IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 57 OF 2020

(Arising from Commercial Case No.37 of 2016)

YARA TANZANIA LIMITED ……APPLICANT

VERSUS

DB SHAPRIYA & CO. LIMITED …… RESPONDENT

RULING

Last order: 20th March, 2023
Ruling: 28th April, 2023

NANGELA, J.

This is an application for extension of time. It was brought under a certificate of urgency and by way of a chamber summons under section 14 of the Law of Limitation Act Cap. 89R.E. 2019 and section 95 of the Civil Procedure Code, Cap.33 R.E 2019. The chamber summons is supported by an affidavit of Mr. Nuhu Mkumbukwa of NexLaw Advocates.

In this application, the Applicant herein is applying for the following orders of this Court:

1. That, this Honourable Court be pleased to issue an order extending time within which the Applicant may file an application to set aside a default Judgement/Decree dated 30th August 2018 and delivered on the 24th

September, 2018 in Commercial Case No.37 of 2016.

2. The Cost of this Application be provided for; and
3. Any other relief that this Court deems just and equitable to grant.

Although this application was brought under a certificate of urgency and the Court opted to have it treated that way and advised the parties to argued both the preliminary legal issues which were raised by the Respondent together with the merits of the application, there followed an application, Misc. Commercial Application No.76 of 2020 which arose out of this same application. In that application, the Respondent had wanted the presiding judge to recuse himself from having the conduct of this matter. However, following a ruling which disposed of that application, the Respondent was dissatisfied and informed the Court of her intention of filing an appeal before the Court of Appeal of Tanzania and, that, a Notice of Appeal to that effect had been lodged with the Court of Appeal.

Due to that fact, on 1st December 2020, this Court made an order to stay this matter pending determination of the intended appeal for which a Notice was already filed in Court. Unfortunately, however, since then, nothing was heard from the Respondent and no appeal was preferred to date. In view of that fact and, this matter being a long pending one, this Court summoned the parties on 17th March 2023 and vacated its orders dated 1st December 2020 with a view to proceed with determination of this matter including the various preliminary

legal issues which the parties had earlier raised and for which submissions had already been filed in tandem with those supporting and opposing the merits of the application.

I will, thus, addressed those matters by revisiting the written submissions filed by the learned counsels for the parties herein. To begin with, I will start by looking at the Preliminary objections since the submissions took into account the objections raised by the Respondent's counsel as well as the application itself. The preliminary objections by the Respondent were as follows:

1. This present application is *res-subjudice* to the pending Civil Appeal No.244 of 2018, pending in the Court of Appeal.
2. This present application is *res-subjudice* to the pending matters in Misc. Commercial Application No.48 of 2019; Misc. Commercial Application No.1 of 2020, Misc. Commercial Cause No. 11 of 2018 and Misc. Commercial Cause No.3 of 2019.
3. That, this honourable Court lacks jurisdiction over the matter for lack of citation of the enabling provision of the law;
4. That, this Honourable Court has not been properly moved for lack of citation of mandatory provision, namely Rule 23(1) and (2) of the

High Court (Commercial Division) Procedure Rules, 2012;

5. That, the Application is supported by an incurably defective affidavit for alleging fraud which requires higher standard of proof and that cannot be contained in the same affidavit with other pleaded matters; and
6. That, the application is supported by incurably defective affidavit for being argumentative and scandalous.

In his submission in support of the objections, Mr. Roman Masumbuko abandoned grounds 1 and 2 of his grounds of objection and submitted on grounds 3, 4, 5, and 6 only. Submitting in support of the 3rd ground that this Court lacks jurisdiction, Mr. Masumbuko's bone of contention was anchored on the fact that, the Applicant had only cited section 14 of the Law of Limitation Act, Cap.89 R.E 2019 and not section 14(1) of that law. He submitted that, the Applicant had failed to cite the enabling provision which is either section 14 (1) or 14 (2) of the Law of Limitation Act. He argued that, that point alone was sufficiently dispositive of this application.

Mr. Masumbuko submitted further that, the other section cited was section 95 of the Civil Procedure Act, Cap.33 R.E 2019, which cannot be invoked by a party to whom another remedy in law was available. He relied on the case on **Ahmad H. Mulji vs. Shirinbhai Jadavji** [1963] EA, 217 and argued that, the applicant

had remedy to set aside the default judgement. He contended as well that, section 95 of the CPC, like section 68 of the Code, is merely a supplemental provision. He backed up his submission by referring to the Court of Appeal decision in the case of **Sea Saigon Shipping Ltd vs. Mohamed Enterprises (T) Ltd**, Civil Appeal No.37 of 2005 (CAT) (DSM) (unreported) and this Court's decision in the case of **Leighton Offshore PTE Ltd (Tanzania Branch) vs. DB Shapriya & Co. Ltd,** Misc. Commercial Application No. 229 of 2015.

To conclude on this first ground of objection, Mr. Masumbuko contended that, lack of citation or wrong citation of the mandatory provisions of the law turns any application to be incompetent. He relied on the Court of Appeal decisions in the cases of **Robert Leskar vs. Shebesh Abebe**, Civil Appl.No.4 of 2006 (unreported) and **Chama cha Walimu Tanzania vs. The Attorney General** [2008] EALR 57. He urged this Court to make a finding that it has not been properly moved and struck out this application.

As regards the fourth ground, that, this honourable Court has not been properly moved for lack of citation of Rule 23(1) and (2) of the *High Court (Commercial Division) Procedure Rules, 2012,* it was Mr. Masumbuko's submission that, the default judgement was issued under Rule 22(1) and (2) of the *High Court (Commercial Division) Procedure Rules, 2012.* He submitted that, the application was preferred after the Court of Appeal had, in Civil Appeal No.245 of 2018, ruled that, there is a specific provision under the *High Court (Commercial Division) Procedure Rules, 2012,* which allows

the setting aside of a default judgement, i.e., Rules 23(1) and (2) (a) and (b) of the *High Court (Commercial Division) Procedure Rules, 2012.*

Relying on the case of **Elly Peter Sanya vs. Ester Nelson**, Civil Application No.3 of 2015 (CAT) (unreported), Mr. Masumbuko contended that, the failure to cite such a provision renders the application defective and urged this Court to have it struck out with costs.

As regards the fifth ground of objection, (*viz: that, the application is supported by an incurably defective affidavit for alleging fraud which requires a higher standard of proof and that cannot be contained in the same affidavit with other pleaded matters),* it was the submission of Mr. Masumbuko that, the issue of fraud is a very serious one and requires a higher standard of proof. He also submitted that, looking at paragraph 23 of the supporting affidavit there is nothing in that affidavit which shows such fraud. He surmised that, the issue of fraud cannot be the basis for extension of time and be contained in the same affidavit.

To support his submission, he relied on the decision of the defunct Court of Appeal of Eastern Africa in the case of **Ratilal Gordhnbhai Petel vs. Lalji Makanji** [1957] E.A 314, at 317 as regards the burden of proof where fraud is alleged. Similarly, he relied on the decision of the Court of Appeal of Tanzania in the case of **Abdi Ally Salehe vs. ASAC Care Unit Ltd**, Civil Rev. No.3 of 2012, (unreported) and **Katende vs. Haridas and Company Ltd** [2008] 2E.A, 173 and contended that, the Applicant has mixed the issue of fraud so as to lower the standard of proof

and demanded that, the issue ought to have been pleaded separately on its own and have it proved beyond reasonable doubt. He contended, therefore that, the affidavit is defective because of that.

As regards his last point of objection, it was Mr. Masumbuko's submission that, the affidavit supporting this application is as well defective for being argumentative and scandalous. He argued that, under Order XIX Rule 2(1) of the Civil Procedure Code, Cap.33 R.E 2019, it is trite that, affidavits must contain facts only and not extraneous matters such as arguments, hearsays or prayers. The specific paragraphs assailed by Mr. Masumbuko are paragraphs 22, 23, 24, 25,26, 27, 28 and 29 of the supporting affidavit.

To support his submission, he relied on the cases of **Uganda vs. Commissioner for Prisons ex-parte Matovu** [1966] EA 214; M**/s Bulk Distributors Ltd vs. Happyness William Mollel**, Civil Appl. No.4 of 2008 (unreported); **Justin Joel K. Moshi vs. CMC Land Rover (T) Ltd**, Civil Appl. No.93 of 2009 (CAT) (unreported) and **FEM Construction Co. Ltd vs. Nkululeko Karanja**, Civil Appeal No.168 of 2005 (HC) (unreported). On the basis of these authorities, he contended that, a defective affidavit renders the application incompetent and nullity.

Submitting in opposition to the preliminary objections, Mr. Nuhu Mkumbukwa, the learned counsel for the Applicant submitted, in respect of the 3rd ground of objection, that, the same should be dismissed as his Court has jurisdiction to entertain this application and, that, the point raised in baseless and academic.

He contended that, all cases cited are distinguishable as they did not discuss the relevant provision and, more, they were decided long before the legal amendments to the *High Court (Commercial Division) Procedure Rules, 2012* in the year 2019 which called upon Courts to take on board the concept of overriding objective principle. To support his assertions, he relied on the Written Laws (Miscellaneous Amendments) (No.3) Act, of 2018, as well as the Court of Appeal decision in the case of **Yakobo Magoiga Gichere vs. Penninah Yusuph**, Civil Appeal No.55 of 2017 (unreported) and the decision of this Court in **Arusha Blooms Limited and Another vs. TIB Development Bank & Others**, Misc. Civil Application No.809 of 2018.

Mr. Mkumbukwa argued, therefore, that, the omission to cite an enabling provision of the law (if any) does not necessarily have to touch the interests of the parties by barring them from getting justice before the Court, and for that matter, the objection should be overruled with costs. As regard the fifth objection, which was about non-citation of Rule 23 (1) and (2) of the *High Court (Commercial Division) Procedure Rules, 2012,* Mr. Mkumbukwa submitted that, the same is misconceived as the application at hand is about extension of time and the arguments based on Rule 23 were raised prematurely. He urged this Court to overrule it as well with costs.

Concerning the last objection which was questioning the soundness of the affidavit supporting the application, Mr. Mkumbukwa submitted that, the same lacks merit. He submitted, regarding the alleged defect because the Applicant has raised the

issues of fraud in the affidavit, that, **firstly**, there is no law that prohibits allegations of fraud and evidence thereof from being included in an affidavit since affidavit is itself evidence. ***Secondly***, he contended that, there are plenty of decisions that have held that, an extension of time can be granted if the decision complained of is problematic on grounds of fraud. He cited the case of **The Registered Trustees Archdiocese of Dar-es-Salaam vs. Adelmarsi Kamili Mosha**, Misc. Land Application No.32 of 2019 (unreported). He contended that; the Respondent has misconstrued the cases he relied on to mislead the Court as they are distinguishable to the matters at hand.

As regards the issue that the affidavit is argumentative and scandalous, Mr. Mkumbukwa submitted that, equally that ground should be dismissed for lack of merit. He contended that, the impugned paragraphs in the affidavit are not argumentative or scandalous as alleged or at all but state facts as observed, heard and understood by the deponent who is a lawyer. He maintained that the alleged fraud cannot be termed as making the affidavit scandalous.

In the alternative, he contended, that, even if the impugned paragraphs were to be declared to be defective, still that cannot be the basis of striking out the matter since the Court can proceed to expunge the offending paragraphs from the affidavit and let the rest to stand. To support that view, he placed reliance on the Court of Appeal decision in the case of **Phantom Modern Transport (1985) Ltd vs. DT Dobie (T) Ltd,** Civil Reference No. 15 of 2001 (unreported).

In his response to the Applicant's submissions, Mr. Masimbuko rejoined by reiterating his earlier position that, the Court has not been moved and the case of **Sea Saigon Shipping Ltd** (supra) is relevant and binding as it provide a position that Courts can only be properly moved if a specific provision of law is cited.

As regards the applicability of the Overriding Objective Principle, as discussed in the case of Y**akobo Magoiga Gichere** (supra), Mr. Masumbuko submitted that, the principle cannot be applied blindly. He relied on the Court of Appeal in **Mondorosi Village Council and 2 Others vs. Tanzania Breweries Ltd & 4 Others**, Civil Appeal No.66 of 2017 (unreported) as well as **Puma Energy Tanzania Ltd vs. Ruby Roadways (T) Limited,** Civil Appeal No.3 of 2018, CAT (unreported).

Mr. Masumbuko re-joined further, as regards the non-citing of Rule 23(1) and (2) of the the *High Court (Commercial Division) Procedure Rules, 2012,* that, a Court will be properly moved of the kind of application is brought through its domain and this being a special Court, it cannot discuss extension of time without being referred to the provisions of Rule 23 (1) and (2) (a) and (b) of the *High Court (Commercial Division) Procedure Rules, 2012.* Finally, he rejoined, as regards the defectiveness of the supporting affidavit, that, the Applicant's counsel has failed to comprehend the gist of his submission which is that, an issue of fraud cannot be raised and contained with other facts as it must be proved separately. Further, that, paragraphs 24, 25, 26, 27, 28 and 29 of the supporting affidavit are defective for being argumentative while

paragraph 23 is scandalous. He urged this Court to strikeout the entire affidavit and, hence, the application, with costs.

As I indicated earlier herein, the parties have filed submissions on both the preliminary legal issues as well as the application itself. I will dispose of the objections in the first place and, if they carry the day, that will be the end of this matter but, if not, I will proceed to consider submissions made in respect of the substantive merits of this application. The issue to consider is whether the preliminary objections filed by the Respondent are meritorious.

In my view, having looked at the objections and the rival submissions filed by the learned counsels for the parties herein, I am of a finding that, even if some of the point of objection raised have got some kernels of truth in them, their dispositive effect is not comprehensive. I will endeavour to explain by looking at the grounds. The third and fourth grounds can just be tackled together as they simply they question whether this Court has been properly moved to entertain this application. In particular, the third ground argues that this honourable Court lacks jurisdiction over the matter for lack of citation of the enabling provision of the law while the fourth ground questions whether this Honourable Court has not been properly moved for lack of citation of mandatory provision, namely Rule 23 (1) and (2) of the High Court (Commercial Division) Procedure Rules, 2012.

In my view, I do share the views of Mr. Mkumbukwa that, this Court has jurisdiction to entertain the application because the citing of a wrong or inappropriate provision is no longer a fatal

ground that may be relied on to defeat an application since the mistake can and should be rectified by mere insertion of the appropriate provision to the chamber summons as the Court is to be concerned more with rendering substantive justice.

While I am aware of what the Court of Appeal stated in the case of **Mondorosi Village** (supra) or the case **PUMA Energy** (supra), I do not think the alleged defect is of the intensity that will warrant a rejection of application of the overriding objective principle does provide the remedy to such a mistake.

For that matter, I will, as I hereby do, overrule the 3rd and 4th ground of objection and proceed to invoke the overriding objective principle to the effect that the defects noted cannot override the interests of justice to the extent of warranting a striking out of this matter from the Court. Instead, the requisite provisions are to be inserted manually to the records of the Court.

The fifth ground was about the alleged defects in the affidavit. This ground can as well be tackled together with ground number six as the same attacks the propriety of the affidavit filed by the Applicant.

In ground number five, the Respondent argued that the affidavit is incurably defective because it has included in it matters of alleged fraud which requires higher standard of proof and that cannot be contained in the same affidavit with other pleaded matters. In ground number six, the Respondent has contended that, the affidavit filed in support of the application is incurably defective for being argumentative and scandalous.

In the first place, it is trite that, the standard of proof of fraud in civil cases is higher than a mere balance of probabilities. See the case of **International Commercial Bank Limited vs. Jadecam Estate Limited** [2021] TZCA 673. See also the case of **Omari Yusuf vs Rahma Ahmed Abduikadir** (1987) TLR 169. However, while such degree of proof is higher than the normal balance of probability, I do not agree with the Respondent counsel's contention that, that standard of proof is on a "*beyond reasonable doubt*" scale.

That fact aside, the gist of the matter is whether there was any wrong to raise such matters of fraud in the same affidavit or that such facts ought to have been raised on their own. The Respondent's learned counsel has contended that it should have been separately raised and, that, comingling it with other facts proved on the balance of probability is erroneous and makes the affidavit defective. However, the Applicant's counsel had a different view. He contended that; no law has any such prescriptions.

Indeed, I find no valid reasons why the affidavit is to be considered defective merely because of deponing on facts regarding fraud. The mere fact that such facts will require a much higher standard of proof is not a reason for deponing them separately since each fact is to be proved on its own. Secondly, as regards whether the affidavit is defective for being argumentative or scandalous, while the Respondent's counsel holds it to be so, the Applicant's counsel is opposed to that view. The impugned

paragraphs of the supporting affidavit are paragraphs 23, 24, 25, 26, 27, 28 and 29.

I have looked at those paragraphs and I am in full agreement with the learned counsel for the Applicant that, they are not offensive at all but states facts as observed by the deponent and as per his knowledge of the law. See the Court of Appeal decision in the case **Convergence Wireless Networks vs. WIA Group Ltd & Others**, Civil Appl. No. 263 "B" of 2015, CAT, DSM (unreported), As such there is not merit in the Respondent counsel's arguments.

In any case, as rightly submitted by Mr. Mkumbukwa, even if one was to hold that the said paragraphs to be defective, the remedy is not to struck out the affidavit but expunge them therefrom and if the remaining paragraphs still support the application, then, the Court will proceed. See, for that matter, the cases of **Sanyou Service Station Ltd vs. BP Tanzania Ltd (now Puma Energy (T)**, Civil Appl. No. 185/17 of 2018 (unreported); **Invest International Ltd vs. Tanzania Harbour Authority &2 Others**, Civil Appl. No.8 of 2001 (Unreported); **University of Dar-es-salaam vs. Mwenge Gas and Lub Oil Ltd**, Civil Appl. No.76 of 1999 (unreported). The Court can even order a refiling of a fresh affidavit without striking out the application if defects found therein are not of substantial nature. See the case of **Lycopodium Tanzania Ltd vs. Power Road (T) Ltd & 2Others**, Misc. Comm. Appl. No.47 of 2020 (unreported). However, such orders are unnecessary to the matters at hand, as I find no offence on those paragraphs.

In view of all that, I will as well reject the 5th and 6th grounds and overrule them forthwith. The conclusion as regards the preliminary objections is to the effect, therefore, that, the remaining four grounds of objection are hereby overruled. Having overruled the objections, I now proceed to the merits of the application. As I pointed out herein earlier, the application at hand is one for extension of time within which to file an application for setting aside a default judgement and decree in Commercial Case No.37 of 2016.

Submitting in support of the application, Mr. Mkumbukwa adopted the supporting affidavit and contended that, the instant application having been brought under section 14(1) of the Law of Limitation Act, Cap.89 R.E 2019, this Court is empowered to extend time within which the Applicant can do that which she could not have done out of time, provided sufficient reasons for the delay are given. He cited the following as reasons for the delays, which include, firstly, the applicant being held up in prosecuting the Civil Appeal No.245 of 2018 at the Court of Appeal between the same parties, which appeal was, however, struck out on technicalities on 22nd April 2020, hence, a technical delay to file the intended application. He has relied on paragraph 17, 19 and 22 of the supporting affidavit.

Secondly, submitted that, the Applicant has all along been diligent in prosecuting the Civil Appeal No.245 of 2018 at the Court of Appeal which was nevertheless struck of from the Court on 22nd April 2020. *Thirdly*, he submitted as a reason for the application, that, the impugned decree is featured with issues of

serious illegalities and material irregularities warranting interventions of this Court. He has relied on paragraphs 23, 24 and 27 of the supporting affidavit.

Fourthly, he submitted as a reason that, the Applicant has also been diligent in filing this application following the striking out of the Civil Appeal No.245 of 2018 by the Court of Appeal on 22nd April 2020, as disclosed in paragraphs 19, 20 and 30 of the supporting affidavit and the instant application was filed on the 27th April 2020. He submitted, finally, that, the Respondent will not be prejudiced by the granting of this application. To support his submissions, he has relied on the case **Mr. Fortunatus Masha vs. William Shija and another**, [1997] TLR. 154 as a relevant supporting case as it made a distinction between real and technical delays. He also referred to this Court the case of **Yara Tanzania Ltd vs. DB Shapriya & Co. Ltd**, Civil Appl.No.498/16 of 2016 and **Hamis Mohamed (as Administrator of the Estate of the late Risasi Ngawe) vs. Mtumwa Moshi (as aministratix of the Estate of the late Moshi Abdallah),** Civil Appl. No.407/17 of 2019 (unreported).

He submitted, therefore, that, the above authorities fit squarely to the matters at hand as the Applicant has taken only 5days to file this application since the Civil Appeal No.245 of 2018 was struck out on technicality, and the Applicant was never sloppy or negligent in prosecuting it. He contended that, because of the striking out of the appeal, the Applicant should not be punished. He relied on the case of **Philipp Chemowolo & Another vs.**

Augustine Kubede (1892-88) KAR 103 at 104 where Apalloo, JA observed that:

> "It does not follow that 'because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline."

He also relied on other authorities including the case of Shah **Hemraj Bharml and Brothers vs. Santosh Kumari w/o J.N.Bhola**, [1961] EA.679, 685 and **Harnam Sigh and Another vs. Mistri** [1971] EA 122 , 126 and urged this Court to find such grounds as disclosed here in to be sufficient to warrant the granting of the application.

As regards the issue of illegalities and irregularities in the impugned decision, he submitted, relying on paragraph 23, 24 and 27 of the supporting affidavit and the annexures thereto, that, the illegalities are apparent on the record of the proceedings in Commercial Case No.37 of 2016, ***firstly***, because, the default decree was issued without affording the Applicant right to be heard; ***secondly***, that, it was procured out of tempered proceedings of the Court; and, ***thirdly***, that, the decree was issued while there was a pending arbitration proceedings.

To support the necessity of granting an application for extension of time where an issue of illegality has been relied on, he cited the decision of the Court of Appeal in the case of **The**

Principal Secretary, Ministry of Defence and National Service vs. Devram Valambhia [1992] TLR 192. In that case, the Court of Appeal was of the firm view that, where it was held that:

> "[W]hen the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

He also relied on other cases such as the case of **The Registered Trustees of Joy in the Harvest vs. Hamza Sungura**, Civil Appl. No. 131of 2009 (unreported) and **Aruben Chaggan Mistry vs. Naushad Mohamed Hussen & 3 Others**, Civil Application No. 6 of 2016 (unreported).

As regards that the Applicant has all along been acting diligently and has never been sloppy or negligent, Mr. Mkumbukwa relied on the cases of **Benedict Mumello vs. Bank of Tanzania**, Civil Appeal No.12 of 2002, (unreported), **Tanga Cement Company Ltd vs. Jumanne D. Masangwa and Another**, Civil Appl. No.6 of 2001 (unreported) and **Michael Lessani Kweka vs. John Eliafye** [1997] TLR 152.

Finally, Mr. Mkumbukwa submitted that, as regards the contention that the Respondent will not be prejudiced if the transaction is granted, the Applicant holds that view because, the intended Application seeks to ensure that parties are availed with

opportunity to canvass the legal issues complained of by the Applicant. He thus urged this Court to grant the application.

Submitting in opposition to the application, Mr. Masumbuko contended that, having read the submissions of the Applicant's counsel and the supporting affidavit, he considers the application to be lacking merits. Having adopted the counter affidavit as forming part of his submission, he contended that, since the Default Judgement was already published as required by the *High Court (Commercial Division) Procedure Rules, 2012*, it cannot be set aside. He contended, ***first***, that, the Applicant has failed as well to account for the length of the delay and each day thereof as he had 21 days after the default judgement was issued to file an application as per Rule 23(1) the *High Court (Commercial Division) Procedure Rules, 2012.*

Second, it was Mr. Masumbuko's submission that, though the Applicant has claimed that the period between 11th December 2018 up to 22nd April 2020 should be excluded because it was when she was wrongly pursuing the Civil Appeal No.245 of 2018, that amounts to admission of negligence since she was being represented by a form of reputable lawyers who failed or ignored to read the law. He contended that negligence, as it was held in the case of **Calico Textile Industries Ltd vs. Pyaraliesmail Premji** [1983] TLR, 28, cannot be a sufficient ground to warrant extension of time.

He also relied on the cases of **Wankira Bethel Mbise vs. Kauka Foya**, Civil Appl. No.63 of 1999 (unreported), **Hadija Adamu vs. Godbless Tumba**, Civil Appl.No.14 of 2013

(unreported) and that of **Bank of Tanzania vs. Said A. Marinda & 30 Others**, Civil Appl. No.150 of 2011 (unreported). where it was reiterated that, ignorance of the law cannot be and has never been a basis for extension of time. He contended that the claim that the Applicant was pursuing an appeal does not negate the fact that, the Applicant did not adhere to the requirements of Rule 23(1) and (2) of the *High Court (Commercial Division) Procedure Rules, 2012.*

Mr. Masumbuko contended that, the contention that the Appeal was struck out on technicality does not justify the condoning of negligence on the part of the Applicant and cannot be termed as a technical delay. For that matter, he submitted that, the cited cases of **Fortunatus Masha** (supra), **Yara Tanzania Ltd** (supra) and **Hamis Mohamed** (supra) are all distinguishable as negligence or ignorance of law cannot be termed as technical delay.

As regard the contention that the Applicant should not be punished for the wrong committed by her lawyers, it was Mr. Masumbuko's submission that, the standard on negligence and mistake of law is raised where an Applicant is represented by a lawyer, not to say a lawyer of reputable law firm as held in the **Calico Textile Industries Ltd** (supra) and **Wankira Mbise's** case (supra).

He contended that, this Court will not need persuasive cases as those cited by the Applicant as those do not concern the situation at hand, where the Applicant purposely preferred an appeal instead of setting aside a default decree. He also submitted

that, the issue of acting diligently has no merit as the Applicant has failed to account for each day of delay which is 56 days from when the time to file an application ended in 15th October 2018 and when the Civil Appeal No.245 of 2018 was filed on 11th December 2018. He argued that, more so, the whole period of 20 months can be attributed to negligence, ignorance and mistake on the part of the Applicant.

Relying on the case of **Zuberi Nassor Moh'med vs. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No.93/15 of 2018, (CAT) at Zanzibar (Unreported), it was Mr. Masumbuko's submission that, as a matter of law, each day of delay needs to be accounted for.

As regards the issue of illegality, it was Mr. Masumbuko's submission that, the same is misconceived. He argued that, the same cannot apply to the same Court and if the Applicant so wanted the same should have been investigated by the same judge by way of review of his decision under Order XLII of the Civil Procedure Code, Cap.33 R.E 2019.

To support that position, he cited the case of **Mohamed Enterprises (T) Ltd vs. Masoud Mohamed Nasser**, Civil Appl. No.33 of 2012 (Unreported). In that case, the Court of Appeal was of the view that:

> 'there should be no room open to the High Court and Courts subordinate thereto whereby one judge would enter judgement and draw up a decree in one case (thus bringing such a case to a finality)

> only to find another judge of the High Court soon thereafter setting aside the said judgement and decree an substituting therefor with a contrary judgement and decree in a subsequent application. To do so in our considered opinion, amounts to gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction."

Mr. Masumbuko argued that, this present matter is one that squarely fits the situation as the Applicant is trying to open issues on illegality of one judge before another judge, a fact which cannot be condoned and the application should fail. He contended that, the cases cited by the Applicant's counsel on this point of illegality, i.e., the case of **Permanent Secretary Ministry of Defence** (supra), **The Registered Trustees of Joy in Harvest** (supra) and **Arunaben Chaggan Mistry** (supra) were all from the vantage point of the Court of Appeal over decisions of the High Court.

He submitted that, what the learned counsel seems to insinuate is that the proceedings were fraudulently altered and the default judgement was fraudulently obtained, a fact which he contended is akin to impeaching one judge against the other. He contended that, the alleged illegality must be visible on record and relied on the case of **Praygod Mbaga vs. The Government of Kenya Criminal Investigation Department & Another**, Civil Ref.

No.04 of 2019 (unreported). He submitted that, nothing illegal appears on record.

As regards the issue of being prejudiced or not, Mr. Masumbuko submitted that, the Respondent is highly prejudiced so far as the Applicant is the one who called the guarantees in April 2016 and has been playing delaying tactics and forum shopping. He urged this Court to dismiss the application with costs for lack of merits. d

In his rejoinder submission, the Applicant's counsel submitted that, the Applicant has accounted for each of the days of the delay. He stated that, the Applicant acted promptly and decided to appeal against the decision as per paragraph 17 of the supporting affidavit and the annexures O, P,Q and R to it. He stated that, the Court's proceedings were certified on 9/11/2018 and the appeal was filed timely on 11/12/2018 thus explaining the delay from 24th September 2018 when the default decree was issued to 11th December 2018 when the appeal was filed and on 22nd April 2020 was technically determined. He submitted that, paragraph 19, 20 and 21 of the supporting affidavit do explain the delay from 22nd April 2020 to 27th April 2020 when the present application got filed.

He insisted that, the delay is technical and that, the case of **Fortunatus Masha** (supra) and **Yara** (supra) are all relevant. He contended that, the alleged negligence or ignorance of the law on the part of the Applicant, which the Applicant nevertheless disputes, was already penalized by striking out the appeal with costs and, so, the applicant cannot be punished twice, he so

contended. He contended that, in **Jomo Kenyatta Traders Ltd and Others vs. NBC Limited**, Civil Appeal No.48 of 2016, (unreported), the Court of Appeal proceeded to determine the appeal without striking it out on grounds of prematurity as it was done in the appeal which was struck out and gave rise to this application. He contended that, as such, there cannot be an issue of being negligent or ignorance of law.

As regards that the applicant ought to have sought for a review and not setting aside the default judgement, Mr. Mkumbukwa was of the view that, that submission is a misconception because review is not a substitute of an application for extension of time or an application to set aside a default judgement as Rule 23 of the *High Court (Commercial Division) Procedure Rule 2012* provides for the remedy. He contended that; the issue of fraud is pleaded as a ground for allowing this application. He argued that, there are two set of proceedings covering the same events from the same Court with two different accounts, hence, an alleged tempering or fraud which undermined the applicant. He rejoined, as regards the issue of prejudice on the part of the Respondent, that, justice will be meted out if parties are heard.

I have taken time to carefully consider the rival arguments by the learned counsel for the parties. The question I am supposed to address is whether the applicant has disclosed sufficient reasons for the delay in lodging this application for which an extension of time is sought to file an application for setting aside a default judgement. The general principle stands to be that, there must be

sufficient reasons or cause if an application of the like nature is to be granted. Besides, any delay, even for a day, mut be sufficiently accounted for. There is a number of cases which have cemented the requirement of accounting for every day of delay.

Examples of such decisions pf the Court include the cases of **Bushiri Hassan vs. Latifa Lukio, Mashayo,** Civil Application No. 3 of 2007 (unreported)**, Karibu Textile Mills vs. Commissioner General (TRA),** Civil Application No. 192/20 of 2016 (unreported), and **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported) and the cited case of **Zuberi Nassor Moh'med** (supra)**.**

In the case of **Tanga Cement Company Limited vs. Jumanne D. Massanga and Amos A. Mwalwanda, Civil Application No. 6 of 2001**, (unreported), Nsekela JA (as he then was), stated, that:

> "from decided cases a number of factors have to be taken into accounting whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant."

In another decision of this Court, in the case of **Mwananchi Insurance Company Ltd vs. The Commissioner of Insurance,** Misc. Commercial Application No. 264 of 2016 (unreported), this

Court dismissed the Applicant's application because there was no proof as to why there was delay on the part of the Applicant. That means, therefore, that, where proof is provided, the Court may consider to grant the prayers sought. Has there been reasonable and sufficient ground warranting condonation of the delay? In other words, has there been a clear accounting of the reasons why was there such delay and are they convincing reasons?

In this present application, the Respondent has contended that, the Applicant has failure to offer reasonable explanations for about 56 days from when the time to file an application ended in 15th October 2018 and when the Civil Appeal No.245 of 2018 was filed on 11th December 2018. In his submissions, however, the learned counsel for the Applicant has refuted such a view, arguing that, a clear account for each day has been rendered.

I have looked at paragraphs 17, 19 and 20 of the Applicant's affidavit supporting this application. In my view, having looked at the time when the default decree was issued, the time when the Civil Appeal No. 245 of 2018 was instituted and later struck out on 22nd April 2020 and, the time when this application was instituted on 27th April 2020, I do agree with the learned counsel for the Applicant that, the Applicant has accounted for the delay. But was such a delay a matter which could be justified?

In his submissions, Mr. Masumbuko, the Respondent's counsel, has attributed the delay on the Applicant's negligence and/or ignorance of the law and argued that, such cannot be justified or condoned as good cause. His reasoning is based on the fact that, the Applicant having been duly represented by a learned

counsel ought to have known what should have been the remedy of a default judgement as provided for under Rule 23 of the this Court's Procedure Rules. He contended that; ignorance of the law cannot as well be a ground for extending time. The Applicant has denied being negligent and argued that, if anything, the Applicant has been punished by the Court of Appeal her appeal filed thereat having been truck out with costs.

In my view, I tend to agree with the Applicant's counsel that, since the Applicant has been punished by way of her appeal being struck out, the same reasons which made her suffer at the Court of Appeal cannot as well be used to make her suffer when she now wants to follow the appropriate procedural route. If her counsel was negligent or ignorant, she suffered the price of that, and paid for it. That cannot be a ground to rely on once again in this application.

In his submission, Mr. Mkumbukwa, the Applicant's learned counsel, has also raised an issue of alleged illegality, contending that, there was fraud perpetrated at the time when the proceedings before this Court were underway. He has relied on that illegality as a ground for extension of time. The Respondent's learned counsel, Mr. Masumbuko, has contended that, such a ground cannot be raised before this Court but ought to have been raised before the Court of Appeal. He contended that, the cases relied upon were decisions made by the Court of Appeal and, therefore, this Court cannot seat to overrule a decision made by itself.

In my view, while I am well aware of the decision of the Court of Appeal in the case of **Mohamed Enterprises (T) Ltd** (supra), I **do** not think that such a situation as it applied in that case is one and the same as in this application. This is an application for extension of time to file an application for setting aside a default judgement and there are grounds which needs to be satisfied if the application is to be granted or not. Illegality of an impugned decision is one of such grounds and the illegality claimed is not investigated until one is granted such extended period of time.

In view of that, it will be utterly premature to contend that, the alleged ground if looked at will be akin to correcting a decision of the judge of the same Court. That submission amounts to jumping the gun since it should not be offered at this time. In my view, what needs to be challenged is whether such illegality is apparent or not since, as the Court of Appeal stated in the case of that, where the issue of illegality is raised, the Court must be satisfied that, such a claimed illegality really exists. See the case of **Lyamuya Construction Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No.2 of 2010, (CAT) (unreported).

In this present case, there has been conflicting set of proceedings and that raises the eyebrows but this Court can only go to that extent of raising its eyes without much ado since it should only be satisfied that, there is something worth investigating. I do not buy the argument that the principle established in the case of **Principal Secretary Ministry of Defence**

and National Service (supra) is confined only to a situation when one seeks for extension of time before the Court of Appeal. In my view, that principle is for application and does guides all courts when dealing with an application for extension of time and the ground of illegality is raised. As such, it is a valid ground upon which this Court can as well grant the application. Validity or otherwise of the alleged illegality will be finally determined in the intended application and not at an earlier stage as this.

Finally, there Applicant has contended that, the delay if any, should be treated as a technical delay. In my view, I tend to agree with that submission. The delay was caused not by negligence per se or inaction on the part of the Applicant but because the Applicant was wrongly before another forum diligently pursuing for her rights. That kind of delay was said in the **Fortunatus Masha's case** (supra) to constitute a technical delay and should be condoned.

In view of the above and taking into account the reasons set out in the Applicant's affidavit in support of this application and the submission made and analysed herein, I find that, there is a good cause regarding why I should grant this application. In the upshot of all that, this Court settles for the following orders:

1. That, the prayer for extension of time within which the Applicant is to file an application to set aside a default judgement/Decree dated 30th August 2018 and delivered on 24th September 2018 in

Commercial case No.37 of 2016 is hereby granted with costs.

2. That, the same be filed within 21days from the date of this ruling.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 28TH DAY OF APRIL 2023

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DEO JOHN NANGELA
JUDGE

RIGHT OF APPEAL EXPLAINED