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

MISCELLANEOUS COMMERCIAL APPLICATION NO. 47 OF 2020

LYCOPODIUM TANZANIA LTD.....APPLICANT

VERSUS

POWER ROAD (T) LIMITED.....1st RESPONDENT

PANGEA MINERALS LTD.....2nd RESPONDENT

PETROFUEL (T) LIMITED.....3rd RESPONDENT

RULING

Date of Last order: 16/10/2020
Delivery of Ruling: 30/11/2020

NANGELA, J:.,

This is a ruling in respect of an application for extension of time filed by way of a Chamber Summons supported by an affidavit of Ms. Linda Bosco, dated in Dar-es-Salaam on the 29th July 2020. The Chamber Summons was filed under *Order XLIII rule 2 of the Civil Procedure Code, Cap.33 [R.E.2019] (as amended)* and section 14

(1), and 21 (2) of the *Law of Limitation Act, Cap.89 [R.E 2019].*

In this Application, the Applicant is seeking for the following Orders of the Court:

1. *That, the Court be pleased to extend the time within which to file an application for setting aside the ex-parte Decree dated 24th October 2014; and*
2. *The Honourable Court be pleased to exclude the time between October 2019 to 15th April 2019 as such time was used by the Applicant to defend an appeal and prosecute a cross-appeal which was filed in the Court of Appeal of Tanzania.*
3. *That, the costs of the application be in the cause.*

At first, this Court made a ruling, dated 23rd July 2020, which allowed the Applicant to file a fresh affidavit owing to some irregularities noted in the earlier affidavit filed in this Court, which irregularities, though not substantial in nature, had attracted a notice of preliminary objections from the 3rd Respondent. A fresh affidavit was filed, as per the orders of this Court dated

23rd July 2020. The 1st and 2nd Respondents did not file counter affidavits as they do not intend to oppose the application. However, the 3rd Respondent filed its counter affidavit on 05th August 2020. A reply affidavit was filed on 12th August 2020.

Since the pleadings were now completed, the matter was scheduled for hearing on 17th September 2020. However, for other reasons, the hearing was rescheduled to 12th October 2020.

On that material date, the Applicant enjoyed the services of Ms Janeth Njombe, learned advocate, while Ms Kivuyo, learned Advocate, appeared for the 2nd Respondent and Mr Bavoo Junus, learned advocate appeared for the 3rd Respondent. The 1st Respondent was absent. On such a material date, the matter could not proceed orally as the parties prayed that the same be disposed by way of written submissions. This Court granted the prayer and proceeded to issue the following directives, that:

1. *the Applicant should file its written submission on or before 26th October 2020;*
2. *the 3rd Respondent should file its Reply to the Applicant's submissions on or before 9th November 2020; and*
3. *the Applicant shall file rejoinder submission, if any on or before 16th November 2020.*
4. *Ruling to be delivered on 30th November 2020 at 9.00 am.*

The parties duly complied with the directives of this court. Since the matter had earlier been set of oral hearing of the parties, the learned advocates for the parties had also filed their skeleton arguments. I will also consider them alongside the Chamber summons, the affidavit and the counter affidavit as well as the written submissions.

In her submission in support of the Application, Ms Bosco submitted that, the matter before the Court is for orders that grant an extended period within which the Applicant will be able to apply to the Court for an orders setting side an *Ex-parte Decree* of this Court in *Commercial Case No.29 of 2012*, issued on the 24th day of

October 2014. In terms of section 14 (1) of the Law of Limitation Act, Cap.89 R.E.2019, she submitted, this Court may extend the period of limitation for the institution of an application, either before or after the expiry of the prescribed period.

Although extension of time is a matter in the full discretion of the Court, Ms Linda argued, it is also trite law that, in an application for extension of time like the one at hand, the Court should look into whether sufficient reasons have been given to warrant the exercise of its discretionary powers. To backup her submission, this Court was requested to be guided by the decision of the Court of Appeal in the case of **William Shija vs. Fortunatus Masha [1997]TLR 213**.

Ms Linda submitted that, the Affidavit in support of the Chamber Summons has disclosed three main reasons regarding why the application for extension of time should be granted. The grounds are as follows:

> *(i) the Applicant not being served with a summons to appear or enter defence;*

(ii) the delay being contributed by the lack of knowledge of the existence of the case (Comm. Case No.29 of 2019) and by the bonafide prosecution of an appeal and cross appeal in Civil Appeal No.96 of 2015; and

(iii) that the e ex-parte judgement of the Court is tainted with illegalities.

Expounding more on the above stated reasons, Ms Linda submitted, as regards the first ground, that, there is no record at all to demonstrate that Applicant was ever served with a summons to appear or file a defence as required under *Rule 15 of the High Court (Commercial Division) Procedure Rules, 2012 (as amended 2019*).

Ms Linda maintained that, regardless of an Order of this Court fated 21st March 2012 requiring the 3rd Respondent to serve the Applicant (2nd Defendant) and other Defendants therein, the 3rd Respondent failed or neglected to serve the Applicant.

She further contended that, on 11th July 2012 this Court did order the 3rd Respondent to effect substituted service but the record of the Court, which was entered on the 27th August 2012 noted that, there was no evidence

on record that the Applicant had been served through substituted service either. She submitted, referring to *Rule 17* (1) and (2) *of the High Court (Commercial Division) Procedure Rules, 2012 (as amended 2019*), that, the 3rd Respondent never complied with that rule, since, had he done so the Court would have noted in its record.

Relying on the case of *Mohamed Nassoro v Ally Mohamed [1991] TLR 133*, Ms Linda submitted that where there is proof that there was no proper service, it will be proper to set aside an *ex-parte* judgement. She contended, therefore, that, since the Applicant was not properly served, the application should be allowed to provide room to the Applicant to apply to the Court to set aside the *ex-parte* Decree.

She argued, therefore, that, although the 3rd Respondent claim to have served the Applicant by way of a publication, that publication was not in-line with the orders of the Court when granting leave to effect substituted service and was improper under the law as

the 3rd Respondent failed to provide proof of service at that material time.

As regards the importance of proving service and what should be done to effectively prove that service was effected, the learned counsel for the Applicant relied on what the Court of Appeal emphasized in case of ***Ramadhani Haji Abdulkarim vs Harbart Mwara and Family Investment & 3Others, Civil Appeal No.88 of 2015 (CAT DSM) (unreported)***.

She concluded, therefore, that, presentation of the publication which is not part of the record of the Court in Commercial Case No.29 of 2012 at this time is not only impugning but also improper as the 3rd Respondent ought to have complied with the requirement to prove effectuation of the substituted service at the material time and not otherwise in this Application.

As regards the second reason, Ms Linda submitted that, the Applicant was only made aware of *Commercial Case No. 29 of 2012* on 29th October 2019 when the 2nd Respondent served the Applicant with the memorandum

and record of Appeal in *Civil Appeal No.96 of 2015* which was pending at the Court of Appeal. This was already 5 years after the ex-parte Decree had been issued. She contended that, had it not been the appeal, the Applicant would not have a chance of knowing about the *ex-parte* judgment.

It was the learned counsel's further submission that, from the time the Applicant become aware, the Applicant got involved in the prosecution of the *Civil Appeal No.96 of 2015 (and its cross-appeal)* which were then struck out by the Court of Appeal on 15th April 2020.

She submitted further that, in terms of section 21(2) of *the Law of Limitation Act, Cap.89 R.E 2019,* the Court should be pleased to exclude the time which the Applicant took to prosecute a matter founded on the same cause of action in good faith. Relying on the Court of Appeal decision in the case of ***VIP Engineering & Marketing Ltd and 2Others vs Citibank Tanzania Ltd, Consolidated Civil References No.6, 7 and 8 of 2006,*** Ms Linda submitted that extension of time could

be granted provided that the delay was not caused by contributory or dilatory conduct of the Applicant. In that decision, the Court had relied on the case of ***Shanti vs Hindoche & Others [1973] EA 2017.***

Concerning the 3rd reason as to why this Court should grant the orders sought in this application, the Applicant's learned counsel submitted that, the *ex-parte* judgement is tainted by illegalities. Such illegalities are said to be that, the Applicant was not served with summons or the Plaint or any other notification whatsoever regarding the pendency of the matter and that, the Applicant was condemned unheard.

Referring to the Court of appeal decision in ***VIP Engineering (supra)*** it was submitted that, illegality once raised is a sufficient ground to grant extension of time. She, therefore, prayed that, this Court should be pleased to grant the application.

In reply to the submissions made by the Applicant, the learned counsel for the Respondent adopted an earlier skeleton argument filed in this Court. Together

with his reply submissions, the learned counsel submitted, in the first place, that, it is an utter misconception to cite rule 15 and 17 of the High Court (Commercial Division) Procedure Rules, 2012 as the Applicant seems to have cited such rules in paragraphs 4, 5 and 6 of the her submissions in support of her Applicant is misconceived.

He submitted that, while the Commercial Case No.29 of 2012 between the parties was filed in March 21st 2012, the rules cited by the Applicant came into operation in July 2012. As such, when the Court made an order of substituted service on 11th July 2012, the Rules were not yet in force.

It was also submitted that, the substituted service by way of a publication in the Daily News was properly undertaken as evidence in annexure PFTL-3. The learned counsel for the Respondent submitted that, the Applicant was in no way prejudiced by a two days delay of such a publication. He submitted that such a publication was effected on 20th July 2012 while the Court's Order to

proceed *ex-parte* was made on 14th March 2014 (almost two years after the substituted service by way of publication in the Daily News was effected).

It was argued further that, the decision of this Court to proceed ex-parte in Commercial case No.29 of 2012 was not solely based on the Applicant's absence but that, the Court was mindful of the non-appearance of the 1st and 2nd Respondents also.

The 3rd Respondent went ahead to distinguish the case of **Ramadhani Haji (supra)** arguing that the case was wholly irrelevant. He distinguished it on the ground that the major issue in that case was failure to serve a Respondent as required by Rule 90(2) of the Court of Appeal.

As for the second and third grounds, as argued by the Applicant, it was the Respondent's submission that, the Applicant has not advanced sufficient cause to warrant any grant of extension of time. He also submitted that the application does not qualify for exclusion of time. In the first place, it was submitted that, the Applicant has

not been able to account for the 1826 days of delay and such delay was an inordinate delay.

To buttress his point, the learned counsel for the Respondent referred this Court to the case of **Bushiri Hassan vs Latifa Lukio Mashayo, Civil Application No.3 of 2007** where the Court of Appeal was of the view that delay, even of a single day must be accounted for.

Furthermore, it was submitted that, the Applicant decision to opt for a cross-appeal instead of applying to this Court to have the ex-parte judgement set aside was a sheer act of negligence which cannot be condoned by the Court and cannot be a ground for extension of time. This Court was referred to the case of **Tumsifu Elia Sawe vs Tommy Spades Limited, Civil Case No.362 of 1996 (unreported)** and **Umoja Garage vs Nationl Bank of Commerce [1997]TLR 9; Transport Equipment vs DP Valambhia [1993]TLR 91.**

The learned counsel for the Respondent also submitted that the Applicant has failed to pinpoint the illegality of the decision. He contended that, a point of

illegality must be readily discernible and has to do with the appropriateness of the Court's decision or order. The Respondent relied on the case of **Adbul-Rahman Saleman Islam vs Africarriers Ltd, Misc. Comm. Appl. No.203 of 2018 (unreported)** as well that of **Lyamuya Construction Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Appl. No.2 of 2010 (unreported)** to support his contention.

Relying on the case of **Leslie Douglas Omar v Exim Bank (T) Ltd and Another, Misc. Commercial Application No.353 of 2017 (unreported)**, it was contended that, a party's failure to appear after a substituted service has been duly issued could not be referred to mean that such a party was denied opportunity to be heard but rather has waived such a right by failing and ignoring to enter appearance himself or by a representative.

It was also the submission of the Respondent that the application does not qualify to benefit the exclusions

allowed under section 21 of the Law of Limitation Act. The reasons advanced are that it has not been able to fulfil the requirements of exhibiting that there was due diligence in prosecuting the appeals (**Civil Appeal.No.96 of 2015**), existence of same parties and for the same reliefs, and defects in jurisdiction.

The Respondent relied on the decision of this Court in **Deodat Dominic Kahanda & Edith Abdallah Kahanda vs Tropical Fisheries (T) Ltd & 2Others, Misc. Comm. Appl. No.200 of 2017 (unreported).**

The Respondent's counsel distinguished the cases relied upon by the Applicant, in particular the case of **VIP Engineering and Marketing Ltd v Citibank Tanzania Ltd (supra)** arguing that the other party was not a party to the winding up proceedings for which a petition had led to the annulment of debentures which had previously been issued in favour of the Citibank. He argued that not every error amounts to an illegality. As such, the Respondent urged the Court to dismiss the application in its entirety and with costs.

On 16th November, 2020 the Applicant's legal counsel filed a rejoinder submission. In her rejoinder submission, she submitted that, the fact that the Commercial Court rules came into force after the Court had made the Order for substituted service does not do away with the requirement to prove that service was duly effected as ordered by this Court.

She relied on Order V rule 18 of the Civil Procedure Code, Cap.33 R.E 2019 on the need to prove that service was effected to the other party. She reiterated her submission in chief and on the relevance of the cases of **Mohamed Nassoro v Ally Mohamed [1991] TLR 133** and that of **Ramadhani Haji (supra)** which laid emphasis on the issue of proof of service.

It was further submitted that, the claim that the Applicant was served by way of substituted service is nothing but a fallacy. It was argued that, the copies of publications attached annexed to the Respondent's Counter Affidavit as PFTL-3 are not evidence that the Applicant was served but merely that there was a

publication of a summons on 20th July 2012, and that, the same does not amount to proper service.

The Applicant's learned counsel held that view due to the reasons that, (i) the summons was published in contravention of the orders of this Court; and (ii) there was no proof of service filed in Court.

She submitted, therefore, that an *ultra-vires* execution of a publication which was not returned to the Court to prove that service was effected as ordered cannot, in any legal sense, stand as proper service. For such a reason, she reiterated her submission that the Applicant was never served, and, hence, only became aware of the existence of the *ex-parte Decree* in Commercial Case No.29 of 2012 on 29th October 2019.

As regards the averment that the Applicant was not prejudiced by the two days delay in publishing the substituted service, the Applicant's legal counsel rejoined that, far from that fact, the Applicant was prejudiced because that forms part of the chain of actions that ended up with an *ex-parte Decree* being issued.

The learned advocate for the Applicant brought to the attention of this Court the case of **Tanzania Breweries Limited v Edson Dhobe, Misc. Application No.96 of 2006(unreported)** which was quoted with approval in the case of **Tabitha Maro vs Rddy Fibre Solutions Limited, Civil case No. 124 of 2018 (unreported)** in which this Court emphasized on the need to strictly comply with the Court Order once issued.

In her rejoined submission, the counsel for the Applicant reiterated further that, at no point was the Applicant properly served with the summons to appear in Comm. Case No.29 of 2012. She submitted that, if that was the case, the Counsel for the Plaintiff in that case would not have once again sought for leave to serve the Applicant by way of substitute serves.

As regards the fulfilment of the requirements under sections 14 (1) and 21(2) of the Law of Limitations Act, Cap.89 R.E 2019, it was the submission of the learned counsel for the Applicant that all conditions were

met and the Court can safely exercise its discretion. As such, it was argued that the cases cited by the learned Counsel for the Respondent in his reply submission are in support of what has already been established by the Applicant. She denounced the alleged negligence on the part of the Applicant and distinguished the cases of **Deodat Kahanda (supra); Abdul-Rahman's Case (supra), Umoja Garage (supra)** and **DP Vhalambia's case (supra)**, as being utterly distinguishable.

The learned Counsel for the Applicant rejoined further that, there was no proof of service filed in the Court showing that the Applicant was indeed served and, reliance was placed on the case of **Haroon Mulla v Philip Dubeau, Civil Appeal No.158 of 2018 (CAT) DSM, (unreported)**, on the importance of proof of service. She submitted that, the Applicant fully qualifies for the exclusion of time under section 21(2) of the Limitations Act having satisfied the requirements therein.

She finally requested this Court to grant the application noting that, the alleged illegality in this matter

is on its own sufficient to warrant an extension of time being granted, citing the cases of **VIP Engineering (supra)**; **Hassan Abdulhamid v Erasto Eliphate, Civil Appl.No.402 of 2019, CAT, DSM** (unreported), **TANAPA v Joseph K Magombi, Civil Appl.No.471/18 of 2016, CAT-DSM** (unreported) and **Seif Store Ltd v Zulfikar H. Karim, Civil Appl.No.181 of 2013**, CAT- DSM (unreported).

Having carefully gone through the summarized submissions of the learned counsel for the parties herein, as well as the Chamber summons and the affidavits/Counter affidavit filed in this Court, the question which I am tasked with is whether the application has demonstrated sufficient cause to warrant it being granted.

As clearly indicated in the Chamber summons, the application has been preferred under *Order XLIII rule 2 of the Civil Procedure Code, Cap.33 [R. E. 2019] (as amended)* and section 14 (1), and 21 (2) of the *Law of Limitation Act, Cap.89 [R.E 2019].*

Section 14(1) of the Law of Limitation is about the issue of extension of time while section 21(2) has been cited to support a prayer for exclusion of time spent while the applicant was engaged in other matters related to the application in other forum.

While it is clear that the requirements of Order XLIII rule 2 are fully met, issue that remains is whether the requirements under section 14(1) and section 21(2) of the Law of Limitation Act Cap.89 have been fulfilled. Section 14 (1) of the Law of Limitation Act provides as follows, that:

> *'Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.'*

As correctly stated by both learned counsels for the parties herein, if the Court's discretion is to be exercised under section 14(1), what is required is that the applicant

for an application for extension of time must demonstrate reasonable or sufficient cause for the delay or reasons regarding why he or she was unable to act within the prescribed period. Several cases have been cited by both parties herein which are relevant for consideration in this application.

In her submissions and the supporting affidavit, the Applicant's learned counsel has delved on three grounds regarding why the application should be granted. In particular, it has been contended that:

(i) the Applicant was not served with a summons to appear or enter defence;
(ii) the lack of knowledge of the existence of the case (*Comm.* Case *No.29 of 2019*) and by the *bonafide* prosecution of an appeal and cross appeal in *Civil Appeal No.96 of 2015*, delayed the filing of this application was; and
(iii) that the *ex-parte judgement* of the Court which the Applicant will seek to be set aside is tainted with

illegalities. The Respondent has countered all these grounds as being inadequate and baseless.

In her affidavit filed in this Court to support the Chamber Summons, the applicant states, under paragraph 17 that, the intended application to set aside the *ex-parte decree* raises issues of illegality as the Court Proceedings annexed to the affidavit as LTL-1 are not showing any evidence received in Court that service was effected to the Applicant before the *ex-parted order* was made. In support of her averments this Court was referred to the cases of **VIP Engineering (supra)** and **Hassan Abdulhamid (supra)**.

Although the Respondent's legal counsel has sought to have these cases distinguished from the case at hand, it is a well established principle, as well captured in the **VIP Engineering case (supra)**, that:,

> *'a claim of illegality of the challenged decision constitutes sufficient reason for extension of time ... regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.'*

While it is not the right opportunity for this Court to examine the nature of the alleged illegality in this application (as doing so will be pre-emptying the intended application) it suffices to note that the Affidavit filed by the Applicant in this Court has raised that as a ground upon which the application for extension of time is based.

In my view, that ground alone, is a sufficient ground under section 14(1) of the Law of Limitation Act, Cap 89 R.E 2019, to warrant the granting of the prayers sought. (See the cases of **Hassan Abdulhamid (supra) and TANAPA (supra)**.

In view of the above, I see no reason why I should delve on the other issues raised in the submissions made by the parties as I am satisfied that, even on the alleged ground of illegality alone, this Court can exercise its discretion and allow the application for extension of time. In the upshot, this Court settles for the following orders:

(i) That, the application for extension of time within which to file an application for setting aside the Ex-

parte Decree dated 24th October 2014 is hereby granted.

(ii) The Applicant is hereby directed to file the intended application for setting aside the Ex-parte Decree dated 24th October 2014 within twenty one days (21) days from the date of this ruling (i.e., on or before 21st December 2020).

(iii) The Application is allowed with ***no orders as to costs****.*

Order accordingly*.*

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)
30 / 11 /2020