IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 91 OF 2022.

QUALITY GROUP LIMITED.....APPLICANT

VERSUS

EASTERN AND SOUTHERN AFRICA TRADE AND DEVELOPMENT BANK T/A TRADE AND DEVELOPMENT BANK (TDB).....RESPONDENT

RULING.

Date of last Order: 17th August 2022.

Date of Ruling : 8th September 2022.

MARUMA, J.

The Applicant before this Court is seeking for an extension of time to file notice of appeal out of time so to challenge the Judgment and the Decree in Commercial Case No. 174 of 2018. The application is made under section 11 (1) of the Appellate Jurisdictions Act, Cap 141 R.E 2019 and section 95 of the Civil Procedure Code, Cap 33 R.E 2019. The application is supported by the affidavit deposed by Eliya Rioba, a representative of the Applicant filed in Court on 10th June 2022. On the

other hand opposing the application, the respondent filed a counter affidavit deponed by Pladius Mwombeki, advocate which was filed in Court on 6th July 2022.

The matter was scheduled for hearing on 17th August 2022, whereby the parties were represented by advocate Elia Rioba for the Applicant and advocate Pladius Mwombeki for the Respondent.

Adopting his affidavit, reply to counter affidavit, and skeleton written arguments, Mr. Eliya briefly submitted that the application for extension of time is focused on the ground of illegality. He pointed out that there were two illegalities which the applicant thought would be sufficient enough to grant this application. Highlighting the first one, he pointed out that it is an issue of the choice of forum clause (contract clause) part of the facility agreement which led to the existence of the Commercial Case 174 of 2018. He submitted that the said clause requires that any dispute between the parties in all matters relating to facility agreements shall be governed under the laws of England and that the rules of reconciliation and arbitration of the International Chamber of Commerce consensus on to seek redress rather than institute a commercial suit in the High Court of Commercial. He referred this Court to the decision of the Court of Appeal in the case of, **Scova Engineering**

ASEA & Another vs Mtibwa Sugar Estate Limited & Three Others, Civil Appeal No. 133 of 2017. The issue was discussed at length but will point few lines pg 16 from paragraph 2 from line 1-8 lines. He argued that, it was the respondent assertion through their counter affidavit that the choice of forum clause has been wrongly interpreted and according to the several variations to the facility agreements. The respondent was right to file the commercial suit to this Court since it is for realisation of security attached to under the facility agreement. He further clarified by defining the term dispute as per law dictionary 11th ED 593, which defines the term dispute to mean a conflict or controversy especially one that has given rise to particular law suit. He submitted that since the clause is explicitly and specifically, requires that any dispute in any matter relating to the agreement should be regulated according to the clause it is the applicant position that filling of law suit under this court in commercial case no. 174 of 2018 is contrary to the parties' autonomy and the court should not entertain the suit.

On the second ground of illegality, It was his submission that the service of statutory notice provided under section 127 of the Land Act, Cap 113. The law requires that whenever there is default of payment of

any interest or payment on un fulfillment of any conditions in secured mortgage, The mortgagee shall serve the mortgagee a notice in writing of such a default. He stated that in Commercial Case No.174 of 2018, the Plaintiff in that suit attached the document in the plaint labeled as CRB-5, which according to the plaint is the notice of payment default dated July 13th, 2018. It is attached as QGL-4 on the part of the mortgagor is plain as the plaintiff did not indicate in any para in the plaint on the modality used to serve the mortgagor. He also argued that the respondent in the counter affidavit has come in assertion that service was served through postal or facsimile service and that the respondent in the counter affidavit has attached a receipt to support their stand. It is the applicant's position that since in the original suit the plaintiff did not show to the Court that a notice of default was served to the mortgagor, the respondent's stand is an afterthought or attempt to add new evidence to a case which had already been determined by this Court. He submitted that it is the applicant's prayer that stand be disregarded and this application be allowed with costs.

Opposing the application, Mr. Pladius Mwombeki, advocate for the respondent, responded to the grounds submitted by the advocate for the respondent, starting with the second ground on statutory notice.

He submitted that the applicant is misleading this Court as the service was dully served as seen in the annexure CRB-1 collectively on pg 17 & 18. He clarified that the mortgage deed provides for the modality of the services and this claim is new evidence and at no point in the reply to the counter affidavit or submission, the counsel questioned the mode of service, but rather it is an afterthought, which is not what is in the counter affidavit and skeleton of argument and he prayed to be adopted.

On the first ground, Mr. Mwombeki began by interpreting what constitutes or defines a dispute or controversy, citing the Black Dictionary 8th Ed., page 505. He clarified that from the financial point of view, the relationship between the applicant and respondent was eminent from the sister's company, where the applicant was the 3rd mortgage. The question is whether there is a repayment default. Is it an agreement or is it a conflict? He pointed out that their stand is that it is not a dispute or disagreement or conflict. Therefore, the act of the respondent instituting a suit is her right as stipulated in the Mortgagee at pg 19. The last 4-5

lines give the picture. The choice of forum explicitly provides a choice of law to be used, and the interpretation is either the law of Tanzania or the place where the dispute arose. He also insisted that there was no dispute that there was only a non-repayment default, which was not disputed. In the event of realisation, the laws of Tanzania allow the mortgagee to initiate receiving proceedings. He added that in the event the Applicant had thought they did not agree with the loan amount outstanding or the appointment was not proper or the initiation of receivership over her property, that would be a dispute, but that is not at all. He referred this Court to the two cases of **Leocadia Rugambwa vs Asia Mzee Mkwanga & Another, Misc. Land Case No.476 of 2019** at pg 9 which made reference to **FINCA (T) Limited vs Kipondogoro Auction Mart vs Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 at pg 10. All these had discussed the issue of illegality and what entails to warrant an extension of time that the principle is that illegality should be on the face of record and not the one need evidence. He submitted that the application at hand does not reach the test set out in the two cases and also the applicant is hiding behind the texts of granting the extension, and n o counting of delays.

Evaluating the submissions and arguments made by the advocates on both sides, as well as the affidavits in support and opposition to this application, I have only one task to determine if there are good grounds established to warrant the extension of time requested based on the tests and principles vastly provided by case law.

Observing the submissions made by the counsel herein, the central issue of this application is on the ground of illegality focused on two issues, one on illegality on the choice of forum clause and the second on the mode of service of statutory notice.

In determining this issue, I have been guided by the principles of granting an extension of time based on the ground of illegality such that, the alleged illegality must be apparent on the face of record as directed in the case of **FINCA (T) Limited** (supra) cited by the respondent. Applying this principle to the matter at hand, I have to consider the argument made by the Applicant that there is a clause in the contract which guides the parties into the loan agreement on choice of forum. Having perused the record in support of this application, I have seen the agreement which is alleged to have the clause of choice of forum under Article XIV of the agreement. The said clause demonstrates how the

parties could **settle the dispute between themselves amicably and in case they failed, the parties shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules**. The contended argument by the respondent is that there is no dispute so to make the parties go with the clause. The respondent's stand is that there is no illegality and the choice of forum explicitly provides a choice of law to be used and interpretation is either the law of Tanzania or where the dispute arose. He also insisted that there was no dispute between the parties and what the respondent is claiming is a realisation that the laws of Tanzania allow the mortgagee to initiate receiving proceedings against non-repayment default, which was not disputed.

Also, moving to the issue of statutory notice, which is alleged to be served contrary to section 127 of the Land Act, Cap 113 which requires that, whenever there is a default in payment of any interest or payment on unfulfilled conditions in a secured mortgage, the mortgagee shall serve a mortgagor a notice in writing of such default. The respondent contested this argument by clarifying that the mortgage deed provides for the

modality of the services and the claim is new evidence as it is not covered in the counter affidavit or submission made by the counsel but rather it is an afterthought.

I have gone through the affidavit and found this issue adduced under paragraph 7, whereby the applicant alleged that the notice of default was not served upon the Mortgagor and or guarantor. However, I failed to locate the said notice OGL-4 as indicated in paragraph 7. Besides reading paragraph 9 of the counter affidavit, the respondent contested the applicant's argument that they were properly served as the notice was sent to the applicant through postal services, attaching the said notice and the EMS receipt as annexure CRB 1. Moreover, in the same paragraph, the respondent adduced the fact that the applicant was served through the accepted means in the facility letter and mortgage deed. Having gone through the referred documents, it is indicated in the facility letter that the notices shall be in writing and delivered personally or by mail or facsimile. The mortgage deed under clause 5.2 provides for any demand or notice to be addressed at the place last known to the Mortgagee or change of address of the mortgagee, which should be communicated to the mortgagee in writing.

Looking at the above arguments and what is stated in the clause in the agreement and the mortgage deed, I think there is a point of law that needs to be addressed by the superior Court.

On the above observations made without further consideration of the other grounds, in this present application, neither the applicant nor the respondent focused on them apart from being mentioned in their pleadings as under paragraph 10 of the applicant's affidavit and contested by the respondent under paragraph 13 in the counter affidavit. Also, being aware of the settled condition or test in granting prayer for extension of time as stated in various decisions, each day of delay should be accounted for by the person who wants the Court to decide in his favour. However, guided by the Court of Appeal facing situation like this, in the case of **Tanesco vs Mafungo Leornard Majura and 15 Others**, Civil Application No. 94 of 2016 (Unreported) the Court stated that,

"*… Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision intended to be impugned… suffices to move the Court to grant extension of times so that, the alleged illegality can be addressed by the Court…"*

Also, the case of **VIP Engineering and Marketing and Two Others vs Citibank Tanzania Limited**, Consolidated Civil Reference No.6,7 and 8 of 2006 (Unreported).

Ascertaining the issues of illegality raised and discussed herein, I am satisfied that it does constitute good cause to grant the extension of time requested. In any event, I find the application has merit and is hereby granted with costs.

Dated at **Dar es Salaam** this 8th day of September 2022.

Z.A.Maruma.

JUDGE