

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 414 OF 2017

(Arising from Commercial Case No.109 of 2015)

MEGA BUILDERS LIMITED.....APPLICANT/JUDGMENT DEBTOR

VERSUS

DPI SIMBA LIMITED.....RESPONDENT/DECREE HOLDER

RULING

B.K. PHILLIP, J

In the year 2015, the respondent/ decree holder herein lodged a case against the applicant/judgment debtor vide Commercial Case No.109 of 2015. The dispute between the parties in the said Commercial case No. 109 of 2015 ended by amicable settlement during the mediation session which was held on 2nd March 2016, thus a court decree was entered as follows;

- (i) That the defendant shall pay to the plaintiff USD 51,512.16 being the outstanding amount plus interest at the rate of 10% (say ten percent) per annum for from the date of judgment to the date of full payment.
- (ii) That the plaintiff waives all other claims in the suit.
- (iii) That each party shall bear its own costs.

The court records show that in 2017, the respondent/ decree holder made an application for execution of the court decree and on 30th November 2017 this court issued an order for arrest of one Jabir Singh Malik pursuant to the provisions of Rule 35(2) of the Civil Procedure Code, Cap 33,R.E 2002. (Henceforth "the CPC"). On 28th November, 2017 the applicant /Judgment debtor lodged this application under the provisions of section 14(1)of the Law of Limitation Act, Cap 89,R.E 2002 and Order XXXIX, Rule 5(1) of the CPC praying for the following orders;

- i. That, this honourable court may be pleased to extend time within which the applicant may apply for stay of execution of a decree in respect of Commercial Case No. 109 of 2015 dated 2nd March 2016 by Mr. Justice A.R. Mruma
- ii. That, upon extending time, the Honourable Court be pleased to stay the execution of the decree in respect of Commercial Case No. 109 of 2015 passed on the 2nd March, 2016 by Mr. Justice A.R. Mruma.
- iii. Costs of this application be borne by the Respondent.
- iv. Any other reliefs the honourable court deems just and fit to grant.

The application is supported by an affidavit sworn by Balbir Singh Malik and counter affidavit sworn by James Betram in opposition of the application was filed in court on 15th February 2018.I ordered the application to be disposed of by written submission and all parties filed their submissions as scheduled by the court. The applicant was represented by the learned Advocate Ashiru Lugwisa while the learned advocate Mussa R. Mfinanga appeared for the respondent.

In the affidavit in support of the application, the deponent stated that the applicant was unable to pay the decretal sum due to the fact that he had not received its payment from the Ministry of Water and Irrigation. The deponent stated further that during the mediation session the applicant said clearly that the payment of the decretal sum was dependent on the applicant's payments from the Ministry of Water and Irrigation, but the court decree that was drawn after the amicable settlement of the case, omitted that fundamental condition. Further, the deponent stated that it was on 3rd October 2016, when applicant received a letter from the respondent demanding for the payment of the decretal sum, became aware that the fundamental term on the payment of the decretal sum was omitted. The deponent stated furthermore that, thereafter the applicant looked for a lawyer to assist it. That on 27th December 2017, the applicant managed to get a lawyer. In addition to the above, the deponent stated that the decree issued by the court is defective as it reads that, it is the plaintiff who is supposed to pay the decretal sum to the defendant instead of the plaintiff.

In the counter affidavit in opposition to the application the deponent stated that, as per the agreement reached by the parties at the mediation session and the court decree entered thereafter, the payment of the decretal sum was not dependent on the applicant's payments from the Ministry of Water and Irrigation. In addition to the above the deponent stated as follows; That the decree was entered after both parties had reached a consensus on the payment of the decretal sum and the court explained to the parties

clearly the term and conditions of the court decree as well as the consequences upon failure to fulfill it. That the applicant was aware of the existence of the court decree since March 2016 and no good reasons have been advanced to warrant the grant of an application for extension of time sought in this application.

In his submission in support of the application the applicant's advocate reiterated what was stated in the affidavit in support of the application including the allegation that the payment of the decretal sum was dependent upon the payment of the applicant's money from the Ministry of water and irrigation. The learned Advocate, submitted further that in an application for extension of time a party has to demonstrate good grounds for delay to take the appropriate action, but there is neither statutory law nor case law which defines what amounts to sufficient cause/reason, thus what constitutes sufficient reason depends on the peculiar facts of each situation. The applicant's advocate contended that the applicant discovered in October 2016, that the condition on the payment of the decretal sum was not included on the court decree, that is when it started looking for a lawyer to assist it. The learned Advocate was of the view that this is a fit case to grant the order for extension of time sought by the applicant.

On the other side the respondent's advocate submitted that, the applicant was aware of the Court decree since March 2016, when the parties agreed to settle their dispute amicably. The respondent's advocate contended that this application was filed on 28th December 2017, more than a year from the date the decree was passed and the applicant has failed to show

sufficient reasons for each day of delay for the period of more than twelve months (12). As regards the allegation that the decree subject to execution is defective, the respondent's advocate contended that the defect in the decree is curable under the provisions of Rule 2(2) of the High Court (Commercial Division) Procedure Rules, 2012 and section 96 of the Civil Procedure Code, R.E 2002. That the respondent is in the process of rectifying the alleged defect, thus cannot constitute a sufficient reason for the extension of time to be granted in favour of the applicant.

In his rejoinder the applicant's advocate brought on board a new point on illegality. He contended that the court decree cannot be executed due to its illegality, that is, it omitted the fundamental term that is, the applicant would pay the decretal sum after being paid by the government. The applicant's advocate contended further that the court decree is fatally defective. The applicant's advocate insisted that illegality is also a ground for extension of the time even without accounting delay for each day of delay. He referred this court to the case of **TanESCO Vrs Mufungo Leonard Majura & 15 others, Civil Application No.94 of 2016, CAT** (unreported), in which the court held that;

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be impugned, in line with what was held in the above quoted decisions, it suffices to move the court to grant the extension of time so that, the alleged illegality can be addressed by

this court. In that regard, the application for extension of time to apply for stay of execution is hereby granted. I would make no order as to costs",

and the case of **Lyamuya Construction Company Ltd Vrs Board of registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010, CAT, Arusha, (unreported)** to buttress his arguments.

I have dispassionately analyzed the arguments raised by the learned advocates and let me start with the last point on illegality that has been raised by the applicant's advocate in his rejoinder. With due respect to the applicant's advocate, the new point on illegality that has been introduced in the rejoinder I cannot entertain it, leaving alone the fact that on the face of the records it has no merit, but also the same is not reflected in the pleadings completely. Parties are bound by their pleadings. Submissions are normally confined to what is pleaded. On top of that, it has to be noted that in a rejoinder a party is not supposed to bring in new points or arguments that did not feature in the submission in chief completely. In rejoinder a party is expected to make elaborations on his/her points in the submission in chief as well as respond to any issues raised by the respondent while responding to the submission in chief. Thus, under the circumstances the point on illegality is a pure after thought in this application.

As regards the reason adduced for the delay in applying for extension of time, I am inclined to agree with the respondent's advocate that no sufficient reasons have been adduced for each day of delay. It is not in dispute that the decree subject of this application was delivered in March 2016 in the presence of all parties to the suit and this application was filed in December 2017, therefore, more than twenty (20) months have lapsed from the date of delivery of the decree. Going by the arguments raised by the applicant's advocate, that the applicant became aware of the omission of the fundamental conditions for the payment of the decretal sum in October, 2016, then more than twelve (12) months lapsed before applicant filed this application. Looking at the affidavit in support of the application, it is evident that the applicant has failed to account for each day of delay in respect of the above mentioned delay of more than twelve (12) months as per what was stated by the applicant in the affidavit in support this application. I am alive that this court has discretionary powers to grant an order for extension of time and the same has to be exercised judicially. The position of the law is very clear that there are no hard and fast rules on the what constitutes sufficient reason (see the case of **Tanga Cement Limited Vrs Jumanne Masangwa and another, Civil application No. 6 of 2001** (unreported) however, the courts have been taking into account a number of factors such as the applicant's diligence in pursuing the matter and magnitude of delay. (See the case of **Benedict Shayo Vrs Consolidated Holdings Corporation as official receivers of Tanzania Film Company Limited, Civil application No. 366/01/2017**). I am of the settled view that a delay of more than twelve

(12) months is inordinate and bearing in mind that no sufficient reasons have been advanced for the same, under the circumstances, this court cannot exercise its discretionary powers to grant the extension of time sought.

I also, wish to point out that , it is true that the decree subject of this application, a copy of which was attached to the affidavit in support of this application is defective as submitted by the applicant's advocate, however, as correctly submitted by the respondent's advocate that cannot be a ground for granting the extension of time sought. In fact a defective decree cannot be executed until it is rectified and I think the applicant has opportunity to raise that issue in the application for execution not in this application which seeks to extend the time for applying for stay of execution.

In the upshot this application is dismissed with costs.

Dated in Dar Es Salaam this 29th day of April, 2019.




B.K. PHILLIP
JUDGE