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

COMMERCIAL CASE NO. 44 OF 2001

NABRO LIMITED.....1ST DEFENDANT
MEEDA REUBEN NABURI.....2ND DEFENDANT
VERSUS
NATIONAL BANK OF COMMERCE LTD.....RESPONDENTS

RULING

Date of Hearing – 26/7/2007

Date of Ruling – 1/8/2007

MASSATI, J:

The brief background to this ruling is this. On 15th March 2001, the Plaintiff/Respondent filed a suit in this court against the Defendants to claim the sum of shs.100,253,662, plus interests, or in the alternative for an order of foreclosure and sale of the property at plot No. 5 Msasani Beach, Dar es Salaam. The Defendants/Applicants resisted the claim. Leaving aside what transpired in between, the suit was partly heard by my predecessor Kalegeya, J (as he then was). He took the whole of the Plaintiff's case, which was closed on 8/6/2004. Defence was scheduled to take off on 23/6/2004. Again for reasons which need not be revisited here, the matter finally landed on my lap on 30/1/2007. After disposing of

some interlocutory application and several adjournments, I set the case for defence hearing on 5/6/2007.

On 5/6/2007 neither the Defendants nor Dr. Tenga, learned defence Counsel were present. Dr. Tenga, however, had written to inform the court that he was appearing in the Court of Appeal on that same day. In my ruling I found that there was no sufficient cause for adjournment. So I entered an ex-parte judgment against the Defendants.

On 29/6/2007, the Applicants filed the present application for an order: -

> *"That this court be pleased to set aside its exparte judgment aforesaid."*

The application is supported by the affidavit of Dr. Tenga. Briefly according to paragraphs 3, 5, 6, 7, 8 and 9 of the affidavit, Dr. Tenga deponed that while this case was fixed for hearing on 5/6/2007 he had been served with a summons to appear in the Court of Appeal in Civil Appeal No. 89 of 1988. Although the appeal was originally fixed for hearing on 17/4/2007, this was later altered to 5/6/2007, and that when this matter was fixed for hearing on 28/3/2007 he had no knowledge of the altered date in the Court of Appeal matter.

Dr. Tenga learned Counsel, also appeared to argue the application. He submitted that under O. IX rule 13 (1) of the Civil Procedure Code, the facts shown in his affidavit constitute sufficient cause for non appearance and therefore implored the Court to set aside the exparte judgment.

On the other hand, Mr. Gasper Nyika filed a counter affidavit to oppose the application. His principal reason (according to paragraphs 4 and 6 of the counter affidavit) is that the Applicants' Counsel had sufficient prior knowledge of the two dates. According to him there was a span of 55 days in which to organize himself. Besides, the Applicants had caused several adjournments in the past. So there was no sufficient cause disclosed to justify a departure from the exparte judgment.

Ms. Fatuma Karume, learned Counsel, who appeared to oppose the application, submitted that, since the learned Counsel's chambers had many lawyers, and since he had 55 days in which to properly organize himself, Dr. Tenga had no sufficient reason not even to send another lawyer to take his brief on 5/6/2007. It was her view that, if this was found to be no sufficient cause on 5/6/2007 it cannot constitute sufficient cause under O. IX rule 13 of the Civil Procedure Code 1966. She said that by the disorganization, the

Applicants wasted the court's time and the Respondent's. She therefore urged the court to dismiss the application with costs.

In his rebuttal submission, Dr. Tenga reiterated his submission in chief, and added that if there was any time wasted, it could be compensated by way of costs and not by an exparte judgment. He pleaded further, that in the other previous occasions he was unable to appear because he was bereaved. He insisted that he had good reasons for non appearance on 5/6/2006, and so an order to set aside the exparte judgment was apposite.

As intimated above, this application was filed under O. IX rule 13 (1) of the Civil Procedure Code Act (Cap 33 – RE 2002). This rule commands the court to set aside an exparte order if the applicant satisfies the court that: -

> *"The summons was not duly served or that he was prevented by any* ***sufficient cause*** *from appearing when the suit was called on for hearing..."*

From the submissions of the learned Counsel, it appears to me that the only issue that calls for determination is whether the Applicants have disclosed a **sufficient cause** for their non appearance on the date of hearing.

As indicated above Ms. Karume, learned Counsel for the Respondent, forcefully submitted that if there was no sufficient reason for adjournment under O. XVII rule 1 (1) in the first place, there cannot be any now, under O. IX rule 13 (1) of the Civil Procedure Code 1966. Dr. Tenga learned Counsel for the Applicants, on the other hand, also strenuously argued that on 5/6/2007, the court was not fully appraised of the facts, but the real situation on the ground, has now been brought forth in his affidavit, to which he annexed two summonses issued by the Court of Appeal as Annexures A and B.

I think it is now settled that ***"sufficient cause"*** in O. IX rule 13 (1) of the Civil Procedure Code Act, is a question of fact. The term has to be construed liberally and with regard to the facts and circumstances of each case. **SARKAR ON CODE OF CIVIL PROCEDURE,** 10th ed. Vol. 1 at p. 1118 has put it this way: -

> *"What is or is not sufficient cause for non appearance is a question of fact and it must depend on the varied and special circumstances of each case. In cases, of discretion, it is very undesirable to act on precedents as every judge has to deal with the particular facts of each case. So, the question cannot be decided with the aid of decisions*

unless they lay down any principle of universal application."

According to the learned authors (pp. 118 – 19) it has also been held as a matter of principle, that: -

"The Defendant is not required to show cause for his absence on all previous dates of hearing. Sufficient cause for absence on date on which the matter was heard and exparte decree passed, ...
A party cannot be penalized for his/her previous negligence which has been overlooked.....
.....

Where a Defendant has been grossly negligent and no sufficient cause is made out for non appearance before the court, the exparte decree shall not be set aside...If there is some minor negligence on the part of the party concerned in prosecution of the case, the same can be compensated by the common curative of costs."

It is with those principles in mind that I now turn to consider, whether in the circumstances of this case the Applicants have shown sufficient cause for non appearance on 5/6/2007.

In my ruling of 5/6/2007, I found that: -

"Although the notice does not indicate the date of service, the date of issue is 16th March, 2007. This matter was last adjourned on 28/3/2007. I do not believe that by that time the learned Counsel would not have received that notice..."

In reaching that conclusion by inference, the court was, however, guided by the presence of only one notice issued on 16/3/2007 which set the date of hearing of the matter on 5/6/2007 at the Court of Appeal.

In the present case, the Applicants have attached two summonses, marked Annexure A and B. Annexure A was issued on 16/3/2007 and it shows that the date of hearing was initially fixed for 17/4/2007. Annexure B was issued on 4/4/2007. It shows that the previous date was altered to 5/6/2007. In the absence of the originals of these summonses and the affidavit of the issuing officer (s) the following questions, leap to the eye. First, it is now clear, that on 4/6/2007, when the learned Counsel wrote his letter to this court, he must have had both summonses in his possession. There is no explanation in the affidavit why they were not attached in their letter. Secondly, both summonses appear to have been issued on the same date, i.e. 16/3/2007,

but with different dates of hearing. Annexure A (17/4/2007) and the other summons, (5/6/2007). This appears to be rather strange to me. An affidavit from the issuing officer or a counter affidavit would have provided the missing link because if the summons attached to the letter was genuine, there would have been, in my opinion, no need to issue another summons (Annexure B) because the (5/6/2007) date of hearing, had already been fixed, as early as 16th March 2007. All these circumstances leave a lot of doubts in my mind as to whether or not both these summonses were genuine. Lastly, it is also clear from the evidence presented by the Applicants that, according to Annexure B the learned Counsel had been aware of those changes for 55 days prior to 5/6/2007. This, as rightly submitted by Ms. Karume, left the learned Counsel, with ample time in which to organize his diary and seek for an adjournment much earlier, either by a letter or by a written application.

There is of course, no doubt, that as a matter of practice and courtesy, a superior court would have precedence over an inferior or subordinate court. So, in this case, indeed, the Court of Appeal had precedence over the High Court. However, I cannot accept that as a general rule, this rule of practice should be used as a shield with which Counsel could hide for all their mischiefs. In a case, where, as in the present case, Counsel was aware of the coincidence in the date in the

two courts, in plenty of time before, it would be idle for Counsel to wait and fold his hands until the last minute before he takes action to notify the subordinate court and seek for the necessary adjournment. This can only, in my view, smack of negligence or recklessness on the part of the learned Counsel. It has nothing to do with the precedence of the Court of Appeal over the High Court.

As shown above, the Applicant had to satisfy the court that they had sufficient cause for non appearance in this court on 5/6/2007. The Applicants have shown that their Counsel was engaged in the Court of Appeal on that day. Although I have had serious doubts on the authenticity of the two summonses allegedly issued on 16/3/2007 that largely remains just a strong suspicion. For the court to act on this there must be a more cogent and hard evidence to replace it, particularly from the Respondent by way of a counter affidavit. In the absence of such rebuttal evidence, I must hold although reluctantly, that the Applicants have discharged their burden of proof. On a balance of probabilities, they have proved that the learned Counsel was appearing in the Court of Appeal. That constitutes a sufficient cause.

There is also the matter of negligence on the part of the learned Counsel for the Applicants. I quite agree that the learned Counsel had plenty of time (55 days) in which to

organize his diary. I however also agree with **SARKAR** (op cit) and Dr. Tenga, learned Counsel, that this can be compensated by the curative of costs.

For the immediately foregoing reasons I will allow this application and set aside the exparte decree, on condition that the Applicants deposit in court the sum of shs.1,000,000/= as deposit for the Respondent's costs for the last adjournment and this application, (to be taxed) before the next date of hearing of the defence.

Order accordingly.

SGD

S.A. MASSATI

JUDGE

1/8/2007

1,983 words

I Certify that this is a true and correct
of the ~~original order Judgment Ruling~~
Sign
Registrar Commercial Court Nrb.
Date 01/8/07