

TANZANIA / JUDGMENT

AQUILINE TRADERS T LIMITED v EQUITY BANK TANZANIA LIMITED MCC NO

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1 January 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
ARUSHA MISC. COMMERCIAL APPLICATION NO. 13715 OF 2024 (Arising from Commercial Case
No. 6 of 2023) AQUILINE TRADERS (T) LIMITED APPLICANT VERSUS EQUITY BANK
(TANZANIA) LIMITED RESPONDENT

RULING

Date of hearing: 20/09/2024 Date of ruling: 27/09/2024 AGATHO, J.: The applicant by way of
chamber summons supported by an affidavit deposed by herself moved the court for the
following orders:

- (i) The court be pleased to set aside its default judgment and decree in Commercial Case No. 06 of 2023 delivered on 21st May 2024. (ii) Costs of the application be in the main cause. (iii) Any other reliefs that the court deems fit to grant. Upon being served with a copy of the application the respondent filed a counter affidavit to resist the application. The counter affidavit was deposed by the applicant's counsel, Edwin Lyaro. Besides the counter affidavit, the respondent filed a notice of preliminary objection, which 1 contained a point of law that the application is hopelessly time barred and therefore unmaintainable in law. In terms of legal representation, whereas Erick Kimaro appeared for the applicant, Edwin Lyaro, Advocate stood for the respondent. The hearing of the application was conducted on 20/09/2024. From the outset, I wish to state that I will refer to the counsel's submissions. But I will not reproduce them in verbatim. I will evaluate the evidence in the affidavit and counter affidavit parallel with the law governing application for setting aside default judgment. There are two key points to be examined in this application: one, whether the application is time barred. Two, whether there is a sufficient cause to set aside the default judgment. I will start with the preliminary objection (PO) raised by the respondent that the application is time barred. Mr Lyaro for the respondent submitted that the respondent was served with chamber summons and affidavit on 25th June 2024. That is when she realised that the application was time barred for a day because it was endorsed by the court on 11th June 2024. The learned counsel submitted that even in the electronic case management

system it shows to have been filed on 11th June 2024 the case reference number 202406111000013715 also indicates the date to be 11th June 2024. Therefore, it was his view that the application is time barred by one day contrary to Rule 23(1) of the High Court Commercial Division Procedure Rule, 2012 as amended in 2019. I disagree with the above submission. Instead, I have been persuaded by the submission of Mr Kimaro for the applicant that the application is not 2 time barred because the payment of filing fees was effected on 10th June 2024, but the hard copy of the documents was filed in the court on 11th June

2024. And the receipt was issued on 11th June 2024. It is the position of Court of Appeal in the case of *Chris George Kasalile v Tanzania Institute of Education and Attorney General*, Civil Application No. 775/01 of 2022 CAT at DSM, which held that a date of payment is considered as a date of filing. Rule 21 of the electronic Filing Rules is clear that the document is filed in court when it is filed electronically. Moreover, it is my observation that a control number cannot be issued without a document being filed in court. Here the payment receipt is clear that the control number was issued, and payment done on 10th June 2024. Hence, the application is not time barred. I thus proceed to overrule the preliminary objection raised. This being an application to set aside default judgment the applicant is duty bound to put forward a sufficient reason with evidence to persuade the court to exercise its discretion to set aside the default judgment or ex parte judgment. Rule 23(2)(b) of the High Court (Commercial Division) Procedure Rules G.N. No 250 of 2012 as amended by G.N. No. 107 of 2019 guides the court in considering whether to set aside or vary default judgment that it shall consider if an aggrieved party has given sufficient reason for failing to file a written statement of defence (WSD). The ground put forward by the applicant is that she failed to file her WSD because her then advocate, Emmanuel Elisamia Raphael was at sober house suffering from alcoholism. That is stated in paragraph 4 of the applicant's affidavit. A question which lingers here is whether the act of the applicant's advocate being in sober house for alcoholism is a sufficient reason to set 3 aside the default judgment. There are several court decisions which held that advocates' negligence is not a sufficient cause to extend time. These are *Ramadhani Rashidi Kitime v Anna Ally Senyagwa* Misc. Land Application No. 3 of 2023, High Court of Tanzania at Morogoro; *Mahawi Enterprises v Serengeti Breweries Limited*, Misc. Commercial Application No. 24 of 2020 High Court, Commercial Division at Dar es salaam at pages 16 and 17. By analogy the negligence or the fact that the applicant's advocate was at sober house is not a sufficient cause to set aside the default judgment. The applicant has not explained what prevented her from looking for another advocate to prepare her WSD. In the case of *Mhango and Company Advocates v Hotel Travertine*, Misc. Commercial Case No. 32 of 2004, High Court Commercial Division, at Dar es salaam the court refused to interference with taxing master decision because of advocates illness because the applicant failed to convince the court as to why he did not engage another advocate when the matter was set for hearing. While I agree that the right to be heard audi alterem partem is fundamental, that right comes with an obligation not to be negligent where the right is accorded. The applicant was given time

to file her WSD through which she could have exercise her right to be heard. She knew her advocate went to sober house why then not engaging another advocate? Therefore, I am not moved with the claim that the applicant has shown sufficient cause to set aside the default judgment. This stand will not be against the principle of natural justice that a party has a right to be heard. A party's negligence is a poison to the rights granted to her by the law. To set aside a default judgment or ex parte judgment and decree in a situation like this is tantamount to condoning negligence and setting a bad precedent. Moreover, parties must remember that an advocate is not a party to the case. He does not step into the shoes of a party. It is for this reason a party who fails to follow up on his case does so at his own peril. I am fortified with a holding by the Court of Appeal in *Lim Han Yung & Another v Lucy Treseas Kristensen*, (Civil Appeal 219 of 2019) [2022] TZCA 400 (28 June 2022) at page 12 that: "...even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him." Relying on the above authority, I am firm in my view that the fact that the applicant's counsel went to sober house, and the applicant was aware or ought to have been aware that she was required to file her WSD, and she failed to engage another advocate to file the WSD timely even after being granted extension of time, that amount to insufficient cause to set aside the default judgment. Further, having a good defence in the suit that was heard ex parte does not override a requirement of showing a sufficient cause to set aside the default judgment. For that reason, I would distinguish *Jesse Kimani v McConnel and Another* (1966) 1 EA 547 because the defendant/applicant was not prevented from taking the step in default of which ex parte judgment was entered. I would also add here that the applicant is reminded that advocates are not parties to the case. The duty of a party to follow up on her case does not end when she engages an advocate. The applicant's advocate to be in the sober house is not a sufficient reason to set aside the default judgment. That said, the application is meritless. It is dismissed with costs. Order accordingly. DATED at ARUSHA this 27th Day of September 2024. U. J. AGATHO JUDGE 27/09/2024 6 Court: Ruling delivered today, 27th September 2024 by Hon. Sophia Massati, Deputy Registrar in the presence of the parties. U. J. AGATHO JUDGE 27/09/2024 7

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Prepared on 14 October 2026 · Esheria