

IN THE HIGHCOURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION No. 77 OF 2021

(Arising from Commercial Case No. 85 of 2019)

ZEDS LOGISTICS LIMITED.....1ST APPLICANT

ZULFIKAR HUSSEIN DEWJI.....2ND APPLICANT

ABBAS ZULFIKAR DEWJI.....3RD APPLICANT

VERSUS

ECOBANK TANZANIA LIMITED.....RESPONDENT

Date of Last Order: 26/ 08/ 2021

Date of Ruling: 31/ 08/ 2021

RULING

MKEHA, J.

Through the present application, the applicants are moving the court for an order of extension of time so that they can file an application to set aside exparte judgment and decree of this court in Commercial Case No. 85 of 2019. The application is made under section 14 (1) of the Law of Limitation

Act, Cap. 89 RE 2019. The same is supported by an affidavit of one Shalom Samwel Msakyi who also appeared during hearing of the application as an advocate for the applicants.

Submitting in support of the application, Mr. Msakyi learned advocate commenced his submissions by adopting contents of the chamber summons and the supporting affidavit as part of his submissions. He then went on submitting that, the applicants were defendants in Commercial Case No. 85 of 2019 which proceeded *ex parte* against them due to failure of their advocate to enter appearance in court, for being COVID 19 positive.

The learned advocate proceeded submitting that, after the matter had been fixed for *ex parte* hearing, he appeared from the hearing stage to the date of delivery of judgment on 20th May, 2021. The learned advocate added that, immediately after pronouncement of judgment, the applicants applied for copies of judgment and decree to set aside the said *ex parte* orders. It was until the 3rd day of June, 2021 when copies of judgment and decree were supplied to the applicants. Since the 3rd day of June was the 14th day since delivery of the judgment sought to be set aside, the applicants opted to file the present application to obtain extension of time so as to file an application for setting aside the *ex parte* judgment and decree. Filing of the

present application was done on the first working day, after obtaining copies of the ex parte judgment and decree. To strengthen his arguments, the learned advocate cited the decisions in **Tanzania China Friendship Textile Co. Ltd Vs. Charles Kabweza & Others, Civil Appeal No. 62 of 2015, CAT (Unreported)** and **Alex Senkoro & 3 Others Vs. Eliambuya Lyimo, Civil Appeal No. 16 of 2017, CAT (Unreported)**.

Mr. Mbogela learned advocate submitted in reply that, waiting for supply of copies of judgment and decree was not a sufficient cause of delay. According to the learned advocate, the said documents were unnecessary in an application for setting aside ex parte orders which had to be done before the same court. The learned advocate called to his aid the decision in **L. R.M INVESTMENT CO. LTD Vs. BANK OF AFRICA LIMITED, MISC. CIVIL APPLICATION No. 12 of 2020 (HC) AT MOSHI**. In that case, it was held that, in case of restoration or setting aside, annexing copies of the order or proceedings by the same court is not necessary. In view of the learned advocate, the applicants had not accounted for the delay.

When Mr. Msakyi learned advocate rose to rejoin, insistence was made that, the applicants were entitled to get the copies of the decision before applying for setting aside the ex parte judgment and decree. He did not clarify as to

how the said copies would be relevant in an application for setting aside *ex parte* orders. The remaining part of his submissions was reiteration of what had been submitted in chief.

The issue for determination is **whether there was sufficient cause for delay in applying for setting aside**. According to the learned advocate for the applicants, delay in obtaining copies of the *ex parte* judgment and decree is what necessitated delay in filing the application for setting aside. The learned advocate insisted that, despite prompt request for the same, the court failed to supply the requested documents timely. Mr. Mbogela learned advocate for the respondent was of the firm view that, at any rate, copies of judgment, decree and proceedings were unnecessary in supporting the application for setting aside the *ex parte* orders. I see substance in Mr. Mbogela`s submissions. This is so because, apart from the undeniable fact that the application for setting aside lies to the same court which issued the impugned *ex parte* orders, in an application of that nature, the usual determinative issue is always, whether the applicant had sufficient reasons for not attending hearing of the matter to which copies of *ex parte* judgment and decree are of little use if any. To say the least, as it was held in **L. R. M INVESTMENT CO. LTD Vs. BANK OF AFRICA LIMITED (supra)**, they

are not necessary. Neither of the decisions cited by the learned advocate for the applicants is to the effect that it was necessary to wait for supply of copies of the ex parte judgment and decree before making an application for setting aside the said ex parte orders. Neither Rule 43 (2) of the Commercial Court Rules nor Order VIII Rule 20 (2) of the Civil Procedure Code is to that effect.

I find this to be one of those cases in which a party may find himself suffering because of negligence or lack of diligence on part of his own counsel. The legal position governing situations like the instant one is fortunately now settled. Generally, the court will not grant an application for extension of time where there is an element of negligence or lack of diligence on the part of the applicant. However, there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the advocate. See: **DR. A. NKINI & ASSOCIATES LIMITED Vs. NATIONAL HOUSING CORPORATION, CIVIL APPEAL No. 72 of 2015, CAT AT DAR ES SALAAM (Unreported).**

In the present case, though mistakenly, the applicants' advocate was diligent in taking steps aimed at rescuing his clients. He filed this application

on the 15th day since when the exparte judgment was pronounced. Although the learned advocate had no justifiable reasons for delaying in making an application for setting aside, in the interests of justice and on strength of the decision in **DR. A. NKINI & ASSOCIATES LIMITEDVs. NATIONAL HOUSING CORPORATION (supra)**, I grant the application for extension of time for the applicants to file an application to set aside the exparte judgment and decree of Commercial Case No. 85 of 2019. Fourteen days` time is given for the applicants to achieve the said purpose. I make no order for costs.

Dated at DAR ES SALAAM this 31st day of AUGUST, 2021.


C. P. MKEHA

JUDGE

31/08/2021



Court: Ruled is delivered in the presence of the parties` advocates this 31st day of AUGUST, 2021.


C.P. MKEHA

JUDGE

31/08/2021