IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 129 OF 2019

BETWEEN

NAVNIT GORDHANDAS DAVDA.....APPLICANT

Versus

NEXT TELECOM INT (T) LIMITED.....1st RESPONDENT

NISHIT RATILAL PATTANI.....2nd RESPONDENT

NITEN RATAILAL PATTANI.....3rd RESPONDENT

BHARAT BADIANI.....4th RESPONDENT

Last Order: 11st Mar, 2020

Date of Ruling: 28th Apr, 2020

RULING

FIKIRINI, J.

The applicant, Navnit Gordhandas Davda brought this application by way of chamber summons under Order XXV Rule 2 (2) and section 95 of the Civil Procedure Code, Cap 33, R.E 2002 (the CPC) to set aside the order dated 17th September, 2019, in Commercial Application No. 43 of 2018 which was dismissed.

The application was orally heard, whereby the applicant enjoyed the legal service of Ms. Ernestilla Bahati, learned advocate, while 1st and 3rd respondents were represented by Mr. George Nyangusu, learned counsel, and Mr. Jerome Msemwa, learned counsel appeared for the 2nd and 4th respondents.

It was Ms. Bahati's submission that Order XXV Rule 2(2) of the CPC, allows the Court to set aside its order upon sufficient cause. Strengthening her position, she cited the case of **Pimak Profesyonel Mutfak Ltd Sirketi V Pimak Tanzania Limited & Farha Abdullah Noor, Miscellaneous Commercial Application No. 55 of 2018, at p. 7.** In which the Court discussed on sufficient cause.

She as well submitted that this application which was filed on 16th October, 2019, was within the 30 days statutory time for filing such an application as prescribed by the Law of Limitation Act, Cap 89. R.E 2002 (the Law of Limitation).

Extending her submission, contesting the ruling, she submitted that the applicant did not fail to deposit the security for cost as ordered by the Court within the given time. Instead he did comply by depositing security for cost on the 16th September, 2019. She argued this premising her submission on section 60 (1) (f) of the Laws of Interpretation Act, Cap. 1 R.E 2002 (the Interpretation Act), which excludes a day when the event happened. According to her the time started running on 17th August, 2019 and lapsed on the 15th September, 2019. Since 15th September was a Sunday, and according to section 60 (1) (e) of the Interpretation Act, the day like

Saturday, Sunday and Public Holidays are excluded. The carrying out of a required exercise could be done on the next day, work day.

In alternative but without prejudice it was the applicant's position that even if at all there was a delay, the said delay happened due to misguided information that the applicant obtained from his former lawyer. Otherwise, paragraph 7 of the affidavit filed in support and the annextures annexed, clearly show the steps the applicant took before lapse of time. Furthering the submission, she argued that the law did not state who should deposit the security for costs. In the present case it was Tradexim, who deposited the security for costs on behalf of the applicant, she submitted.

Apart from the above submission, the applicant also invited the Court to apply overriding principle which, require doing away with technicality and focus on substantive justice.

Concluding her submission, she prayed that, the application to be allowed and restore the suit for the interest of justice.

Opposing the application Mr. Msemwa, submitted that the person who seeks orders as per Order XXV Rule 2(2) and section 95 of the CPC, must show good cause. The provision presupposes that the period that the applicant was required to furnish the security did not do so because the applicant was prevented by the sufficient cause not to do so. Extending his submission, he contended that sufficient cause

can be that applicant was sick or outside the jurisdiction. The applicant in the instant situation did not deposit the security for costs instead he claims to have used the company in which he is a director to deposit such security for costs. The applicant was now coming to Court to tell the Court that he was prevented by sufficient cause, and argued that does not add up.

Reacting on the applicant's submission, he submitted that the case cited was misconceived because the sufficient cause discussed in that case was on an extension of time, to do an act, which was different from the applicant's submission which departed from sufficient cause and imputed that the security for costs was deposited. This Court was not invited for the review of a ruling delivered by this Court, the submission was thus misplaced.

It was more of the respondent's submission that the applicant counsel maintained and named the company without having any document showing the board of directors' approval to the applicant undertaking, of depositing security for costs using the company's money. Since the issue has already been decided in Miscellaneous Commercial Application No.108 of 2018, the same was actually *res judicata.* There was nothing new which has been brought to the attention of the Court for determination. Moreover, since the applicant never deposited any amount of money as security for costs, he cannot bring on board the issue of limitation.

Taking up on the issue of overriding principle submitted, Mr. Msemwa, contended that overriding principle cannot assist the party who was against complying with the law and who still insisted that he deposited security for costs which was a naked lie. Also the fact that the law was silent as who should deposit security for costs was misconception. Meaning that not just anyone or a person who was not a party can deposit security for costs, he thus disputed that assertion as not true. The ruling in Commercial Case No. 43 and 108 of 2018 ordered the applicant and not just anybody.

Finalizing his submission, Mr. Msemwa submitted that no good cause and justifiable reasons, have been advanced to warrant setting aside of the dismissal order in the petition to make the Court restore the application.

Mr. Nyangusu, for the 1st and 3rd respondents, adding to Mr. Msemwa's submission, submitted that the remedy to set aside the dismissal order was not mandatory rather upon the discretion of the Court to decide whether to grant or not to grant. The applicant's main task was to show successfully that he was prevented by sufficient cause from complying with the Court order from depositing the security for costs within the time prescribed as ordered by the Court. Under paragraph 6 of the affidavit the applicant conceded that the Court order of 16th August, 2019, required him to furnish security for costs within 30 days, yet as of 16th September, 2019, when parties appeared before the Court the applicant was

found to have failed to comply with the Court order. Though the applicant believed that 3rd party could satisfy the order upon his instruction, yet that reason did not constitute sufficient cause to warrant grant of the application. After all, actions under paragraph 7 of the affidavit were null and void.

Rejoining her submission, she submitted that the affidavit filed showed the steps the applicant took from the day of the order up to the day of the dismissal order, which satisfied the condition that the applicant acted diligently. The affidavit also showed the reason for the delay in depositing the security which involved erroneous information which was given by the applicant counsel. Concluding her submission, she submitted that the security of costs was deposited in time and prayed the Court to exercise its power vested under order XXV Rule 2 (2) of the CPC.

I have carefully examined the rivalry submissions. From the outset, I would wish to restate that, grant or not granting of this application is at Court's discretion, which ought to be exercised judiciously, by taking into account all the circumstances of the particular case.

Sufficient cause or reason is one of the pre-condition to the grant of an extension of time. Although so far there is no exact definition of what amount to "sufficient cause" or "reason", but with time the Court of Appeal has come out with decisions giving guideline on what should be considered as sufficient cause or reason. The

list is not exhaustive but suffices. The cases of **Benedict Mumello v BOT, CAT, Civil Appeal No. 12 of 2002, (unreported)** p. 5 - 6, **Tanga Cement Company Ltd v Jumanne D. Masangwa & Amos A. Mwalwanda, Civil Application No. 6 of 2001 (unreported), Yusuf Same & Another v Hadija Yusuf, Civil Application No. 1 of 2002, CAT (unreported), Gideon Mosa Onchwart v Kenya Oil Co Ltd & Another, [2017]** and **Registered Trustees of the Archdiocese of Dar es salaam v Chairman Bunju v Village Government & Others,** all have discussed on sufficient or reasonable cause, warranting granting or not granting the application.

The provision of Order XXV Rule 2(2) of the CPC, relied on by the applicant, provides as follows:

> "*Where the suit is dismissed under this rule, the plaintiff may apply for an order to set aside dismissal order and* ***if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed,*** *the court shall set aside the dismissal upon such terms as to security costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit.*" [Emphasis mine]

The cited provision and decisions examined in light of this application will assist in determining as to whether the applicant has displayed reasonable or sufficient reasons, warranting grant of the application to set aside the dismissal order.

In the case of **the Registered Trustees of the Archdiocese of Dar es Salaam v Chairman Bunju Village Government & Others,** in discussing what constitute sufficient cause, the Court had this to say;

> *"It is difficult to attempt to define the meaning of the word* ***'sufficient cause'*** *It is generally accepted however, that the word should receive a liberal construction, in order to advance substantial justice where no negligence or in action or what of bona fides, is imputed to the appellant".*

The applicant in this suit advanced four reasons as sufficient: **one,** that the security of costs was paid within the time limit specifically on 17th September 2019, by **Tradexim**, a third party. **Two**, that the law did not state who should deposit the security for costs. **Three,** if there was delay then that was due to the applicant receiving misguided information from his former lawyer, and **four,** overriding principle which was to do away with technicality and focus on substantive justice, should be brought into play.

I will examine the first and second reasons together, that the security was paid within the prescribed time by the third party, since the law did not state who should

deposit the security for costs, the order, plainly may be taken to have been complied with. However, this assertion cannot be said to be a sufficient reason, for two reasons: **first and foremost**, from the assertion, the applicant is contending that security for costs was timely deposited. Meaning the Court wrongly dismissed the suit. Assuming, that was indeed the case, the remedy should not have therefore been an application to set aside the dismissal order, but review, whereby the Court would have been asked to review its order. In the case of **National Bank of Kenya Limited v Ndugu Njau, Civil Appeal, No. 211 of 1996,** the Court held that:

> *"review may be granted whenever the court consider that it is necessary to correct an apparent error or omission on the party of the court".*

Before this Court there is no application for review but to set aside the dismissal order, the application which purely depends on furnishing of sufficient or reasonable cause.

Furthermore, the stance that the law did not stipulate who should deposit the security for costs, though cannot be completely faulted, but in this particular instance, the averment is contested. *One*, the money, if at all deposited was deposited by **Tradexim**, who was not a party to the suit or petition and hence a stranger. For **Tradexim** to swiftly be part of the suit or petition, It has to be either a necessary party or proper party and if they were to feature as a third party then

third party procedure should have been followed. This is important because, the commitment comes with obligation. Once the plaintiff loses the suit, the deposited money might be appropriated to satisfy the Court decree. The rationale behind security for costs is essentially to see that the winning party, in this case if would be the defendant/respondent do not get an empty decree. The Court was not informed on how **Tradexim** came on board, so that its action could be considered as compliance to Court order.

Two, **Tradexim** being a limited liability entity, for it to commit itself there must be Board resolution in that regard or approval from all shareholders, lest unscrupulous members or shareholders misuse the opportunity. In the current situation there was no such information relayed to this Court then or even now.

Second, even if that was correct, that **Tradexim** deposited money timely, still it was not sufficient reason upon which the Court can predicate its decision pursuant to Order XXV R 2 (2) of the CPC. Order XXV R 2 (2) of the CPC, provides that:

> *"Where the suit is dismissed under this rule, the plaintiff may apply for an order to set aside dismissal order and* ***if it is proved to the satisfaction of the court that he was prevented by any sufficient cause from furnishing the security within the time allowed,*** (Emphasis is mine)

The provision envisioned for sufficient reason and not objection proceedings that the security was timely deposited.

On the **third** point, the reason raised was that if there was delay then that was due to the applicant receiving misguided information from his former lawyer. Section 110 (2) of the Evidence Act, Cap. 6 R.E 2002 (the Evidence Act) is clear when it comes to burden of proof. The provision states:

> "*When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*"

The account of what transpired between when the order was given up to when the suit/petition was dismissed and later on, examined together, yet this Court is not persuaded. The Miscellaneous Commercial Application No. 43 of 2018, was dismissed by this Court on 17th September 2019, upon the Court satisfying itself that the applicant has failed to furnish security for costs ordered on 16th August, 2019. The 30 days envisioned by the Court indeed ended on 15th September 2019. As submitted by Ms. Bahati, since the 15th September, 2019 happened to be on a Sunday, which going by section 60 (1) (e) of the Interpretation Act, the exercise which was to be carried could be carried out on 16th September, 2019. Ordinarily, that would have been correct and the transaction would have been considered valid. The only anomaly in the present case is **Tradexim** was not a party ordered to comply and/or the Court was not made aware of how this third party has been

brought on board. Against that background, the alleged timely deposit which is questionable cannot be considered affirmatively.

In addition, considering that the applicant was being represented by professionals, yet the narrative given did not exhibit to this Court diligence. The averment made in paragraphs 6 and 7 (i) to (iv) speaks volume of the counsels. After the Court had declined to accept the bank guarantees and time was running out, instead of resorting to third party without Court's leave, the applicant ought to have filed for an application for extension of time to comply with the Court order. In **Calico Textile Industries Ltd v Pyaraliesmail Premji [1983] T.L.R.28,** the Court had this to say about advocate role in a case:

> *"……once advocate are instructed to take the conduct of the case they are expected to use all diligence and industry, ……"*

Although the facts in the above cited case are not exactly the same as those in this application, but the Court wanted to draw attention on the aspect of advocate's accountability once instructed. The advocate is expected to exhibit thoroughness in his/her undertaking including advising his/her client, on what exactly to do and time to be observed lest they fail to comply with the prescribed timeline or Court order.

Another thing is there was no affidavit from any of the counsels who dealt with the matter to support the applicant's averment that he was misled by his counsels. Overriding principle was as well raised as ground to be considered in granting the application. Ms. Bahati urged the Court to do away with technicality and focus on substantive justice. In general sense, I do agree to the principle, but with due respect, to Ms. Bahati's stance, overriding principle with all its good intention, cannot assist the party who is against complying with the law. The principle cannot be applied blindly and before one can claim for justice, rules of the practice should rather be observed and not ignored.

In the light of the above, the application is dismissed with costs. It is so ordered.

P.S. FIKIRINI

JUDGE

28th APRIL, 2020