

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM.

COMMERCIAL APPLICATION NO. 399 OF 2017

(Arising from Commercial Case No. 77 of 2017)

HABIBA ABDALLAH EDHAAPPLICANT

VERSUS

AFRICARRIERS LIMITEDRESPONDENT

RULING

MRUMA, J:

This is a ruling on the preliminary objection raised by the Respondent's Counsel to the effect that the Applicant's application to set aside an ex-parte judgment and decree passed by this court on 18/10/2017 is time barred and that this court has been wrongly moved by the Applicant.

The brief background of the matter which gave rise to the impugned application is that the Respondent instituted Commercial Case No. 77 of 2017 against the Applicant. The Applicant was duly served and when the matter was called a before judge on 20/6/2017 one Saidi Azizi (advocate) appeared for the present Applicant (who was the Defendant) and prayed to

be served with copy of the plaint so that he could prepare and file his client's defence the prayer was duly granted and he was ordered to file Written Statement of Defence within seven days from 20/6/2017 and the plaintiff was ordered to file a reply (if any) within seven (7) days after being served with Written Statement of Defence. The matter was adjourned for 1st pre trial and scheduling conference on 12/7/2017.

Come the 12th July 2017, Defendant had not filed any defence. Counsel for the plaintiff prayed for leave to file Form No. 1 so that court could enter a default judgment against the Defendant. Because of the nature of the plaintiff's claim, the prayer was rejected and the plaintiff was ordered to prove her case ex-parte as per Rule 14 (1) and (2) (b) of Order VIII of the Civil Procedure Code (Cap 33 RE 2002). The plaintiff complied and she called one witness for that purpose. After considering the adduced evidence, the court passed ex-parte judgment on 18/10/2017. It is this judgment that the Applicant seeks to impugne through Miscellaneous Commercial Application No. 399 of 2017 (i.e the present application), which is being objected on the ground that it is time barred and that it has been brought under wrong provisions of the law.

The Application was filed on 15th December, 2017 and it is brought under the provisions of Rule 43 (2) of the High Court (Commercial Division) Procedure Rules, 2012, hereinafter the Rules, and Order IX Rule 13 (1) and Section 68 (e) and 95 of the Civil Procedure Code, hereinafter, the Code.

The Application was taken at the instance of Havan Attorneys and is supported by the affidavit of Habiba Abdallah Edhe, the Applicant.

It has been submitted that under the provisions of Rule 43 (2) of the Rules an aggrieved party can apply to the court to have the ex-parte judgment to be set aside within 14 days from the date the applicant received a copy of judgment.

Without wasting much time of the court I do not agree with this interpretation of the law by Mr. Haji Mlosi, advocate for the Applicant. The law is very clear that time starts to run from the date of judgment and not from the date the aggrieved party receives the judgment.

The said Rule provides:

“When the court has entered an ex-parte judgment or passed a dismissal order or any other order, in accordance with Order IX of the Code, it shall be lawful for the court, upon application being made by an aggrieved party within fourteen days **from the date of the judgment or the order**, to set aside or vary such judgment or order upon such terms as may be considered by the court to be just.”

As stated hereinabove, the law is very clear that time starts to run from the date of judgement and the date of judgment is the date when the judgment was pronounced. If the Applicant found that he was out of the prescribed time he ought to have applied for extension of time within which he could apply for setting aside the said judgment.

Secondly, there is a question as to whether the impugned judgment was entered under Order IX of the Code so as to bring this application under the preview of that law.

As the record would bare testimony, the suit in Commercial Case No. 77 of 2017 proceeded under Rule 14 (1) and (2) (b) of Order VIII of the Code and not Order IX of the same Code. Thus, because Rule 43 (2) of the Rules specifically caters for judgment and orders passed under Order IX of the Code, it was wrong for the Applicant to bring this Application under Rule 43 (2) of the High Court (Commercial Division) Procedure Rules.

For those two reasons, namely:

- (i) That the application is filed out of the prescribed time and
- (ii) That the Application has been preferred under inapplicable provision of the law, and pursuant to the provisions Section 3 of the law of Limitation Act, the Application is dismissed with costs to the Respondent.



A. R. Mruma

Judge

16/4/2018