

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 96 OF 2015

(Original Commercial Case No. 98 of 2014)

METRO PETROLEUM TANZANIA LIMITED1st APPLICANT

BILL KIPSANG ROTICH 2nd APPLICANT

FLORENCE CHEPKOECH 3rd APPLICANT

PREMIUM PETROLEUM COMPANY LIMITED 4th APPLICANT

VERSUS

UNITED BANK OF AFRICA (T) LIMITEDRESPONDENT

Date of Last Order: 10th November 2022

Date of Ruling: 18th November 2022

RULING

MKEHA, J.

On 23/04/2015 the applicant filed the present application moving the court to extend time within which to make an application for setting aside the Default Judgment and Decree made on 15th October 2014 in Commercial Case Number 98 of 2014.

The applicants further asked the court, upon making an order for extension of time, to proceed setting aside the Default Judgment and Decree as indicated hereinabove.

The application was filed under section 14(1) of the Law of Limitation Act, section

95 of (the Civil Procedure Code as well as Rule 21 (I) and (2) of the High Court, (Commercial Division) Procedure Rules, 2012. The application is supported by an affidavits sworn by one Bill Kipsang Rotich, the second Applicant, Florence Chepkoech, the third Applicant and that of Mugo Ruthlru, the General Manager of the 4th Applicant. On the other hand, the application is contested through three distinct counter affidavits sworn by Ms. Elizabeth Muro, Principal Officer of the Respondent.

After the parties had filed skeleton written arguments for and against the application, this court (Songoro J.), delivered the court's ruling dated the 24th day of July, 2015 in which prayer for extension of time within which to make an application to set aside the default judgment and decree in Commercial Case No. 98 of 2014 was refused. The applicants were dissatisfied. They appealed to the Court of Appeal of Tanzania.

On 10/12/2021 the Court of Appeal held that, the omission on part of the trial court to determine the issues of illegality which were pleaded by the applicants and addressed by the counsel from both sides of the application was a serious breach of procedure which could result into miscarriage of justice.

Consequently, the court allowed the appeal, quashed the ruling of the High Court in respect of the present application. It then ordered that, the case file be remitted back to the High Court for it to determine the issue of illegality which was omitted in its ruling with regards to the extension of time sought. This second ruling of this court on the same subject matter, results from the directives of the Court of Appeal as indicated hereinabove.

Whereas Mr. James Bwana learned advocate represented the applicants in arguing the application, Mr. Abel Msuya learned advocate represented the respondent. The application was argued by way of filing skeleton written arguments under Rule 64 of the Commercial Court Rules. Therefore, in determining the issue of illegality as instructed by the Court of Appeal reference will be made to the affidavits in support and contest of the application, as well as the skeleton written arguments filed by the learned counsel for the parties, way back June, 2015.

On return of the case file at this court's registry, parties were summoned for directions. Mr. James Bwana learned advocate appeared for the Applicants. Mr. Aloyce Bahebe and Ms. Bertha Bihondo learned advocates represented by Respondent. So as to comply with the court's order, the matter was fixed to come up for ruling on 18/11/2022. This is the ruling.

With regard to the issue of illegality it was the Applicants' position that, they were

not properly and lawfully served with the summons to appear or file defence in the Commercial Court for reasons best known to the Respondent: Paragraphs 18 and 19 of the 2nd Applicant's affidavit, paragraph 15 of the 3- Applicant's affidavit and paragraph 13 of the affidavit sworn by the General Manager for the 4th Applicant.

In terms of the three affidavits and the skeleton written arguments by the learned advocate for the applicants, there are serious questions of fraud against the Respondent and the collateral Manager over the whole transaction that led to the institution of Commercial Case No. 98 of 2014. That, the court can only render justice when the hearing is made on merits and the roles played by various parties in this case are investigated, given that the amount granted in the default judgment of USD 2,279,740.27 is colossal.

In the counter affidavits sworn by Ms. Elizabeth Muro, the Principal Officer of the Respondent, it is explained the way attempts were made to serve the Applicants and the legal procedures followed to procure the Default Judgment and Decree against the Applicants. See: The whole of paragraph 2 of each of the counter affidavits. According to the learned advocate for the respondent, in any case irregularities regarding services to the Applicants cannot be faulted in an application to set aside a default judgment.

The only issue for determination is **whether the Applicants have demonstrated presence of illegality justifying extension of time to make an application for setting aside the Default Judgment and Decree made on 15th October 2014 in Commercial Case No. 98 of 2014.** The settled legal position governing the problem at hand is that the court extends time for purposes of rectifying the noted illegality in the intended application, appeal or revision. See:

- 1. THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE VS. DEVRAN VALAMBHIA (1992) T.L.R 387;**
- 2. TRANSPORT EQUIPMENT VS. D.P. VALAMBHIA (1993) T.L.R 91 and**
- 3. IRON AND STEEL LIMITED VS. MARTIN KUMALIJA AND 117 OTHERS, CIVIL APPLICATION NO. 292/18 OF 2020.**

In the case of **IBRAHIM TWAHIL KUSUNDWA AND ANOTHER VS. EPIMAKI S. MAKOI AND ANOTHER, CIVIL APPLICATION NO. 437/17/2022 CAT, DSM,** extension of time was being sought so as to file an application for stay of execution. The Court refused granting the application reasoning that, illegalities complained of in the impugned decision would not be addressed in the application for stay of execution.

Equally, I ask myself the following important question: Can this court address and decide on the issues of illegality complained of by the applicants in the application for setting aside the Default Judgment and Decree made on 15th October 2014 in

Commercial Case No. 978 of 2014? The answer is in the negative. That being the case, the application is bound to fail.

For the foregoing reasons, the application is dismissed with costs for want of merit.

DATED at DAR ES SALAAM this 18th day of November 2022.




C.P. MKEHA

JUDGE

18/11/2022

Delivered this 18th day of November, 2022 in the presence of Advocate James Bwana for the Applicant and Advocate Bertha Bihondo for the Respondent.





J. M. MINDE

DEPUTY REGISTRAR

18/11/2022