IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 208 OF 2022

BETWEEN

QUALITY GROUP LIMITED..... APPLICANT

VERSUS

NMB BANK PLC..... 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 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 is a known principle stated in **Bushiri Hassan v Latifa Lukio Mashayo, Civil Application No. 03 of 2007, CAT** (unreported). That same 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 be negligent.

The factors to be considered in determining application for extension of time were outlined 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 Principal Secretary, Ministry of Defence and National Service V Devram Valambhia [1992] TLR 387**. 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 important to note 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.

In the case at hand as seen on paragraph 4(b),(c) and (d) of the affidavit in support of the application, the only ground for seeking extension of time in this application is illegality in the judgment of

Commercial Case No. 84 of 2018. The illegality complained of is that the Respondent did not serve the Applicant with Statutory Notice of Default prior to the institution of the suit. The Respondent in paragraph 6 of the counter affidavit has refuted the averments in paragraph 4(b),(c) and (d) of the affidavit and stated that the applicant defaulted to repay the loan as agreed, and the Respondent had obligation to issue with 60 days' default notice which was communicated to the Applicant. On page 7 of the judgment in Commercial Case No. 84 of 2018 the judge held that the Defendant (now the Applicant) did not dispute having been served with the 60 days' default notice when defaulted to repay the loan.

Since the applicant is applying for extension of time based on illegality the Court must satisfy itself whether there is indeed illegality in the judgment of Commercial Case No. 84 of 2018 and whether that illegality is apparent on record, and whether it will not require a long-drawn-out process to reach to the bottom of the illegality.

Before proceeding further with an examination of the law on extension of time it logical to consider the submissions of the parties' counsel. To begin with the submission by Mr Eliya Rioba the Counsel for applicant in support of the application

He prayed to adopt the skeleton arguments and the affidavit to form part of his submission. He told the court that this is an application for extension of time within which the Applicant is seeking to file notice of appeal. He also prayed to adopt the submissions made in Misc. Application No. 207 to form part of the submission in this application. He hinted that in this application the problem is the same non-compliance

with law. He argued that the respondent never issued nor served the applicant herein and the rest of the defendants in Commercial Case No. 84 of 2018 with statutory notice of default prior to instituting the said commercial case. However, the respondent issued a letter which has been annexed in the applicant's affidavit as QGL – 4 and which was tendered during hearing of commercial case No. 84 of 2018 as notice of default and it was admitted as exhibit P4.

Mr Rioba submitted that the referred notice does not comply with Section 127 of the Land Act [Cap 113 R.E. 2019] which requires a statutory notice of default to be in a prescribed form. The law clearly states that if the notice shall not be in the prescribed form, it shall be void. The counsel submitted further that the hearing of the commercial case No. 84 of 2018 proceeded *ex parte* against the Defendants (one of them being the Applicant). Therefore, they were not availed with an opportunity to challenge the legality of the notice of default tendered by the witness brought by the Respondent. In my view, first, if the Judge in Commercial Case No. 84 of 2018 was satisfied that statutory notice of default was issued then cannot be questioned at this stage. Second, the issue of statutory notice of default is matter of evidence. It will require a long drawn up process that of examining the proceeding of trial court in Commercial Case No. 84 of 2018. That is what is disallowed by **Lyamuya Construction Case** (supra). It means the illegality is not apparent on record. Third, failure of the Applicant and co-defendants to attend mediation which led to the matter to be proceed *ex parte* against the defendants. However, they had filed their joint WSD.

Mr Rioba submitted that the Applicant is praying for the application solely on the ground of illegality. As it can be viewed from the referred

documents, it is the applicant's belief that the respondent did not comply with Section 127 of the Land Act [Cap 113 R.E. 2019], therefore filing of Commercial No. 84 of 2018 prior to issuance of the said notice of default would have been considered that the suit was brought pre-maturely. This position was cited in the case of **Diamond Trust Bank (Kenya) Limited v Prime Catch Export Limited and 5 Others, Commercial case No. 62 of 2017** at page 20.The Court held that issuance of statutory notice being a mandatory requirement skipping it makes the suit being brought prematurely. Briefly, I am of the settled view that the context of **Diamond Trust Bank (Kenya)** (supra) and the case at hand are dissimilar. In the present case the judgment at page 7 stated clearly that statutory notice of default was issued. That is in my view is sufficient to fulfil the requirement of Section 127 of Land Act. I am not privy to reopen the proceedings and examine the evidence including the said statutory notice of default admitted as exhibit P7.Mr Rioba relying on the spirit in the case of **Principal Secretary of Defence and National Service v Devran Vallambia [1992] TLR** 387 praying the Court to grant extension of time.

Mr. Muya, Advocate of the Respondent replied by opposing the counsel for applicant's submission. He submitted that it is not true that the applicant was not severed with 60 days default notice. This is because on the face of record on last paragraph of page 7 starting from fifth line of the judgment itself recognizes that there was a default notice. Therefore, saying that there was no default notice is misleading. I agree with Mr Muya on this. And if the applicant was in dispute of the content of exhibit P7 either to object or challenge it through cross examination. But they never brought any evidence before this court to challenge that

exhibit. The Respondent's counsel submitted that to challenge the default notice now that is a new issue which was not before the trial court. On this, the court disagrees with Mr Muya, and find Mr Rioba's argument to be valid that cross examination by the Defendants would not be possible because the hearing was *ex parte* in favour of the Applicant.

Mr. Muya submitted that the judgment itself (at page 8 annexed in the counter affidavit) stated clearly that the exhibit P7 was unchallenged even by the WSD. He humbly objected the QGL – 4 (exhibit p7 attached in the affidavit)which Mr. Rioba asked the Court to consider if it is statutory default notice because in the view of Mr Muya that document has no indication that it was court exhibit. I am inclined to concur with Mr Muya that if the document was not part of court record that cannot anyhow be considered even on appeal unless the appellate court orders taking of new evidence. The counsel for the Respondent submitted that as per the guidance in the case of **Power and Network Backup Limited v Olafsson Sequeira, Civil Application No. 307/18 of 2021 CAT at Dar es salaam,** that the point of illegality must be on face of record which should not take long argument to discover that illegality. The long-drawn-out process will be to fetch for evidence instead of point of law. Mr Muya was of the view that the notice of default is the issue between the borrower and respondent, it has nothing to do with the bonafide purchaser. Even the Land Act [Cap 113 R.E. 2019] has a principle of protection of bonafide purchaser. Even if they go to the CAT that cannot affect the interest of purchaser. The applicant failed in an application for extension of time to challenge the execution instead of appealing against the judgment as shown on

respondent counter affidavit (Misc. Application No.77 of 2022). They were clearly not intending to challenge the judgment of this Court. As the facts stand there is no way accounting for each of delay will be avoided. Muya submitted that the applicant was negligent. Good enough the advocate who is before this court was the one who represented the applicant in Misc. Application No. 77 of 2022. I am of the view that while illegality is a good cause for extension of time, the Applicant need to be diligent. She should not exhibit negligence as shown in the case at hand where the applicant did not bother to file notice of appeal instead was busy pursuing application against execution. Indeed I find the applicant to have not been diligent.

The Respondent's counsel submitted that the application is baseless. And if allowed it will injure the interest of the respondent. He argued that the issue of statutory notice of default was resolved in the judgment at page 8. He concluded his submission by praying for the dismissal of the application with costs.

In his rejoinder Mr Rioba, Advocate for the Applicant submitted that the application is pegged on exhibit P7. He prayed that the court take judicial notice of exhibit p7 and there was annexture QGL-4 which is the said exhibit p7. That exhibit is the court record. It is not in the custody of the applicant. He thereafter referred to page 3 of the judgment in commercial case No.84 that proceeded *ex parte* entailing what transpired during hearing of the case. And that was between the court and the plaintiff. He also reacted to the counsel for the respondent submission about cross examination. At this juncture, I concur with the Applicant's counsel that that could not have been done as the hearing was *ex parte*. Therefore, the applicant could not challenge legality of

exhibit P7 during hearing. Mr Rioba submitted that in order to accurately determine the rights and liabilities of the parties to this application, the court should glance on the exhibit P7 to see if it is part parcel of QGL-4. In conclusion he prayed that the application be allowed with costs. The applicant be allowed to challenge these issues before the CAT. I decline to this invitation to examine exhibit P7 and QGL-4. This process cannot be done by this Court without re-examining the record of proceedings in Commercial Case No. 84 of 2018 and compare exhibit P7 and annexture QGL-4 to the affidavit which is not part of court record. In my view that is not judicial notice if we are comparing documents some of which are not in court record. Judicial notice applies to public documents, laws, and court records. Besides QGL-4 is conspicuous that the Applicant received the said document on 08/09/2017. Therefore, the Applicant's prayer that the court dig into the record of proceedings to determine the legality or illegality of exhibit P7 will take a long-drawn-out process. It will thus offend the holding in **Lyamuya Construction's case** (supra).

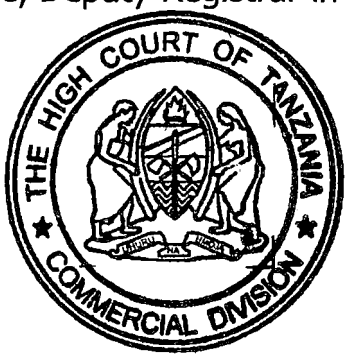
For the foregoing reasons the application for extension of time is refused for lacking merit. The Respondent shall have her costs.

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
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