IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 350 OF 2017
(Originating from Commercial Case No. 40 of 2017)

BETWEEN

KAYUWA DGK ENTERPRISES CO LTD ..... APPLICANT

VERSUS

HANGZHOU LIANGLIANG ELECTRONICS LIGHTING CO LIMITED ..... RESPONDENT

RULING

Date of the Last Order: 20/04/2018 *Date of the Ruling 23/04/2018*

SEHEL, J.

The applicant through the services of Dickson Venance Mtogesewa, learned advocate from M/S Dickson Consulting [Advocates], filed an application praying for the following orders:

1. That the Honourable Court be pleased to extend and out of time proceed to determine this application; and

   Upon grant of prayer (1) above

2. This Honourable Court be pleased to set aside and vary its decision of 19/09/2017 ordering judgment and decree for the respondent against the applicant in Commercial Case No. 40 of 2017 between parties herein and further order its hearing inter-parties;

3. Any other reliefs and orders meriting interest of justice; and

4. Costs

The application is made under Section 14 (1) of the Law of Limitation Act, Cap. 89 (hereinafter referred to as "LMA"); Rule 31 (2) of the High Court (Commercial Division) Procedure Rules GN 250 of 2012 (hereinafter referred to as "the Rules"); Section 2 (1) of the Judicature and Application of Laws Act, Cap. 358 (hereinafter referred to as "JALA"); and Section 95 of the Civil Procedure Act, Cap. 33 (hereinafter referred to as "CPC").

The respondent having been served with summons, through its learned advocate Nuhu Mkumbukwa from NexLaw Advocates, filed a counter affidavit and a notice of preliminary objection to oppose the application. The notice of preliminary objection raised five points of law namely;-

1. That the application is incompetent for being omnibus;
2. That the application is incurably defective for being supported by affidavits with defective jurat of attestation;
3. That the affidavits in support of the application are incurably defective for constituting hearsay statements;
4. The application is incurably defective for being supported by incurably defective affidavits that do not show place where affidavit were signed contrary to the law; and
5. That the application is incurably defective for impleading a party who was not a party in the original Commercial Case Number 40 of 2017.

The hearing of the preliminary point of objections was done orally and prior to the oral hearing, the counsel for applicant dully complied with Rule 64 of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 ("the Rules"). Learned advocate Robert Ruben who appeared to represent the respondent notified this Court that he drops second, third and fourth preliminary points of law and he will argue an extra point of law that the application is time barred. He submitted that pursuant to Rule 31 (2) of the Rules the application for setting aside default judgment shall be made within fourteen days from the date of default judgment. He said the dismissal was made on 19th September while the present application was filed on 7th November, 2017 after a lapse of 52 days as such the applicant is late by 38 days. Counsel Ruben prayed for the application to be dismissed under Section 3 of the Law of Limitation Act, Cap. 89 (hereinafter referred to as "LLA") for being time barred.

Counsel Mtogesewa replied by complaining that the objection was raised without leave of the Court and in any event, he said, the respondent's objection is misconceived since there is a prayer for

extension of time which is made under Section 14 (1) of LLA and enlisted under prayer number one in the Chamber Summons. He further contended that the prayer is supported by an affidavit.

In rejoinder counsel Ruben argued the objection touches jurisdiction of this Court as such it can be raise at any time. He further insisted that the application is time barred.

In essence, I agree with counsel Mtogesewa that the objection is misplaced as the applicant in its application is seeking for an extension of time. Prayer number one contained in the Chamber Summons is for an extension of time. As pointed herein, the applicant's application is, amongst other orders also seeks for an extension of time through Section 14 (1) of LLA. As such though the application for setting aside default judgment is made out of time but it is at the same time supported with a prayer for extension of time.

For the objection that the application is incompetent for being omnibus, it was submitted that Order XLIII Rule 2 of CPC contemplates that each application shall be brought separately supported by an affidavit and not dual application in one chamber summons. The

Counsel contended that the applicant combined more than one application in a chamber summons and in a single affidavit. He pointed out that applicant is praying for two different applications in one chamber summons, namely, he prays for stay of extension of time under Section 14 (1) of LLA and for setting aside default judgment under Rule 31 (2) of the Rules. He argued time frame for bringing two applications are different, application for extension of time is 60 days while application of setting aside default judgment is 14 days. He also said determination of two applications are different, for extension of time one has to show sufficient reason while for setting aside one has to show reason as to why he did not appear on the particular date. In support of his submission, counsel Ruben cited the cases of **Rutagatina C.L Vs The Advocates Committee and Another**, Civil Application No. 98 of 2010 (Unreported- CAT); **St. Mary International Academy Ltd Vs. Asile Ally Said & 6 Others**, Misc. Land Application No. 347 of 2016 (Unreported-H.C); and **Zaidi Baraka and 2 Others Vs. Exim Bank (T)**, Misc. Commercial Application No. 28 of 2015 (Unreported-H.C) where it was found that it was not proper to combine two applications which

have different time frames within which to prefer the applications and they have different considerations in determining them.

In response, Counsel Mtogesewa submitted that the application is competent as there is no law that prevents the combination of two applications in one chamber summons. He asserted that the Court abhors multiplicity of applications. He further contended that the applicant has not combined two applications but has filed a composite application with distinct prayers so order XLII of CPC is not applicable.

By way of rejoinder, it was maintained that the application is omnibus and there is wrong citation of the law. It was thus insisted that the application should be strike out with costs.

I have carefully considered the submissions and arguments advanced by the respective learned counsels on this issue of omnibus application. I prefer to start with the wisdom stated by the Court of Appeal in the case of **MIC Tanzania Limited Vs Minister for Labour and Youth Development & Another**, Civil Appeal No. 103 of 2004 (Unreported) adopted in approval a High Court decision in **Tanzania**

Knitwear Ltd Vs Samshu Esmail [1989] T.L.R 48 wherein the High Court was faced with two distinct applications, one for issuance of temporary injunction and the other one was for setting aside a temporary injunction, wherein Mapigano, J (as he then was) stated:

> *"In my opinion the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."*

The Court of Appeal further stated:

> *"....unless there is a specific law barring the combination of more than one prayer in one chamber summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts"*

On this position of the Court of Appeal I wish also to add that the Court should seek to ascertain, according to circumstance of each, whether the applications can conveniently be combined.

Applying the above guidance to the matter at hand, counsel for respondent correctly pointed out and it was acknowledged by the counsel for applicant, that the applicant is seeking two different applications. One for extension of time and the other is for setting aside default judgment. These two applications have different time frames within which to prefer the applications, the extension of time has a time limit of fourteen days while the application for setting aside has time limit of sixty days. Further they have different considerations in determining them. An application for extension of time made under Section 14 (1) of LLA the applicant has to advance sufficient reasons while an application for setting aside default judgment made under Rule 31 (2) of the Rules, the Court has to use discretionary power to determine it. Therefore, according to the circumstances of this case, the two applications are diametrically opposed to each other in terms of determining factors and time frames. Consequently, the preliminary objection is upheld and the application is strike out with costs. Since this objection suffice to dispose the whole application I

will not labour to determine the objection on impleading non-party. It is so ordered.

Dated at Dar es Salaam this 23rd day of April, 2018.

B.M.A Sehel

JUDGE

23rd day of April, 2018.