principles: *one,*

that rules of Court must be observed, and *two,* that a party should not be denied to prosecute his claim on its merits just because of technicalities, unless the default prejudices the other party, for which an award of costs cannot compensate. Overriding principle was not left out and the applicants wanted for its application citing the case of **Yakobo Magoiga Gichere v Peninnah Yusuph, Civil Appeal No. 35 of 2017 (unreported).**

He thus prayed for the application for extension of time to set aside the *ex parte* judgment and decree be granted with costs to abide by the outcome in the main application.

Opposing the application, Mr. Mnyele prayed the two counter affidavits, skeleton arguments as well as the authorities attached be adopted, which the Court adopted and looked at it in considering this ruling. Adding to the above, he submitted that applications of this nature the Court is actually tasked to look at what led for the *ex parte* order in the first place, and second, the reasons for failing to make an application to set aside an *ex parte* judgment timely. The case of **Caritas Kigoma v K.G. Denisi Ltd [2005] T. L. R. 420,** was cited in support.

Canvassing through the affidavit in support of the application Mr. Mnyele pointed out two reasons advanced by the applicants: *one,* that the applicants were waiting for judgment & decree and *two,* that they were not aware of the judgment. According to him those reasons cannot constitute as sufficient reasons for granting an extension of time providing the following reasons that: the applicant's affidavit has not disclosed when the applicants became aware of the judgment, except stating it was by "sheer luck" as averred in paragraph 10 of the affidavit; that there was no date disclosed or letter attached to show when the application for the necessary documents was made. And in absence of those details, and since the Law of Limitation has provided for 30 (thirty) days as per Item 5 of Part III of the 1st Schedule, then the days from 20th August to 19th November, 2018, the applicants were required to account for each delayed day. The case of **Tumsifu Kimaro v Mohamed Mshindo, Civil Application No. 28 of 2017 (unreported) p. 6 -7** was cited to buttress the point.

Mr. Mnyele as well submitted that the applicants have not filed reply to the counter affidavit to controvert the averment by Mr. Mwasaga in paragraph 10 of his counter affidavit. He referred this Court to the case of **John**

Chuwa v Anthony Ceaser [1992] T. L. R. 233, p. 234. To him this therefore means that the facts stated stand unchallenged and thus can be deduced that the applicants were aware of the judgment. Countering on the blame placed on the applicants' counsel by the applicants, it was Mr. Mnyele's submission that the blame cannot be shifted as the applicants had a primary duty of following up on their case. In support of this assertion, Mr. Mnyele cited the case of **Exim Bank (T) Ltd v Zawadi Masala, 2017 TLSLR, p. 3,** where the Court discussed the obligation of the parties to follow up their cases.

Refuting the submission that the applicants have been denied right to be heard, he asserted that not to be an issue since the applicants were negligent to follow up on their case and also that has not been stated in the affidavit deponed. Addressing the submission on overriding principle he contended that the principle cannot be applied where there was a specific law in that regard. Consequently the applicants could not rely on the principle to rescue their case while they had 30 (thirty) days which they could not use. Fortifying the position the case of **Mwalimu Amina Hamisi v National Examination Council, Civil Appeal No. 20 of**

2015, CAT (unreported), where overriding principle has been discussed in pages 12, 13, 14 and 15, and the situations under which the principle can be applied illustrated.

With the above submission he urged the Court to dismiss the application.

Rejoining the submission, Mr. Omar basically reiterated his earlier submission, but specifically responding to Mr. Mnyele's submission he contended that part of Mr. Mnyele's submission was premature as the present application was only for extension of time to set aside *ex parte* judgment. As for the present application he submitted that paragraph 11 of the affidavit in support stated the reason for the delay, the contention which was not disputed in the counter affidavit deponed by Mr. Mwasaga, that it was until 19th November, 2018 the applicants were supplied with copies of the necessary documents. So the only time the applicants were supposed to account for was from 20th to 21st November, 2018. On this it was their submission that this application was filed immediately just after receiving the documents which shows they were serious in dealing with the matter.

Arguing on filing a reply to the counter affidavits, apart from it not being a must but at this stage what they were obligated to do was show that they promptly brought the application, argued Mr. Omar. In view of the submission he urged the Court to grant the application.

Applications for extension of time are in nature discretionary. The Court in exercising those discretionary powers has to be mindful of acting judiciously and in accordance to the rules of reason and justice and not according to private opinion or arbitrarily. And in order for the Court to do so there has to be information placed before it for scrutiny.

Sufficient cause or reason is one of the pre-condition to the grant of an extension of time. Although so far there is no exact definition of what amount to "sufficient cause" or "reason", but with time the Court of Appeal has come out with decisions giving guidelines of what should be considered as sufficient cause or reason. The list is not exhaustive but suffices. The cases of **Mumello** (supra), **Tanga Cement Company Limited** (supra) and **Yusuf Same & Another v Hadija Yusuf, Civil Application No. 1 of 2002, CAT (unreported),** cited by the applicants as well as the respondent are amongst the relevant cases as far as extension of time is

concerned. In all three cases cited above the Court spelt out factors or rather indicators which can assist in arriving at the conclusion as to whether the applicants have advanced sufficient reasons or not warranting the grant of the application before it or not. Accounting for each delayed day being one of them.

Having laid down the governing principles let me now examine if the application before this Court is meritorious or not. The applicants in their application stated two reasons for the delay: *One*, that they were waiting for copies of judgment and decree, and *two*, that they were not aware of the judgment date. The second reason was averred in paragraph 10 of the deponent affidavit. For ease of reference the paragraph is reproduced below:

> *"That it was out of sheer luck and coincidence that I became aware of the same, well after the hearing had finished and judgment delivered. No notice on the delivery of the judgment was issued to the applicants herein"*

Ordinarily the two stated reasons would have constituted as a good or sufficient cause, once backed by evidence. Although the applicants contended that they were waiting for copies of judgment but failed to give the date when those documents were requested from the Court. This could have been done by annexing a copy of a letter as proof.

In addition, in paragraph 10 of the applicant's affidavit, the deponent stated that he became aware of the judgment by "sheer luck" without disclosing when he got the information, how or by who and how did they process it. The applicants by failing to state as to, when they learnt of the information that the judgment has already been delivered or when did they write the Court requesting to be availed with the necessary documents, made it difficult for this Court to compute if there was delay and if any of how long. Despite what is stated above, the applicants were not being absolved from the requirement to account for each delayed day, the obligation which they have as well failed to fulfill. Accounting of each delayed day was again restated in the case of **Tumsifu Kimaro** (supra) where the Court underscored the requirement.

Furthermore, while I agree that filing a reply to the counter affidavit was not a legal requirement, but it is an avenue whereby facts deponed in the counter affidavit can be countered. Once that opportunity has not been used and facts in the counter affidavit not controverted, those facts in the counter affidavit will inevitably be considered as correct and true. And that is how this Court is going to treat the averrement in paragraph 10 of counter affidavit deponed by Mr. Mwasaga. From the deposition the Court fixed hearing on two consecutive days that is the 18th and 19th June, 2018 in the presence of the applicants' advocate one Joseph Sungwa from Bulwark Attorneys. On those dates no one appeared for the applicants. The matter was rescheduled the next day when again none of the applicants or their advocate entered Court appearance. The Court proceeded to fix the matter for hearing *ex parte* on 18th July, 2018. Between 19th June 2018 and 18th July, 2018 there was ample time for the applicants to arrest the situation had they wished, but nothing occurred.

Ms. Kagashe for the respondent twice wrote the applicants through their counsels as exhibited in Exim 1 a letter dated 3rd July, 2018 and Exim 2 a letter dated 16th August, 2018 informing the applicants, of the Court

appearance dates including the judgment date. The uncontested letters were attached to the counter affidavit of Mr. Mwasaga and affidavit of Ms. Levina Kagashe deponed in support. The fact the applicants counsel was in Court when the matter was set for hearing on 18th June, 2018, and the two letters from Mnyele, Msengezi & Company Advocates dated 23rd July, 2018 – Exim - 1 and that of 16th August, 2018 – Exim 2 were in my view sufficient proof that the applicants through their counsel Mr. Joseph had sufficient notice. What was going on between the applicants and their counsel is beyond Court's reach. Having stated so, I still strongly believe that hiring a counsel does not stop a party from following up on their cases before the Court. I thus agree to Mr. Mnyele's submission that the applicants cannot wholly blame it upon their counsel, as they had a primary duty of following up on their case. And this could have been done by either checking with their counsel on the progress of the case or them or one of them following up closely by attending to the Court sessions.

Following in the **Exim** decision (supra), where the Court of Appeal discussed a role and obligation of a party to their case, I without doubt conclude that the applicants were duly informed of the judgment date

through their counsel. Added to this is the fact that the applicants failed to take charge of their case, they are thus themselves to blame.

The cases of **Mumello, Tanga Cement and Haidar** (supra) all cited by the applicants had categorically pointed out, that extension of time may be granted upon furnishing of sufficient reasons or cause. Similarly, in the case of **Haidar** (supra) cited by the applicant, the Court stressed on the reasons advanced would be evidential and have to appear in the affidavit deponed in support of the application. That has unfortunately not been the case as the affidavit deponed by Bharat Ramji Bhesania on behalf of other applicants was lacking and could not as such support the application as pointed out earlier in my ruling.

Equally the assertion by Mr. Omar, that the applicants were denied right to be heard apart from not being stated in the affidavit but the account is not supported. The applicants neglected to use the opportunity availed to them. Likewise, the contention that overriding principle should be invoked pursuant to the Amendment of the CPC, as Written Laws (Miscellaneous Amendment) (No. 3) Act. No. 8 of 2018 [Act No. 8 of 2018], I find this case not fitting the situation. The applicants had all the time available to

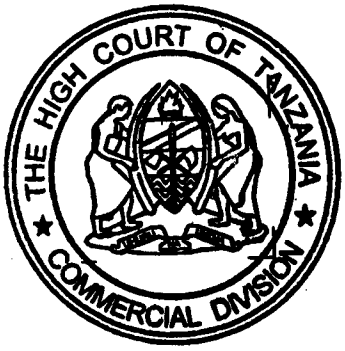
them but for the reasons best known to themselves did not seize the opportunity. In the case of **Mwalimu Amina** (supra), the Court faced with the situation had this to say:

> *"...the overriding objective principle cannot be applied blindly against the mandatory provisions of the procedural law which goes to the very foundation of the case"*

Period of limitation upon which one can institute an application for an extension of time as provided under the Law of Limitation that it has to be within 30 (thirty) days is a mandatory requirement. This is my view goes to the root of the matter. But even with being within the period 30 (thirty) days prescribed by the Law of Limitation still the applicants are obliged to furnish the Court with sufficient cause or reason for the delay. The case of **Yakob Magoiga Gichere** (supra), cited by the applicants is distinguished. The spirit of the Land Disputes Act, Cap. 216 R.E. 2002, was to enhance peace and tranquility in the society. The procedures established for the Ward Tribunals was to cater for simplicity and not complex procedural aspects, which is different from other Court especially the High Court,

whereby application of procedures in place, particularly the mandatory ones are to be observed. The circumstances under this application in my view do not warrant invoking the overriding objective principle.

For the foregoing, I find this application devoid of merits and consequently dismissed with costs. It is so ordered.



P.S.FIKIRINI

JUDGE

17th SEPTEMBER, 2019