IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 47 OF 2019

(Originating from Commercial Case No. 55 of 2018)

QUALITY CORPORATION LIMITED.....1st APPLICANT

QUALITY GROUP LIMITED.....2nd APPLICANT

TANPERCH LIMITED.....3rd APPLICANT

YUSUF MANJI.....4th APPLICANT

KANIZ MANJI.....5th APPLICANT

Versus

NATIONAL BANK OF COMMERCE LIMITED.....RESPONDENT

Last Order: 10th Dec, 2019

Date of Ruling: 27th Feb, 2020

RULING

FIKIRINI, J.

The applicant under certificate of urgency and by way of chamber summons moved this Court under section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 (the Law of Limitation); Order XXXV Rules 3 (1) (a), 3 (1) (b), 3 (1) (c),

Rule 8 and section 95 of the Civil Procedure Code, Cap. 33 R.E. 2002 (the CPC), seeking for the following orders:

1. That, this Honourable Court be pleased to grant extension of time for the applicants to set aside decree and execution of Summary Judgment entered in Commercial Case No. 55 of 2018.
2. That, this Honourable Court be pleased to grant extension of time for the applicants to file leave to appear and defend the suit, Commercial Case No. 55 of 2018.
3. That, this Honourable Court may be pleased to set aside decree and execution of Summary Judgment entered in Commercial Case No. 55 of 2018.
4. That, this Honourable Court may be pleased to grant the applicants leave to appear and defend a suit in Commercial Case No. 55 of 2018.
5. Costs of this suit.
6. Any other relief(s) which the Honourable Court shall deem fit to grant in favour of the applicants.

Mr. Yassin Mwaitenda Maka counsel for the applicants filed an affidavit in support of the application whereas Doxa Mbapila –Head of Legal and Company Secretary of the respondent filed a counter affidavit contesting the application. The

application was orally heard, whereby Mr.Maka appeared for the applicants and Mr. Joseph Nuwamanya appeared for the respondent. The applicants were basically seeking for an extension of time to set aside decree and summary judgment entered in Commercial Case No. 55 of 2018 assigning reasons for the delay to be: *one,* that Tanzania Revenue Authority (TRA), closed the business of the 1st, 2nd and 3rd applicants, consequently leading to its employees, expatriates working under the applicants terminate their contracts and other employees resigning. So the applicants failed to access their offices up to when the hearing of this application took place. There were no files, documents or records which could be easily received by the applicants for lack of office or access to their documentation.

Two, another reason advanced was change of advocates. The previous advocate is stated withdrew his services without notice. As a result when the applicant became aware of the existence of the Commercial Case No. 55 of 2018 time had already elapsed. Fortifying his position he cited the case of **Anche Mwedu Ltd & 2 Others v The Treasury Registrar, Civil Reference No. 3 of 2015, CAT -DSM (unreported) pgs. 12-14.**

Mr. Maka maintained that if this application for extension of time is not going to be granted the applicants will not be heard and this will shut down their right to be

heard. Under paragraph 15 of the affidavit in support, the applicants have claimed to have been servicing the debt loan, therefore if not heard injustice might be occasioned. After all this was a reasonable ground for the applicants to be granted leave to defend the suit, he submitted. The case of **Nararisa Enterprises Co. Ltd & 3 Others v DTB, Miscellaneous Commercial Cause No. 202 of 2015** was cited in support.

Three, challenging the legality of the suit subject of this application, it was his submission that Order XXXV Rule 1 of the CPC provides for suits capable to be filed by way of summary suit. Rule 1 (c) of Order XXXV provides for suits arising out of mortgage which is not the case in Commercial Case No. 55 of 2018. In that suit the respondent sued the borrower and joined the mortgager, which was wrong as the 4th and 5th applicants were not party to the suit envisioned under Order XXXV Rule 1 of the CPC. Instead the respondent was required to institute an ordinary civil suit against the 4th and 5th applicants if at all there was such need.

Submitting on the leave to appear and defend the suit as well as to set aside the summary judgment he contended that Order XXXV Rule 8 of the CPC provided for that. Against the submissions he prayed for the application be granted with costs.

Mr. Nuwamanya apart from adopting the affidavit of Doxa Mbapila filed on 04th June, 2019 and skeleton arguments filed on 11th October, 2019, he objected to the grant of the application. He invited the Court to take cognizance of the principles stated in numerous authorities, which included account of each day of the delay; that the delay should not be inordinate and that there was no laxity and lack of diligence.

Furthering his submission and taking up on Mr. Maka's submission he contended that Mr. Maka has not supplied any proof to the Court that the applicants' offices were closed. What he submitted was just a statement from the bar. And even if there was closure of the said business, the Court was not informed as to when that occurred. This would have assisted the Court in determining when the time should have started running. Equally there was no proof of employees, expatriates and other service providers resigning, the Court should therefore treat the account as mere statement, stressed Mr. Nuwamanya.

The applicants were at all material times represented in the Commercial Case No. 55 of 2018 up to when the final orders were made and there was no proof of advocate abandoning instructions. Discussing the **Anche's** case (supra), it was his position that in the cited case there was issue of illegality which none has been pointed out by Mr. Maka. The authority is therefore distinguishable, he submitted.

On the right to be heard, it was his submission that the applicants were at all material time accorded opportunity and the Court had even ordered substituted service in that regard. Mr. Nuwamanya believed that the application besides being an afterthought was brought to frustrate the execution that was happening in the Commercial Case No. 55 of 2018.

On the order to set aside the execution of the summary decree, he referred this Court to paragraph 2.2.2 -2.2.7 of the skeleton arguments filed as well inviting the Court to get inspiration from **Mulla on Civil Procedure, p.202 Vol. 4, 7th Ed**, that it is only on "exceptional circumstances" The Court can consider to grant the application to set aside the decree.

Furthering his argument, Mr. Nuwamanya argued that the application of Order XXXV Rule 8 of the CPC can become useful had the order been ex parte and not as is the case in the present situation whereby summary decree was passed in the presence of the applicants after the application for leave to defend was struck out for non-citation of enabling provision.

On extension for leave to defend the suit, Mr. Nuwamanya again referred this Court to paragraph 2.1.3 under which the criteria for granting or not granting such an application was discussed, that sufficient cause or reason is what would determine grant of such application, citing the cases **Regional Manager,**

Tanroads Kagera v Ruaha Concrete Company Limited, Civil Application No. 96 of 2017 (CAT) (unreported), p. 6, where the Court illustrated determination of what constituted sufficient reason must depend on each particular case. And **Zuberi Nassor Mohamed v Mkurugenzi Mkuu Shirika la Bandari Zanzibar, Civil Application No. 93/15 of 2018 (CAT) (unreported),** the Court stressed on substantiating any statement made. In the case of **Ngao Godwin Losero v Julius Mwarabu, Miscellaneous Civil Application No. 10 of 2015 (CAT) (unreported)** the Court of Appeal made reference to the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010,** whereby 3 (three) conditions were spelt out as guideline in considering an application for extension of time namely: (i) account for each delayed day; (ii) delay should not be inordinate; (iii) diligence must be exhibited and not apathy, negligence or sloppiness in taking action. That was echoed in the case of **Finca (T) Limited & Another v Boniface Mwalukisa, Civil Application No. 598/12 of 2018 (CAT) (unreported),** whereby the Court maintained that delay even of one day has to be accounted for.

As for the submission and citing of the **Nararisa** case (supra) that the debt loan was being serviced, contended by Mr. Maka, but without proof the submission

should not be considered as sufficient reason, stated Mr. Nuwamanya. This was also in paragraphs 13, 14 and 15 of the respondent's counter affidavit, disputing that there was money has paid servicing the debt loan.

Finally, Mr. Nuwamanya addressed the Court to the effect that the 4th and 5th applicants are natural persons and directors of the 1st, 2nd, and 3rd applicants and who at all material times could not have been affected by closure of the office and leaving of employees., that can therefore not be a reason.

From the submissions he prayed for the application to be declined and dismissed with costs.

Rejoining Mr. Maka and specifically expressing on the closure of the office, he contended that to be public information of which should also be judicial notice. As for the applicants' representation he disputed the information and referred this Court to paragraphs 5, 6 and 7 of the affidavit in support. He as well maintained that the application was not an afterthought but the one which is allowed under Order XXXV R 8 of the CPC. Submitting on the relevancy of **Nararisa** case, it was his statement that the case is applicable as the Court concluded an application for leave was not full hearing, therefore no need to analyze evidence which would otherwise be presented at the full hearing of the main case.

Reacting to the submission related to the 4th and 5th applicants, he stated that to have been a proof of illegality claimed, which was contrary to Order XXXV Rule 1 of the CPC, that the respondent should only have sued the borrower. If there was any intention of lifting the corporate veil then it is not proper to bring it by way of summary suit. As for the illegality part and in reference to the **Finca** case cited by the respondent, it was Mr. Maka's submission that the Court had already stated that there was need to account for each delayed day as long as there was an issue of illegality.

Closing his submission he reiterated that the applicants have been servicing the debt loan and therefore prayed for the application to be granted.

The pertinent issue for determination is as to whether the applicants have furnished this Court with sufficient cause or reasons to grant any of the three applications made: (i) extension of time to set aside decree and execution of summary judgment; (ii) extension of time for the applicants to file for leave to appear and defend; and (iii) order to set aside a decree and execution of summary judgment entered in Commercial Case. 55 of 2018.

In answering I will combine the 1st and 2nd prayers for extension of time by providing the guiding principles in the application of this nature. Granting or not granting an extension of time is purely discretionary powers vested upon the Court.

The powers are however, to be exercised judiciously lest the Court act arbitrary. In order to fulfill the obligation a party seeking for such relief (s) is expected to a show sufficient cause or good cause to warrant grant of such application. Of course what amount to sufficient cause or reason has not been defined anywhere, but over time Court decisions have evolved and came up with what can be considered as a guideline. There is a long list of authorities in that regard and Mr. Nuwamanya has referred and supplied this Court with some of them. I will thus guide myself along the lines of the decisions supplied which to a great extent I subscribe to.

In the case of **Regional Manager, Tanroads Kagera** (supra) the Court stance was clearly depicted when it held:

> "*What constitute sufficient reason must be determined by reference to all circumstances of each particular case. This means the applicant must place before the Court material which will move the Court to exercise its discretion in order to extend time limited by the Rules.*"

The applicant is expected to furnish the Court with reasons which caused delay, for it to act upon. In the present application the applicants have assigned three main reasons: ***one***, closure of business in respect of the 1st 2nd and 3rd applicants by Tanzania Revenue Authority, resulting into the applicants' failure to access files,

documents or records as well as easily receive any information for lack of having office premises. ***Two,*** change of advocates impacted them and this occurred after the previous advocate is stated withdrew his services without notice. As a result when the applicant became aware of the existence of the Commercial Case No. 55 of 2018 time had already elapsed. ***Three***, that the proceedings were marred with illegalities.

All the reasons advanced were not substantiated in any manner whatsoever. Mr. Maka in his rejoining submission averred that the closure of the applicants' business was public of which judicial notice ought to have taken place. His assertion, besides not being necessarily correct did not stop him from providing evidence in support of what he alleged. Otherwise unsupported claim or statement cannot be construed to constitute sufficient reason. This position was illustrated in the case of **Zuberi Nassor** (supra), which fully agree to.

The applicants have as well pointed out that change of advocates after the previous abandoned instructions also interfered with the conduct of their case. This account has been vehemently controverted by Mr. Nuwamanya in his submission. Mr. Maka has not been able to counter the submission or provide proof, that the applicants were not fully represented or at what stage of the conduct of the suit their advocate abandoned them as alleged. Usually client/s and the Court are

have been curtailed. Summary suit is a process used to effectively compel payment. The process in most cases does not involve calling of witnesses, whereby defence can be mounted. In principle that is the position, however under Order XXXV Rule 2 (1) of the CPC, summons to appear and defend can be issued upon application. This in my view should have been considered as an opportune time for any guarantor to raise their defence, if they want to be heard. In the present situation the application was declined. The applicants cannot therefore claim to have been denied right to be heard. Right always comes with obligations. Once a party seeking for the alleged right fails to comply with the requirement, such party would not be correct to claim that right to be heard was denied.

The case of **Anche Mwedu** (supra), though relevant but does not fit the present scenario. No one can read from the inclusion of the 4th and 5th applicants that they were guarantors unless the information is availed, so the illegality claimed would be subject to more legal arguments and analysis. I could have perhaps considered the submission that the debt loan had been being serviced as averred under paragraph 15 of the affidavit, but that was not substantiated nor any documents annexed. The decision **Nararisa** (supra) has not been ignored but did not fit in the present situation.

Putting all my evaluation together they all answer this question as to whether the applicants have provided the Court with sufficient cause or ground warranting grant of an extension of time to set aside summary decree and execution of summary judgment as well as leave to defend in the negative. The answer is the applicants have failed to show sufficient cause.

Turning to the 3rd ground that of the order to set aside execution of summary decree and execution of summary judgment; the Court's power to order as requested is provided for under Order XXXV Rule 8 of the CPC. The power provided under the provision come with condition, that only on "exceptional circumstances" the Court can grant such order. The applicants have not demonstrated any "exceptional circumstances" compelling this Court to act so. Going by **Mulla's** (supra) amplification which I agree to he explained exceptional circumstances as follows:

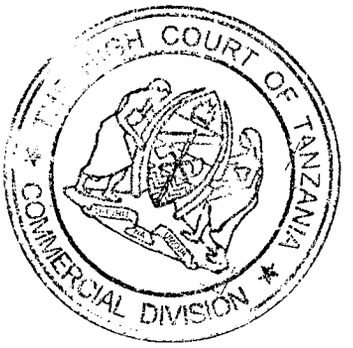
> *"such circumstances that would take with it a "cause" or "reason" which prevents a person in such a way that it is almost impossible for him to attend court application"*

The applicants have not shared with the Court as to what has transpired from 26th November 2018, the last time one Mr. Andrew Chima advocate representing all the

applicants (then defendants) up to when this application was preferred. No reasons were advanced as to why it took that long for this application be filed.

I completely agree with Mr. Maka that the applicants deserve a day in Court as of right, but as pointed out earlier rights and obligation go hand in hand. The applicants all these time, failed to show up or process their application until now when it was already out of time and with inordinate delay, still with no sufficient cause assigned to the delay.

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



P. S. FIKIRINI

JUDGE

27th FEBRUARY, 2020