

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 13 OF 2020

(Arising from Commercial Case No. 35 of 2020)

MBEZI FRESH MARKET LIMITED 1ST APPLICANT

KHALIFA SALUM ALLY 2ND APPLICANT

FIRDAUS ISMAIL KHAMIS 3RD APPLICANT

VERSUS

INTERNATIONAL COMMERCIAL

BANK (TANZANIA) LIMITED RESPONDENT

RULING

B.K. PHILLIP, J

A brief background to this application is that, the respondent herein has lodged a suit in this Court under summary procedure (Order XXXV), vide Commercial Case No. 35 of 2020 against the applicants herein (defendants in the suit), claiming for payments for a sum of Tshs. 1,008,065,243.09 arising from an overdraft facility granted to the 1st applicant among other reliefs. The overdraft facility was secured by a legal mortgage in respect of the property located on Plot No. 583 Block "J" Mbezi Area, L.O. 123333, CT No. 46224, Kinondoni Dar es Salaam,

Plot No. 582 Block "J", Mbezi Area Kinondoni, Dar es Salaam and guarantee of the Directors of the 1st applicant.

Upon being served with the summons for the suit filed under summary procedure (Order XXXV) the applicants, on 19th June 2019 through the legal services of the learned Advocate Deogratias Mwarabu of South Law Chambers lodged an application for leave to defend the suit under the provisions of order XXXV rule 3(1)(a) and Rule 2 of the Civil procedure Code Act Cap 33 R.E. 2019 (henceforth "the CPC") Vide Misc Commercial Application No.93 of 2020. In response to the aforesaid application the respondent's advocate Mr. Juventus Katikiro raised a point of preliminary objection that the applicants did not cite the enabling provisions of the law to move this court to grant the prayers sought in the application. This court delivered its ruling on 3rd of February 2021 in respect of the aforesaid point of preliminary objection whereby the application for leave to defend the suit was struck out.

Following the ruling aforesaid, on 9th of February 2021 the applicant filed the application in hand under the provisions of section 14(1) of the Law of Limitation Act (Cap 89, R.E 2019), Order XLIII, Rule (2) and section 95 of the CPC seeking for extension of time to file an application for leave to defend the suit (Commercial Case No.35/2020). The application is supported by an affidavit sworn by the learned

Advocate Deogratias Mwarabu who appears for the applicants. In his affidavit Mr. Mwarabu narrated the background to this application and stated that the ruling in respect of the applicants' application for leave to defend the suit was delivered in his absence because he was preparing the last respect of his house maid namely Georgina Pastory Rwehumbiza who passed away on 1st February 2021 and thereafter, on 3rd of February he travelled to Bukoba to attend her funeral. He came back to Dar es Salaam on 7th February 2021 and prepared this application immediately. He managed to file it in Court on 9th of February 2021. A Copy of the burial permit of the late Georgina Pastory Rwehumbiza from Muhimbili National Hospital is attached to the affidavit.

On the other hand, the learned advocate Juventus Katikiro who appeared for the respondent swore a counter affidavit in opposition to the application. Mr. Katikiro deponed as follows; That he is opposing the application, the learned Advocate Mwarabu works at South Law Chambers with other advocates who could have attended in court on the 3rd of February 2021 when the ruling in respect of the application for leave to defend was delivered and no good reasons have been advanced to move the Court to grant this application.

This application has been disposed of by way of written submissions. Relying on the case of **Lyamuya Construction Company Ltd Vs Board of Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010**, (unreported), Mr. Mwarabu submitted that an order for extension of time is under the court's discretion and such discretion has to be exercised judiciously and the guidelines for grant of an order for extension of time as stipulated in the case of **Lyamuya** (Supra) are as follows;

- i) The applicant must account for the period of delay*
- ii) The delay should be inordinate*
- iii) The applicant must show diligence , and not apathy negligence or sloppiness in the prosecution of the action that he intends to take*
- iv) It the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance , such as the illegality of the decision sought to be challenged.*

Moreover, he submitted that in addition to the above conditions, the court considers the degree of prejudice to the opposite party. To cement his arguments he cited the case of **Felister Samuel Lukumay (Administratrix of Samuel Lukumay) Vs Prof Agness Njabili, Misc. Civil Application No. 214 of 2020 (unreported)** and Joel

Silomba Vs Republic, Criminal Application No. 5 of 2012, CA (unreported).

Furthermore, Mr. Mwarabu submitted that the provision of section 14(1) of the Law of Limitation Act, empowers this court to grant an order for extension of time, provided that the applicant shows good cause. Relying on the case of **Bharya Enigneering & Contracting Co Ltd Vs Hamoud Ahmed Nassor, Civil Application No. 342/01, CA** (unreported), he contended that what amounts to good cause cannot be laid down by any hard and fast rules but is dependent upon the facts obtained in each particular case. He invited this court to find that what has been deponed in the affidavit in support of this application amounts to good cause. He contended that the applicants have been diligently prosecuting their case without any kind of negligence and have sufficiently accounted for each day of delay. He also challenged the respondent's stance on this application as being unfounded since the he has failed to show any prejudice that will be occasioned to him if this application is granted.

On the other hand Mr. Katikiro submitted that the applicant has not adduced any sufficient reasons for the delay. He contended as follows; That the applicant engaged the Law Firm, namely South Law Chambers where Mr. Mwarabu works with other advocates who were capable of

filing this application without any delay. There was no need of waiting for Mr. Mwarabu to file this application.

Moreover, Mr. Katikiro contended that this application is just a delaying technique of the respondent's case employed by the applicants' advocate. He insisted that the respondent is a financial institution whose business depends on availability of money in running its business and the applicants' delay in repayment of the loan facility granted unto the 1st applicant in 2017 has paralyzed the respondent's business. He invited this court to dismiss this application with costs.

In this application, it is a common ground that an order for extension of time is a discretionary order granted upon the applicant showing sufficient /good cause for the delay. As correctly submitted by Mr. Mwarabu, there is no hard and fast rule on what amounts to good cause. It all depends on the circumstances of each case. Sufficient causes for delay are not exhaustive. [see the case of **Yusufu Same & Hawa Dada Vs Hadija Yusufu, Civil Appeal No. 1 Of 2002** (unreported)]. However, our courts have set some factors through which they manage to determine whether or not good cause has been established. For instance in the case of **Tanga cement Company Limited Vs Jumanne D. Masangwa and another, Civil Application No. 6/ 2001** the Court said the following;

"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly, the absence of any valid explanation for the delay, lack of diligence on part of the applicant"

In addition to the above, in determination of an application for extension of time, the court has to ascertain the type of delay as there is real delay and technical delay. In the case of **Fortunatus Masha Vs William Shija and another**, (1997) TLR 154, while deliberating on an application for extension of time this Court said the following;

"Distinction should be drawn between cases involving real delay or actual delay and those such as the present one which clearly only involved technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reasons and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the court striking out the first appeal. In these circumstances an extension of time ought to be granted"

From the foregoing, it is obvious that the application in hand involves a technical delay as it is not in dispute that upon being served with the

summons for summary suit under Order XXXV of the CPC, the applicants through the legal services of South Law Chambers, filed their application for leave to defend the suit timely, but the same was struck out as explained earlier on this ruling. Upon perusing the affidavit in support of this application and analysing the rival arguments made by the learned advocates, I am of a settled opinion that this application has merits as I will demonstrated soon hereunder.

First of all, as I have pointed out herein above, the delay in filing this application is a technical delay and the instant application was filed within seven (7) days after the applicants' application for leave to defend the suit was struck out. Under the circumstances of this matter which involves a technical delay, I am of a settled opinion that this application has been filed within a reasonable time. There is no inordinate delay in lodging this application. And I wish to make it clear here that the days of delay are not supposed to be counted from the date of service of the summons for the summary suit under Order XXXV of the CPC unto the applicant because doing so will amount to punishing the applicants twice. ([see the case of **William Shija** (supra)]).

In addition to the above, the reasons explained by Mr. Mwarabu as to why he had to file this application on 9th of February 2021, not earlier than that are good enough to move this court to grant this application. He substantiated what he deposed on the death of his house maid by attaching a copy of the burial permit from Muhimbili National Hospital.

I have considered the arguments raised by Mr. Katikiro that this application could have been filed earlier by other advocates from South Law Chambers instead of waiting for Mr. Mwarabu . With due respect to Mr. Katikiro, his argument stated herein above is misconceived, because this is matter of technical delay. Therefore, it would not have made much difference even if the application would have been filed by other advocates before the 9th of February 2021. What is important here is that the applicants' advocate took the necessary steps by lodging this application as soon as practicable. Seven (7) days cannot be termed as inordinate delay to the extent of condemning the applicants' advocate/applicants for being negligent in prosecuting their case.

As regards Mr. Katikiro's contention that the applicants are applying delaying technique in the case, the same is also unfounded because the first application for leave to defend the suit was filed timely but it was struck out on the point of preliminary objection raised by Mr.

Katikiro himself. It has to be noted that the law gives the applicants right to seek for extension of time to file their application for leave to defend the suit again if they have good cause and that is what they have done. Thus, I do not see any element of employing delaying techniques as claimed by Mr. katikiro.

In the upshot, this application is granted, the applicants are granted seven (7) days from the date of this Ruling for filing their application for leave to defend the suit.

Dated at Dar Es Salaam this 14th day of June 2021.




B.K. PHILLIP

JUDGE