

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO.160 OF 2019**

**(ARISING FROM COMMERCIAL CASE NO 90 OF 2019)**

**NANCY SINAY HUGGINS.....APPLICANT**

**VERSUS**

**EXIM BANK (TANZANIA) LIMITED .....RESPONDENT**

**Date of Last Order:15/07/2020**

**Date of Judgement: 30/07/2020**

**RULING.**

**MAGOIGA, J.**

The applicant, NANCY SINAY HUGGINS by chambers summons made under Order XXXV Rule 8 and section 95 of the Civil Procedure Code, [Cap 33 R.E.2002] instituted this application against the above named respondent praying for the following orders, namely:-

- i. This honourable court be pleased to set aside the summary judgement and decree dated the 29<sup>th</sup> day of November, 2019 before Hon. Magoiga, J for the applicant to be allowed to file an

application to appear and defend the suit in Commercial Case No. 90/2019.

- ii. Costs of this application be provided for by the respondent
- iii. Any other orders as this honourable court deems just and fit to grant.

The chambers summons was accompanied by the affidavit deposed by the applicant, stating the reasons why this application should be granted.

Upon being served with the chamber summons and affidavit, the respondent, filed a counter affidavit deposed by Mr. Jovinson Kagirwa, stating the reasons why this application should not be granted.

The learned advocates for parties equally filed their respective skeleton written argument in support of their respective stances. I have had an opportunity to read their respective arguments and I am grateful to their well done research. Truly, I found them useful in making this ruling possible.

When this application was called for hearing, the applicant had the legal services of Mr. Mrisho M. Mrisho, learned advocate, on one part, and the respondent, on the other part, had the legal services of Mr. Jovinson

Kagirwa, learned advocate. Both learned advocates were ready for hearing, hence, paving way for this ruling.

Mr. Mrisho opened up his submissions by telling the court that, under the provisions by which the court was moved, the purpose of this application was for this court, to be pleased to set aside its summary judgement dated 29<sup>th</sup> day of November, 2019 and allow the applicant to defend in Commercial Case No. 90 of 2019. One of the reasons advanced in the accompanied affidavit and in the skeleton written arguments is that, by the time the applicant was supposed to have filed an application for leave to defend, she was on safari and when she came back, time for filing the defence had elapsed and her oral prayer for extension of time was not granted.

According to Mr. Mrisho, to be out of Dar es Salaam is an exceptional circumstances, which caused the applicant not to file the application for leave and as such failed to sign an affidavit enabling the filing of the application to seek leave to defend. Another reason advanced by Mr. Mrisho is that, the negligent committed by the advocates, should not be used to punish parties and limit the court from dispensing justice inter parties. In support of this stance, the learned advocate for the applicant cited the case

of CRDB BANK LIMITED v. NBC HOLDING CORPORATION AND OTHERS, [2002] TLR 426.

On the strength of the above two reasons, Mr. Mrisho humbly urged that this application be granted as prayed in the chamber summons.

On the other adversary part, Mr. Kagirwa opposing this application prayed to adopt his counter affidavit and his skeleton arguments. Mr. Kagirwa direct to the point submitted that, in order for the provisions of Order XXXV Rule 8 of the CPC to come into play the applicant need to advance exceptional circumstances. According to Mr. Kagirwa, the renown Indian author Mulla on Code of Civil Procedure 16<sup>th</sup> edition, Volume 4 underscore the point while interpreting Order XXXVII Rule 4 which is pari materia with Order 35 Rule 8 and concluded that, exceptional circumstances require more proof than are sufficient reasons. Mr. Kagirwa went on to argue that the reason that the applicant was out of Dar es Salaam cannot be a exceptional circumstances and the service that was done to the advocate of the applicant was through her directions and cannot say I chose wrong advocate.

Further, it was argued that, entertaining a negligence that was demonstrated by the learned advocates for the applicant, is not an exceptional circumstances, so to speak, insisted Mr. Kagirwa.

Furthermore, Mr. Kagirwa argued that, the issue of extension by this court was determined by this court on 20<sup>th</sup> November, 2019, hence this court is functus officio. In support of this argument, the learned advocate for the respondent, cited the cases of BIBI KISOKO MEDARD v. MINISTER FOR LANDS, HOUSING AND URBAN DEVELOPMENT AND ANOTHER [1983]TLR 250 , KHALFAN MOHAMED(as surviving administrator of the estate of the late Said Khalife) v. AZIZ KHALIFE AND ANOTHER, CIVIL APPEAL NO. 97 OF 2018 (Unreported) but which was not attached and GODVIVE TRANSPORT LTD AND ANOTHER v. COMMERCIAL BANK OF AFRICA, MISC. COMMERCIAL APPLICATION NO. 135 OF 2018 (Unreported) but not attached to the submissions.

It was the strong view of Mr. Kagirwa that, the purpose of Order 35 Rule 8 was aimed to protect defendant in an exceptional circumstances. Since the applicant has utterly failed to state any exceptional circumstances in this application in her affidavit, skeleton arguments, and oral submissions, nor showing a probable defence, then, to grant the instant application will

undermine the purposes of Order 35, which was aimed to dispose cases within a very short time. In support of his arguments, the learned counsel for the defendant cited the cases of LESLIE DOUGLAS OMARI v. EXIM BANK TANZANIA LIMITED AND OTEHRS, MISC. COMMERCIAL APPLICATION NO.353 OF 2017 (Unreported) but not attached to the skeleton written arguments and CRDB BANK LIMITED v. JOHN KAGIMBO LWAMBAGAZA [2002] TLR 117 in which it was held that summary suit is to enable a plaintiff to obtain judgement expeditiously where the defendant has in effect no substantial defence to the suit and to prevent such a defendant from employing delaying tactics and in the process, postpone the day of reckoning.

Based on the above reasons, the learned advocate for the respondent humbly urged this court to dismiss this application for want of merits with costs.

In rejoinder, Mr. Mrisho, learned advocate for the applicant submitted that, the requirement of demonstrating probable defence is not a requirement of the law and reiterated that, for reasons advanced in their submissions in chief suffices to be exceptional circumstances and cause the application to be granted as prayed.

This marked the end of hearing of this application.

The task of this court now is to determine the merits or otherwise of this application. However, this court has noted that there are some of the facts in the main suit, subject of this application, which are not in dispute which in one way or another, will assist this court in doing justice to parties. These are. **One**, the main suit arises out of legal mortgage and same was preferred under summary procedure under Order XXXV of the Civil Procedure Code,[Cap 33 R.E. 2002]. **Two**, there is no dispute that, the applicant (who is the defendant in the main suit) was dully served on 05/09/2019 through her chosen advocates from Dirm Attorneys. **Three**, there is no dispute that, one, advocate Hamza Yusuf, from Dirm Attorneys appeared in court on 11/09/2019 and acknowledged that service and informed the court that the main suit being a "**summary suit**" they intend to file an application for leave. **Four**, there is no dispute that the application for leave to defend is to be done within 21 days from the date of service and by 26/09/2019 twenty one days elapsed without any application preferred by the applicant. **Five**, on 20/11/2019, when the matter was called for orders, which was more than 67 days since service was done, no application for extension was ever filed, but on that day without assigning

any reasons, the learned advocate for applicant, orally moved this court to grant extension of time to file an application for leave to defend, which oral application was seriously objected by the learned counsel for respondent and the court declined to grant the same.

Moreover, this court find that ,the provisions of Order XXXV Rule 8 which this application was pegged, are imperative to be reproduced hereunder for easy of reference.

**Order XXXV Rule 8- After decree the court may in exceptional circumstances set aside the decree and, if necessary, stay or set aside execution, and may give leave to the defendant to appear to summons and defend the suit, if it seems reasonable to the court so to do, and on such terms as the court think fit. (Emphasis mine)**

From the literal interpretation of the above Rule, it is crystal clear that, after decree of the court is once issued under Order XXXV of the CPC, where the defendant fails to get a leave to defend, this court has discretion to set aside the said decree provided that, the applicant can demonstrate '**exceptional circumstances.**' By exceptional circumstantial, in my considered opinion, it means, the reasons must be exceptional to the



general phrase of '**sufficient reasons**' which is lower in proof than exceptional circumstances. Examples of exceptional circumstances, that can make the court right away set aside the judgement and decree are; **one**, if no services known to law was done to the applicant before the judgement and decree was issued; **two**, that upon being served, the applicant was prevented by some circumstances that were beyond his/her control to the satisfaction of the court; **three**, if the decree was obtained by fraud or misrepresentation; **four**, if the court had no jurisdiction to entertain the matter in dispute; and, **five**, if the judgement and decree was tainted with illegality just but few to mention.

Now back to the instant application, none of the above exceptional circumstances was demonstrated in this application, save that, the applicant generally alleged that, she travelled outside Dar es Salaam without showing an exceptionality of her travel outside Dar es Salaam. This, at any degree of imagination, cannot be exceptional circumstances in this matter. The applicant utterly failed to show why she was forced to travel despite knowing time was not to her best allies and in the absence of any facts demonstrating and showing why she was prevented to make an application

for leave in time, makes this reason far from convincing this court to hold otherwise.

The second reason advanced was that, advocates' negligence should not be used to punish the applicant. Having considered the circumstances, and the manner the applicant's advocates conducted themselves in this matter as demonstrated above, I am very much convinced and as rightly argued by the learned advocate for the respondent that, an advocate's negligence in handling the matter cannot be an exceptional circumstances. The application, that was envisaged was to get leave, being an interlocutory application, even an advocate for the applicant could depone to the facts for the grant of the leave, sign all the necessary documents and with the wake of communication revolution we have today, and without demonstration that, the applicant was not reachable from where she was, this reason, in my considered opinion, is not and cannot be an exception circumstances, but a demonstration of the highest degree of negligence, that this court cannot entertain despite the right of the applicant to defend as both rights have to be exercised with limitations. The case of **CRDB Bank Limited (supra)** cited by the learned advocate for the applicant being unreported and not attached in the skeleton written arguments, will


not be considered and is another indication of negligence on their part in handling this application.

Having found that no exceptional circumstances were advanced by the applicant in her application, I hereby without much ado, constrained to dismiss this application with costs.

It is so ordered.

Dated at Dar es Salaam this 30<sup>th</sup> July, 2020.



  
**S. M. MAGOIGA**  
**JUDGE**  
**30/07/2020**