IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 262 OF 2018

(Arising from Commercial Case No. 203 of 2017)

IMPERIAL MEDIA AGENCIES LIMITED.....1st APPLICANT

FRANK JOHN NICODEMUS.....2nd APPLICANT

Versus

JCDECAUX TANZANIA LIMITED.....RESPONDENT

Last Order: 20th May, 2020

Date of Ruling: 14th July, 2020

RULING

FIKIRINI, J.

This is an application for extension of time to file witness statements filed under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC). The application is supported by an affidavit of Ms. Gracc N. Msuya, the counsel for the defendants/applicants. Sickness of the counsel from 15th to 19th November 2018 is deponed as the reason for the delay. A copy of medical chit was annexed marked as "A".

Contesting the application, the respondent through Mr. Audax Kijana Kameja learned counsel filed a counter-affidavit deponing that no sufficient reason for

extending time was availed. Besides the three (3) days which the deponent was sick as certified by the doctor, the other delayed days the deponent has not accounted for.

Counsels filed their skeleton arguments pursuant to Rule 64 of the Rules and had their day in Court for oral submissions.

It was Ms. Msuya's submission that she delayed in filing witness statements as she was sick and had no one else at the firm to whom she could delegate the assignment. On reasons to be considered in granting the application, she contended that reasonable and sufficient cause has not been defined by the law, but have somehow been defined through case laws such as **Benedict Mumello v Bank of Tanzania, Civil Appeal No. 12 of 2002 (unreported) p. 7** where the Court expressed what can be counted as sufficient or reasonable cause. Stress on her position, she stated that if the extension of time was not intended to suffocate speed of justice and right of the parties then it should be granted. She also submitted that granting of an extension of time will not in any way prejudice the respondent. And also a matter of justice that a party should not be condemned unheard especially bearing in mind the compensation the plaintiff was demanding in the suit amounts to USD. 906, 017. Ms. Msuya, as well urged the Court to do away with technicalities and invited the Court to observe the requirement under Article 107A

(2) (e) of the Constitution of the United Republic of Tanzania, 1977. In support she cited the case of **General Marketing Co. Ltd v A. A. Shariff [1980] T. L. R. 61 at 65**, where the Court stated:

> *"Rules of procedure are handmaids of justice and should not be used to defeat justice."*

Based on her submission and skeleton arguments filed she pressed the Court to grant the application.

Mr. Kameja took the floor by requesting the Court to adopt his skeleton arguments filed in objection to the application as well as the counter- affidavit deponed. In his skeleton arguments, Mr. Kameja challenged the applicant for failure to adduce sufficient reasons as the counsel fell sick after three (3) days have elapsed and nothing has been said in that regard. In addition, it took her ten (10) days to file this application after recovering, again without stating the reasons as to why, he submitted. Commenting on the reason that she was the sole advocate in the firm, he argued, was countered by the submission that was sufficient reason since it was not a legal position that sole practicing advocates were to be held to a lower standard of obligation than advocates who were in larger firms.

Underlining the submission on sufficient reasons, he submitted that in order for the application to succeed, the applicant must adduce sufficient reason for the delay citing the cases of **Martha Daniel v Peter Thomas Nko [1992] T. L. R. 359** and **William Shija v Fortunatus Masha [1997] T.L.R. 213**, where the Court reminded the Court to act judiciously in exercising its discretionary powers. The applicant on the contrary is equally required to account for each day of the delay. Supporting his stance Mr. Kameja cited the cases of **Jumanne Hussein v R, Criminal Application No. 20 of 2014, CAT (unreported)** and **Bruno Wenceslaus Nyalifa v The Permanent Secretary Ministry of Home Affairs & The AG, Civil Appeal No. 82 of 2017, CAT (unreported).** Since the expiry date was 19th November, 2018 for filing of the witness statements, the applicant had to account of the days from 20th November to 28th November, 2018 when this application was filed, which she did not.

Submitting on prejudice, he submitted that since the service of the witness statement of the plaintiff was effected on 19th November, 2018, to this date, which was almost twelve (12) months, it was his opinion the plaintiff will be prejudiced as the defendants/ applicants cannot be stopped from tailoring their evidence to counter the evidence already availed to them through the witness statements served upon the defendants. Rule 49 (2) of the Rules required that both parties file their

witness statements during the specified time. The rationale being to avoid the danger of one party being prejudiced, and thus, if extension of time will be granted to the defendants would lead to miscarriage of justice.

Touching on overriding objective principle, it was his submission that the recent amendments to the Commercial Court Rules, though GN. No. 107 of 2019, which requires, under Rule 4, that this Court, while administering its Rules, shall give effect to the principle as provided under section 3A and 3B of the CPC. The essence of which, was that the Court shall facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This application was however, not the proper one for the Court to invoke the overriding principle. As submitted earlier on that the granting of an application for extension of time after twelve (12) months, after the witness statements have been served upon the defendants will occasion a grave injustice to the plaintiff. Also, the notion of justice, which was central to the rationale behind sections 3A and 3B of the CPC, must be considered for both parties to the dispute, Mr. Kameja maintained. And if at all the principle has to be applied then it should be applied in favour of the plaintiff who otherwise stood to be gravely prejudiced by grant of the application.

He thus prayed for the application be dismissed with costs.

I have dully considered the application and the accompanying affidavits in light of the rivalry submissions and filed skeleton arguments by the counsels. The Court is bestowed with unlimited discretionary powers. However, those discretionary powers have to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily. Aside from the **Martha Nko** and **William Masha** cases (supra) there is a long list of authorities on that. To add just a few are **Yusuph Same & Hawa Dada v Hadija Yusuph, Civil Appeal No. 1 of 2003, CAT; Regional Manager, Tanroads Kagera v Ruaha Concrete Company Limited, Civil Application No. 96 of 2007** and **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania.**

Apart from the powers bestowed on it, in order for the Court to act there must be sufficient reasons for the Court to do so. Although what amounts to sufficient reasons or cause has not been defined but over time and through case laws a number of factors to be taken into account have been established. In the **Mumello** case (supra), the Court had this to say:

> *"What amounts to sufficient cause has not been defined and from decided cases as number of factors have to be taken into accounting including whether or not the application has been*

brought promptly, the absence of any or valid explanation and lack of diligence on the part of the applicant."

Accounting for each and every day of the delay is one of the requirements. In the present application and the affidavit in support, the applicant has not been able to explain or account for each and every day of the delay. *One*, immediately after the mediation has failed on 13th November, 2018, parties were ordered to file their witness statements within seven (7) days as required prior to the amendment of the Commercial Court Rules, GN. No. 107 of 2019. The applicant has reported that she fell sick and annexed a medical chit in that regard. The medical chit and her own account revealed that she was sick from 15th to 19th November, 2018. This means she wasted three (3) goods days prior to falling sick. These days have not been accounted for.

After recovering from her sickness and three (3) days of rest as advised by the medical personnel, it again took the applicant ten (10) good days to file this application. Even though she considered this to be prompt reaction but it is a legal position that delay even of one day can be adversely judged whereas delay of several days albeit with valid reasons can lead to granting of the application. This position has been acknowledged in several cases including **Bushfire Hassan v Latina Lucia Masanya, Civil Application No. 3 of 2007, CAT (unreported)** and

Wambele Mtumwa Shaban v Mohamed Hamis, Civil Reference No. 8 of 2016 (unreported), to name a few. In the case of **Bruno Wenceslaus** (supra) the Court specifically mentioned on the need to account for each and every delayed day until an application was lodged. The Court had this to say:

> *"The time which is to be accounted for is not only the original prescribed time frame which has expired,* ***but also each and every delayed day which passes until an application for extension of time is lodged.*** "[Emphasis mine]

The applicant has failed to account for each of the delayed ten (10) days after her recovery. I thus agree to Mr. Kameja that no sufficient cause has been advanced. Sickness can of course be a good or sufficient cause but without enough proof or failure to account the days wasted after a party has recovered, weakens the defence or good cause sickness would have provided. In the premises, the failure to account for each and every day of the delay in the affidavit in support of the application certainly renders the application lacking and hence devoid of merit.

Mr. Kameja in his counter-affidavit and skeleton arguments raised concern if this application will be granted. His concern was that the respondent/plaintiff will be prejudiced. This argument was premised on the fact that the defendant/plaintiff had already filed her witness statements since 19th November, 2018, which is a year

plus. If an extension of time will be granted, there would be nothing to prevent the applicants/defendants from tailoring their evidence in such a way as to counter whatever is contained in the witness statements, which would be to the respondent/plaintiff's detriment, for the sound of the submission is plausible, but close scrutiny does not give me an affirmative answer to the concern. Prior to coming into effect of filing witness statements, the processing of the case was the plaintiff would go first and defendant come later after the close of the plaintiff's case. There was no prejudice apprehension ever raised. The filing of witness statement, alike would in my view not been easily countered unless the plaintiff's case was in itself weak. Moreover, the plaintiff will still have room to cross-examine would be witnesses and their documentary evidence if any.

It is important to note that the Court in dispensation of justice has to ensure facilitation of just, expeditious, proportionate and affordable resolution of civil disputes. This has been an emphasis even in the recent amendments to the Commercial Court Rules, through GN. No. 107 of 2019. Pursuant to Rule 4, the Court, has been cautioned that while administering its Rules, it shall give effect to the overriding objective principle as provided under sections 3A and 3B of the CPC. Ms. Msuya treading along the same line invited this Court to look into the

matter without being tied to technicalities as stipulated under Article 107A (2) (e) of the Constitution which provides as follows:

(2)

> (e) *"To dispense justice without being tied up with undue technical provisions, which may obstruct dispensation of justice."*

While in agreement with Ms. Msuya on the application of Article 107A (2) (e) of the Constitution but I do not think this meant completely doing away with the provisions of the law and procedures in place. In the **SGS Societe Generale de Surveillance SA and another v. VIP Engineering & Marketing Ltd and another, Civil Appeal No. 124 of 2017, CAT –DSM (unreported) p. 23,** the Court stated:

> *"That the amendment by Act No. 8 of 2018 was not meant to enable parties to circumvent the mandatory rules of the Court or to turn blind to the mandatory provisions of the procedural law which go to the foundation of the case."*

In this application equally, I find it not the proper one for the Court to invoke the overriding principle. As submitted by Mr. Kameja, the submission I subscribe to,

there was no sufficient reason advanced to persuade this Court to grant the application. Also, the notion of justice, which was central to the rationale behind sections 3A and 3B of the CPC, if at all, is to be considered it must be considered for both parties to the dispute. The argument by the Counsel that the amount of USD. 906, 017 involved is huge notwithstanding.

For the reasons stated above, I find the application devoid of merit and proceed to dismiss it with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

14th JULY, 2020