

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 170 OF 2023

(Arising from Commercial Case No. 114 of 2017)

BETWEEN

TANZANIA PORTS AUTHORITY.....1ST APPLICANT

THE ATTORNEY GENERAL.....2ND APPLICANT

VERSUS

LEIGHTON OFFSHORE PTE LIMITED.....RESPONDENT

RULING

Date of last order:12/02/2024

Date of ruling:23/02/2024

AGATHO, J.:

In this application, the applicants have sought for among other orders that, this Honourable Court be pleased to set aside its ex parte judgment and decree dated 27th October, 2023 (Hon. A.M.K. Matuma J.) in Commercial Case No. 114 of 2017. In the said case, the respondent was the plaintiff while the applicants were the 1st and 2nd defendant respectively, they also had their counterclaim. The ex parte judgment was a result of ex parte hearing against the applicants after they failed to enter appearance in court when the matter was scheduled for continuation of hearing.

The application was by way of chamber summons supported by affidavits of Lukelo Samwel, Principal State Attorney, Ms. Asia Abdul Shamte, Senior State Attorney, Mr. Charles Mtae, State Attorney, Ms. Neisha Shao, State Attorney, Mr. Mathew Fuko, State Attorney and Ms. Renalda Kabewa, Law Secretary.

On the other hand, although the respondent contested the application by way of counter affidavit, hearing of the same proceeded ex parte against her for non- appearance of the respondent. The hearing was by way of oral submissions in which the applicants were represented by Mr. Mark Mulwambo, Mr. Deodatus Nyoni and Mr. Aloyce Sekule, Principal State Attorneys.

Submitting for the applicants, Mr. Mulwambo started by adopting the affidavits in support of the application as indicated earlier on hereinabove as well as the documents annexed thereto.

The Principal State Attorney then proceeded by praying for this court to be pleased to set aside ex parte judgment and its resultant decree dated 27/10/2023 delivered by this court (Hon. Matuma, J.) in Commercial Case No. 114 of 2017. He further prayed that, after setting aside the ex parte judgment, this court be pleased to fix the matter for continuation of hearing

on other date convenient to the court's diary. He then finalized by praying that, the costs of this application be provided for in the main suit.

He went on to submit that, the law has vested this court with mandate and authority to set aside ex parte judgment if it is satisfied that there is a good cause. To support this argument, he referred this court to Order IX rule 9 of the Civil Procedure Code. He also referred the court to the book by DR Medha Kolhatkar, **The Code of Civil Procedure, 5th edition 2019 at 726-728** where it is stated therein that, the test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing and did his best to do so.

He continued by submitting that, the applicants were prevented by sufficient reason from appearing on the date the matter was called for hearing following reasons stated in the affidavits.

According to the Principal State Attorney, the reasons contained in the said affidavits are that Mr. Lukelo Samwel, Principal State Attorney was sick and had no prior notice of hearing date until the date he appeared at his office to extend leave to seek medical attention due to his long-term ailment. That, Mr. Lukelo Samwel made all initiatives to the best of his ability to seek an adjournment, but he was denied. That after denial of adjournment he

made effort to contact Ms. Shamte who upon entering appearance in court found the matter proceeding ex parte. That the State Attorneys who were handling this matter jointly with Mr. Lukelo had to their knowledge that the matter was set for necessary orders on 01/11/2023. Thus, they had no knowledge that the matter was set to be conducted at special session on 23-24/10/2023.

Therefore, Mr. Mulwambo argued that basing on the series of events that took place on 23/10/2023 and efforts done by Mr. Lukelo Samwel, Principal State Attorney, it is evidence that the applicants did everything in their powers to ensure that they appeared in court as soon as summons came into their knowledge. That, they were sincere in showing respect of court orders and summons. On that ground, he prayed for this court to rule that efforts shown by the applicants are proof that there was sufficient cause which prevented the applicants to appear on record on the date fixed for hearing, that is on 23/10/2023.

The learned State Attorney submitted further that here is great public interest as the claim involved is against public funds to the tune of USD 23,364,628 from the plaintiff's case and more than USD 39,114,194.91 through the counter claim raised by the applicants.

As such, he submitted that, the respondent will not be prejudiced if the application is granted. To the contrary, the applicants are bound to suffer irreparable loss of public funds to the tune of USD 10,766,536 in case the application is not granted.

In support of this contention, the learned State Attorney drew attention of this court to the case of **Mwanza Director M/S New Refrigerator Co. Ltd v. Mwanza Regional Manager of TANESCO Ltd and Another [2006] T.L.R. 329**, in which it was held that:

It has been held on more occasions than one that it is preferable that suits must be determined on merit in the absence of any evidence that a party is trying to obstruct or delay the course of justice or is in diligent or otherwise acting mala fide. To deny a subject the right to a hearing should be last resort of a court.

As a concluding remark he stated that there are a lot of State Attorneys at the Office of Solicitor General, but the assignment of cases is based on individual diaries. He in the end besought the court to set aside the ex parte judgment.

I have carefully considered the application at hand, the applicants' affidavits, and final submissions. As such, I agree with the learned State Attorney that Order IX rule 9 of the Civil Procedure Code empowers this court to set aside ex parte judgment and decree. However, such power is not automatic as it depends on this court being satisfied by the defendant (the applicant) that there was sufficient cause that prevented him or her from appearing in court when the suit was called on for hearing. This fact is well acknowledged by Mr. Mulwambo in his submissions.

For that case therefore, the issue for determination is whether the applicants had sufficient cause that prevented them from entering appearance in court on the date Commercial Case No. 114 of 2017 proceeded for hearing.

Although the term sufficient cause is the key factor for setting aside ex parte judgments and decrees, the same is not defined in the statutes in our jurisdiction. However, in the case of **Yusuph Same & Another v. Hadija Yusuph, Civil Application No. 1 of 2001**, the Court of Appeal of Tanzania stated that:

'It should be observed that the term "sufficient cause" should not be interpreted narrowly but should be given a

wide interpretation to encompass all reasons or cases which are outside the applicant's power to control or influence resulting in delay in taking any necessary step...'

Therefore, basing on the above stated position of the law, the applicants herein were not only duty bound to prove the reasons for their failure to appear on the material date when Commercial Case No. 114 of 2017 proceeded ex parte, but also, they were duty bound to prove that such reasons were outside their power or control. I am therefore compelled to identify and analyze each of the reasons advanced by the applicants in this application.

As stated above, through the affidavits in support of the application and submissions of Mr. Mulwambo, Principal State Attorney, the applicants have advanced 4 major reasons as hereunder.

One, that Mr. Lukelo Samwel, Principal State Attorney was sick and had no prior notice of hearing date until the date he appeared at his office to extend leave to seek medical treatment due to his long-term ailment. Mr. Lukelo Samwel also stated this reason in his affidavit specifically in paragraphs 5, 6 and 7. According to paragraph 5 of the said affidavit, he acknowledged to have attached two documents to support his ailment which

are, a copy of medical records and sick leave marked as Exhibit 'OSG' collectively. Nevertheless, upon perusal of the said affidavit I have not seen any copy of sick leave. What is found is only a piece of paper titled **HEALTH SERVICES** from Sinza Hospital containing other details.

That is perplexing, and it is my considered view that, in the absence of the said sick leave this reason is bound to collapse. That is because even if the piece of paper mentioned above can be proof that Mr. Lukelo was sick, the same cannot prove that he was away from his office for treatment for more than two weeks. After all, the said paper from Sinza Hospital bears only one date that is, 10/10/2023. As such, I am not able to know whether Mr. Lukelo was away from his office for treatment during the period of two weeks as he has alleged. Otherwise, even if he had been able to prove that he was away from his office for treatment, the same could not be maintainable because that being an office, he could have assigned his duties to someone else acting on his behalf. On that regard, his argument suggests that, in his absence his office becomes inoperative. Therefore, I find no merit on this reason.

Two, that Mr. Lukelo Samwel made all initiatives to the best of his ability to seek an adjournment, but he was denied. That after denial of

adjournment he made effort to contact Ms. Shamte who upon entering appearance in court found the matter proceeding ex parte. According to the affidavit of Mr. Lukelo Samwel, the effort he made was to write a letter to this court seeking for an adjournment of the matter to 24th October, 2023. He then handed the letter to a Law Secretary one Ms. Renalda Kabewa on 23rd October, 2023 at 09:00 A.M. for filing the same with the Registry of the court. The said Ms. Renalda Kabewa took the letter physically for filing in court. That, the same was not received by Honourable Deputy Registrar who instead, requested the secretary to find any State Attorney who could address the message to the trial judge.

That he was informed by Ms. Renalda that, she hurriedly looked for a State Attorney one Mr. Mathew Fuko, who was about to enter Chambers for hearing before another trial Judge in Commercial Case No. 57 of 2023 between Tanzania Electric Supply Company and Attorney General versus Gemen Engineering Company Ltd.

That Mr. Fuko's request for adjournment before the trial Judge (referred to as Hon. A. M. Kirati, J but his name is Matuma, J) ended in vain as the court ordered the matter to proceed for a hearing in the open court. That Ms. Renalda informed him on the continuation of the hearing whereby

he personally came in court with the view of informing the Judge that he was sick. He went to the open court and found the Judge proceeding with hearing of another case. He then waited outside for a while, but he had to leave and heading to the hospital. While heading to the hospital, he called Ms. Asia Abdul Shamte, Senior State Attorney from Tanzania Ports Authority to come to court and see progress of the matter. Upon reaching the court, Ms. Asia Abdul Shamte found the case proceeded ex parte against the applicants herein and the same was fixed for Judgment on 27th October, 2023.

I have carefully considered this argument which is claimed to be effort made by Mr. Lukelo Samwel. I find that the same is tainted with negligence due to the following reasons; first, the letter that is said to have been rejected by Honourable Deputy Registrar is dated 23rd October, 2023 and as per the records, the said case proceeded on the same date. Even the summons that was undisputedly received by the applicants on 12th October, 2023 reveals this fact. Under such circumstances, if the applicants were unable to attend in court on that material date, they would have written the said letter earlier on because they had an ample time from 12th October to at least 22nd October, 2023. However, that was not done. This fact is relevant

because firstly, Mr. Lukelo Samwel has failed to prove that he was away from his office for treatment or at least no one could act in his behalf at the office.

Secondly, Mr. Lukelo Samwel personally attended in court after being informed by the secretary that the request for adjournment was rejected, then I think it was unwise for him to leave the court premises without attending the case or leaving another State Attorney to attend the same. The fact that, he informed Ms. Asia Abdul Shamte while already outside the court premises conveys nothing else but negligence. I hold so because, as he stated he came to court with the view of informing the trial Judge of his sickness. Fortunately, he found him proceeding with another matter. Surprisingly, he left without fulfilling his purpose. This raises many questions including whether he came to court on that material date.

Three, that the State Attorneys who were handling this matter jointly with Mr. Lukelo had to their knowledge that the matter was set for necessary orders on 01/11/2023. Thus, they had no knowledge that the matter was set to be conducted at special session on 23-24/10/2023.

Likewise, I find this reason to be unfounded because as I have already stated above, it is undisputed that the applicants received summons for hearing of the matter on 12th October, 2023. This fact is well acknowledged

by Mr. Lukelo Samwel in paragraph 4 of his affidavit. It is the law as held in the case of **Caritas Kigoma v K. G. Dewsi, Civil Appeal No. 47 of 2004 CAT; and Kiwenga Limited Alopi Tour World Hotels and Resort SPA and Two Others, Civil Appeal No. 240 CAT**, at page 15 that there can be no negligence in the absence of proof that summons was served upon the applicants. By the same token, where there is proof that summons was duly served upon a party who failed to enter appearance on the date of hearing, it is prima facie evidence that there was negligence. In the case at hand the court record and the applicants' affidavits testify that they were duly served upon with summons for hearing. I would particularly refer to the proceedings before the court on 23/10/2023 which show that the summons for hearing was received by the applicants. I have seen the said summons, which was conspicuously endorsed on 11/10/2023 by the applicants. It is in the court file. According to the records, Mr. Gerald Nangi, advocate, and Mathew Funke (sic), State Attorney, I think the correct name is Mr. Mathew Fuko, they went to the trial judge's chamber prior to the hearing time and the state attorney pressed for adjournment, the judge was not convinced and told him that the matter will not be adjourned as it was a backlog. When the matter was called to an open court for hearing the learned State Attorney

was nowhere to be found. To say the least, that is unbecoming for any officer of the court. He should have had the courtesy of waiting and ensuring his name is in the coram.

Four, the State Attorneys who previously handled the matter together with Mr. Lukelo Samwel namely, Mr. Charles Mtae and Ms. Neisha Shao were on safari for other official assignments.

Again, I find this ground to be unmerited because there is not any evidence that supports it. All in all, in his submissions Mr. Mulwambo, Principal State Attorney has made it clear that there are many State Attorneys at the Office of Solicitor General. Therefore, any State Attorney could have attended in court not even for continuation of hearing but for seeking adjournment. In the premises, the issue raised is proved in the negative.

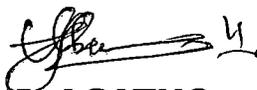
In the end the court orders as follows:

1. The application is dismissed for want of merit.
2. No order as to costs is given.

Order accordingly.

DATED at DAR ES SALAAM this 23rd Day of February 2024.




U. J. AGATHO

JUDGE

23/02/2024

Date: 23/02/2024

Coram: Hon. U.J. Agatho J.

For Applicants: Lukelo Samwel, Principal State Attorney

For Respondents: Gerald Nangi, Advocate.

C/Clerk: Mustafa

Court: Ruling delivered today, this 23rd February 2024 in the presence of Lukelo Samwel, learned Principal State Attorney for the Applicants and Gerald Nangi, the learned counsel for the Respondent.




U. J. AGATHO

JUDGE

23/02/2024