

**IN THE HIGH COURT OF UNITED REPUBLIC  
OF THE TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM**

**MISC.COMMERCIAL APPL. NO. 188 OF 2020**

**LYCOPODIUM TANZANIA  
LIMITED.....APPLICANT / 2<sup>nd</sup> DEFENDANT**

**VERSUS**

**POWER ROAD (T) LTD.....1<sup>st</sup> RESPONDENT  
/ 1<sup>st</sup> DEFENDANT**

**PANGEA MINERALS LTD.....2<sup>nd</sup> RESPONDENT  
/ 3<sup>rd</sup> DEFENDANT**

**PETROFUEL (T) LTD.....3<sup>rd</sup> RESPONDENT  
/ PLAINTIFF**

**RULING**

Date of Last Order: 29/04/2021  
Date of Ruling: 30/06/2021

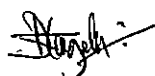
**NANGELA, J:.,**

This ruling was prompted by an application made under Order IX rule 9 of the Civil Procedure Code, Cap.33 R.E. 2019. The Applicant is seeking for the following orders, that:

- 1. This Honourable Court be pleased  
to set aside its ex parte judgment  
and Decree dated 24<sup>th</sup> October  
2012.*
- 2. Costs of the application be in the  
cause; and*
- 3. Any other Orders this  
Honourable Court may deem fit  
and just to grant.*

The Application which was by way of a chamber summons was supported by an affidavit of Ms Linda Bosco which was filed in this Court on 15<sup>th</sup> December 2020. On 17<sup>th</sup> December 2020, when it was brought to my attention in chambers, both parties were absent. I scheduled it for necessary orders on 22<sup>nd</sup> March 2021 as the Court was already on its vacation.

On the material date, i.e., 22<sup>nd</sup> March 2021, Ms Janeth Njombe, learned advocate appeared in



Court. The Respondents were absent. She informed this Court that the Respondents were duly served and thus prayed for another date since no Counter affidavit was filed in Court by that time. I scheduled the matter for a mention on 29<sup>th</sup> April 2021.

When the application was called on for mention on the 29<sup>th</sup> April 2021, Ms Janeth Njombe, learned advocate, appeared for the Applicant. The Respondents were absent and no counter affidavit was filed in Court. Ms Njombe seized the moments and applied to proceed *ex-parte*. She argued that, since the Respondents did not file their counter affidavit, the application was unopposed.

She relied on the decision of this Court in the case of **Emmanuel Gidahotay vs.**



**Gambanyashita Muhale, Misc. Land Application No.41 of 2017, HC (Arusha District Registry) (unreported).** In that case, his lordship Maige, J (as he then was), relying on the decision of this Court in **Mosess Ndosu vs. Suzana Ndosu, Misc. Land Application No.117 of 2013 (unreported)**, was persuaded, and noted that, failure to file a counter affidavit is a signification that the application is not factually opposed. At the end of the day, his lordship, allowed the uncontested application.

That being the case, Ms Njombe has enticed me to take the similar route and grant the prayers sought in the chamber summons. I have gone through the uncontested facts adduced in the affidavit of Ms Linda and its annexure.



According to Ms Linda's affidavit, the ex-parte judgement and Decree which the Applicant seeks to set aside was delivered on 24<sup>th</sup> October 2014 in **Commercial Case No. 29 of 2012.**

In that decision, this Court, (Nchimbi, J) found the Applicant, 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally liable to pay the 3<sup>rd</sup> Respondent the sum of **TZS 16,500,000** and compound interest of **TZS 30,946,128** for Diesel Oil supplied to Buzwagi; payment of **TZS 292,679,126**; payment of interest on the decretal sum at a rate of 7% from the date of the Judgment till full and final satisfaction of the decree; payment of general damages of **TZS 100,000,000**; and costs of the suit.

In her affidavit, the deponent has averred that the Applicant was never served with the



Summons or the Complaint or any notification whatsoever, in respect of that suit which proceeded ex-parte against the Applicant.

She stated that the Applicant only came to be aware of the suit in October 20<sup>th</sup>, 2019, some five years after the ex-parte judgment had been issued, and when the Applicant was served with the Written Submissions and the Record of Appeal in Civil Appeal No. 96 of 2015, which was pending at the Court of Appeal of Tanzania, between the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent.

In short, what the Applicant avers in her affidavit is that, the Applicant was unfairly condemned without being given an opportunity to defend its case. She stated, for that matter, therefore, that, the *ex-parte* Decree which the Applicant seeks to set aside is tainted with



illegalities as the Court's orders to proceed ex-parte were made before the Court was able to fully ascertain whether the Applicant herein was ever served.

I have gone through the proceedings of the previous suit, in **Commercial Case No. 29 of 2012**. Indeed, I find nowhere is it indicated that the Applicant was ever served with the Plaint or any summons.

I indeed note, at page 26 of the Court record, that, one, Mr Peter Kibatala, learned advocate is said to have appeared for the 2<sup>nd</sup> Defendant (who is the applicant herein). However, in her affidavit, Ms Linda states, at paragraph 9, that, the Applicant never instructed Mr Kibatala to appear for on its behalf in that case.



As I said earlier, all facts in the affidavit have never been controverted as no counter affidavit was filed. From that position, therefore, the facts are presumed to be true.

It follows, therefore, that, there being no counter-factual position and, taking into account that the facts as disclosed in the affidavit reveal that the Applicant was not afforded the opportunity to file its defence because of not being served with the Plaint, I find that the *ex-parte* judgment was tainted with an illegality.

Order IX rule 9 of the Civil Procedure Code, Cap.33 R.E 2019 provides that:

"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he **satisfies the court that he was prevented by any sufficient cause from appearing when the**



**suit was called on for hearing**, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also." (Emphasis added).

In the case of **Cartas Kigoma v KG Dews Ltd [2003] T.L.R. 420**, the Court of Appeal held *inter alia* that, in an application to set aside *an ex-parte* decision, disclosure of reasons why a defendant failed to appear is a necessity.

In this instant application, I am satisfied that the Applicant's reasons disclosed in the affidavit filed in this Court in support of the chamber summons, constitute sufficient cause regarding



why this Court should grant the prayers sought in this application.

I find it to be so, because, the right to be heard is one of the natural and basic rights to all litigants and, for a defendant to be able to appear in court and be heard, he must have been served with the relevant documents constituting the claims filed against him or her in court.

Failure to serve the defendant and, proceeding with the hearing on an assumption that the defendant failed to file a defence after being required to do so, while it was not the case, constituted an outright denial of the defendant's right to be heard and, constitutes an illegality which no Court properly constituted can keep its eyes closed. It is for that reason I proceed to grant the application.



In that regard, this Court settles for the following orders, that:

- (i) The *ex-parte* Judgement and Decree dated 24<sup>th</sup> October 2014 is hereby set aside as against all defendant in that suit.
- (ii) The suit, i.e., *Commercial Case No. 29 of 2012*, is hereby restored for it to proceed with its hearing, with the involvement of all parties there to on such a date to be fixed by the Court.
- (iii) Costs of this application be in the cause.

**It is so ordered.**

DATED at **DAR-ES-SALAAM**, this 30<sup>th</sup> JUNE 2021



**HON. DEO JOHN NANGELA  
JUDGE**