IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 34 OF 2018

(Originating from Commercial Case No. 59 of 2017)

MAXCOM AFRICA PLC ..... **APPLICANT**

Versus

UDA RAPID TRANSIT PLC ..... **RESPONDENT**

RULING

Date of the Last Order: 29/05/2018 *Date of the Ruling 21/06/2018*

SEHEL, J.

This is a ruling on application for setting aside ruling and decree delivered on 16th day of February, 2018 that dismissed applicant's/Plaintiff's main case in Commercial Case No. 59 of 2017 against the respondent/defendant. The application is made under Rule 29 (4) of the High Court (Commercial Division) Procedure Rules

GN 250 of 2012 (hereinafter referred to as "the Rules") and Section 95 of the Civil Procedure Act, Cap.33.

The facts that gave rise to the present application can briefly be canvassed in the following manner: The applicant sued the respondent for declaratory orders that the respondent is in breach of the contract; declaratory orders that the applicant has a right to withhold and retain all and any equipment and or information it obtained in the course of executing its responsibilities and duties as per the agreements until all its contractual dues are paid; for payment of Tanzanian Shillings Five Hundred Eighteen Million, Five Hundred Two Thousand, Four Hundred Forty Four, Four Cents Twenty Six Only (Tshs. 518,902,444.26) being outstanding balance in respect of Intergrated Transport System Management Agreement; for payment of Tanzanian Shillings Eight Hundred Ninety Seven Million, Nine Hundred Ninety Six Thousand, Nine Hundred Fifty Two Cents Thirty Only (Tshs. 897,996,952.30) being outstanding balance in respect of E-Top Up Card Agreement; for payment of Tanzanian Shillings Nine Million, Three Hundred Seventy Thousand, Six Hundred

Seventy Seven and Two Cents Only (Tshs. 9,370,667.02) being outstanding balance in respect of Ticket Office Machines Management. The applicant also claimed for general damages and costs of the suit.

The respondent upon being served with the plaint, filed its written statement of defence. After completion of the preliminary issues, the suit went through mediation whereby mediation was marked as failed on 9th August, 2017. On 10th day of October, 2017 the applicant was granted extension of time to file the witness statement after it had failed to comply with the provisions of Rule 49 (2) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 ("the Rules") and the matter was fixed to come for final pre-trial conference on 21st day of November, 2017. However, on 21st November, 2017 the counsel for the applicant notified this Court that they have not yet served the respondent with their witness statement. It was also noted by the Court that the alleged witness statement is not in the Court file. Having noted so, the counsel for the applicant informed this Court that they did file the witness statement

in time and he intimidated that he even have a receipt to prove the same. But thereafter he told this Court that the alleged receipt which he has it is written that they have filed written statement of defence instead of witness statement. Suffice to state here that the said receipt was not tendered nor shown to the Court. The counsel therefore requested for time so that he can sort out the matter with the registry. Therefore, the final pre-trial conference was rescheduled to be held on 14th February, 2018. But on 14th February, 2018 the final pre-trial conference could not be held because the counsel for the applicant advanced an oral prayer for extension of time for filing witness statement with the reason that the plaintiff wants to rectify the errors on the face of the Exchequer Receipt. Having heard both parties' submissions on 16th day of February, 2018 the application was declined as there was no justifiable reason advanced for extension of time. The Court went further by dismissing the applicant's suit with costs under Rule 29(3) of the Rules.

Following the dismissal of the suit, the applicant has now come to this Court requesting for setting aside the dismissal order.

At the hearing of the application, advocate Clement Kihioko together with advocate Gwamaka Mwaikugile appeared to represent the applicant while advocate Patrick Mtani and advocate Quinn Allen appeared to represent the respondent.

In trying to explain the reasons for as to why this Court should grant the applicant's prayer, counsel Kihoko submitted that the applicant duly filed its witness statement as directed by the on 12th October, 2017 but the only error which can be apparent on the face of the record was the exchequer receipt issued by the High Court Registry which indicated that the applicant had filed written statement of defence. He submitted that when the applicant appeared on 2nd December, 2017 prayed for leave to rectify exchequer receipt which would indicate that he had filed a witness statement and not written statement of defence. The counsel further contended that the applicant filed a document as a witness statement which was not proper before the court as the only document to prove that it was filed was an exchequer receipt which was not there. It was his submission that an error of writing an

exchequer receipt was not caused by the applicant so it would be unfair for the plaintiff to suffer as a result of errors conducted or done by the registry. He pointed out that in the affidavit the applicant has attached copy of the witness statement and exchequer receipt as Annexure HA1 to show that the witness statement was filed. He thus prayed for the application to be granted.

In opposing the application Counsel Mtani first acknowledged that this Court has power to restore the suit but he did not agree with the reasons submitted by the applicant. He pointed out that this Court at page 5 of its ruling dated 16th February, 2018 extensively dealt with the issue of exchequer receipt and went further that the applicant failed even to produce an affidavit of the registry officer who is said to have mistakenly written the receipt. He further pointed out that at Paragraphs 6 to 10 of the affidavit in support of the application, the applicant is advancing same reasons which this same Court considered and ruled them out. He is thus of the firm view that the Court is functus officio in that the Court cannot go through the same facts which it has already previously determined

unless the applicant is seeking for review. In support of his submission, he referred the Court to **Zee Hotel Management Group Vs. Minister of Finance [1997] T.L.R 265 (CAT)** and **Laemthongrice Company Ltd Vs Principal Secretary, Ministry of Finance [2002] T.L.R 389 (CAT)**. He therefore prayed for the application to be dismissed with costs.

It was re-joined by insisting that there was an error made in the exchequer receipt so for the interests of justice the Court should grant the prayer.

From the rival submissions, the issue here is whether the Court should grant the prayer for setting aside dismissal order. As I said the present application is made under Rule 29 (4) of the Rules which provides:

> *"Any judgment or order made under sub-rule (3) may be set aside by the Court, on application of the party against whom such judgment or orders was made, on such terms, as it considers just."*

The above provision of the law gives discretionary power to the Court to set aside judgment and orders made under sub-rule (3) of Rule 24 of the Rules. For the Court to exercise its discretionary powers it must be satisfied that there are sufficient reasons for setting aside the judgment or order. Consequently, the granting or not of the application depends as to whether the applicant has advanced sufficient reasons. What constitutes sufficient reason has to be considered according to the facts and circumstances of each case. What matters is the explanation given (See the case of **Dimension Data Solution Limited Vs WiA Group Limited and 2 Others, Civil Application No. 218 of 2016 (Unreported-CAT))**.

The explanation given as to why this Court should set aside the dismissal order was that there was an error on the receipt issued in filing the witness statement. As succinctly submitted by counsel Mtani the issue of exchequer receipt was extensively dealt with by this Court in its ruling dated 16th February, 2018 that dismissed the applicant's suit. In its ruling the Court observed that the said exchequer receipt which was said to be mistakenly written was

neither tendered nor shown to the Court. The Court also noted that the alleged witness statement is no-where to be found in the Court file. The Court further stated in absence of affidavit of the registry officer who is alleged to have mistakenly written the exchequer receipt then the applicant is left with no justifiable explanation for extension of time. Generally, the Court extensively weighted the evidences in respect of exchequer receipt and ruled it out. In principle, the excuse given by the counsel in Commercial Case No. 59 of 2017 regarding error appears in the exchequer receipt was adequately dealt with by this same Court and it is the same excuse that is being brought forward in the present application. It has been repeatedly reminded by the Court of Appeal of Tanzania that the Court having performed its duty it cannot reopen it again as it becomes functus officio, in absence of review (See the case of **Laemthong Rice** (Supra)). In the matter at hand the Court have pronounced itself on the issue of exchequer receipt therefore it becomes functus officio. It has no mandate to reopen again in absence of review. In the end I have no other option than to dismiss

the application with costs for the Court is functus officio. It is so ordered.

DATED at Dar es Salaam this 21st day of June, 2018.

B.M.A Sehel

JUDGE

21st day of June, 2018