IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 75 OF 2019

(Arising from Commercial Case No. 45 of 2017)

BETWEEN

F.A COMPANY LIMITED.....1st APPLICANT

FIAT ALAIN.....2nd APPLICANT

VERSUS

SODETRA (SPPL).....RESPONDENT

Last Order: 24th Oct, 2019

Date of Ruling: 20th Feb, 2020

RULING

FIKIRINI, J.

This is a ruling on an application for extension of time to file an application to set aside default judgment and decree in Commercial Case No. 45 of 2017 delivered on 05th September, 2017. The application has been brought under section 14 (1) of the Law Limitation Act, Cap 89 R.E 2002(the Law of Limitation) and Rule 23 (1) of the High Court (Commercial Division) Procedure Rules 2012 (the Rules) and supported by the affidavit of Fiat Allain in support

of the application. The respondent Lewis Karl Ruhiza filed counter affidavit contesting the application.

When the application was called for hearing on 24th October, 2019, Mr. Erasmus Buberwa counsel for the respondent entered appearance, as well holding brief of Mr. Alexander Kyaruzi for the 2nd applicant who was reported sick. Mr. Buberwa on behalf of Mr. Kyaruzi, pleaded with the Court that, the application be disposed of by way of written submissions, the prayer which was granted by this Court.

In his submission Mr. Kyaruzi averred that 2nd applicant was not aware of the proceedings in Commercial Case No. 45 of 2017, until on 14th June, 2019 after being served, while he was in Rwanda, with a notice to show cause, with no details of the matter, except that the hearing of the matter was set on 24th June, 2019. The applicant could not enter appearance on the 24th June, 2019, as he resides in Kigali City, Rwanda and hence instructed the counsel to enter appearance on his behalf and that is when what actually had transpired in Court was revealed. The applicant's counsel learnt that a default judgment had been entered against the applicant on 5th September, 2017 for the decretal sum of 62,749.12 USD plus interests. This occurred at the execution stage where the applicant was either to pay the decretal sum or else be detained as a civil prisoner.

The 2nd applicant raised two reasons: One, that during the time involved or those days when the case was being conducted, he was busy moving in and out of Rwanda attending to his sick mother who later passed on. To support his assertion he annexed a number of documents in the affidavit deponed in support of the application.

Two, based on what has been learnt on the records of proceedings, it is not disputed that the applicants were based in Rwanda and that was why the service followed them in Rwanda. Despite this knowledge no notice of date of judgment was issued to the applicants besides the notice issued on 28th May, 2017. In additional after the delivery of the default judgment and decree, the Court ordered it be advertised in Tanzanian local newspaper. The applicant could in no way get those local newspapers as was based in Rwanda. It was thus the applicant's argument that the service which culminated into a default judgment was not properly served, the anomaly which hindered the applicants fail to timely apply for orders to set aside the default judgment.

In the proceedings it has also been asserted that service was effected on someone termed as the 2nd applicant's wife, however there was no proof that the summons reached the targeted persons. Supporting his submission the counsel cited Order V Rule 29 of the CPC, regarding how summons must be served if the defendants reside outside of Tanzania. Shining light on the aspect, the Court

was referred to the case of **Nasra Said v KCB Bank Tanzania Limited (2016) TLS LR 417,** when the issue of service impacting a party was discussed.

Apart from the service in Rwanda which was later, the records show that initially applicants were served with notice to show cause as if they were normal residents in Tanzania while they were not. It was only at the execution stage when it was realized the applicants were residents of Rwanda and opted to order service of notice to show cause be effected through the High Court of Rwanda under Order V Rule 33 (1) (a) and (b) of the CPC on 06th May, 2018. And that was when proper service could be said was effected since the government bodies were involved including the High Court of Rwanda and Rwanda Investigation Bureau.

Finalizing his submission, Mr. Kyaruzi submitted that since service was not proper and satisfactory, they pray the default judgment be set aside and the case proceed on merit inter-parties by giving defendants opportunity to be heard. The application be granted with costs.

Opposing the submission Mr. Buberwa submitted that the applicants' were served with the summons as provided under Order V Rule 15 of the CPC, through the 2nd applicants wife named Borah Kalimba on 28th May, 2017 as reflected by proof of service filed in the Court records. No affidavit has been sworn countering the submission. Fortifying the position the case of **John**

Chuwa v Anthony Giza [1992] T.L.R. 233 at 234 was cited, where the court stressed that an affidavit of a material person to the case is necessary.

It was further submitted that the applicants refused service effected upon them on 14th June 2019 in Rwanda from the court bailiff Bizimoyo Aloys. The summons was returned with remarks that the applicant could not receive or sign summons as he was aware of the date. It was thus not correct and actually lying for the applicant to state that he was served with a notice to show cause on 14th June, 2019 while he never signed receipt of the summons.

Mr. Buberwa submitted that no sufficient grounds were submitted by the applicant to justify his non-appearances. The tickets attached to the application were irrelevant because summons to appear was served to his wife on 28th May, 2017, requiring him to appear on 13th June, 2017. The copies of the tickets attached clearly showed that on 22nd June, 2017 the applicant was at Kigali international airport, on 04th July, 2017 in Congo, on 08th July, 2017 was in Rwanda, on 03rd July, 2017 was in Congo and 24th September, 2017 he travelled from Brussels to Kigali. While acknowledging the copies of the tickets indicating the applicant's travel schedule but that information was completely of no assistance on him.

In short the applicant has failed to account for each and every day of the delay that is from 05th September, 2017 when the default judgment was passed to 25th

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July, 2019 when the application to set aside the default judgment out of time was filed in Court, concluded the Counsel.

Concluding his submission the respondent's counsel contended that the application lacks merit and the same deserves dismissal with cost.

In rejoinder Mr. Kyaruzi submitted that the provision of Order V Rule 29 of the CPC, applied to the service on normal citizen and resident of Tanzania. Otherwise, the applicable provision for serving notice to the persons residing outside of Tanzania the proper provision is Order V Rule 29 of the CPC. Furthermore Rule 29 of Order V of the CPC, does not provide for the service that can be effected to somebody else other than the defendant. In additional, it was the duty of the respondent to prove that notice served has physically reached the defendant.

As for the submission on accounting each day of the delay, he submitted that the 2nd applicant became aware of this matter on 14th June, 2019 when notice to show cause was brought to him. The notice required him to appear on 24th June, 2019. Since he stays in Rwanda he was unable to appear and Mr. Kyaruzi who entered appearance on his behalf was the one, who noticed that there was default judgment passed on 05th September, 2017. This was why the extension of time is being sought. Since there was procedural irregularity by not complying with

Order V Rule 29 of the CPC, the Court has discretion to grant extension of time sought.

Having heard arguments from both sides, this Court is invited to determine as whether the applicants have sufficient reasons for the extension of time to be granted or not.

Granting or refusing grant of an extension of time is Court's discretionary power which it has to exercise judiciously. However, in order to do that, the Court must be provided with materials pointing out sufficient or reasonable cause as to the delay in timely reaction when a party was required to do so. There is a long list of decided cases by the Court of Appeal examining applications of this nature from different angles, but for the purposes of this application will be guided by the cases of **Kalunga and Company Advocates v National Bank of Commerce Limited [2006] T.L.R 235.** While it is clear that no definition has been given on what amounts to sufficient or good reason but a number of factors have to be taken into account by the Court in exercising its discretional powers. In the case of **Lyamuya Construction Company Limited v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010,** the Court of Appeal, considering it pertinent to lead the way, set guidelines establishing four criteria what might possibly amount to sufficient reasons namely; **First,** the applicants must account for all the periods of the delay. **Second,** the delay should not be inordinate. **Third,** the

applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. **Fourth**, if the court feels that there are other sufficient reasons such as the existence of point of law of sufficient importance such as illegality of the decision sought to be challenged.

Guided by the stated criteria, I shall now consider this application if it deserves granting or not. It is not disputed that the applicants reside in Kigali, Rwanda. Also it is clear that a default judgment against the applicants was entered on 05th September, 2017.

What is disputed is whether the applicants were duly served and hence aware of the existing Commercial Case No. 45 of 2017.

While the applicants deny having knowledge of the suit and were not served as they are resident in Rwanda, only to be served later at the execution stage, the respondent controverted the assertion claiming the applicants were duly served in particular the 2nd applicant, who was served through his wife one Borah Kalimba on 28th May, 2017. This averment was nonetheless, not supported as no affidavit was filed from Borah Kalimba, the claimed to be 2nd applicant's wife nor was the assertion controverted as no reply to the counter affidavit was ever made. Considering it was the respondent who was alleging that, then, they are the ones tasked with a duty to prove that fact. This is concluded, the respondent's argument notwithstanding that the 2nd applicant did not file an

affidavit to counter the assertion that Borah I. Karimba was not his wife. The case of **John Chuwa** (supra) cited in that regard though relevant but did not favour the respondent's position. This is said based on the fact that the one who alleges must prove. The respondent was the one alleging the applicants were served through Borah I. Karimba, so they are the ones obligated to prove that to this Court and not to wait for the 2nd applicant to denounce that fact.

Furthermore, since the applicants' residence in Kigali, Rwanda has not been disputed, as night follows day, their service should therefore be governed by the provision of Order V Rule 29 of the CPC, which provides:

> *"where the plaintiff is believed to reside outside of Tanzania , elsewhere than in Kenya, Uganda, Malawi or Zambia and has no known agent in Tanzania empowered to accept service, the court may on the application of the plaintiff order the service of summons be effected*

(a) By posts;

(b) By the plaintiff or his agent; or

(c) Through the court of the country in which the defendant is believed to reside."

As evidenced in the records of proceedings, no summons was ever issued to the applicants until sometime in May, 2018, when the Court realized the applicants

were residents of Rwanda and opted to order service of notice to show cause be effected through the High Court of Rwanda under Order V Rule 33 (1) (a) and (b) of the CPC. By then the default judgment had already been long pronounced on 05th September, 2017. This later service of notice to show cause was the proper service. *First and foremost*, it followed the appropriate procedure of going through the government bodies including the High Court of Rwanda and Rwanda Investigation Bureau. *Secondly,* through this service the 2nd applicant was located and informed of the notice though he did not receive or sign to acknowledge service, but this is the only service which was in compliance to Order V Rule 29 and 33 (1) (a) and (b) of the CPC. In that regard, I am persuaded that the applicants were not properly served and the claim that they were not aware of the existence of the suit which culminated into a default judgment, cannot be totally refuted.

After satisfying myself on the first aspect regarding service, I now turn to determine whether the applicants have advanced sufficient and/ or reasonable cause which would warrant granting of this application for extension of time. Section 14 (1) of the Law of Limitation Act, Cap 89 provides as follows:

> "*Notwithstanding the provision of this Act, the court may for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application of execution of decree, an*

application for such extension may be made either before or after the expire of the period of limitation prescribed for such appeal or application".

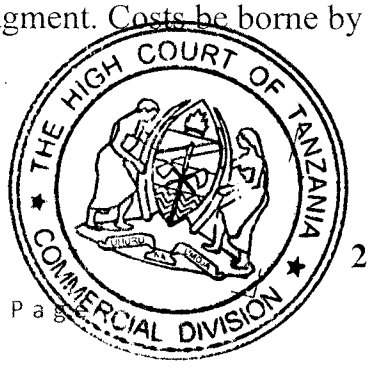
This application was filed on 25th July, 2019, while the notice to show cause was served upon the applicants on 14th June, 2019 or rather the 2nd applicant became aware of the existence of the default judgment against them pronounced on 05th September, 2017. It was the applicants' argument that since the notice to show cause was not accompanied by any documents they were unable to do anything. Likewise, the 2nd applicant could not comply with the notice which required him to enter appearance on 24th June, 2019, due to the fact that he resides in Rwanda, so he instructed his advocate to appear on his behalf. And that was when he was supplied with a copy of judgment and decree.

This application followed almost thirty (30) days later and to be exact was filed on 25th July, 2019. For the notice that was served on 14th June, 2019 requiring the applicants to enter appearance on 24th June, 2019, which he failed despite there being good ten (10) days, which I consider sufficient for one to travel from Rwanda **to seat of the** Court in Dar es Salaam. I am holding that view as the applicant has not pointed out what failed him to appear in person on the day ordered by the Court. The fact he resides in Rwanda which is outside Tanzania, alone is not sufficient reason for him not to enter Court appearance as required. However, this is considered leniently considering that a counsel entered

appearance on their behalf and that was when they were served with copy of judgment and decree.

This application for an extension of time was filed on 25th July, 2019, which was almost thirty (30) days from the date the applicants were supplied with a copy of judgment and decree. No reasons were advanced as to why the applicants failed to immediately file their application for an extension of time. Borrowing from the **Lyamuya's** case (supra) the applicants have in actual fact not shown any diligence, instead have shown apathy, negligence and sloppiness in applying for an extension of time. Whereas improper service would have been a good ground to be considered in setting aside the default judgment but the delay of more than thirty (30) after he was served with a copy of default judgment and decree from the default judgment without any reasonable explanation has in actual fact placed this Court in an awkward position to consider the application for extension of time in the applicants' favour.

In light of the above, the application for extension of time is hereby declined for failure to account for each delayed day as from 24th June, 2019 when the applicants were served with a copy of judgment and decree from the default judgment. Costs be borne by the applicants. It is so ordered.



P. S.FIKIRINI

JUDGE

20th FEBRUARY, 2020.