IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 207 OF 2022

BETWEEN

QUALITY GROUP LIMITED ..... APPLICANT

VERSUS

NMB BANK LIMITED ..... RESPONDENT

RULING

Date of last order: 08/03/2023
Date of ruling: 16/03/2023

AGATHO, J.:

The ruling at hand stems from the Applicant's application for orders that:

1. This Court be pleased to grant an extension of time within which the Applicant shall file a Notice of Appeal to the Court of Appeal out of time against judgment and decree in Commercial Case No. 84 of 2018.
2. Costs
3. Any other relief this Court will deem just and fit to grant.

The application was by way of chamber summons supported by an affidavit of Eliya Rioba, the counsel of the Applicant. To protest the application the Respondent filed a counter affidavit deponed by Sharifa Karanda, Principal Officer of the Respondent.

The parties to the application were both under legal representation. Whereas the Applicant was represented by Eliya Rioba, Advocate, the

Respondent enjoyed the legal services of Mohamed Muya, Advocate. The hearing of the application was conducted orally on 08/03/2023.

It is the trite law that for an extension of time to be granted one has to show a sufficient cause to persuade the Court to exercise its discretion to extend time. What amounts to a sufficient cause depends on the circumstance of a particular case. There are no hard and fast rules.

But the law has sets out criteria for granting extension of time. That the applicant ought to account for each day of the delay. **Bushiri Hassan v Latifa Lukio Mashayo, Civil Application No. 03 of 2007, CAT** (unreported). That was reiterated in **Moto Matiko Mabanga v Ophir Energy Plc and Two Others, Civil Application No. 463/01 of 2017, CAT at Dar es salaam** (unreported) at p. 9. The delay should also not be exorbitant. Moreover, the applicant should not negligent.

The factors to be considered in determining application for extension of time were stated in **Lyamuya Constructions Company Limited v. Board of Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010.** The factors to be considered in application for extension of time were listed as follows:

(a) That, the applicant must account for all the period of delay.

(b) That, the delay should not be inordinate

(c) That, the applicant must show diligence; and not apathy, negligence or sloppiness in the prosecution of the act that he intends to take, and

(d) If the court feels that there are other sufficient reasons, such as existence of the point of law of sufficient

importance, such as the illegality of the decision sought to be challenged.

Moreover, the case law has recognized illegality to be a good cause for extension of time as per **the Principlal Secretary, Ministry of Defence and National Service V Devram Valambhia [1992] TLR 182**. However, such illegality has been qualified. It should be illegality that it apparent on records as held in **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT**. It is trite that whenever illegality is alleged and substantiated then it does not matter the length of the delay. That is in accordance with the case of **Attorney General v Wafanyabiashara Soko Dogo Kariakoo Cooperative Society Ltd, Misc. Application No. 606 of 2015.** In that case at page 10, the extension of time was granted citing illegality as sufficient cause despite the Applicant's delay for 12 years.

Mr Eliya Rioba, the applicant counsel made submission in chief in support of the application. He prayed to adopt the skeleton arguments and the affidavit to form part of this submission. He submitted that the application is for extension of time within which the Applicant is seeking for court's permission to file notice of appeal to the CAT against the judgment and decree in Commercial Case No. 83 of 2018. The applicant is relying solely on illegality as a ground for the prayer for extension of time.

Mr Rioba submitted that it is the applicant position as seen on para 4 and 5 of the affidavit in support of the application alleges that the

Applicant was not served with Statutory Notice of Default prior to instituting the above mentioned commercial. The learned counsel submitted that the Respondent in this application neither served the applicant with statutory notice of default, nor did she serve the rest of the defendants in the cited commercial case with the said notice. It was Mr Rioba's submission that non service of statutory notice of default is contrary to Section 127 of the Land Act [Cap 113 R.E. 2019]. However, during hearing of the Commercial Case No. 83 of 2018 PW1 representing the Respondent herein testified to have served the Applicant herein and the rest of the Defendants in the commercial case No. 83 of 2018 as statutory notice of default by way of registered mail. To the contrary, the tendered evidence in the cited case by the same witness PW1 who tendered documents which were exhibited as exhibit P17, P18 and P19 which he intended them to be both statutory notice of default and postal receipts in support of the argument that the service of notice was done by way of registered mail. Mr Rioba submitted that the tendered documents do however contradict each other. Whereby exhibit P19, the postal receipts indicate to have been posted on the 11/09/2017 while exhibit P17, notice of statutory default indicates to have been issued on 08/09/2017. But at the foot of the notice exhibit P 17 indicates to have been received on the same date 08/09/2017 by the Applicant. These two positions do contradict each other. The Court should be guided by annexture QGL-1 (judgment of the Court in Commercial Case No. 83 of 2018) and QGL-4 (statutory default notice) attached in the Applicant's affidavit to support the submission.

The Applicant's counsel submitted that while these documents were tendered and admitted, it is the duty of the Court to have had

addressed the inconsistencies and contradictions highlighted and as submitted. The position which was stated in the case **Mohamed Said Matula v R [1995] TLR 3**. Mr Rioba submitted that although the documents were tendered and admitted by the Court, it does not necessarily mean that its content were also admitted by the Applicant. To buttress on the same position he cited the case of **NARCIS Rukyebesha Mbarara v Equity Bank Tanzania Limited and Another, Civil Appeal No. 4 of 2022 pages 13-14**where the CAT held "*Admission of documentary evidence is one thing and the weight of it is another.*" That cements his submission on the context that the inconsistencies and contradictions in exhibit P17 and P19 were not addressed by Court. He added that had it been the same the Court would have issued or given its opinion on the inconsistencies and would have determined that non service of statutory default renders or makes the suit to be considered as having been brought prematurely as cited in the case of **Diamond Trust Bank Limited v Prime Catch Exports Limited and 5 Others, Commercial Case No. 62 of 2017** at page 20. Mr Rioba prays that this court be persuaded by the position in that case. I with respect distance myself from the submission by Mr Rioba as the same seems to have been given under misconception. The issue of contradictions and inconsistencies in evidence must be raised in the trial. If it is raised now in the application for extension of time would at best be an afterthought. This Court in far as that issue is concerned it has become *functus officio*. For detailed discussion as to when the Court becomes *functus officio* see the case of **Bibi Kisoko Medard v Minister for Lands, Housing and Urban Development and Another [1983] TLR 250**.

Moreover, the Applicant's counsel in paragraph 5 of his affidavit averred that the Applicant in the joint WSD of the Defendant pointed out that he was not served with statutory notice of defence. Interestingly, the judgment in Commercial case No. 83 is clear that during the trial both the Plaintiff and Defendants were heard. If the allegation that the Applicant was not served with statutory notice of default or if there were any contradictions or inconsistencies in the said default notices it was up to the Defendants including the Applicant or their learned counsel to cross examine the Plaintiff's witnesses. This was not done. Failure to cross examine on a crucial point amount to admission of that point. See the case of **Emmanuel Saguda @ Sulukuka and Another v Republic, Criminal Appeal No. 422 "B" of 2013 CAT.** I am therefore not impressed by the counsel for Applicant's averment in his affidavit and submission that there were contradictions and inconsistences at trial. That in my view could have been resolved by cross examination. I am equally unmoved by an unsubstantiated allegation that the Applicant was not served with the statutory default notice. Hence, in my view the illegality complained of is not apparent on record.

Mr Rioba, submitted that the application is pegged on illegality, and the illegality apparent on the face of record is sufficient ground to warrant to an extension of time. This being the court of law he humbly prayed that the application be allowed with costs for the applicant to be availed with an opportunity to challenge the inconsistencies and contradictions surrounding non- compliance to serving of statutory notice of default by the Respondent.

Mr Muya, Advocate for the Respondent replied in opposition to the counsel for applicant's submission. He submitted that the Court has power to grant extension of time. However, it is upon the Applicant to establish good cause of the delay. There are number of cases which try to define what amount to good cause of delay. The case of **Power and Network Backup Ltd v Olafsson Sequeira, Civil Application No. 307/18 of 2021 CAT at Dar es salaam**, 2nd paragraph of page 10. In that case the factors mentioned are: whether the applicant was diligent, the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether there is a point of law of sufficient importance such as the illegality of the impugned decision.

Mr Muya submitted further that the CAT also cited **Elius Mwakalinga v Domina Kagaruki and 5 Others, Civil Application No. 120/17 of 2018** (unreported), where the CAT stated that:

" *Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.*"

He went on submitting that the Court has to exercise its power depending on the circumstances of each case. They expected that the counsel of the Applicant to tell the Court where was his client? It is about 5 years that have lapsed. They failed to file notice of appeal or appeal itself. To Mr Muya that shows clearly the Applicant was not diligent. The Applicant has not accounted for each day of the delay. The Applicant on paragraph 3 of the affidavit in support of application admits that there was an application for execution and avers that the

respondent has already sold the property. I do not entirely agree with Mr Muya's submission that the Applicant has to account for each day of delay in every application for extension of time. As held in **the Principal Secretary, Ministry of Defense and National Services V. Devran P. Valambia [1992] TLR 387** and in **Attorney General v Wafanyabiashara Soko Dogo Kariakoo Cooperative Society Ltd, Misc. Application No. 606 of 2015** in which the Court held that where there is illegality in the impugned decision the court is inclined to grant extension of time regardless of length of the delay.

Mr Muya referred to the case **Power and Network Back up Limited** on pages 15 – 16 where the CAT cited the cases of **Lyamuya Construction Ltd** (supra),**and Tumsifu Kimaro (The Administrator of the Estate of the Later Eliamini Kimaro) v Mohamed Mshindo, Civil Application No. 28/17 of 2017 CAT** (supra) that provide for tests which the court should consider when to rely on the point of illegality.

> *"The Court there emphasized that such point of law must be that of sufficient importance, and I would add that it must be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*

The learned counsel of the Respondent submitted that the point raised by the Applicant is like they ask the court to go and evaluate the evidence of Commercial Case No. 83 of 2018 which has already been determined by this Court. It is not true that the notice was not served upon the Applicant. This is because on last paragraph of page 18 – 19 of

the judgment shows that the notices were properly served. He submitted that the notices were served. I concur with the counsel that the statutory notice of default was served upon the Applicant.

Indeed, the Defendants are not disputing that they were not served. Rather they are claiming that there were contradictions. That there are notices that they signed manually on 08/09/2018 but there is other evidence which shows that the notices were served through postal address on 11/09/2017. I am with the Respondent on this as averred on paragraph 6 of the counter affidavit that they effected services through physical mode and through postal services. As rightly pointed out by Mr Muya that they first served physically and later by postal services.

In his rejoinder Mr Rioba, the counsel for the Applicant submitted that he completely disagrees with what Mr Muya has submitted. He prayed to reiterate the submission in chief that the Applicant was not served with statutory notice of default. I do not have to repeat what I hve held here in above that the Applicant was served upon with the statutory notice of default. Should such allegation be valid the appropriate forum was during trial where they had opportunity to do cross examination and they decided not to do so.

Mr Rioba protested further that the counsel for the Respondent insisted that the service was effectively done. And he cited and referred to the decision of this Court in Commercial Case No. 83 on pages 18-19 of the judgment, but the word used was "issued" and that is not the same as "served." The counsel for Applicant argued that the Black's Dictionary 11th edition on page 996 defines the term "issue" in different context and page 1643 defines the word "serve". They mean different things.

Let me say a word or two on this allegation. The controversy of the words used in the judgment was not averred in the Applicant's affidavit. Besides the words must be interpreted depending on the context they are used. It is my view that the judgment in Commercial Case No. 83 of 2018 used the word issued to mean that the notices were effectively served upon the defendants including the Applicant. It will be misleading to invoke the definition of the term issued and served at this stage. We have to travel with the thinking of the judge in the trial case instead of planting meaning that was not in the mind of the judge.

Mr Rioba submitted further that as far as good cause of delay is concerned, the current context of the application is distinguishable from the position submitted by the counsel for the respondent. He has cited the case of **Power and Network Back Up Limited**(supra),and provided several requirements in determining good cause in as far as application for extension of time is concerned. He submitted that that case is distinguished from the case at hand. He rightly emphasized that they are relying solely on illegality. Mr Rioba reiterated the position in the same case of **Power and Network Back up**(supra) at page 10 citing **the Principal Secretary, Ministry of Defense and National Services V. Devran P. Valambia [1992] TLR 387**, which is reflected also in his skeleton argument under paragraph 11 it states that illegality constitutes sufficient cause. The Applicant does not have to account for days of delay if she is relying on illegality. In my considered view, it will be a misnomer to assume that once illegality is alleged this Court automatically is bound to grant extension of time. The court will be reduced into a rubber-stamping Court. That is contrary to what is envisioned in **Lyamuya construction case** (supra) that illegality

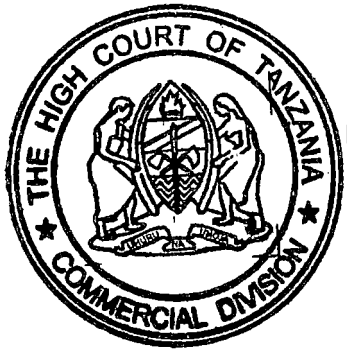
should be apparent on record. It should not be one that demands a long-drawn-out process. In the present case the Applicant is asking the Court to examine the record of proceedings to uncover the inconsistencies and contradictions which would have otherwise been revealed by cross examination during the trial. In addition following revealing of inconsistencies or contradictions by cross examination the trial court is required to determine whether such contradictions goes to the root of the matter or not. See **Said Matula's case** (supra).

Mr Rioba also opposed the counsel for the respondent's submission that the applicant wants the court to evaluate evidence to ascertain the illegality. He submitted that the referred documents (the exhibits P17 and P19) which the applicant highlighted the inconsistency and contradictions are court documents and therefore in determining this application and in view of ascertaining if there is an apparent error on the face of record, it will be the duty of the court to cross check on mentioned documents in contemplation of the submission made in support of this application. The response to this has already been given that the inconsistencies ought to have been revealed by cross examination at trial stage not now. This will be an invitation to the court to open a pandora box that a party may simply fetch any irregularity or contradiction in the evidence at trial even those that could have been revealed by cross examination. I am afraid that invitation is declined.

For the reasons stated herein above I find this application deficient in merit. I thus dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 16th day of March, 2023.



U. J. AGATHO

JUDGE

16/03/2023

Court: Ruling to be delivered today, this 16th March, 2023 by Hon. Minde Deputy Registrar in the presence of the parties.

U. J. AGATHO

JUDGE

16/03/2023