IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 55 OF 2020

Messrs. SERENGETI GLOBAL SERVICES LIMITED..... APPLICANT

VERSUS

TANZANIA BUREAU OF STANDARDS ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

Date of Last Order: 15/04/2021.

Date of Judgement: 17/05/2021.

RULING.

MAGOIGA, J.

The applicant, Messrs. SERENGETI GLOBAL SERVICES LIMITED by way of amended chamber summons made under section 14(1) of the Law of Limitation Act, [Cap 89 R.E. 2020], Rule 23(1) of the High Court (Commercial Division) Procedure Rules, 2012 as amended by G.N.107 of 2019 is moving this Honourable court to be pleased to grant the following orders, namely:

1. An order extending time within which the applicant to file out of time an application to set aside a default judgement arising from

Commercial Case No. 82 of 2019 between Tanzania Bureau of Standards and The Hon. Attorney General vs. Messrs. Serengeti Global Services Limited delivered on 20th day of March, 2020 by Hon. Magoiga, J.;

2. Having enlarged the time, this court be pleased to issue an order setting aside default judgement and decree delivered on 20th day of March, 2020 in respect of Commercial Case No.82 of 2019;
3. Costs of the application;
4. Any further orders and reliefs this honourable court deems fit and just to grant.

The chamber summons was accompanied by the affidavits of Mr. Mwami Mengo Kiozya, learned advocate for the applicant and Mr. Augustino Boniface Lukosi stating the grounds and reasons for grant of the orders sought.

Upon being served with the chamber summons and affidavits in support of the application, the respondent, filed counter affidavit sworn by Mr. Hangi Matakeleza Chan'ga, learned Senior State Attorney stating the grounds and reasons why this application should not be granted.

The facts pertaining to the instant application are not complicated. The respondents vide Commercial Case No. 82 of 2019 instituted a suit against the applicant in this court claiming several reliefs. Services to the applicant which is a foreign company were effected by way of email on 11/10/2019 and by DHL on 24/10/2019. On 10/03/2020 when the suit was called on for orders no defence has been filed and in the circumstances, the learned Senior State Attorney for the respondents prayed to proceed under the provision of Rule 22 of the High Court (Commercial Division) Procedure Rules, 2012 as amended by G.N.107 of 2019 by filing Form number one to the Rules and an affidavit in proof of the claim. His prayed was granted and upon complying with the legal procedure, this court delivered its default judgement on 20/03/2020 in favour of the respondent.

Against the above background, the applicant has come to this court praying for extension of time within which to file an application to set aside the default judgement, hence, this ruling.

When this application was called on for hearing, the applicant was enjoying the legal services of Mr. Maganya Maganya, learned advocate. On the other hand, the respondents were enjoying the legal services of Ms. Gati Mseti, learned State Attorney.

Parties' legal trained minds had earlier filed skeleton written arguments to support their respective rival stances. Mr. Maganya when rose to argue the application told the court that, in support of the application, he adopts the chamber summons, affidavit and skeleton written arguments and implored the court to grant the orders as prayed.

In the affidavit in support of this application, the applicant stated that failure to verify the email amounts to illegality and the person who received the DHL by the name of AUGUSTIN, A was neither an office of the applicant nor authorized agent of the applicant. Another point taken was that, the applicant was not existing following its dissolution on 3rd day of July,2018 and as such no service could be effected to the applicant and that even failure to file application for setting aside default judgement in time was not intentional but was due not being knowledgeable of the case and none of the ex-directors of the applicant could travel to Tanzania following coronavirus pandemic which forced many countries in the world to ban safaris outside their jurisdiction and lastly but not least that for the interest of justice the extension be granted as prayed for the Commercial Case No.82 of 2019 attracts contestable issues.

In support of the prayers the learned advocates for the applicant cited the case of MOHAMED BAKARI RAMADHAN AND ANOTHER versus MWANASHERIA MKUU WAS SERIKALI ZANZIBAR, CIVIL APPLICATION NO.107/15 OF 2019 (ZANZIBAR) CAT (UNREPORTED) in which the Court referred its decision in the case of PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE vs. DEVRAM P. VALAMBIA [1992] TLR 387 in which it was held that:-

> "in our view when the point at issue is one challenging illegality of the decision being challenged, the Court has a duty even if it means extending time for purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

Mr. Maganya in his oral arguments insisted that his client was not served with the plaint. On late filing of the application, the learned advocate for the applicant told the court that, the instant application was filed online on 24/04/2020 and hard copies were signed on 27/04/2020 not on 7/05/2020 after getting instructions from Christopher Boniface Lukosi. The learned advocate for the applicant distinguished the case of FINCA TANZANIA LIMITED VS. BONIFACE MWALUKASA AND ANOTHER, CIVIL APPLICATION

NO. 589/12 OF 2018 relied by the learned State Attorney because the circumstances were different. Mr. Maganya pointed out that in the case of JUTO ALLY vs. LUCAS KOMBA AND ANOTHER, CIVIL APPLICATION NO. 484/17 OF 2019, in which it was held that, where illegality is involved in decision extension has to be granted.

On that note, Mr. Maganya insisted that the applicant was not served with summons and plaint and as such denied right to be heard which suffices to grant the prayers sought.

On the other hand, Ms. Mseti prayed to adopt their counter affidavit and skeleton written arguments and prayed that this application be not granted.

In their written submissions, the learned Attorneys dismissed the reasons advanced as of no merits in the circumstances of this application and was of the view that the delay in filing the application was inordinate delay and the number of days delayed shows negligence or sloppiness in prosecuting the case and have as such failed to account for each day of delay. To bolt up her arguments, the learned State Attorney cited the case of FINCA TANZANIA LIMITED AND ANOTHER vs. BONIFACE MWALUKISA, CIVIL

APPLICATION NO. 589/12 OF 2018, (IRINGA) CAT (UNREPORTED) in which it was held that:-

> **"requirement of accounting for every day of delay has been emphasized by the Court in a number of decisions, example of such cases of Bushiri Hassan vs. Latifa Lukio Mashayo, Civil Application No.3 of 2007 (unreported) and Karibu Textile Mills vs. Commissioner General TRA, civil application No.192/20 of 2016 (Unreported). In the Bushiri Hassan case the Court stated delay, of even a single day, has to be accounted for otherwise there would be no proof of having rules prescribing within which certain steps have to be taken."**

Guided by the above holding of the Court of Appeal, the learned Attorney concluded that the applicant has utterly failed to advance reasons to warrant this court grant extension of time and subsequently set aside the default judgement. The learned Attorneys cited string of cases to support their stance and eventually prayed that this application be dismissed with costs.

Submitting orally, the learned State Attorney pointed out that, the issue of illegality as argued by Mr. Maganya was not among the grounds stated in the affidavit and written skeleton argument but is raised as an afterthought on their part now. On late filing if the application, it was the submission of the learned Attorney that the applicant failed to account for each day of delay, hence, the case of FINCA (supra) cited is relevant and applicable in this application.

Ms. Mseti went on to argue that, the applicant was served via addresses that parties were using while under business relationship. According to Ms. Mseti, no notification of change of address was communicated and the service by email was delivered and received.

On that note, the learned Attorney implored this court to dismiss this application with costs as no prospects of chances of success of the suit.

In rejoinder, Mr. Maganya argued that on 15/08/2019 the learned State Attorney told the court that were communicating with the Ministry of Foreign Affairs and instantly prayed to serve by way of email which prayers were irregularity because were to finish up with Ministry of Foreign Affairs before opting for email service. Mr. Maganya went on to argue that, the

email used to deliver plaint and summons could have been confirmed by the applicant because that was no longer in use. The learned advocate prayed that for the interest of justice, this application be granted as prayed in the chamber summons.

That marked an end to hearing of this application.

The task of this court now is to determine the merits or demerits of this application. Having carefully listened to rival arguments for parties' herein, the first issue I am bound to resolve is whether the applicant has demonstrated sufficient reasons for grant of extension of time. The second issue related is whether service was done or not in the circumstances of this application.

I will start with the first issue on whether the applicant has demonstrated sufficient reasons for this court to grant extension of time to file an application to set aside default judgement. The time limit for an application to set aside default judgement is 21 days from the date of judgement. This is clearly provided for under Rule 23 of the Commercial Court Rules. For easy of reference Rule 23 provides as follows:

Rule 23 (1) Where a judgement has been entered pursuant to Rule 22 the Court may, upon application made by the aggrieved party, within twenty-one days from the date of the judgement, set aside or vary such a judgement upon such terms as may be considered by the court to be just.

(2) In considering whether to set aside or vary the judgement under this Rule, the Court shall consider whether the aggrieved party has:-

(a) applied to the Court within the period specified under sub rule (1); and

(b) given sufficient reasons for failing to file defence

(3) N/A

(4) N/A

In this application, no doubt the applicant did not file the application within 21 days specified under sub rule (1) of Rule 23 from the date of the judgement. This application is for extension time to file one. The default judgement was delivered on 20/03/2020. On 15th April, 2020 the applicant counsel was instructed but already out of time to peruse the file. The

instant application was filed on 27th April, 2020. From the affidavit of the applicant, no single paragraph stated what happened from 15th April, 2020 to 27th April, 2020 inclusive and decided to file this application which is more than 12 days. Therefore, 12 days of delayed, no reason was stated at all why it took the applicant 12 days to file an application that they knew it was out of time.

Therefore, guided by the authorities cited by the learned State Attorney for the need to account for each day of delay, I am inclined to find and hold that failure to account each day of delay was fatal to this application on the part of the applicant.

Another point taken by Mr. Maganya worthy to grant this application is that, there is an illegality, and the illegality worth of consideration was failure to verify an email as stated in paragraph 6 of the affidavit. With due respect to Mr. Maganya, the illegality, if any, has to be in the judgement and not on services. This court before granting, the respondent to prove her case under Rule 22, was supplied with email printer out sent and delivered to the address of the applicant without fail. The email address when fails it gives back immediately failure delivery report.

I have further considered both the affidavit and the written arguments by the learned advocate for the applicant and I find them contradicting themselves as to whether the email was not working and that the company was dissolved way back in July 2018. It is for those reasons, I agree with the argument by the learned State Attorney that, the applicant was dully served and no illegality in the decision has been pointed out and proved.

That said and done, this application must be, and is hereby dismissed for want of merits with costs.

It is so ordered.

Date at Dar es Salaam this 17th day of May, 2021.

S.M.MAGOIGA

JUDGE

17/05/2021