

TANZANIA / JUDGMENT

DIANA JUSTINO JEKELA VS T WOMENS BANK LTD MISC

COURT
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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM MISC
COMMERCIAL APPLICATION NO 160 OF 2017 (Arising from Commercial Case No 154 of 2014)
BETWEEN DIANA JUSTINO JEKELA-----APPLICANT VERSUS TANZANIA
WOMEN'S BANK LTD----- 1st RESPONDENT MODEPA TANZANIA
LTD----- 2nd RESPONDENT DEOGRATIUS FRANCIS
MOSFIY----- 3ND RESPONDENT

RULING

SONGORO, J This is a ruling on the application filed by Diana Justino Jekela the applicant for an order of extension of time within which to file an application for review of Judgment and decree of this court in the Commercial Case No 154 of 2014 delivered by Hon. Songoro, J The applicant application for extension of time is made under Section 14(1) of the Law of Limitation Act Cap 89 R.E 2002] and is supported by an affidavit sworn by Diana Justino Jekela the applicant. The main reason supporting the application for extension of time and intended review is essentially found at paragraph 5 of the applicant affidavit that, she was sued in Commercial Case No 154 of 2017. She also stated that, the court record indicates that, Mashiku & Co and Advocate and Kabula Advocate appeared on her Page 1 of 10 behalf. The applicant claim that, she never hired or instructed them to represent her in court. Further, the applicant stated that, the proceedings of Commercial Court No 154 of 2014 were conducted without her knowledge. Further, she never assign any of the two advocates to represent her. Next, the applicant contested that, the purported deed of settlement filed in court was procured by fraud. The respondents in the application are Tanzania Women Bank Ltd, Modepa Tanzania Ltd, and Deogratias Francis Moshy who filed the counter affidavit of Mbuga Jonathan the Respondent's Advocate and opposed the application. In the light of the application for extension of time Mr. Mpayia Kamala Learned Advocate the applicant, and Mbuga Jonathan Learned Advocate of the 1st Respondent bank with the leave of the court pursued the application by a way of written submissions. To start with the applicant with assistance of Mr. Mpayia Kamala Learned Advocate stated that, she is praying for a court of extension of time in order to file a Review of the Decree resulting from Deed of Settlement in Commercial Case No 154 of 2014. The applicant counsel then stated that, under Section 14(1) of the Law of Limitation Act Cap 89 the court has discretionary powers to grant the

application and extend the time of filing an application for review. It was the applicant views and submission that, the applicant became aware of the proceedings of the Commercial Page 2 of 10 Case No 154 of 2014 including a Decree on 30th May, 2017, while the Decree was passed on 13th April, 2015. The applicant then argued it is only where she served with notice to show because she realized what transpired. It was the applicant argument that, on the 13th April, 2015 Advocate Kabula appeared before the Court with Deed of Settlement purported to have been signed by the parties including the applicant but her name in the deed of settlement was properly stated. The applicant then stated that, she was completely unaware of Commercial Case No 154 of 2014 and all what transpired. Next the applicant stated that, she never instructed Advocate Mashiku & Company to represent her in the said suit. Furthermore, the applicant contested that, even the signature which was on the deed of settlement does not belong to her. While on this point the applicant stated that, the representation by Advocate Mashiku and entire proceedings of Commercial Case No 154 of 2014 was false and fabricated and is fraud because at no time she had instructed the said advocate to represent her in court. So the applicant applied that, the court grant an extension of time to allow the applicant to file an application for review so that, the matter may be investigated. Then relying on decision in the case of Haruna Mpangao & Others Versus Tanzania Portland Cement Co Ltd Civil Application No 98 of 2008 where the Court of Appeal stated that, there is no particular reason which has been set out as standard reason and the reason depends on circumstances of each case, then explained that, the circumstances of the present case call for an order of extension of time to allow the applicant to file an application for review. Finally, the applicant and Mr Kamala Mpayya prayed to the Court to grant the application. Page 3 of 10 In response to the application, Mr Mbuga Jonathan for the 1st Respondent bank filed the counter affidavit to oppose the application. The counsel then argued that, the main task of the applicant in the application is demonstrate sufficient reasons under which the court may exercise its discretion and grant extension of time within which to file an application of review of the decree in Commercial Case No 154 of 2014. The Respondent then explained that, the applicant application has some shortfall in the sense that, did not annex the decree or order sought to be reviewed and which is subject matter of the present application, therefore the application is incompetent. In respect of Commercial Case No 154 of 2014 the respondent counsel argued that, there was a summary suit involving three defendants. The defendants were granted leave to file a written statement of defence and the applicant filed the same. The respondent counsel then explained that, the matter was settled by the parties involving three defendants and the court issued a Court Decree compelling the applicant and other to pay a sum of shs 135,935,919 which has not yet been paid to- date. He then argued that, the applicant claim to have been aware of the court decree and proceedings of commercial case No 154 of 2014 after being served a notice to show cause, and disputed that, she did not sign the deed of settlement. The respondent then argued the applicant indeed was served with pleadings of Commercial Case No 154 of 2014 through his husband by a process server one Hatihu Omary. Page 4 of 10 Next, Respondent counsel submitted that, since there was an Advocate who appeared on behalf of Respondents and the issue of none serve of the pleadings was not raised and disputed in the cause of hearing of the Commercial Case No 154 of 2014, such complaint may not be heard from the applicant at this moment. The counsel then indicated that, since the 3rd Respondent in his affidavit has indicated

that, the applicant was aware of the suit the applicant complaint that, was not aware has no basis t On the execution of the court order, of Commercial Case No 154 of 2014 the Respondent's bank explained the mortgaged plot was already sold as part of the execution of the court decree to the third party and any review will be academic exercises and the applicant is aware and her statement that, is not aware is total false The 1st Respondent bank then explained that, from a legal point of view, the applicant is supposed to assign sufficient reason which may warrant the court to exercise its discretion and grant an order of extension of time. It was the view of 1st Respondent bank that, the applicant has not assigned sufficient reason to enable the court to exercise its discretion and grant an extension within which to file an application for review. On the applicant concerned that, she was never served with the court summons of Commercial Case No 154 of 2014 and a deed of settlement was procured by fraud the 1st Respondent argued that, the applicant appeared in court by representation of an advocates and claims that, was not served may not arise. It was the views of the 1st Respondent's bank that, the issues of names , and that, of fraud has been raised purposely to seek sympathy of the court and manipulation in Page 5 of 10 the application but the applicant and her husband were both parties to the loan facility agreement, parties to the suit. Next the 1st Respondent bank argued that, the applicant court summon was served by Hatibu Omari, Court Process Server through Deogratias Francis the 3rd Respondent who is his husband after the efforts of tracing the applicant did not bear any fruit. Therefore the applicant as wife of the 3rd respondent may not turn around and claim was not aware of the ongoing suit or settlement. The first respondent then explained that, according to paragraph 5 of his counter affidavit Deogratias Francis Moshy the 3rd Respondent and husband of the applicant, he personally briefed the applicant about Commercial Case No 154 of 2014 and also he briefed the applicant that, Mr. Mashiku and Company Advocate was instructed to handle their Commercial Case No 154 of 2014. The 3rd Respondent's bank then caution the court that, it will be prejudicial if the court will allow the application on matters which were finalized after elapse of years and such practice may open a Pandora's box which may be utilized by litigants who are instruct advocate to pursue their cases and later turn around and denied to have not instruct advocate to represent them. Then finally the 1st Respondent bank explained that, the applicant application has been filed after a long delay therefore an extension of time should not be allowed. On the part of Deogratias Francis Mushi the 3rd Respondent he claim that, it is true was served with summons to serve the applicant, but did not notify the applicant who happen to be his wife. Page 6 of 10 The 3rd Respondent the explained that, it is himself who instructed Mr Mashiku & co to represent all the defendants in the ongoing case. The 3rd Respondent then stated in paragraph 5 of his counter affidavit that, he personally briefed the applicant who is his wife that, they have a case and already instructed an advocate to handle their case. The 3rd Respondent who happened to be the wife of the applicant and maintained that, the applicant was aware of Commercial Case NO 154 of 2014. The court has had time to consider the applicant application for extension of time within which to file an application for review the decree and find the court under Section 14(1) of the Law of Limitation Act Cap 89 [R.E 2002] has a discretionary power to grant an extension time to file an application for review either before or after the expiry of the requisite time of limitation. However as explained by the Court of Appeal in Civil Application No 13 of 2016 between Keloi Madore Versus Mepukori Mbelekeni and another Arusha Registry (Unreported)

that; "as a matter of general principle, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That, discretion is, however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of "good cause " by the applicant. As to what constitutes "good cause " is dependent upon a variety of factors which may include the length of the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and; the degree of prejudice to the respondent if the application is granted (see *Mbogo Vs. Shah* [1968] E A 93. So guided by the above cited decision of the Court of Appeal in exercising a discretion of an extension of time, the court has to look and assess variety of factors including a length of delay. Page 7 of 10 While on this point I will add that, remedy of extension of time within which to file an application under Section 14(1) of the Law of Limitation Act Cap 89 [R.E 2002] is available to a party who exercise due diligence in pursuing his case but due reasonable and sufficient cause he or she was obstructed from filing the application for review. In other words the remedy of extension of time may not be available to a party who utilized his or her time in bonanza and after years he or she applies for an order of extension of time. Turning to the present application the court find a court decree of Commercial Case No 154 of 2014 involved the applicant and two other respondents namely Modepa Tanzania Limited and Deogratias Francis Moshy. And the court decree sought to be reviewed emerged from deed of settlement filed in court on the 9th April, 2015 which shows was signed by the applicant and 3rd Respondent. The deed of settlement was filed in court, and order on the deed of settlement was made on 14th April, 2015. The court further noted that, the applicant application for review was filed on the 6th June 2017. Quite frankly the court find according to simple mathematics the applicant application for extension of time was filed after the expiry of about 21 months from the date the court order on the deed of settlement was issued. Pursuant to Item 1 of Part 111 to the schedule of the Law of Limitation Act Cap 89 [R E 2009] the applicant was statutory bound to file an application for review within 21 days from the date the order of the deed of settlement was issued. In case he delay to file an application for extension of time within 21 days as per the Law of Limitation Act Cap 33, then she was bound to use reasonable period of time which in my view may be 3 months from the date the order of the court was made. Page 8 of 10 Bui by filing the application for extension of time after a lapse of about 21 months from the date the order was made that, shows that, the application has been filed with inordinate delay and the applicant has not accounted for each day of delay. As party who knew from the 3rd Respondent that, was a party to the Commercial Case No 154 of 2014 was supposed to demonstrate that, after being aware of the suit from the 3rd Respondent she diligently followed the proceedings, and even after an order of deed of settlement she diligently acted to file an application of extension of time but was obstructed by good or sufficient cause to file the present application. Since the applicant did not demonstrate diligence in filing the present application, and the application was filed after long delay of about 22 months, I find the granting of such application after elapse of more than 21 months from the date the deed of settlement was filed is likely to open a Pandora's box, that, will promote endless litigation arising from excuses from litigants that, were not aware of their ongoing cases, while were being represented by advocates Due to the fact that, the application filed application after long delay of time which has not been accounted for, the court find the applicant was not diligent enough in

pursuing the application and I decline to exercise a court discretion and refuse to grant an extension of time within which to file an application for review. Consequently I hereby dismiss the application on the basis that, the applicant application has been filed after a long delay and the grant of the application may be prejudicial. I make no order as to costs. Dated and Delivered at Dar es Salaam on this 29th May, 2018 Page 9 of 10 (JUDGE) The ruling was delivered in the presence of Mr. Mpayi Kamala Advocate for Page 10 of 10

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